

# **COLORADO REVISED STATUTES**



**TITLES 37-38**

**2012**



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# Colorado

# Revised Statutes

## 2012

Titles 37-38  
Water and Irrigation  
Property — Real and Personal



Edited, Collated, Revised,  
Annotated, and Indexed  
Under the Supervision and Direction of the

COMMITTEE ON LEGAL SERVICES

by

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*Reenacted by the General Assembly as the  
Positive Statutory Law of Colorado of a General and Permanent Nature  
and as the Official Statutes of the State of Colorado*

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COLORADO REVISED STATUTES**

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**CERTIFICATION  
OF  
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The Committee on Legal Services hereby certifies that the 2012 Colorado Revised Statutes includes all the laws of a general and permanent nature of the state of Colorado as revised and reenacted in Colorado Revised Statutes 1973, together with all of the laws of a general and permanent nature enacted by the General Assembly subsequent to 1973, as corrected, collated, and revised as authorized by and in conformity with Article 5 of Title 2, Colorado Revised Statutes.

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## Source Note Information

A source note shows the legislative history of a C.R.S. section and is located immediately after the text of the section. The source note for each section indicates the year the section was added, each year it was amended, and the page of the Session Laws and the section of the bill where the amendment can be found. The source note includes the number of the section in prior codifications when applicable. For amendments made after 1973, information on each specific provision of the section that has been changed by a bill, the specific change to the provision (i.e. added, added with relocations, amended, amended with relocations, repealed, repealed and reenacted, or recreated and reenacted), and the effective date of the bill are shown.

The legislative history is arranged by year of passage; if the section was amended by two or more acts in the same year, the order of the information for that year is determined by the effective dates of the acts. The effective date in the source note indicates the date the act or portion of the act takes effect even if the text of the amendment indicates a different date. If the year is not included with the month and day, the provision is effective the year of passage. Additional information to assist the user in researching C.R.S. sections can be found beginning on page vii.

The following provides a further explanation of the information found in a source note:

“L.” is the symbol for “Session Laws” and will be followed by a number indicating the year when the C.R.S. section was changed by an act generally either creating new law, amending existing law, or repealing existing law; except that, in the constitution, “L.” also means constitutional measures referred by the General Assembly and voted on by the people of Colorado at a general or an odd-year election.

“Ex. Sess.” is the symbol for “Extraordinary Session”. If this symbol follows the year, the amended provision can be found in the Session Laws for an extraordinary session for that year and not in the Session Laws for the regular session of the General Assembly for that year (S, S2 in the Red Book).

“p.” is the symbol for “page” and will be followed by a number indicating the page of the Session Laws where the amendment to the C.R.S. section can be found.

“§” is the symbol for “section” and will be followed by a number indicating the section of the act where the amendment to the C.R.S. section can be found.

“IP” is the symbol for the “introductory portion” to a section, subsection, paragraph, or subparagraph.

“Added” means the provision was newly enacted by the act (N in the Red Book).

“Added with relocations” means the provision in existing law was relocated from one title, article, part, or section to another title, article, part, or section with amendments by the act.

“Amended” means the provision in existing law was amended by the act (A in the Red Book).

“Amended with relocations” means the provision in existing law was amended to reorganize an entire title, article, part, or section by the act.

“Repealed” means the provision was deleted from the existing law by the act through the use of a repeal provision (R in the Red Book).

“R&RE” is the symbol for “Repealed and Reenacted” and means the provision in existing law was repealed and reenacted by the act (RE in the Red Book).

“RC&RE” is the symbol for “Recreated and Reenacted” and means a previously repealed provision has been recreated by the act (RC in the Red Book).

“Added by revision” means a provision providing for the repeal of a statutory provision on a specified date has been added by the Revisor of Statutes as a C.R.S. provision. Adding the provision is necessary because a separate section of the act provided for the repeal of the provision with a future effective date.

“Initiated” means a provision that was amended by means of an initiated petition approved by a vote of the people of Colorado at a general or an odd-year election.

“Referred” means a provision that was amended by a measure referred by the General Assembly and voted on by the people of Colorado at a general or an odd-year election; except that, in the constitution, a referred measure is indicated by “L.” and also means constitutional measures referred by the General Assembly and voted on by the people of Colorado at a general or an odd-year election.

Starting in 2009, references to the bill number and chapter number have been included in the source note. If you are conducting a search on-line, the bill number reference within the source note links directly to the bill itself.

## **Colorado Statutory Research**

Legislative history is not already written. It must be compiled by the researcher from many different sources and materials. The following information is a helpful starting point in identifying information you wish to research. Consult the red book table distributed with the session laws, the softbound editions of Colorado Revised Statutes beginning in 1997, the comparative tables located in the back of the C.R.S. index, C.R.S. 1963 and subsequent cumulative supplements thereto through 1971, and C.R.S. 1973 and annual cumulative supplements thereto through 1996.

Prior to 1921, enacted laws were not compiled into a comparative table, thereby making it more difficult to track the legislative history. Determining the subject matter in the statutory index is the only choice for tracking the history of a statute since a statute did not retain its original number. The General Statutes of 1883 arranged laws into numbered chapters, alphabetically entitled, collated, and arranged by sections. This became the foundation and

model for compiling the statutes until the codification of C.R.S. 1973. (See Revised Statutes of Colorado 1908, An Act Providing For the Compilation, Publication, and Distribution of all the general statutes of the state.)

References in some source notes throughout the Colorado Revised Statutes to “Code 08”, “Code 21”, and “Code 35” are to the Revised Statutes of Colorado 1908, the Compiled Laws of Colorado 1921, and the Colorado Statutes Annotated 1935, respectively. Each of these volumes set forth the general statutes of the state of Colorado, including the Code of Civil Procedure and, in 1935, the Colorado Supreme Court Rules. On January 6, 1941, the Colorado Supreme Court adopted the new Rules of Civil Procedure, which became effective on April 6, 1941, resulting in the publication of a replacement volume. Thereafter, the publication of the Colorado Court Rules, although a continuing part of the Colorado Revised Statutes, contained a combination of the Federal Rules and the Colorado Code of Civil Procedure and, in addition, included some provisions that were entirely distinct from both the Federal Rules and the Colorado Code of Civil Procedure, as adopted or amended by the Supreme Court of Colorado.

To research a statute as it existed in previous years, the following is a chronological list of C.R.S. publications and the correct citation for each publication.

Revised Statutes of Colorado	(1868)	R.S.
General Laws of Colorado	(1877)	G.L.
General Statutes of Colorado	(1883)	G.S.
Revised Statutes of Colorado	(1908)	R.S. 08
Compiled Laws of Colorado	(1921)	C.L.
Colorado Statutes Annotated	(1935)	CSA
Colorado Revised Statutes 1953	(1953)	CRS 53
Colorado Revised Statutes 1963	(1963)	C.R.S. 1963
Colorado Revised Statutes	(1973)	C.R.S.

**Comparative Tables:**

- R.S. 08 to C.L. 1921 - located in the front of the C.L. 1921
- C.L. 1921 to CSA 1935 - located in the back of the Index to CSA 1935
- CSA 1935 to CRS 1953 - located in the front of the Index to CRS 1953
- CRS 1953 to C.R.S. 1963 - located in the front of the Index to C.R.S. 1963
- C.R.S. 1963 to C.R.S. - located in the back of the Index to C.R.S.

**Supplements to C.R.S. 1963 include:**

- 1965 hardbound supplement containing laws enacted in 1964 and 1965
- 1967 hardbound supplement containing laws enacted in 1966 and 1967
- 1969 hardbound supplement containing laws enacted in 1968 and 1969
- 1971 hardbound supplement containing laws enacted in 1970 and 1971

The softbound publication of the “Official Report of the Committee on Legal Services” was not intended as an official publication of our office. Copies were distributed to the members of the General Assembly for the purpose of certifying the laws enacted in the 1972 and 1973 Sessions for inclusion in the compilation of the 1973 C.R.S., which was not available until 1974. To find the 1972 or 1973 amended language, refer to the session laws of either 1972 or 1973.



**Supplements and Replacement Volumes to C.R.S. 1973 and, on and after 1983, to Colorado Revised Statutes**

<b>Titles</b>	<b>Supplements to C.R.S. 1973 and, on and after 1983, to Colorado Revised Statutes</b>	<b>Replacement Volumes and Supplements to Replacement Volumes</b>
Title 37	1975-89 Supplements	<b>1990 Replacement Volume</b> 1991-96 Supplements
Title 38	1975-81 Supplements	<b>1982 Replacement Volume - Vol. 16A</b> 1983-93 Supplements <b>1994 Replacement Volume - Vol. 16A</b> 1995-96 Supplements

**Starting in 1997**, annual softbound volumes are published each year.

For additional information on researching legislative history, see [www.leg.state.co.us](http://www.leg.state.co.us), Services Agencies, and select Legislative Legal Services. Choose Legal Topics and click on Researching Legislative History.

**Bills Enacted Without A Safety Clause  
Explanation of Effective Date**

If a bill is enacted without a safety clause and an effective date is not indicated in the bill, the effective date is the day following the expiration of the ninety-day period after final adjournment of the General Assembly that is allowed for submitting a referendum petition pursuant to article V, section 1 (3) of the state Constitution unless a referendum petition is filed against the act within such time period. If a referendum petition is filed, the act, if approved by the people, will take effect on the date of the official declaration of the vote thereon by proclamation of the Governor or the date indicated in the act if it is later than the Governor’s proclamation. The source note for a provision contained in such an act will indicate the actual date following the ninety-day period or the date set out in the act. If a referendum petition is filed, the date in the source note will be adjusted accordingly in the next publication following the election where the referendum petition is considered.

**Annotations**

Beginning in 2012, the annotations for Colorado state appellate court decisions include both public domain and regional reporter case cites. In preparing annotations to court decisions, we endeavor to include the most recent decisions. Occasionally, this may result in the inclusion of a decision before it becomes finalized and published in an official reporter. In such instances, the case cite will contain blank spaces for the volume and page number of the reporter. The volume and page number will be substituted for the blank spaces in subsequent publications of the statutes.



## **TITLE 37**

# **WATER AND IRRIGATION**

1970

1970-1971



# TITLE 37

## WATER AND IRRIGATION

**Cross references:** For water rights generally, see §§ 5 to 8 of art. XVI, Colo. Const.

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## CONSERVANCY LAW OF COLORADO - FLOOD CONTROL

### ARTICLE 1

#### Conservancy Law - Flood Control

37-1-101.	Short title.	37-1-106.	Early hearings.
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37-1-104.	Removal of officials for cause.	37-1-109.	Repeal - saving clause.
37-1-105.	Remedy by mandamus.		

**37-1-101. Short title.** Articles 1 to 8 of this title shall be known and may be cited as the "Conservancy Law of Colorado".

**Source:** L. 22: p. 11, § 1. C.L. § 9515. CSA: C. 138, § 126. CRS 53: § 30-1-1. C.R.S. 1963: § 29-1-1.

**37-1-102. Definitions.** As used in articles 1 to 8 of this title, unless the context otherwise requires:

(1) "Conservancy district" means the districts created under articles 1 to 8 of this title; and the bonds which may be issued under articles 1 to 8 of this title may be called "conservancy bonds", and such designation may be engraved or printed on their face.

(2) "Court" means the district court of that judicial district of the state of Colorado wherein the petition for the organization of a conservancy district shall be filed.

(3) (a) "Land" or "property" means real estate, as "real estate" is defined by the laws of the state of Colorado, and shall embrace all railroads, tramroads, electric railroads, street and interurban railroads, highways, roads, streets and street improvements, telephone, telegraph, and transmission lines, gas, sewer, and water systems, water rights, pipelines, and rights-of-way of public service corporations, and all other real property whether held for public or private use.

(b) When "land" or "property" is used, with reference to benefits, appraisals, assessments, or taxes, public corporations, as political entities, according to benefits received, shall be considered as included in such reference, in the same manner as "land" or "property".

(4) "Person" means a person, firm, partnership, association, or corporation, other than a county, town, city, or other political subdivision. Similarly, "public corporation" means counties, towns, cities, school districts, drainage districts, irrigation districts, water districts, park districts, and all governmental agencies clothed with the power of levying or providing for the levy of general or special taxes or special assessments.

(5) "Publication" means printing once a week for three consecutive weeks in at least one newspaper of general circulation in each county wherein such publication is to be made. It shall not be necessary that publication shall be made on the same day of the week in each of the three weeks, but not less than fourteen days (excluding the day of the first publication) shall intervene between the first publication and the last publication, and publication shall be complete on the date of the last publication.



**Source:** L. 22: p. 11, § 1. C.L. § 9515. CSA: C. 138, § 126. CRS 53: § 30-1-1. C.R.S. 1963: § 29-1-1.

**Cross references:** For publication of legal notices, see part 1 of article 70 of title 24.

**37-1-103. Liberal construction.** Articles 1 to 8 of this title, being necessary to secure and preserve the public health, safety, convenience, and welfare, and being necessary for the prevention of great loss of life and for the security of public and private property from floods and other uncontrolled waters, shall be liberally construed to effect the purposes of said articles.

**Source:** L. 22: p. 72, § 71. C.L. § 9585. CSA: C. 138, § 196. CRS 53: § 30-1-6. C.R.S. 1963: § 29-1-6.

**37-1-104. Removal of officials for cause.** Any director or other officer of any district organized under articles 1 to 8 of this title may be removed for cause after a hearing upon a motion filed by any interested person in the original proceeding in which the district was organized.

**Source:** L. 22: p. 70, § 67. C.L. § 9581. CSA: C. 138, § 192. CRS 53: § 30-1-2. C.R.S. 1963: § 29-1-2.

**37-1-105. Remedy by mandamus.** The performance of all duties prescribed in articles 1 to 8 of this title concerning the organization and administration or operation of a conservancy district may be enforced against any officer thereof or against any person or corporation refusing to comply with any order of the board of directors, by mandamus, at the instance of the board or of any person or corporation interested in any way in such district or proposed district. Such proceedings shall be instituted in the district court having jurisdiction of the original case.

**Source:** L. 22: p. 70, § 68. C.L. § 9582. CSA: C. 138, § 193. CRS 53: § 30-1-3. C.R.S. 1963: § 29-1-3.

#### ANNOTATION

**Law reviews.** For article, "Highlights of the 1955 Legislative Session — Corporations", see 28 Rocky Mt. L. Rev. 60 (1955).

**37-1-106. Early hearings.** All cases in which there may arise a question of the validity of the organization of a conservancy district, or a question of the validity of any proceeding under articles 1 to 8 of this title, shall be advanced as a matter of immediate public interest and concern and heard in all courts at the earliest practicable moment. The courts shall be open at all times for the purposes of said articles.

**Source:** L. 22: p. 72, § 70. C.L. § 9584. CSA: C. 138, § 195. CRS 53: § 30-1-5. C.R.S. 1963: § 29-1-5.

**37-1-107. Correction of faulty notices.** (1) In every case where a notice is provided for in articles 1 to 8 of this title, if the court finds for any reason that due notice was not given, the court shall not thereby lose jurisdiction, and the proceeding in question shall not thereby be void or be abated, but the court shall in that case order due notice to be given, and shall continue the hearing until such time as notice shall be properly given, and thereupon shall proceed as though notice had been properly given in the first instance.

(2) In case any particular appraisal, assessment, or levy is held void for want of legal notice, or in case the board of directors determines that any notice with reference to any land



may be faulty, then the board of directors may file a motion in the original cause asking that the court order notice to be given to the owner of such land, and the court shall set a time for hearing as provided in articles 1 to 8 of this title. If the original notice as a whole is held to be sufficient but faulty only with reference to publication as to particular lands, only the owners of and persons interested in such particular lands need be notified by such subsequent notice, and if the publication of any notice in any county is held to be defective or not made in time, publication of the defective notice need be had only in the county in which the defect occurred.

**Source:** L. 22: p. 71, § 69. C.L. § 9583. CSA: C. 138, § 194. CRS 53: § 30-1-4. C.R.S. 1963: § 29-1-4.

**37-1-108. Short forms and abbreviations.** (1) In any order of court the words "The court now here finds that it hath jurisdiction of the parties to and of the subject matter of this proceeding", shall be equivalent to a finding of the existence of each jurisdictional fact necessary to confer plenary jurisdiction upon the court and necessary from the proper signing and filing of the initial petitions to the date of the order, to meet every legal requirement imposed by articles 1 to 8 of this title.

(2) No other evidence of the legal hypothecation of the proceeds of any special assessment levied under said articles, to pay the bonds or warrants issued pursuant to articles 1 to 8 of this title, shall be required than the passage of a resolution by the board of directors and the issuance of bonds or warrants in accordance therewith.

(3) In the preparation of any assessment or appraisal record the usual abbreviations employed by engineers, surveyors, and abstractors may be used.

(4) Where it would be necessary to use a long description to properly describe any parcel of land, the appraisers, after locating the land generally, may refer to the book and page of the public record of any instrument in which the land is described, which reference shall be sufficient for all the purposes of articles 1 to 8 of this title to identify the land described in the public record so referred to.

(5) It shall not be necessary in any notice required to be published by articles 1 to 8 of this title to specify the names of the owners of the lands or of the persons interested therein; but any such notice may be addressed "To all persons interested" with like effect as though such notice named every owner of any lands within the territory specified in the notice and every person interested therein and every lienor, actual or inchoate.

(6) Every district declared upon hearing to be a conservancy district shall thereupon become a political subdivision and a public corporation of the state of Colorado invested with all the powers and privileges conferred upon such districts by articles 1 to 8 of this title.

**Source:** L. 22: p. 72, § 74. C.L. § 9588. CSA: C. 138, § 198. CRS 53: § 30-1-8. C.R.S. 1963: § 29-1-8.

**37-1-109. Repeal - saving clause.** All laws or parts of laws conflicting in any way with any of the provisions of articles 1 to 8 of this title, in regard to improvements of the character contemplated by said articles, or regulating or limiting the power of taxation or assessment, or otherwise interfering with the execution of articles 1 to 8 of this title according to their terms, are declared inoperative and ineffective as to said articles, as completely as if they did not exist. But all such laws and parts of laws shall not be otherwise affected by said articles.

**Source:** L. 22: p. 72, § 73. C.L. § 9587. CSA: C. 138, § 197. CRS 53: § 30-1-7. C.R.S. 1963: § 29-1-7.

## ARTICLE 2

### Organization of Conservancy Districts

37-2-101.	Jurisdiction of district court - purposes of districts.	37-2-105.	Protesting petitions - hearing on petitions - organization of districts.
37-2-102.	Petition.	37-2-106.	Provisions for recording decree of incorporation.
37-2-103.	Bond of petitioners.		
37-2-104.	Notice of hearing on petition.		

**37-2-101. Jurisdiction of district court - purposes of districts.** (1) The district court sitting in and for any county in this state has jurisdiction, when the conditions stated in section 37-2-102 are found to exist, to establish conservancy districts, which may be entirely within or partly within and partly without the judicial district in which said court is located, for any of the following purposes:

- (a) Preventing floods;
- (b) Regulating stream channels by changing, widening, and deepening the same;
- (c) Regulating the flow of streams;
- (d) Diverting, controlling, or in whole or in part eliminating watercourses;
- (e) Protecting public and private property from inundation; and incident to such purposes and to enable its accomplishment, any district so established has the power to straighten, widen, deepen, change, divert, or change the course or terminus of any natural or artificial watercourse; to build reservoirs, canals, levees, walls, embankments, bridges, or dams; to reclaim or fill low lands and lands subject to overflow; to remove and to regulate and prescribe the location of improvements upon land; to maintain, operate, and repair any of the construction herein named; and to do all other things necessary for the fulfillment of the purposes of articles 1 to 8 of this title; and such powers shall also be construed as purposes for which benefits may be appraised as provided in articles 1 to 8 of this title;
- (f) The conservation, development, utilization, and disposal of water for agricultural, municipal, and industrial uses thereof, when desirable as a part of a project or undertaking the principal purpose of which is one or more of the purposes set out in this section;
- (g) Participating in the development of parks and recreational facilities within the boundaries of the conservancy district.

**Source:** L. 22: p. 12, § 2. C.L. § 9516. CSA: C. 138, § 127. CRS 53: § 30-2-1. L. 57: p. 296, § 1. C.R.S. 1963: § 29-2-1. L. 94: (1)(g) added, p. 577, § 1, effective April 7.

### ANNOTATION

The general assembly has authority to form a conservancy district involving parts of cities and counties, and the conservancy district act is not in violation of art. XX, Colo. Const.,

governing municipal improvements of home rule city. People ex rel. Setters v. Lee, 72 Colo. 598, 213 P. 583 (1923).

**37-2-102. Petition.** (1) The establishment of conservancy districts for the purposes and in the manner provided for in articles 1 to 8 of this title is declared to be conducive to public health, safety, convenience, and welfare. Before any conservancy district is established under articles 1 to 8 of this title, a petition shall be filed in the office of the clerk of the court vested with jurisdiction, in a county in which all or part of the lands embraced in said proposed conservancy district are situated, signed either by two hundred owners of land or by a majority of the owners of land situate within the limits of the territory proposed to be organized into a district. Such petition may be signed by the governing body of any public corporation lying wholly or partly within the proposed district, in such manner as it may prescribe, and when so signed by such governing body such a petition on the part of the said governing body shall fill all the requirements of representation upon such petition of the owners of land of such public corporation as they appear upon the tax rolls; and thereafter it shall not be necessary for individuals within said public corporation to sign



such a petition. Such a petition may also be signed by railroad corporations and other corporations owning lands within the proposed district. Any city interested in some degree in the improvement, upon proper action by its governing body, may alone file the petition required by this section.

(2) The petition shall set forth: The proposed name of said district; that property within the proposed district will be benefited by the accomplishment of one or more of the purposes enumerated in section 37-2-101; and a general description of the purpose of the contemplated improvement and of the territory to be included in the proposed district. Said description need not be given by metes and bounds or by legal subdivisions, but it shall be sufficient to enable a property owner to ascertain whether his property is within the territory proposed to be organized as a district. Said territory need not be contiguous if it is so situated that the organization as a single district of the territory described is calculated to promote one or more of the purposes enumerated in section 37-2-101. Said petition shall pray for the organization of the district by the name proposed.

(3) No petition with the requisite signatures shall be declared null and void on account of alleged defects, but the court may at any time permit the petition to be amended to conform to the facts by correcting any errors in the description of the territory or in any other particular. Several similar petitions or duplicate copies of the same petition for the organization of the same district may be filed and shall together be regarded as one petition. All such petitions filed prior to the hearing on the first petition filed shall be considered by the court the same as though filed with the first petition placed on file. In determining whether a majority of landowners have signed the petition, the court shall be governed by the names as they appear upon the tax roll, which shall be prima facie evidence of such ownership.

**Source:** L. 22: p. 13, § 3. C.L. § 9517. CSA: C. 138, § 128. CRS 53: § 30-2-2. C.R.S. 1963: § 29-2-2.

#### ANNOTATION

**Mere informalities will not vitiate a notice so long as they do not mislead, and the notice gives the necessary information to the proper**

**parties.** People ex rel. Setters v. Lee, 72 Colo. 598, 213 P. 583 (1923).

**37-2-103. Bond of petitioners.** At the time of filing the petition or at any time subsequent thereto and prior to the time of the hearing on said petition, a bond shall be filed, with security approved by the court, sufficient to pay all the expenses connected with the proceedings in case the organization of the district is not effected. If at any time during the proceeding the court is satisfied that the bond first executed is insufficient in amount, it may require the execution of an additional bond within a time to be fixed not less than ten days distant, and upon failure of the petitioners to execute the same, the petition shall be dismissed.

**Source:** L. 22: p. 15, § 4. C.L. § 9518. CSA: C. 138, § 129. CRS 53: § 30-2-3. C.R.S. 1963: § 29-2-3.

**37-2-104. Notice of hearing on petition.** (1) Immediately after the filing of such petition, the court wherein such petition is filed shall by order fix a place and time, not less than sixty days nor more than ninety days after the petition is filed, for hearing thereon, and thereupon the clerk of said court shall cause notice by publication (Schedule Form I) to be made of the pendency of the petition and of the time and place of the hearing thereon. The clerk of said court shall also forthwith cause a copy of said notice to be mailed by registered mail to the board of county commissioners of each of the several counties having territory within the proposed district.

(2) The district court in and for the county in which the petition for the organization of a conservancy district has been filed shall thereafter, for all purposes of articles 1 to 8 of this title, except as otherwise provided in said articles, maintain and have original and exclusive

jurisdiction coextensive with the boundaries of said conservancy district and of lands and other property proposed to be included in said district or affected by said district, without regard to the usual limits of its jurisdiction.

(3) No judge of such court wherein such petition is filed shall be disqualified to perform any duty imposed by articles 1 to 8 of this title by reason of ownership of property within any conservancy district or proposed conservancy district or by reason of ownership of any property that may be benefited, taxed, or assessed therein.

**Source:** L. 22: p. 15, § 5. C.L. § 9519. CSA: C. 138, § 130. CRS 53: § 30-2-4. C.R.S. 1963: § 29-2-4.

**Cross references:** For Schedule Form I, see § 37-8-101.

#### ANNOTATION

**Notice of hearing is not a process under § 22 of art. VI, Colo. Const.** Notice of hearing upon a petition to form a conservancy district under the provisions of this section is not a

process within the meaning of § 22 of art. VI, Colo. Const. *People ex rel. Setters v. Lee*, 72 Colo. 598, 213 P. 583 (1923).

#### **37-2-105. Protesting petitions - hearing on petitions - organization of districts.**

(1) At any time after the filing of a petition for the organization of a conservancy district and not less than thirty days prior to the time fixed by the order of the court for the hearing upon said petition and not thereafter, a petition may be filed in the office of the clerk of the court wherein the proceeding for the creation of said district is pending, signed by a majority of the owners of the land in said proposed district, protesting the creation of said district. Upon the filing of such protesting petition, it is the duty of the clerk of the court forthwith to make as many certified copies thereof, including the signatures thereto, as there are counties into any part of which said proposed district extends and forthwith to place in the hands of the county treasurer of each of such counties one of said certified copies.

(2) Thereupon it shall be the duty of each of such county treasurers to determine from the last tax rolls of his county in his hands, and to certify to the said district court under his official seal, prior to the day fixed for the hearing, the total number of owners of the land situate in said proposed district within his county and the total number of owners of the land situate in such proposed district within his county who have signed said protesting petition, and such certificate shall constitute prima facie evidence of the facts so stated therein and shall be so received and considered by said court. Upon the day set for the hearing upon the original petition, if it appears to the court from such certificate, and from such other evidence as may be adduced by any party in interest, that the said protesting petition is not signed by a majority of the owners of land within the proposed district, the court shall thereupon dismiss said protesting petition and shall proceed with the original hearing as provided in articles 1 to 8 of this title.

(3) If the court finds from the evidence that said protesting petition is signed by a majority of the owners of the land situate in the district, the court shall forthwith dismiss the original petition praying for the creation of the district. The finding of the court upon the question of the total number of owners of the land situate in said proposed district and upon the question of the number of the owners of the land situate in said proposed district signing said protesting petition, the genuineness of the signatures, and all matters of law and fact incidental to such determinations shall be final and conclusive on all parties in interest whether appearing or not.

(4) At any time prior to the hearing by the court on the petition for the organization of any conservancy district extending into more than one county, or for the inclusion in any existing conservancy district of territory situate in a county no part of which is then in such district, the board of county commissioners of any county into which said proposed district extends, or the board of county commissioners of any county, territory of which is proposed to be included in any existing district, has the right to file, in the court wherein the petition for the organization of such proposed district or the proceeding for the inclusion of



additional territory in any existing district is pending, a copy of a resolution of such board of county commissioners protesting against the organization of such district or the inclusion of such territory in an existing district, which copy of resolution shall be duly certified by the clerk of said board of county commissioners, and thereupon, unless said protest is withdrawn prior to the hearing, said court shall deny and dismiss such petition; but the board of county commissioners of any such county into which said proposed district extends, or territory of which is sought to be included in an existing district, shall be required to make and file such protest, if within the time specified a written request to do so, signed by a majority of the owners of the land lying within the part of said proposed conservancy district in said county, is filed with the clerk of said board of county commissioners.

(5) If the board of county commissioners fails or refuses, upon the filing of such request, to protest against the organization of said district, and to file a certified copy thereof with the clerk of the court, then the court, upon petition, prior to such hearing, of any person or public corporation signing the request, or attorney or agent of any person or corporation signing such request, shall determine the sufficiency of such request so filed, upon notice by publication within said county, and hearing thereon, and if it is determined by the court that such request has the requisite signatures, the court shall enter an order in the same manner and effect as though a protest had been made and filed by the board of county commissioners.

(6) Any owner of real property in said proposed district not having individually signed a petition for the organization of a conservancy district and desiring to object to the organization and incorporation of said district, on or before the date set for the cause to be heard, may file objections to the organization and incorporation of the district. Such objections shall be limited to a denial of the statements in the petition and shall be heard by the court as an advanced case without unnecessary delay.

(7) Upon the said hearing, if it appears that a petition for the organization of a conservancy district has been signed and presented, as provided in section 37-2-102, in conformity with articles 1 to 8 of this title, and that the allegations of the petition are true, and that no protesting petition has been filed, or if filed has been dismissed as provided in this section, the court, by order duly entered of record, shall adjudicate all questions of jurisdiction, declare the district organized, and give it a corporate name by which in all proceedings it shall thereafter be known, and thereupon the district shall be a political subdivision of the state of Colorado and a body corporate with all the powers of a public or municipal corporation and shall have power to sue and be sued, to incur debts, liabilities, and obligations, to exercise the right of eminent domain and of taxation and assessments as provided in said articles, to issue negotiable bonds, and to do all acts expressly authorized and all acts necessary and proper for the carrying out of the purposes for which the district was created and for executing the powers with which it is invested.

(8) In such decree the court shall designate the place where the office or principal place of business of the district shall be located, which shall be within the corporate limits of the district, if practicable, and which may be changed by order of court from time to time. The regular meetings of the board of directors shall be held at such office or place of business, but for cause may be adjourned to any other convenient place. The official records and files of the district shall be kept at the office so established.

(9) If the court finds that no petition has been signed and presented in conformity with articles 1 to 8 of this title, or that the material facts are not as set forth in the petition filed, it shall dismiss said proceedings and adjudge the costs against the signers of the petition in such proportions as it deems just and equitable. No appeal or other remedy shall lie from an order dismissing said proceedings; but nothing in this section shall be construed to prevent the filing of a subsequent petition for similar improvement or for a similar conservancy district, and the right so to renew such proceedings is expressly granted and authorized.

(10) If an order is entered establishing the district, such order shall be deemed final and binding upon the real property within the district, and no appeal or other remedy shall lie therefrom, and the entry of such order shall finally and conclusively establish the regular organization of the said district against all persons except the state of Colorado, in an action

in the nature of quo warranto, commenced by the attorney general within three months after said decree declaring such district organized as provided in this section, and not otherwise. The organization of said district shall not be directly nor collaterally questioned in any suit, action, or proceeding except as expressly authorized in this article.

Source: L. 22: p. 16, § 6. C.L. § 9520. CSA: C. 138, § 131. CRS 53: § 30-2-5. C.R.S. 1963: § 29-2-5.

ANNOTATION

**Law reviews.** For article, “Legal Classification of Special District Corporate Forms in Colorado”, see 45 Den. L.J. 347 (1968).

**There can be no constitutional objection to the conservancy district act on the ground that it provides that no appeal or writ of error shall lie to review the order establishing a district.** People ex rel. Setters v. Lee, 72 Colo. 598, 213 P. 583 (1923).

**A signature by trustee of stockholders does not make stockholders signers.** Where a land owning corporation signed a protesting petition in a proceeding for the organization of a conservancy district, as “trustee for the use of its stockholders”, with a typewritten list of its stockholders attached, this did not make the stockholders signers, and is construed as the

signature of but one owner. People ex rel. Setters v. Lee, 72 Colo. 598, 213 P. 583 (1923).

**Sufficiency of petition need not be determined prior to publication of notice.** Under the provisions of the conservancy district act, there is no necessity for the determination of the sufficiency of a petition for the formation of a district prior to the publication of notice. Such determination may be had at the time of the hearing. People ex rel. Setters v. Lee, 72 Colo. 598, 213 P. 583 (1923).

**The findings of the court in matters pertaining to petitions and protests, in the organization of conservancy districts, are conclusive.** People ex rel. Setters v. Lee, 72 Colo. 598, 213 P. 583 (1923).

**37-2-106. Provisions for recording decree of incorporation.** Within thirty days after the district has been declared a corporation by the court, the clerk of the court shall transmit to the division of local government in the department of local affairs and to the county clerk and recorder in each of the counties having lands in said district copies of the findings and the decree of the court incorporating said district. The same shall be filed with said division, and copies shall also be recorded in the office of the county clerk and recorder of each county in which a part of the district may be, where they shall become permanent records.

Source: L. 22: p. 20, § 7. C.L. § 9521. CSA: C. 138, § 132. CRS 53: § 30-2-6. C.R.S. 1963: § 29-2-6. L. 76: Entire section amended, p. 605, § 29, effective July 1. L. 83: Entire section amended, p. 1227, § 11, effective July 1.

ARTICLE 3

Board of Directors - Powers and Duties

37-3-101.	Appointment of directors.	37-3-112.	Cooperation with United States or other agencies.
37-3-102.	Oath - organization.	37-3-113.	Access to lands - penalty.
37-3-103.	General powers.	37-3-114.	Removal of structures.
37-3-104.	General grant of power.	37-3-115.	Passing equipment through bridge or grade.
37-3-105.	Employment of agents.	37-3-116.	Condemnation under general law.
37-3-106.	Regulations to protect works.	37-3-117.	Dominant right of eminent domain.
37-3-107.	Quorum.		
37-3-108.	Plans.		
37-3-109.	Execution of plans.		
37-3-110.	Contracts.		
37-3-111.	Surveys and investigation.		

**37-3-101. Appointment of directors.** Within thirty days after entering the decree incorporating said district, the court shall appoint as a board of directors of the district three persons who are residents of the county or counties in which the conservancy district is



situated, at least two of whom shall own real property in said district, one for a term of two years, one for a term of three years, and one for a term of five years. At the expiration of their respective terms of office, appointments shall be made by said court for terms of five years. The court shall fill all vacancies which may occur on the said board. Each director shall hold office during the term for which he is appointed and until his successor is duly appointed and has qualified and shall furnish a corporate surety bond, at the expense of the district, in an amount and form fixed and approved by the court, conditioned upon the faithful performance of his duties as director. All special and regular meetings of the board shall be held at locations which are within the boundaries of the district or which are within the boundaries of any county in which the district is located, in whole or in part, or in any county so long as the meeting location does not exceed twenty miles from the district boundaries. The provisions of this section governing the location of meetings may be waived only if the proposed change of location of a meeting of the board appears on the agenda of a regular or special meeting of the board and if a resolution is adopted by the board stating the reason for which a meeting of the board is to be held in a location other than under the provisions of this section and further stating the date, time, and place of such meeting.

**Source:** L. 22: p. 21, § 8. C.L. § 9522. CSA: C. 138, § 133. CRS 53: § 30-3-1. C.R.S. 1963: § 29-3-1. L. 90: Entire section amended, p. 1501, § 13, effective July 1.

#### ANNOTATION

**The conservancy district law is not repugnant to art. III, Colo. Const., as delegating legislative functions to the judiciary,** in the provision for the appointment of district officers by the court. *People ex rel. Setters v. Lee*, 72 Colo. 598, 213 P. 583 (1923).

**The power of appointing officers is more executive than it is legislative.** Such power, taken by itself, is not judicial, but when it is incidental to the exercise of judicial functions, as it is under the conservancy law, its existence does not vitiate the statute. *People ex rel. Setters v. Lee*, 72 Colo. 598, 213 P. 583 (1923).

**The board of directors of a conservancy district is not a "special commission"** as that

term is used in § 35 of art. V, Colo. Const. *People ex rel. Setters v. Lee*, 72 Colo. 598, 213 P. 583 (1923).

**The board of directors is a permanent board.** The governing body of the district is the board of directors. The act contemplates and provides for the permanent existence of that board. It is as much the governing body of the district as the Moffat tunnel commission is of the Moffat tunnel improvement district, and is as permanent. *People ex rel. Setters v. Lee*, 72 Colo. 598, 213 P. 583 (1923).

**37-3-102. Oath - organization.** Each director, before entering upon his or her official duties, shall take and subscribe to an oath, before an officer authorized to administer oaths, that the director will honestly, faithfully, and impartially perform the duties of his or her office and that he or she will not be interested directly or indirectly in any contract let by said district, which oath shall be filed in the office of the clerk of said court in the original case. Upon taking the oath, the board of directors shall choose one of its number as chairman of the board and president of the district and shall elect some suitable person secretary of the board and of the district who may or may not be a member of the board. Such board shall adopt a seal and shall keep in a visual text format that may be transmitted electronically a record of all of its proceedings, minutes of all meetings, certificates, contracts, bonds given by employees, and corporate acts, which shall be open to the inspection of all owners of property in the district as well as to all other interested parties.

**Source:** L. 22: p. 21, § 9. C.L. § 9523. CSA: C. 138, § 134. CRS 53: § 30-3-2. C.R.S. 1963: § 29-3-2. L. 2009: Entire section amended, (HB 09-1118), ch. 130, p. 563, § 10, effective August 5.

**37-3-103. General powers.** (1) In order to protect life and property within the district, and to protect or relieve land subject to overflowing or washing, or which is

menaced or threatened by the normal flow or flood or surplus or overflow waters of any natural watercourse, stream, canyon, or wash, whether perennial, intermittent, or flood, and in order to effect the protection of the land and other property in the district, and in order to accomplish all other purposes of the district, the board of directors is authorized:

(a) To clean out, straighten, widen, alter, deepen, or change the course or terminus of any ditch, drain, sewer, river, watercourse, pond, lake, creek, or natural stream in or out of said district;

(b) To fill up any abandoned or altered ditch, drain, sewer, river, watercourse, pond, lake, creek, or natural stream and to concentrate, divert, or divide the flow of water in or out of said district;

(c) To construct and maintain main and lateral ditches, sewers, canals, levees, dikes, dams, sluices, revetments, reservoirs or retarding basins, floodways, pumping stations and syphons, and any other works and improvements deemed necessary to construct, preserve, operate, or maintain the works in or out of said district;

(d) To construct, reconstruct, or enlarge or cause to be constructed, reconstructed, or enlarged any bridges that may be needed in or out of said district;

(e) To construct, reconstruct, or elevate roadways and streets;

(f) To construct or reconstruct any works and improvements along, across, through, or over any public highway, canal, railroad right-of-way, track, grade, fill, or cut, in or out of said district;

(g) To remove or change the location of any fence, building, railroad, canal, or other improvements in or out of said district;

(h) To acquire by donation, purchase, or condemnation, to construct, own, lease, use, and sell, and to hold, encumber, control, and maintain any easement, water right, railroad right-of-way, canal, sluice, reservoir or retarding basin, mill dam, water power, work, franchise, park, cemetery, or other public way or place, or any real or personal property, public or private, in or out of said district, for rights-of-way or retarding basins, or for materials of construction, or for any other use not inconsistent with the purposes of articles 1 to 8 of this title;

(i) To replot or subdivide land, open new roads, parks, streets, and alleys, or change the location of existing ones;

(j) To cause the dissolution of the district pursuant to article 3.5 of this title;

(k) To participate in the development of parks and recreational facilities including, but not limited to, trails, greenways, and riverfront development within the boundaries of said district.

(2) Nothing in articles 1 to 8 of this title shall be construed to grant to any conservancy district organized under said articles the power to regulate or administer water rights or to take or damage such water rights, except upon payment of compensation.

**Source:** L. 22: p. 25, § 15. C.L. § 9529. CSA: C. 138, § 140. CRS 53: § 30-3-8. L. 57: p. 298, § 1. C.R.S. 1963: § 29-3-8. L. 81: (1)(j) added, p. 1746, § 1, effective May 28. L. 94: (1)(k) added, p. 577, § 2, effective April 7.

**37-3-104. General grant of power.** The board of directors of any district organized under articles 1 to 8 of this title is vested with all powers necessary for the accomplishment of the purposes for which the district is organized and capable of being delegated by the general assembly of the state of Colorado; and no enumeration of particular powers granted shall be construed to impair any general grant of power contained in this section, or to limit any such grant to power of the same class as those so enumerated.

**Source:** L. 22: p. 31, § 24. C.L. § 9538. CSA: C. 138, § 149. CRS 53: § 30-3-17. C.R.S. 1963: § 29-3-17.



## ANNOTATION

**Law reviews.** For article, "County Court Practice Changed", see 29 Dicta 62 (1952).

**37-3-105. Employment of agents.** (1) The secretary shall be the custodian of the records of the district and of its corporate seal and shall assist the board of directors in such particulars as it may direct in the performance of its duties. The secretary shall attest, under the corporate seal of the district, all certified copies of the official records and files of the district that may be required of him by this article or by any person ordering the same and paying the reasonable cost of transcription, and any portion of the record so certified and attested shall prima facie import verity. The secretary shall serve also as treasurer of the district unless a treasurer is otherwise provided for by the board of directors. The board shall also have the authority to appoint other members of the board as custodians for district funds. The board may also employ a chief engineer, who may be an individual, partnership, or corporation; an attorney; and such other engineers, attorneys, and agents and assistants as may be needed; and it may provide for their compensation, which, with all other necessary expenditures, shall be part of the cost or maintenance of the improvement.

(2) The employment of the secretary, treasurer, chief engineer, and attorney for the district shall be evidenced by agreements in writing which, so far as possible, shall specify the amounts to be paid for their services. The chief engineer shall be superintendent of all the works and improvements, and shall make a full report to the board of directors each year, or oftener if required by the board, and may make such suggestions and recommendations to the board as he may deem proper. The secretary and treasurer and such other agents or employees of the district as the court may direct shall furnish corporate surety bonds, at the expense of the district, in amount and form fixed and approved by the court, conditioned upon the faithful performance of their respective duties.

**Source:** L. 22: p. 22, § 11. C.L. § 9525. CSA: C. 138, § 136. CRS 53: § 30-3-4. C.R.S. 1963: § 29-3-4. L. 81: (1) amended, p. 1750, § 3, effective May 28.

**37-3-106. Regulations to protect works.** (1) Where necessary, in order to secure the best results from the execution and operation of the plans of the district or to prevent damage to the district by the deterioration or misuse or by the pollution of the waters of any watercourse therein, the board of directors may make regulations for and may prescribe the manner of building bridges, roads, fences, or other works in, into, along, or across any channel, reservoir, or other construction; and may prescribe the manner in which ditches or other works shall be adjusted to or connected with the works of the district or any watercourse therein; and, when not in conflict with the regulations of the state board of health, may prescribe the manner in which the watercourses of the district may be used for sewer outlets or for disposal of waste.

(2) The construction of any works in a manner harmful to the district or to any watercourse therein, and in a manner contrary to that specified by the board of directors, is a misdemeanor, punishable by a fine of not more than one thousand dollars. The directors have authority to enforce by mandamus or other legal proceedings all necessary regulations made by them and authorized by articles 1 to 8 of this title and may remove any harmful construction or may close any opening improperly made. Any person, corporation, or municipality willfully failing to comply with such regulations is liable for all damage caused by such failure and for the cost of renewing any construction damaged or destroyed.

**Source:** L. 22: p. 28, § 19. C.L. § 9533. CSA: C. 138, § 144. CRS 53: § 30-3-12. C.R.S. 1963: § 29-3-12.

**37-3-107. Quorum.** A majority of the directors shall constitute a quorum, and a concurrence of the majority in any matter within their duties is sufficient for its determination.

**Source:** L. 22: p. 22, § 10. C.L. § 9524. CSA: C. 138, § 135. CRS 53: § 30-3-3. C.R.S. 1963: § 29-3-3.

**37-3-108. Plans.** (1) Upon its qualification, the board of directors shall prepare or cause to be prepared a plan for the improvements for which the district was created. Such plan shall include such maps, profiles, plans, and other data and descriptions as may be necessary to set forth properly the location and character of the work, and of the property benefited or taken or damaged, with estimates of cost and specifications for doing the work.

(2) In case the board of directors finds that any former survey made by any other district or in any other manner is useful for the purposes of the district, it may take over the data secured by such survey or such other proceedings as may be useful to it and may pay therefor an amount equal to the value of such data to said district.

(3) Upon the completion of such plan, the board of directors shall cause notice thereof to be given by publication in each county in which said district may be located, in whole or in part, and shall permit the inspection thereof at the office of the district by all persons interested. Said notice shall fix the time and place for the hearing of all objections to said plan not less than twenty days nor more than thirty days after the last publication of said notice. All objections to said plan shall be in writing and filed with the secretary of the district at his office not more than ten days after the last publication of said notice. After said hearing before the board of directors, the board shall adopt a plan as the official plan of the said district. If, however, any person objects to said official plan, so adopted, then such person may, within ten days from the adoption of said official plan, file in the office of the clerk of the court in the original case establishing the district his objections in writing, specifying the features of the plan to which objection is made, and thereupon the court shall fix a day for the hearing thereof before the court, not less than ten days nor more than twenty days after the time fixed for filing objections, at which time the court shall hear said objections and adopt, reject, or refer back said plan to said board of directors.

(4) If the court should reject said plan, then the board shall proceed as in the first instance under this section to prepare another plan. If the court should refer back said plan to the board for amendment, then the court shall continue the hearing to a day certain without publication of notice. If the court approves the said plan as the official plan of the district, then a certified copy of the order of the court approving the same shall be filed with the secretary of the district and by him incorporated into the records of the district. The official plan may be altered in detail from time to time until the assessment record is filed, and of all such alterations the appraisers shall take notice. After the assessment record has been filed in court, no alterations of the official plan shall be made except as provided in section 37-4-113.

**Source:** L. 22: p. 23, § 12. C.L. § 9526. CSA: C. 138, § 137. CRS 53: § 30-3-5. C.R.S. 1963: § 29-3-5.

#### ANNOTATION

The "official plan" is the plan which may be adopted for the improvements for which the district was created. The board of directors is the body that prepares and, upon a hearing,

adopts the plan. It also has the power to levy assessments, to borrow money, and otherwise act for the conservancy district. *People ex rel. Setters v. Lee*, 72 Colo. 598, 213 P. 58 (1923).

**37-3-109. Execution of plans.** The board of directors has full authority to devise, prepare for, execute, maintain, and operate all works or improvements necessary or desirable to complete, maintain, operate, and protect the works provided for by the official plan and to that end may employ and secure men and equipment under the supervision of the chief engineer or other agents or may in its discretion let contracts for such works, either as a whole or in parts.

**Source:** L. 22: p. 24, § 13. C.L. § 9527. CSA: C. 138, § 138. CRS 53: § 30-3-6. C.R.S. 1963: § 29-3-6.



## ANNOTATION

**Public works constructed under the conservancy district law are of a public nature**

and for public purposes. *People ex rel. Setters v. Lee*, 72 Colo. 598, 213, P. 583 (1923).

**37-3-110. Contracts.** When it is determined to let the work by contract, contracts in amounts in excess of ten thousand dollars shall be advertised after notice by publication calling for bids, and the board may reject any or all bids or may let said contract to the lowest or best bidder who gives a good and approved bond with ample security, conditioned on the carrying out of the contract. Such contract shall be in writing and shall be accompanied by or shall refer to plans and specifications for the work to be done prepared by the chief engineer. Said contract shall be approved by the board of directors and signed by the president of the district and by the contractor and shall be executed in duplicate; but in case of sudden emergency when it is necessary in order to protect the district, the advertising of contracts may be waived upon the unanimous consent of the board of directors, with the approval of the court; but the provisions of this section shall not apply if it is determined by the board of directors that the work be done on force account.

**Source:** L. 22: p. 26, § 16. C.L. § 9530. CSA: C. 138, § 141. CRS 53: § 30-3-9. C.R.S. 1963: § 29-3-9.

## ANNOTATION

**Law reviews.** For article, "Highlights of the 1955 Legislative Session — Corporations", see 28 Rocky Mt. L. Rev. 60 (1955).

**37-3-111. Surveys and investigation.** The board of directors also has the right to establish and maintain stream gauges, rain gauges, and a flood warning service with telephone or telegraph lines or telephone or telegraph service, and may make such surveys and examinations of rainfall and flood conditions, stream flow, and other scientific and engineering subjects as are necessary and proper for the purposes of the district, and may issue reports thereon.

**Source:** L. 22: p. 30, § 22. C.L. § 9536. CSA: C. 138, § 147. CRS 53: § 30-3-15. C.R.S. 1963: § 29-3-15.

**37-3-112. Cooperation with United States or other agencies.** The board of directors also has the authority to enter into contracts or other arrangements with the United States government or any department thereof, with persons, railroads, or other corporations, with public corporations, and with the state government of this or other states and with irrigation, drainage, conservation, conservancy, or other improvement districts, in this or other states, for cooperation or assistance in constructing, maintaining, using, and operating the works of the district or for making surveys and investigations or reports thereon. It may purchase, lease, or acquire land or other property in adjoining states in order to secure outlets or for other purposes of articles 1 to 8 of this title and may let contracts and spend money for securing such outlets or other works in adjoining states.

**Source:** L. 22: p. 30, § 23. C.L. § 9537. CSA: C. 138, § 148. CRS 53: § 30-3-16. C.R.S. 1963: § 29-3-16.

**37-3-113. Access to lands - penalty.** The board of directors of any district organized under articles 1 to 8 of this title, or its employees or agents, including contractors and their employees and the members of the board of appraisers provided for in article 4 of this title, and their assistants, may enter upon lands within or without the district in order to make surveys and examinations to accomplish the necessary preliminary purposes of the district

or to have access to the work, being liable, however, for actual damage done; but no unnecessary damage shall be done. Any person or corporation preventing such entry is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than fifty dollars.

**Source:** L. 22: p. 25, § 14. C.L. § 9528. CSA: C. 138, § 139. CRS 53: § 30-3-7. C.R.S. 1963: § 29-3-7.

**37-3-114. Removal of structures.** (1) For the accomplishment of the official plan, the board of directors of any district has full power to improve in alignment, section, grade, location, or any other manner any watercourse, and it may remove, widen, lengthen, lower, raise, or otherwise change any public or private road bridge or railroad bridge, or any flume, aqueduct, or telephone, telegraph, gas, oil, sewer, water, or other pipelines, or any other construction over, across, in, into, under, or through any such watercourse or may require the same to be done. The foregoing shall apply to all such changes specified by the official plan or reasonably necessary for the accomplishment of the same; but, if any such change is made necessary in any construction because of the failure of the same to permit the free flow of water in such stream in time of flood or to permit the necessary enlargement or protection of the channel, then the owner of such construction shall make such change and all adjustments of grade, roadway, track, approach, or other construction incidental thereto, without cost to the district and without any claim for damages against the district; but the district shall pay the cost of excavating the earth for the enlargement of any channel or for placing earth for the filling of any channel, where such excavation or filling is required as a part of the official plan in making the changes outlined in this section. The district shall not be required to make such fill or excavation unless the same would be necessary to the official plan if the construction or work so changed did not exist.

(2) Before the removal, change, or modification of any work or construction outlined in this section, the board of directors shall give notice to the owner thereof requiring that the same be adapted to the official plan. In case such removals, changes, or adjustments are not commenced and completed by the owner within the respective times specified therefor in such notice, which time shall be reasonable under all circumstances, such removals, changes, or adjustments may be made by the district at the expense of the owner.

**Source:** L. 22: p. 28, § 20. C.L. § 9534. CSA: C. 138, § 145. CRS 53: § 30-3-13. C.R.S. 1963: § 29-3-13.

**37-3-115. Passing equipment through bridge or grade.** In case it is necessary to pass any dredge boat or other equipment through a bridge or grade of any railroad company or other corporation, county, city, town, or other municipality, the board of directors shall give notice to the owner of said bridge or grade that the same shall be removed temporarily to allow the passage of such equipment or that an agreement be immediately entered into in regard thereto. The owner of said bridge or grade shall keep an itemized account of the cost of the removal and if necessary of the replacing of said bridge or grade, and the necessary and actual cost shall be paid by the district. In case the owner of said bridge or grade fails to commence or complete provision for the passage of said equipment within the time specified in the notice, the board of directors may remove such bridge or grade at its own expense, interrupting traffic in the least degree consistent with good work and without unnecessary damage or delay. In case it is hindered or prevented from so doing, the owner of said bridge or grade shall be liable for all damage resulting to the district therefrom.

**Source:** L. 22: p. 30, § 21. C.L. § 9535. CSA: C. 138, § 146. CRS 53: § 30-3-14. C.R.S. 1963: § 29-3-14.

**37-3-116. Condemnation under general law.** The district shall also have the right, instead of having appraisals made by the board of appraisers, to condemn for the use of the district, according to the procedure provided by articles 1 to 7 of title 38, C.R.S., for the



appropriation of land or other property taken for public use, any land or property within or without said district not acquired or condemned by the court on the report of said appraisers.

**Source:** L. 22: p. 27, § 18. C.L. § 9532. CSA: C. 138, § 143. CRS 53: § 30-3-11. C.R.S. 1963: § 29-3-11.

#### ANNOTATION

**Law reviews.** For article, "Eminent Domain in Colorado", see 29 Dicta 313 (1952).

**37-3-117. Dominant right of eminent domain.** (1) The district, when necessary for the purposes of articles 1 to 8 of this title, has a dominant right of eminent domain over the right of eminent domain of railroad, telegraph, telephone, gas, water power, and other companies and corporations and over towns, cities, counties, and other public corporations.

(2) In the exercise of this right, due care shall be taken to do no unnecessary damage to other public utilities and, in case of failure to agree upon the mode and terms of interference, not to interfere with their operations or usefulness beyond the actual necessities of the case, due regard being given to the other public interests involved.

**Source:** L. 22: p. 27, § 17. C.L. § 9531. CSA: C. 138, § 142. CRS 53: § 30-3-10. C.R.S. 1963: § 29-3-10.

#### ANNOTATION

**Law reviews.** For article, "Eminent Domain in Colorado", see 29 Dicta 313 (1952).

### ARTICLE 3.5

#### Dissolution of Conservancy Districts

37-3.5-101.	Dissolution of district.	37-3.5-105.	Election procedure - ballot.
37-3.5-102.	Election for dissolution - petition or resolution filed.	37-3.5-106.	Majority vote determines question.
37-3.5-103.	Notice of election.	37-3.5-107.	Winding up and dissolution - order entered.
37-3.5-104.	Objections to resolution or petition.		

**37-3.5-101. Dissolution of district.** (1) At such time as the board of directors of any conservancy district by unanimous decision determines that the original purposes for the organization of the district have been accomplished and after the district has paid in full any indebtedness incurred by it, the board may devise a plan of dissolution which shall be filed, together with a petition for dissolution, with the court which authorized the organization of the district pursuant to section 37-2-105 (7).

(2) Such plan of dissolution shall set forth the proposal by the board of directors to dispose of any assets which the district may then own and to transfer any remaining responsibilities of the district to a political subdivision of the state.

(3) Immediately after the filing of such petition for dissolution, the court wherein such petition is filed shall, by order, fix a date, time, and place for a public hearing thereon, and thereupon the clerk of said court shall cause notice of said hearing to be published weekly for three successive weeks in a newspaper of general circulation in the county where said court is located. Any person who wishes to object to the proposed plan of dissolution shall file a written objection at any time after the filing of a petition for dissolution but not less than five days prior to the date fixed by the order of the court for the hearing upon said petition. At the hearing, the court may take such testimony as the court deems proper. If the court finds that the original purpose for the organization of the district has been accom-

plished, that the district is no longer indebted to any person, and that adequate provision has been made for the disposition of any assets of the district and the transfer of any remaining responsibilities of the district to a political subdivision of the state, the court may enter an order approving the plan of dissolution. In lieu of approving said plan, the court may order an election submitting the proposition of dissolution of the district to the electors of the district, and any such election ordered shall be conducted pursuant to the procedures of sections 37-3.5-105 to 37-3.5-107.

(4) If an order approving the plan of dissolution is entered, the board of directors shall expeditiously implement the plan of dissolution and upon the completion of its implementation shall file, with the court and with the division of local government in the department of local affairs, a notice that the dissolution of the district has been completed in compliance with the plan of dissolution approved by the court. Upon the receipt of such notice, the court shall enter a decree granting the petition for dissolution and dissolving the district. On and after the date of the entering of such decree, the district shall be deemed dissolved, any bonds posted on behalf of members of the board shall be deemed discharged, and the board of directors shall be relieved of further responsibilities and liabilities with regard to the district.

(5) As used in this section, "political subdivision" means any entity of government authorized by law to impose ad valorem taxes on taxable property located within its territorial limits.

**Source: L. 81:** Entire article added, p. 1746, § 2, effective May 28.

**37-3.5-102. Election for dissolution - petition or resolution filed.** (1) Any conservancy district organized may be dissolved in the manner specified in this section and sections 37-3.5-103 to 37-3.5-107 if such district has not been authorized to incur bonded or other indebtedness under the procedures set forth in article 5 of this title and such district has not incurred bonded or other indebtedness pursuant to the provisions of any other law; except that, if such district has entered into a contract with the United States or any other agency thereof, no dissolution shall take place unless the secretary of the interior of the United States has first consented thereto.

(2) An election submitting the proposition of dissolution of the district may be initiated by the filing of a copy of a resolution adopted by three-fourths of all the members of the board of directors of such district requesting such an election or by the filing of a petition requesting such election. Such resolution or petition shall be filed in the district court which formed said district.

(3) Any such petition so filed shall be accompanied by a good and sufficient bond for five hundred dollars with not less than two sureties approved by the court, and, if a majority of the qualified electors do not vote for dissolution in the election specified in this article, the amount of such bond shall be forfeited to the district; otherwise the same shall be discharged.

(4) If the valuation for assessment of land together with improvements thereon within said district when formed is in excess of twenty million dollars, such petition shall bear signatures of any owners of land equal in number to two-thirds or more of the number of such type of owners required by section 37-2-102 upon a petition for the formation of such a district. Such land shall be situated within the limits of the district and shall not be embraced within the incorporated limits of any city or town. Said petition shall also bear the signatures of any owners of land or land embraced within the incorporated limits of a city or town equal in number to two-thirds or more of the number of such type of owners required by said section upon a petition for the formation of such a district, said land to be situated within the limits of the district.

(5) If the valuation for assessment of land and improvements thereon within such district when formed is less than twenty million dollars, said petition shall contain the same number and type of signatures required by section 37-2-102 upon petitions for the formation of such a district. In either case the petition shall set forth opposite each signature the description of the land and the valuation for assessment thereof together with any improvements. Similar petitions or duplicate copies of the same petition may be filed together and



shall be regarded as one petition. No petition with the requisite signatures shall be declared void on account of alleged defects, but the court may permit the petition to be amended from time to time to conform to the facts by correcting errors in descriptions, valuation, or any other particular.

**Source: L. 81:** Entire article added, p. 1747, § 2, effective May 28.

**37-3.5-103. Notice of election.** Upon presentation of such petition or resolution, the court shall cause a notice to be published forthwith at least once each week for four consecutive weeks in a newspaper of general circulation in each county where the district or parts thereof lie. Such notice shall recite that a petition or resolution for dissolution of the district has been filed, shall describe generally the territory of the district, and shall further specify the time and places of election, which time shall not be less than sixty days nor more than ninety days after the date of the last publication of the notice. If an objection to the petition or resolution is filed in such court by an owner of land situated within said district within twenty days from the date of the last publication of the notice, the court may, if necessary, continue the election from time to time until all objections are disposed of. Due notice of the time and places of any continued election shall be given in the manner and form prescribed above.

**Source: L. 81:** Entire article added, p. 1748, § 2, effective May 28.

**37-3.5-104. Objections to resolution or petition.** Objections to a resolution for an election shall be confined to the question of whether sufficient directors voted in favor of the same. Objections to a petition for such election shall be confined to the question of whether sufficient qualified owners of land situate within the district have signed the petition for such election. Such petition shall be accepted as prima facie evidence of all facts stated therein, and all signatures affixed to such petition shall be presumed to be those of qualified owners residing within the boundaries of the district until the contrary is proven. No signer of a petition shall be permitted to withdraw his name from such petition after it is filed, except for fraud. All objections shall be heard as an advanced case on the docket of the court. Nothing in this section shall be construed to prevent the filing of subsequent resolutions or petitions for the same purpose, but elections on the proposition of dissolution shall not be held more frequently than once every three years.

**Source: L. 81:** Entire article added, p. 1748, § 2, effective May 28.

**37-3.5-105. Election procedure - ballot.** (1) Any election held for the purpose of submitting the proposition of dissolution of a district may be held separately or may be consolidated or held concurrently with any other election authorized by law. The election shall be conducted by the secretary of the board of directors of such district under the supervision of the court, and the court shall fix the manner of holding the same and shall also fix the compensation to be paid the officers of the election and shall designate the precincts and polling places. The court shall also appoint for each polling place and for each precinct, from the electors thereof, the officers of such election, which officers shall consist of three judges, one of whom shall act as clerk, who shall constitute a board of election for each polling place.

(2) The description of precincts may be made by reference to any order of the board of county commissioners of the county in which the district or any part thereof is situated or by reference to any previous order or resolution of the board or by detailed description of such precincts. Precincts established by the boards of the various counties may be consolidated for special elections held under this article. In the event that any such election is called to be held concurrently with any other election or is consolidated therewith, the court order need not designate precincts or polling places or the names of officers of election but shall contain a reference to the act or order calling such other election and fixing the precincts and polling places and appointing election officers therefrom.

(3) The respective election boards shall conduct the election in their respective precincts in the manner prescribed by law for the holding of general elections and shall make their returns to the secretary of the district. At any regular or special meeting of the board held not earlier than five days following the date of such election, the returns thereof shall be canvassed and the results declared. In the event that any election held under this article is consolidated with any primary or general election, the returns thereof shall be made and canvassed at the time and in the manner provided by law for the canvass of the returns of such primary or general election. It is the duty of such canvassing body to promptly certify and transmit to the board a statement of the result of the vote upon the proposition submitted under this article. Upon receipt of such certificate, it is the duty of the board to tabulate and declare the results of the election held under this article.

(4) The results of such election shall be certified promptly by the secretary of the board of directors to the court. It is the duty of the secretary of the board of directors of the district to prepare ballots to be used at the election on which shall be inscribed the words "For Dissolution" and "Against Dissolution". The costs of the election and ballots shall be paid by the district under the supervision of the court, and the district shall be authorized, under the supervision of the court, to borrow funds for this purpose. Irrespective of any other provision of this article, the district shall not be required or authorized to hold any election on the proposition of such borrowing.

**Source: L. 81:** Entire article added, p. 1749, § 2, effective May 28.

**37-3.5-106. Majority vote determines question.** The electors of the district shall be qualified to vote on the question of dissolving the district. If a majority of votes are for dissolution of the district, the district shall be dissolved as provided in section 37-3.5-107. Any objections to the election, or proceedings to invalidate the election, must be filed in the court within thirty days from the date of the election. Errors, omissions, and irregularities not affecting substantial rights shall be disregarded.

**Source: L. 81:** Entire article added, p. 1750, § 2, effective May 28.

**37-3.5-107. Winding up and dissolution - order entered.** (1) In the event that the vote is for dissolution, any qualified signer of the petition for the election or the board of directors of such district may, within such time as may be fixed by the court, present a written plan for the winding up of the affairs of the district. Such plan may specify that the affairs of the district be wound up by the board of directors of the district or by a receiver appointed by the court for that purpose. On a day fixed by the court, the court shall consider such plan and shall enter an order establishing therefrom a plan for the winding up of such affairs. The court shall retain continuing jurisdiction to modify such plan from time to time and shall supervise such winding up.

(2) If no such plan is presented on or before the day set by the court, then the court shall appoint a receiver to wind up the affairs of the district under the court's supervision. Upon the appointment of any receiver, all authority of the board of directors of the district shall terminate; except that its authority to levy taxes for the payment of the obligations of the district and the costs of winding up shall continue until the district is dissolved. Such board shall levy taxes within the limits imposed by article 5 of this title sufficient to pay expeditiously such obligations and costs, and, if a receiver has been appointed, all tax collections shall be delivered to such receiver.

(3) When it appears to the satisfaction of the court that all obligations of the district have been discharged and the costs of winding up the district paid, such court shall enter an order dissolving the district, and a certified copy of such order shall be recorded by the clerk of the court in all counties in which the district may be situate. All funds remaining in the hands of such receiver or board of directors after such dissolution shall be divided among the counties comprising any part of such district in proportion to the total valuation of taxable property in such county within the boundaries of such district, as determined by



the tax roll of such counties in the treasurer's hands, for the calendar year preceding the year in which such dissolution occurs, and said receiver or members of the board of directors shall thereupon be discharged by the court.

**Source: L. 81:** Entire article added, p. 1750, § 2, effective May 28.

## ARTICLE 4

### Appraisal of Benefits

37-4-101.	Appointment of appraisal commissioners.	37-4-108.	Decree on appraisals.
37-4-102.	Appraisals.	37-4-109.	Appeals from awards.
37-4-103.	Land affected outside the district.	37-4-110.	Entry after deposit of award.
37-4-104.	Notice of hearing on land excluded from or taken into district.	37-4-111.	Filing decree.
37-4-105.	Report of appraisal commissioners.	37-4-112.	Appeals shall not delay proceedings.
37-4-106.	Notice of hearing on appraisals.	37-4-113.	Change of official plan.
37-4-107.	Hearing on appraisals.	37-4-114.	Lands exempt and later liable to assessment.
		37-4-115.	Subsequent appraisals.
		37-4-116.	Validation of irregular proceedings.

**37-4-101. Appointment of appraisal commissioners.** At the time of making its order organizing the district or at any time thereafter, the court shall appoint three commissioners, referred to in this article as appraisers or the board of appraisers, whose duties shall be to appraise the lands or other property within and without the district to be acquired for rights-of-way, reservoirs, and other works of the district and to appraise all benefits and damages accruing to all land within or without the district by reason of the execution of the official plan. Said appraisers shall be freeholders residing within the state of Colorado, who may or may not own lands within said district. Each of the appraisers, before taking up his duties, shall take and subscribe to an oath that he will faithfully and impartially discharge his duties as such appraiser and that he will make a true report of such work done by him. The appraisers at their first meeting shall elect one of their own number chairman, and the secretary of the board of directors or his deputy shall be ex officio secretary of said board of appraisers during their continuance in office. A majority of the appraisers shall constitute a quorum, and a concurrence of the majority in any matter within their duties is sufficient for its determination. The court, by order, may remove any appraiser at any time, and shall fill all vacancies in the board of appraisers, or may appoint a new board, as occasion may require, which new board, if appointed, shall perform all the duties and exercise all the powers of the board of appraisers of the district.

**Source: L. 22:** p. 31, § 25. **C.L.** § 9539. **CSA:** C. 138, § 150. **CRS 53:** § 30-4-1. **C.R.S. 1963:** § 29-4-1.

### ANNOTATION

**Law reviews.** For comment, "Water: State-wide or Local Concern? City of Thornton v. Farmers Reservoir & Irrigation Co.", see 56 Den. L.J. 625 (1979).

**37-4-102. Appraisals.** (1) During the preparation of the official plan, the board of appraisers shall examine and become acquainted with the nature of the plans for the improvement and of the lands and other property affected thereby, in order that they may be better prepared to make appraisals.

(2) When the official plan is filed with the secretary of the district, he shall at once notify the appraisers, and they shall thereupon proceed to appraise the benefits of every kind to all land and property within or without the district which will result from the organization

of said district and the execution of the official plan. They shall also appraise the damages sustained and the value of the land and other property necessary to be taken by the district for which settlement has not been made by the board of directors. In the progress of their work, the appraisers shall have the assistance of the attorney, engineers, secretary, and other agents and employees of the district.

(3) The board of appraisers shall also appraise the benefits and damages, if any, accruing to cities, towns, counties, and other public corporations as political entities, and to the state of Colorado, and the same shall be considered the same as benefits or damages, as the case may be, to land or other property.

(4) Before appraisals of compensation and damages are made, the board of directors of the district may report to the appraisers the parcels of land it wishes to purchase and for which it wishes appraisals to be made, both for easement and for purchase in fee simple, and the directors may specify the particular purpose for which and the extent to which an easement in any property is desired, describing definitely such purpose and extent.

(5) The appraisers shall appraise all damages which may, because of the execution of the official plan, accrue to real or other property, either within or without the district, which damages shall also cover easements acquired by the district for all of the purposes of the district, unless otherwise specifically stated.

(6) Wherever instructed to do so by the board of directors, the appraisers shall appraise lands which it may be necessary or desirable for the district to own and shall appraise both the total value of the land and also the damages due to an easement for the purposes of the district. Upon such appraisals being confirmed by the court, the board of directors of the district shall have the option of paying the entire appraised value of the property and acquiring full title to it in fee simple or of paying only the cost of such easement, for the purposes of the district.

(7) Upon written demand by the owner, such option shall be exercised by the directors within ninety days after the date of the final judicial determination of such appraisal. The appraisers in appraising benefits and damages shall consider only the effect of the execution of the official plan. Appraisals of value for property taken shall be made without reference to any increase in value thereof due to the execution of the official plan. The appraisers in making appraisals shall give due consideration and credit to any other works or other systems of protection already constructed or under construction which form a useful part of the work of the district according to the official plan. Where the appraisers or a jury, in case one is called, returns no appraisal of damages to any property, it is deemed a finding by it that no damages will be sustained.

**Source:** L. 22: p. 32, § 26. C.L. § 9540. CSA: C. 138, § 151. CRS 53: § 30-4-2. C.R.S. 1963: § 29-4-2.

**37-4-103. Land affected outside the district.** If the appraisers find that land not embraced within the boundaries of the district will be affected by the proposed improvement or should be included in the district, they shall appraise the benefits and damages to such land, and shall file notice in the court of the appraisal which they have made upon the lands beyond the boundaries of the district, and to the land which, in their opinion, should be included in the district. The appraisers shall also report to the court any lands which, in their opinion, should be eliminated from the district; but no territory lying in any county into which any existing district does not already extend shall be included in such district, except in accordance with the provision of section 37-2-105 with reference to the inclusion of land in such counties.

**Source:** L. 22: p. 34, § 27. C.L. § 9541. CSA: C. 138, § 152. CRS 53: § 30-4-3. C.R.S. 1963: § 29-4-3.

**37-4-104. Notice of hearing on land excluded from or taken into district.** If the report of the board of appraisers includes recommendations that other lands be included in the district or that certain lands be excluded from the district, it is the duty of the clerk of



the court before which the proceeding is pending, upon order of the court, to give notice to the owners of such property by publication (Schedule Form V) to be made as provided in articles 1 to 8 of this title for a hearing on the petition for the creation of the district. The time and place of the hearing shall be the same as provided for the hearing on appraisals, and upon such hearing the court shall make and enter such orders with respect to lands to be included in or excluded from the district as the facts and the provisions of articles 1 to 8 of this title require. As to the owners of property to be excluded from the district, it will be sufficient to notify them of that fact.

**Source:** L. 22: p. 34, § 28. C.L. § 9542. CSA: C. 138, § 153. CRS 53: § 30-4-4. C.R.S. 1963: § 29-4-4.

**Cross references:** For Schedule Form V, see § 37-8-101.

**37-4-105. Report of appraisal commissioners.** (1) The board of appraisers shall prepare a tabulated report of its findings which shall be bound in book form and which shall be known as the conservancy appraisal record. Such record (Schedule Form VI) shall contain the names of the owners of property appraised as they appear on the tax rolls or from the records of the office of the county clerk and recorder, a description of the property appraised, the amount of benefits appraised, the amount of damages appraised, and the appraised value of land or other property which may be taken for the purposes of the district. The appraisers shall also report any other benefits or damages or any other matter which, in their opinion, should be brought to the attention of the court. No error in the names of the owners of property or in the descriptions thereof shall invalidate said appraisal or the levy of assessments or taxes based thereon, if sufficient description is given to identify such property.

(2) When the report is completed, it shall be signed by at least a majority of the appraisers and deposited with the clerk of the court who shall file it in the original case. At the same time certified copies of that part of the report giving the appraisal of benefits and appraisals of land to be taken and of damages in any county other than that in which the original case is pending shall be made and filed with the county clerk and recorder of such county.

**Source:** L. 22: p. 35, § 29. C.L. § 9543. CSA: C. 138, § 154. CRS 53: § 30-4-5. C.R.S. 1963: § 29-4-5.

**Cross references:** For Schedule Form VI, see § 37-8-101.

**37-4-106. Notice of hearing on appraisals.** (1) Upon the filing of the report of the appraisers, the clerk of the court in which the original cause is pending shall, upon order of the court, give notice thereof by publication (Schedule Form VII) in each county in the conservancy district. It shall not be necessary for said clerk to name the parties interested, nor to describe separate lots or tracts of land in giving said notice, but it shall be sufficient to give such descriptions as will enable the owner to determine whether or not his land is covered by such description.

(2) Where lands in different counties are mentioned in said report, it shall not be necessary to publish in each county a description of all the lands in the district but only of that part of the said lands situate in the county in which publication is made.

**Source:** L. 22: p. 35, § 30. C.L. § 9544. CSA: C. 138, § 155. CRS 53: § 30-4-6. C.R.S. 1963: § 29-4-6.

**Cross references:** For Schedule Form VII, see § 37-8-101.

**37-4-107. Hearing on appraisals.** Any property owner may accept the appraisals in his favor of benefits and of damages and of lands to be taken, as made by the appraisers, or may



acquiesce in their failure to appraise damages in his favor, and shall be construed to have done so unless, within ten days after the last publication provided for in section 37-4-106, he has filed exceptions to said report or to any appraisal of either benefits or of damages, or of the value of land to be taken. All exceptions shall be heard by the court beginning not less than twenty nor more than thirty days after the last publication provided for in section 37-4-106 and determined in advance of other business so as to carry out, liberally, the purposes and needs of the district. The court may, if it deems necessary, return the report to the board of appraisers for their further consideration and amendment and may enter its order to that effect. If, however, the appraisal roll as a whole is referred back to the appraisers, the court shall not resume the hearing thereon without new notice, as for an original hearing thereon. But the court may, without new notice, order the appraisers to revise and amend the roll when the order of the court specifies the changes to be made.

**Source:** L. 22: p. 36, § 31. C.L. § 9545. CSA: C. 138, § 156. CRS 53: § 30-4-7. C.R.S. 1963: § 29-4-7.

**Cross references:** For requirements of publication, see § 37-1-102 (5).

**37-4-108. Decree on appraisals.** If it appears to the satisfaction of the court, after having heard and determined all said exceptions, that the estimated cost of constructing the improvements contemplated in the official plan is less than the benefits appraised, then the court shall approve and confirm said appraisers' report as so modified and amended, and such findings and appraisals shall be final and incontestable, except as provided in this article. In considering the appraisals made by the board of appraisers, the court shall take cognizance of the official plan and of the degree to which it is effective for the purposes of the district. In case the court finds that the estimated benefits appraised are less than the estimated total cost of the execution of the official plan, exclusive of interest on deferred payments, or that the official plan is not suited to the requirements of the district, it may at its discretion return said official plan to the directors of the district with an order directing them to prepare new or amended plans, or it may dissolve the district after having provided for the payment of all expenses theretofore incurred.

**Source:** L. 22: p. 36, § 32. C.L. § 9546. CSA: C. 138, § 157. CRS 53: § 30-4-8. C.R.S. 1963: § 29-4-8.

**37-4-109. Appeals from awards.** (1) Any person or public or private corporation desiring to appeal from an award of the appraisers as to compensation, damages, or benefits shall, within ten days from the judgment of the court confirming the report of the appraisers, file with the clerk of the court a written notice making demand for a jury trial. If the appeal is solely from an award as to benefits, the appellant shall, at the same time, file a bond with good and sufficient security to be approved by the clerk, in a sum not exceeding two hundred dollars, to the effect that if the verdict is not more favorable to appellant than the award of the appraisers, the appellant will pay the costs of the appeal. The appellant shall state definitely from what part of the order the appeal is taken. The appeal may be from the award of compensation, damages, or benefits, or one or more of them, but from no other part of the judgment of the court confirming the report of the appraisers.

(2) In case more than one appeal is filed from the award as to compensation, damages, or benefits, the court may, upon a showing that the same may be consolidated without injury to the interest of anyone, consolidate and try the same together.

(3) Upon demand for a jury trial to fix the amount of compensation for property proposed to be taken or damaged, the court shall order the board of directors at once to begin condemnation proceedings therefor in the district court of the county in which are situate the lands sought to be condemned, in the district court in and for such county, which suit shall be conducted in accordance with articles 1 to 7 of title 38, C.R.S., concerning the right of eminent domain, where a jury is demanded.

(4) Upon demand for a jury trial to fix the assessment of benefits or the assessment of damages other than those incident to condemnation proceedings, the court shall order the board of directors to present a petition embodying the facts and the claims made in short form, which shall be filed in the court in which the original case is pending, whereupon a jury shall be empaneled according to law to try and determine the issue presented, as in condemnation proceedings.

**Source:** L. 22: p. 37, § 33. C.L. § 9547. CSA: C. 138, § 158. CRS 53: § 30-4-9. C.R.S. 1963: § 29-4-9.

**37-4-110. Entry after deposit of award.** No property shall be taken under articles 1 to 8 of this title until just compensation has been paid according to law. But where a trial by jury is demanded under section 37-4-109, the board of directors may pay into court the amount allowed by the appraisers, with the costs, and thereupon the court shall make an order admitting the said district into possession of the property and thereupon the board of directors may enter into undisturbed possession of the property and rights involved. The right of entry provided by this section is a cumulative remedy and additional to the district's right of possession during the pendency of condemnation proceedings under the provisions of articles 1 to 7 of title 38, C.R.S.

**Source:** L. 22: p. 38, § 34. C.L. § 9548. CSA: C. 138, § 159. CRS 53: § 30-4-10. C.R.S. 1963: § 29-4-10.

**37-4-111. Filing decree.** (1) Upon the entry of the order of the court approving the report of the appraisers, as provided for in articles 1 to 8 of this title, the clerk of said court in which the same is entered shall transmit to the secretary of the district a certified copy of the said decree and of the appraisals as confirmed by the court, except those parts from which appeals have been perfected in accordance with section 37-4-109, but not determined.

(2) When any proceeding to review a judgment of the district court, confirming the verdict of a jury, has been finally determined, the clerk of the court deciding the same shall certify the amount of each item of the judgment to the clerk of the court having the original case, who shall file the same therein and shall thereupon transmit certified copies of the same to the secretary of the district who shall thereupon complete the conservancy appraisal record.

**Source:** L. 22: p. 39, § 35. C.L. § 9549. CSA: C. 138, § 160. CRS 53: § 30-4-11. C.R.S. 1963: § 29-4-11.

**37-4-112. Appeals shall not delay proceedings.** (1) No appeal from an award by the appraisers under articles 1 to 8 of this title shall be permitted to interrupt or delay any action or the prosecution of any work under articles 1 to 8 of this title, except where the appellant is entitled to a jury trial under the constitution of the state, and the district does not exercise the right of deposit provided by section 37-4-110, in which case only so much of the work shall be interrupted or delayed as would constitute a taking or damaging of the property of such appellant.

(2) No proceeding to review a judgment of the district court entered under the provisions of articles 1 to 8 of this title shall be commenced after thirty days from the entry of the judgment sought to be reviewed.

(3) The board of directors of any district organized under articles 1 to 8 of this title has the same right as property owners to invoke the jurisdiction of an appellate court of the state of Colorado to review any reviewable order of the district court made in any proceeding under said articles.

(4) The failure to appeal from or seek a review of any order of the court in any proceeding under articles 1 to 8 of this title within the time specified in this section shall



constitute a waiver of any irregularity in the proceedings, and the remedies provided for in said articles shall exclude all other remedies except as provided in this section.

**Source:** L. 22: p. 39, § 36. C.L. § 9550. CSA: C. 138, § 161. CRS 53: § 30-4-12. C.R.S. 1963: § 29-4-12.

**37-4-113. Change of official plan.** (1) The board of directors may at any time when necessary to fulfill the objects for which the district was created alter or add to the official plan, and when such alterations or additions are formally approved by the board and by the court and are filed with the secretary, they shall become part of the official plan for all purposes of articles 1 to 8 of this title. Where such alterations or additions in the judgment of the court neither materially modify the general character of the work, nor materially increase resulting damages for which the board is not able to make amicable settlement, nor increase the total cost more than ten percent above that estimated in the official plan, no action other than a resolution of the board of directors shall be necessary for the approval of such alterations or additions. In case the proposed alterations or additions materially modify the general character of the work, or materially modify the resulting damages, or materially reduce the benefits for which the board is not able to make amicable settlement, or materially increase the benefits in such a manner as to require a new appraisal, or increase the total cost more than ten percent above that estimated in the official plan, the court shall direct the board of appraisers, which may be the original board, or a new board appointed by the court on petition of the board of directors, to appraise the property to be taken, benefited, or damaged by the proposed alterations or additions.

(2) Upon the completion of the report by the board of appraisers, notice shall be given and a hearing had on its report in the same manner as in the case of the original report of the board of appraisers, and the same right of appeal to a jury shall exist; but where only a few landowners are affected, the clerk of the court may, on order of the court, if found to be more economical and convenient, give personal notice of the pendency of the report of said appraisers instead of notice by publication; and if the only question at issue is additional damages or reduction of benefits to property due to modifications in or additions to the official plan, the board of directors may, if practicable, make settlements with the owners of the property damaged instead of having appraisals made by the board of appraisers. In case such settlements are made, notice and hearing need not be had. After district bonds are sold, as provided in articles 1 to 8 of this title, in order that their security may not be impaired, no reduction shall be made in the amount of uncontested benefits appraised or costs assessed against any property in the district; but in lieu of any reduction in assessment, if by reason of a modification in or addition to the official plan an excessive assessment is made under the provisions of section 37-5-104, the excess shall be paid to the property owner in cash. This provision shall apply to all changes in appraisals under articles 1 to 8 of this title.

**Source:** L. 22: p. 40, § 37. C.L. § 9551. CSA: C. 138, § 162. CRS 53: § 30-4-13. C.R.S. 1963: § 29-4-13.

#### ANNOTATION

**Law reviews.** For article, "County Court Practice Changed", see 29 Dicta 62 (1952).

**37-4-114. Lands exempt and later liable to assessment.** If any lands in any district organized under articles 1 to 8 of this title are not liable to assessment at the time of the execution of the work, but afterwards, during the period when such work is being paid for, become liable to assessment, such lands shall thereupon be appraised and assessed as other lands in said district receiving equal benefits.

**Source:** L. 22: p. 41, § 38. C.L. § 9552. CSA: C. 138, § 163. CRS 53: § 30-4-14. C.R.S. 1963: § 29-4-14.



**37-4-115. Subsequent appraisals.** In case any property within or without any district is benefited, which for any reason was not appraised in the original proceedings, or was not appraised to the extent of benefits received, or in case any person or public corporation makes use of or profits by the works of any district organized under articles 1 to 8 of this title to a degree not compensated for in the original appraisal, or in case the directors of the district find it necessary subsequent to the time when the first appraisals are made to take or damage any additional property, the directors of said district, at any time such condition becomes evident, shall direct the board of appraisers to appraise the benefits or the enhanced benefits received by such property, or such damages or value of property taken, and the proceedings in articles 1 to 8 of this title for appraising lands not at first included within the boundaries of the district shall in all matters be conformed to, including notice to the parties; or the board may, at its discretion, make settlement with such person or public corporation for such use, benefit, damage, or property taken.

**Source:** L. 22: p. 41, § 39. C.L. § 9553. CSA: C. 138, § 164. CRS 53: § 30-4-15. C.R.S. 1963: § 29-4-15.

**37-4-116. Validation of irregular proceedings.** (1) No fault in any notice or other proceeding shall affect the validity of any proceeding under articles 1 to 8 of this title except to the extent to which it can be shown that such fault resulted in a material denial of justice to the property owner complaining of such fault.

(2) In case it is found upon a hearing that, by reason of some irregularity or defect in the proceedings, the appraisal has not been properly made, the court may, nevertheless, on having proof that expense has been incurred which is a proper charge against the property of the complainant, render a finding as to the amount of benefits to said property and appraise the proper benefits accordingly, subject to a claim for a jury as already provided, when the party is entitled thereto, and thereupon said land shall be assessed as other land equally benefited.

(3) In the event that at any time, either before or after the issuance of bonds pursuant to the provisions of articles 1 to 8 of this title, the appraisal of benefits, either as a whole or in part, is declared by any court of competent jurisdiction to be invalid by reason of any defect or irregularity in the proceedings therefor, whether jurisdictional or otherwise, the said district court where the original case is pending is authorized, on the application of the board of directors of the said district, or on the application of any holder of any bonds which may have been issued pursuant hereto, promptly and without delay to remedy all defects or irregularities, as the case may require, by causing to be made in the manner provided in articles 1 to 8 of this title, a new appraisal of the amount of benefits against the whole or any part of the lands in the said district, as the case may require.

**Source:** L. 22: p. 42, § 40. C.L. § 9554. CSA: C. 138, § 165. CRS 53: § 30-4-16. C.R.S. 1963: § 29-4-16.

## ARTICLE 5

### Financial Administration

37-5-101.	Funds.	37-5-109.	Readjustment of maintenance fund assessments.
37-5-102.	Preliminary fund.	37-5-110.	Levies.
37-5-103.	Power to borrow money for the preliminary fund.	37-5-111.	Manner of collection - tax sale - certificate of purchase - tax deed.
37-5-104.	Construction fund.	37-5-112.	Collection by civil action.
37-5-104.5.	Determination of special benefits - factors considered.	37-5-113.	Bond of county treasurer.
37-5-105.	Payment of assessments.	37-5-114.	Lien of conservancy assessments.
37-5-106.	Conservancy bonds.	37-5-115.	Assessment records prima facie evidence.
37-5-107.	Maintenance fund.		
37-5-108.	Power to borrow money for the maintenance fund.		

37-5-116.	Remedy for defective assessments.	37-5-118.	Penalty for failure of treasurer to pay over tax.
37-5-117.	Duties of officers of public corporations as to assessments.	37-5-119.	Surplus funds and annual reports.
		37-5-120.	Compensation of officials.

**37-5-101. Funds.** (1) The moneys of every conservancy district organized under articles 1 to 8 of this title shall consist of the following separate funds:

(a) "Preliminary funds" means the proceeds of the level rate assessment authorized by section 37-5-102.

(b) "Construction fund" means the proceeds of levies made against the special benefits appraised, equalized, and confirmed under the provisions of articles 1 to 8 of this title.

(c) "Maintenance fund" means the proceeds of a special assessment to be levied annually for the purpose of upkeep, administration, and current expenses as provided in said articles. Moneys received by the district from any other source shall be placed in any fund which the board of directors orders.

(2) No vouchers shall be drawn against the preliminary fund or against the maintenance fund until an assessment levying resolution has been properly passed by the board of directors and duly entered upon its records. No bonds shall be issued against the construction fund until an assessment levying resolution has been properly passed by the board of directors and duly entered upon its records and until the property owners have been given an opportunity for a period of not less than sixty days to pay in cash the assessment so levied against their respective properties.

**Source:** L. 22: p. 43, § 41. C.L. § 9555. CSA: C. 138, § 166. CRS 53: § 30-5-1. C.R.S. 1963: § 29-5-1.

#### ANNOTATION

**The assessment provisions of the conservancy district law held not to be in contravention of the due process clause of the federal**

and state constitutions. *People ex rel. Setters v. Lee*, 72 Colo. 598, 213 P. 583 (1923).

**37-5-102. Preliminary fund.** (1) As soon as any district has been organized under articles 1 to 8 of this title and a board of directors has been appointed and qualified, such board has the authority to fix the amount of an assessment upon the property within the district not to exceed one mill for every dollar of valuation for assessment thereof as a level rate to be used for the purpose of paying the expenses of organization, for surveys and plans, for other incidental expenses which may have been incurred prior to the time when money is received from the sale of bonds or otherwise, and for the general administration of the district. In accordance with the schedule prescribed by section 39-5-128, C.R.S., the amount of assessment for each dollar of valuation for assessment shall be certified to the boards of county commissioners of the various counties in which the district, or any portion thereof, is located and by them included in their next annual levy for state and county purposes. Said amount shall be collected for the use of such district in the same manner as are taxes for county purposes, and the revenue laws of the state for the levy and collection of taxes on real estate for county purposes, except as modified in this article, shall be applicable for the levy and collection of the amount certified by the directors of such district as aforesaid, including the enforcement of penalties and forfeiture for delinquent taxes.

(2) All collections made by the county treasurer pursuant to such levy shall be paid to the treasurer of the conservancy district on or before the tenth day of the next succeeding calendar month. If such items of expense have already been paid in whole or in part from other sources, they may be repaid from the receipts of such levy, and such levy may be made although the work proposed may have been found impracticable or for other reasons may have been abandoned. The information collected by the necessary surveys, the appraisal of benefits and damages, and other information and data are declared to constitute benefits for which said assessment may be levied. In case a district is dissolved or



abandoned for any cause whatsoever before the work is constructed, the data, plans, and estimates which have been secured shall be filed with the clerk of the court in which the district was organized and shall be matters of public record available to any person interested.

(3) If all the expenses of organization, for surveys and plans, and for other incidental expenses which may have been incurred prior to the time when money is received from the sale of bonds or otherwise have been paid in full, any or all of the moneys remaining in the preliminary fund may be transferred by the board of directors to any of the other funds of the district.

**Source:** L. 22: p. 44, § 42. C.L. § 9556. CSA: C. 138, § 167. CRS 53: § 30-5-2. C.R.S. 1963: § 29-5-2. L. 81: (1) amended and (3) added, p. 1751, § 4, effective May 28. L. 87: (1) amended, p. 1408, § 7, effective April 22.

**Cross references:** For the levy and collection of taxes on real estate, see articles 1 to 14 of title 39.

#### ANNOTATION

**Special assessments for conservancy district purposes are not a tax** within the meaning of § 3 of art. X, Colo. Const., concerning tax-

ation. *People ex rel. Setters v. Lee*, 72 Colo. 598, 213 P. 583 (1923).

**37-5-103. Power to borrow money for the preliminary fund.** In order to facilitate the preliminary work, the board of directors may borrow money at a net effective interest rate as determined by said board and, as evidence of the debt so contracted, may issue and sell or may issue to contractors or others negotiable evidences of debt, in this article called "warrants", and may pledge, after it has been levied, the preliminary assessment of not exceeding one mill for the repayment thereof. If any warrant so issued by the board of directors is presented for payment and is not paid for want of funds in the treasury, that fact, with the date of presentation, shall be endorsed on the back of such warrant, which shall thereafter draw interest at the rate specified in the endorsement, not exceeding the net effective interest rate when issued, until such time as there is money on hand sufficient to pay the amount of said warrant with interest.

**Source:** L. 22: p. 45, § 43. C.L. § 9557. CSA: C. 138, § 168. CRS 53: § 30-5-3. C.R.S. 1963: § 29-5-3. L. 75: Entire section amended, p. 1363, § 1, effective June 29.

**37-5-104. Construction fund.** (1) After the list of property, with the appraised benefits as approved by the court or that part thereof from which no appeal is pending, has been filed with the secretary of the district, then from time to time, as the affairs of the district may demand, the board of directors shall levy on all property upon which benefits have been appraised an assessment of such portion of said benefits as may be found necessary by said board to pay the cost of the appraisal, except as paid out of the preliminary fund, the preparation and execution of the official plan including superintendence of construction and administration during the period of construction plus ten percent of said total to be added for contingencies but not to exceed, in the total of principal, the appraised benefits so adjudicated. The assessment to be known as the "construction fund assessment" shall be apportioned to and levied on each tract of land or other property in said district in proportion to the benefits appraised, and not in excess thereof, and, in case bonds are issued as provided in articles 1 to 8 of this title, then the amounts of interest which will accrue on such bonds, as estimated by said board of directors, shall be included in and added to the said assessment, but the interest to accrue on account of the issuing of said bonds shall not be construed as a part of the cost of construction in determining whether or not the expenses and costs of making said improvement are equal to or in excess of the benefits appraised. As soon as said assessment is levied, the secretary of the district, at the expense of the district, shall prepare in duplicate an assessment record of the district. It shall



be in the form of a well-bound book endorsed and named, "Construction Fund Assessment Record of ..... Conservancy District", which endorsement shall also be printed at the top of each page thereof.

(2) The construction fund assessment record shall include a table or schedule (Schedule Form VIII, 1) showing in properly ruled columns:

(a) The names of the owners of the property to which benefits are appraised, which may be as they appear in the decree of the court confirming the appraisals, and, in case of appraisals against a town, city, county, or other public corporation, the name of the individual owners need not be given, but only the name of such corporation;

(b) The descriptions of the items of property appraised and assessed, arranged by counties;

(c) The total amount of benefits appraised against each item of property;

(d) The total assessment levied against each item of property to which benefits have been appraised, and in this column of the record provision shall be made for the entry of successive levies of assessments;

(e) A blank column in which the treasurer shall enter the assessments paid within the sixty-day period in which property owners may pay their assessments;

(f) In successive columns, the construction fund installments, or if bonds are issued, these columns may be designated bond fund installments, both principal and interest, one column for each installment, with provision for the entry of installments of successive levies, if any, and suitable blank columns in which the county treasurer shall record the several installment amounts, principal and interest, as collected by him, and the names of the persons paying the same. Where successive levies of assessments are made for the construction fund, the construction fund assessment record shall contain suitable notations to show the number of levies and the amount of each, to the end that it may disclose the aggregate of all levies for the construction fund.

(3) Upon the completion of the construction fund assessment record, it shall be signed by the president of the district, and the seal of the district shall be thereunto affixed and attested by the signature of the secretary, and the same shall thereafter become a permanent record in the office of said district.

(4) If it is found at any time that the total amount of assessments levied is insufficient to pay the cost of the works set out in the official plan or of additional work done, the board of directors may levy such additional assessments and may make such amendments or supplements to the construction fund assessment record from time to time as may be necessary to provide funds to complete the work, but the total of all such assessments, exclusive of interest, shall not exceed the total of benefits appraised.

(5) After the cost of the works set out in the official plan or of additional work done has been paid in full, any or all moneys remaining in the construction fund may be transferred by the board of directors to the maintenance fund.

**Source:** L. 22: p. 45, § 44. C.L. § 9558. CSA: C. 138, § 169. CRS 53: § 30-5-4. C.R.S. 1963: § 29-5-4. L. 81: (5) added, p. 1751, § 5, effective May 28.

**Cross references:** For Schedule Form VIII, see § 37-8-101.

**37-5-104.5. Determination of special benefits - factors considered.** (1) The term "benefit", for the purposes of assessing a particular property within a conservancy district particularly with respect to regulating streamflow to control floods, includes, but is not limited to, the following:

(a) Any increase in the market value of the property;

(b) The provision for accepting the burden from specific dominant property for discharging surface water onto servient property in a manner or quantity greater than would naturally flow because the dominant owner made some of his property impermeable;

(c) Any adaptability of property to a superior or more profitable use;

(d) Any alleviation of health and sanitation hazards accruing to particular property or accruing to public property in the improvement district, if the provision of health and

sanitation is paid for wholly or partially out of funds derived from taxation of property owners of the improvement district;

(e) Any reduction in the maintenance costs of particular property or of public property in the improvement district, if the maintenance of the public property is paid for wholly or partially out of funds derived from taxation of property owners of the improvement district;

(f) Any increase in convenience or reduction in inconvenience accruing to particular property owners, including the facilitation of access to and travel over streets, roads, and highways;

(g) Recreational improvements accruing to particular property owners as a direct result of drainage improvement.

**Source: L. 75:** Entire section added, p. 998, § 4, effective July 1.

**37-5-105. Payment of assessments.** (1) When the construction fund assessment record is placed on file in the office of the district, notice by publication shall be given to property owners that they may pay their assessments. Any owners of real property assessed for the execution of the official plan under the provisions of articles 1 to 8 of this title shall have the privilege of paying such assessment to the treasurer of the district within sixty days from the time such publication is completed, and the amount to be paid shall be the full amount of the assessment less any amount added thereto to meet interest. When such assessment has been paid, the secretary of the district shall enter upon the said assessment record opposite each tract for which payment is made the words "paid in full", and such assessment shall be deemed satisfied. The payment of such assessment shall not relieve the landowner from the payment of a maintenance assessment nor from the payment of any further assessments, not exceeding the total of benefits appraised which may be necessary as provided in articles 1 to 8 of this title.

(2) Failure to pay the whole construction fund assessment within said period of sixty days shall be conclusively considered an election on the part of all persons interested, whether under disability or otherwise, to pay such assessment in installments as provided in this section. All persons so electing to pay in installments shall be conclusively considered as consenting to said official plan and all work thereunder, the issuance of bonds provided for in articles 1 to 8 of this title, and the payment of interest thereon, and such election shall be conclusively considered as a waiver of all right to question the power or jurisdiction of the conservancy district to construct the works set forth in said official plan, the regularity or sufficiency of the proceedings, or the validity or the correctness of such assessment; except that any public corporation may, within said sixty days, elect to pay, in whole or in part, the amount assessed against such corporation in not more than ten annual installments, beginning at the time of the next annual levy of taxes by such corporation, but nothing in this section shall be construed to relieve such corporation from liability for successive levies of assessments, not exceeding the amount of benefits appraised.

(3) In case of such election to pay in installments, the construction fund assessment shall be payable in not less than five nor more than thirty annual installments of principal, the first of which installments shall be payable in not less than one and not more than five years, and the last in not more than thirty years after the filing of the construction fund assessment record in the office of the district, with interest in all cases on the unpaid principal, computed semiannually, at a rate not exceeding six percent per annum, all as may be determined by the board of directors of the conservancy district by resolution.

(4) Subject to the foregoing requirements, all installments, both of principal and interest, shall be payable at such times as may be determined by the board of directors of the conservancy district by resolution as provided in articles 1 to 8 of this title.

(5) Upon failure to pay any installment, whether of principal or interest, when due, the whole amount of the unpaid principal of such installment and accrued interest thereon shall draw interest at the rate of one percent per month or fraction of a month until the day of sale, as provided in this article; but, at any time prior to the day of sale, the owner may pay the amount of all unpaid and overdue installments, with interest at one percent per month or fraction of a month, and all penalties accrued.



(6) After the expiration of the period of sixty days within which the property owners may pay their respective assessments, as limited in this article, the treasurer of the district shall certify to the board of directors the aggregate of the amount so paid, and thereupon the board of directors may pass and include in its records a bonding resolution in which shall be stated the amount of the construction fund assessment and the amount thereof paid as aforesaid, and in the same resolution they shall apportion the uncollected assessment into installments or levies for the collection of interest upon the unpaid installments, and they may order the issuance of conservancy district bonds in an amount not exceeding ninety percent of the levy in anticipation of the collection of said installments. The residue of the tax so levied, not less than ten percent, shall constitute a contingent account to protect the bonds from casual default, and, if not needed for this purpose, may be transferred from time to time to the maintenance fund of the district.

**Source:** L. 22: p. 48, § 45. C.L. § 9559. CSA: C. 138, § 170. CRS 53: § 30-5-5. C.R.S. 1963: § 29-5-5.

**37-5-106. Conservancy bonds.** (1) The board of directors may, if in its judgment it seems best, issue conservancy bonds (Schedule Form IV) in an amount not to exceed ninety percent of the total amount of the construction fund assessment, exclusive of interest, levied under the provisions of articles 1 to 8 of this title, in denominations of not less than one hundred dollars, bearing interest from date at a net effective interest rate determined by said board, to mature at annual intervals within thirty years commencing not later than five years after date, as may be determined by the board of directors, both principal and interest payable at a place or places determined by the board of directors and designated in the bonds. Said bonds shall be signed by the president of the district, and the seal of the district shall be thereunto affixed and attested by the signature of the secretary. The semiannual payments of interest shall be evidenced by coupons bearing a lithographed or engraved facsimile of the signature of the treasurer of the district. In case any officer whose signature or certificate appears upon bonds or coupons issued pursuant to articles 1 to 8 of this title ceases to be an officer before the delivery of such bonds to the purchaser, such signature or certificate shall nevertheless be valid and sufficient for all purposes, the same as if he had remained in office until the delivery of the bonds.

(2) All of said bonds, when executed, shall be delivered to the treasurer of said district, who shall sell the same in such quantities and at such times as the board of directors may order to meet the payments for the works and improvements of the district. Said bonds may be sold below par, but they shall be sold at such a price that the total payment of principal and interest is not greater than would have been required if the bonds had borne the net effective interest rate when issued and had been sold for par and accrued interest. The bonds shall show on their faces the purpose for which they are issued and shall be payable out of money derived from the construction fund. A sufficient amount of the assessments shall be appropriated by the board of directors for the purpose of paying the principal and interest of bonds, and the same shall, when collected, be set apart in a separate fund for that purpose and no other. All bonds and coupons not paid at maturity shall bear interest at the net effective interest rate when issued, from maturity until paid, or until sufficient funds have been deposited at the place of payment. Any expenses incurred in the issue and sale of said bonds and in paying bonds and interest thereon may be paid out of any funds in the hands of the district treasurer.

(3) The board of directors, in making assessment levies provided in this article, shall take into account maturing bonds and interest on all bonds and shall make ample provision for the payment thereof. In case the proceeds of the original assessments made under the provisions of articles 1 to 8 of this title are not sufficient to pay punctually the principal of and the interest upon all bonds issued under this article, then the board of directors shall make such additional levy or levies against the appraised benefits as may be necessary for such purposes, and under no circumstances shall any assessment levies be made that will in any manner or to any extent impair the security of any bond issued under this article or the fund available for the payment of the principal thereof and interest thereon. But no bond issue under this article, or the assessment made to pay the same, shall have a priority of lien



over any other bond issued or assessment made under this article. Said district treasurer shall, at the time of taking office, execute and deliver to the president of the district a bond with good and sufficient sureties to be approved by the said board of directors, conditioned that he shall account for and pay over as required by law and as ordered by said board of directors all moneys received by him on the sale of such bonds, or from any other source, and that he will sell and deliver such bonds to the purchaser or purchasers thereof, according to the terms prescribed in this article and not otherwise, and that he will, when ordered by said board to do so, return to said board, duly canceled, all bonds not sold, which said bonds shall remain in the custody of the president of the district, who shall produce the same for inspection or for use as evidence whenever and wherever legally required to do so.

(4) The said treasurer shall promptly report all sales of bonds to the board of directors, and the board of directors shall issue warrants upon the treasurer at the proper time for the payment of the maturing bonds so sold and the interest payments coming due on all bonds sold, and said treasurer shall place sufficient funds at the place of payment to pay the same. In case warrants are not issued by the board of directors as provided in this section, then the treasurer shall of his own accord place funds at the place of payment, and the canceled bonds and coupons shall be accepted in lieu of such warrants. The successors in office of any such district treasurer shall not be entitled to said bonds or the proceeds thereof until he has complied with all the foregoing provisions applicable to his predecessor in office; but, if it is deemed more expedient to the board of directors, as to moneys derived from the sale of bonds issued or from any other source, said board may by resolution select some suitable bank or banks or other depository, which depository shall give good and sufficient bond, as temporary or assistant treasurer, to hold and disburse said moneys on the orders of the board of directors as the work progresses, until such fund is exhausted or transferred to the district treasurer by order of the said board of directors. For such deposit the district shall receive not less than two percent interest per annum. The funds derived from the sale of said bonds shall be used for the purpose of paying the cost of the works and improvements and such costs, expenses, fees, and salaries as may be authorized by law and shall be used for no other purpose.

(5) If at the time when the bonds are ready to be issued, the board of directors is of the opinion that such bonds cannot advantageously be issued and sold in whole or in part, the board may sell parts only of the entire issue or may pledge all or part of said issue as collateral to a loan, but no partial sale or pledge shall be made without the order of the board made and entered of record, and no pledge shall be made at a greater margin than at the rate of one hundred dollars of bond principal for ninety dollars of loan.

(6) The district may borrow money from the United States government and provide for the repayment thereof in the manner provided for the payment of bonds, and the board of directors may make any necessary regulations to provide for such payment.

(7) A party who has not sought a remedy against any proceeding under articles 1 to 8 of this title until after bonds have been sold shall not for any cause have an injunction against the collection of taxes or assessments for the payment of said bonds.

(8) Articles 1 to 8 of this title shall, without reference to any other law of the general assembly of the state of Colorado, be full authority for the issuance and sale of the bonds authorized in articles 1 to 8 of this title, which bonds shall have all the qualities of negotiable investment securities as provided by article 8 of title 4, C.R.S. and when executed and sealed in conformity with the provisions of articles 1 to 8 of this title and when sold or pledged in the manner prescribed in this article, and the consideration therefor received by the district shall not be invalid for any irregularity or defect in the proceedings for the issue, sale, or pledge thereof and shall be incontestable in the hands of a holder in due course. No proceedings in respect to the issuance of any such bonds shall be necessary except such as are required by articles 1 to 8 of this title.

(9) Whenever the owner of any coupon issued pursuant to the provisions of articles 1 to 8 of this title presents such bond to the treasurer of the district, or to such bank or other depository as the board of directors of the district may for such purpose designate as registrar, with a request for the conversion of such bond into a registered bond, the said treasurer, bank, or other depository shall cut off and cancel the coupons of any such coupon bond so presented and shall stamp, print, or write upon such coupon bond so presented,

either upon the back or the face thereof, as may be convenient, a statement to the effect that the said bond is registered in the name of the owner and that thereafter the interest and principal of said bond are payable to the registered owner. Thereafter and from time to time, such bond may be transferred by such registered owner in person or by attorney duly authorized on presentation of such bond for registration as before, a similar statement being stamped, printed, or written thereon. Such statement stamped, printed, or written upon any such bond may be substantially in the following form:

“This bond is registered in the name of (here insert name of owner) pursuant to the provisions of the conservancy law of Colorado, and the interest and principal thereof are hereafter payable to such owner.

Treasurer (or Registrar) .....  
Conservancy District.  
Date .....”

(10) If any bond is registered as provided in subsection (9) of this section, the principal and interest of such bond shall be payable to the registered owner. The treasurer of the district shall enter in a register of said bonds to be kept by him or in a separate book the fact of the registration of such bond and the name of the registered owner thereof, so that the register or book shall at all times show what bonds are registered and the name of the registered owner thereof.

(11) All bonds issued by any conservancy district pursuant to articles 1 to 8 of this title shall be exempt from all state, county, municipal, school, and other taxes imposed by any taxing authority of the state of Colorado.

Source: L. 22: p. 50, § 46. C.L. § 9560. CSA: C. 138, § 171. CRS 53: § 30-5-6. C.R.S. 1963: § 29-5-6. L. 75: (1) and (2) amended, p. 1363, § 2, effective June 29; (8) amended, p. 222, § 77, effective July 16.

Cross references: For Schedule Form IV, see § 37-8-101.

**37-5-107. Maintenance fund.** (1) To maintain, operate, and preserve the improvements made pursuant to articles 1 to 8 of this title, and to strengthen, repair, and restore the same when needed, and for the purpose of defraying the current expenses of the district, the board of directors may, upon the substantial completion of said improvements, or any unit thereof, and on or before the first Monday in November in each year thereafter, levy an assessment on each tract or parcel of land and upon public corporations, subject to assessments under articles 1 to 8 of this title, to be known as the “maintenance fund assessment”. Said maintenance fund assessment shall be apportioned upon the basis of the total appraisal of benefits accruing for original and subsequent construction and shall not exceed one percent thereof in any one year, unless the court shall by its order authorize an assessment of a larger percentage.

(2) Said assessment shall be levied by resolution of the board of directors, shall be enrolled in the “maintenance fund assessment record” provided for in this article (Schedule Form VIII, 2), shall be certified to the treasurers of the several counties in which lands so assessed are situated, and shall be collected by the treasurers of said counties and delivered to the treasurer of the district in like manner and with like effect provided for the enrollment, certification, collection, and return of other assessments set forth in said articles; except that no such maintenance assessment shall be payable in annual installments, but the whole assessment shall be due and payable as and when taxes for county purposes levied in the same year are due and payable.

(3) The amount of the maintenance assessment paid by any parcel of land shall not be credited against the benefits appraised against such parcel of land; but the maintenance assessment shall be in addition to any assessment that has been or can be levied against the benefits so appraised.



**Source:** L. 22: p. 55, § 47. C.L. § 9561. CSA: C. 138, § 172. CRS 53: § 30-5-7. C.R.S. 1963: § 29-5-7.

**Cross references:** For Schedule Form VIII, see § 37-8-101.

**37-5-108. Power to borrow money for the maintenance fund.** In anticipation of the collection of maintenance assessments, the board of directors may borrow money at a net effective interest rate determined by said board and, as evidence of the debt so contracted, may issue and sell or may issue to contractors or others negotiable evidence of debt, in this article called "warrants", and may pledge, after it has been levied, the said maintenance assessments for the repayment thereof. If any warrant so issued by the board of directors is presented for payment and is not paid for want of funds in the treasury, that fact, with the date of presentation, shall be endorsed on the back of such warrant, which shall thereafter draw interest at the rate specified in the endorsement, not exceeding the net effective interest rate when issued, until such time as there is money on hand sufficient to pay the amount of said warrant with interest.

**Source:** L. 22: p. 56, § 48. C.L. § 9562. CSA: C. 138, § 173. CRS 53: § 30-5-8. C.R.S. 1963: § 29-5-8. L. 75: Entire section amended, p. 1364, § 3, effective June 29.

**37-5-109. Readjustment of maintenance fund assessments.** (1) Whenever the owners or representatives of twenty-five percent or more of the acreage or value of the lands in the district file a petition in the court in which the original petition was filed, stating that there has been a material change in the values of the property in the district since the last previous appraisal of benefits, and praying for a readjustment of the appraisal of benefits for the purpose of making a more equitable basis for the levy of the maintenance fund assessment, the court shall by order fix a time and place for a hearing thereon, and thereupon the clerk of the court shall give notice by publication of the filing of and hearing upon said petition, in such manner as the court shall provide in the order for such hearing.

(2) Upon the hearing of said petition, if said court finds that there has been a material change in the value of property in said district since the last previous appraisal of benefits, the court shall order that there be a readjustment of the appraisal of benefits for the sole purpose of providing a basis upon which to levy the maintenance assessments of said district. Thereupon the court shall direct the appraisers of the conservancy district to make such readjustment of appraisals in the manner provided in articles 1 to 8 of this title, and said appraisers shall make their report, and the same proceedings shall be had thereon, as nearly as may be, as are provided in this article for the appraisal of benefits accruing for original construction; except that in making the readjustment of the appraisal of benefits said appraisal shall not be limited to the aggregate amount of the original or any previous appraisal of benefits, and after the making of such readjustment, the limitation of the annual maintenance assessment to one percent of the total appraised benefits shall, unless otherwise ordered by the court, apply to the amount of benefits as readjusted; and except that there shall be no such readjustment of benefits oftener than once in ten years.

**Source:** L. 22: p. 57, § 49. C.L. § 9563. CSA: C. 138, § 174. CRS 53: § 30-5-9. C.R.S. 1963: § 29-5-9.

**37-5-110. Levies.** (1) After the expiration of the sixty-day period in which persons interested may pay the whole construction fund assessment, and each year thereafter if necessary to effectuate the provisions of this article, the board of directors shall determine, order, and levy the total assessments to be collected annually under articles 1 to 8 of this title for the payment of conservancy district bonds, principal and interest, and the treasurer of the district shall thereupon enter the same in the construction fund assessment record of the district, tabulating and extending said record as provided in this article, which record shall thereupon be approved by the board of directors, and the portion thereof relating to each county shall be certified by the clerk of the district, under the seal thereof, and by him



delivered to the county treasurer of each county wherein property assessed is located. It is the duty of the treasurer of each county to receive the same as a tax book and to collect the same according to law, and such construction fund assessment record shall be the treasurer's warrant and authority to demand and receive the assessments due in his county as found in the same.

(2) Such assessments shall become due and shall be collected during each year at the same time and in the same manner that state and county taxes are due and collectible; and, if further assessments are necessary to effectuate the provisions of this article, such assessments shall be levied, evidenced, and certified as provided in this section in apt time and not later than November 1 in such year, to the treasurer of each county in which the real property subject to such assessment in each district is situate.

(3) The board of directors shall each year determine, order, and levy the assessments authorized by articles 1 to 8 of this title which become due and collectible during each year on account of the maintenance fund as provided in this article.

(4) The maintenance fund assessment record (Schedule Form VIII, 2) shall include a table or schedule showing in properly ruled columns:

(a) The names of the owners of the property to which benefits are appraised, which may be as they appear in the decree of the court confirming the appraisals, and, in case of appraisals against a town, city, county, or other public corporation, the name of the individual owners need not be given, but only the name of such corporation;

(b) The description of the items of property appraised and assessed, arranged by counties;

(c) The total maintenance assessment levied against each item of property;

(d) Blank columns in which the treasurer shall enter payments as made and the name of the persons paying the same.

(5) The maintenance fund assessment record shall be prepared in duplicate in a well-bound book, which shall be endorsed and named "Maintenance Fund Assessment Record of ..... Conservancy District", which endorsement shall also be printed at the top of each page in said book. One copy of that part of such duplicate affecting lands in any county shall be forwarded to the county treasurer of such county for his use. It is the duty of the treasurer of each county to receive the same as a tax book and to collect the same according to law, and such maintenance fund assessment record shall be the treasurer's warrant and authority to demand and receive the assessments due in his county as found in the same.

(6) The county treasurer shall receive payment of all assessments, with interest and penalties, appearing upon said construction fund assessment record and said maintenance fund assessment record, or portion thereof, filed with him and, in case of default in the payment of any installment of principal of the construction fund assessment, or interest thereon, when due, shall advertise and sell any property concerning which such default is suffered for the unpaid installment of the assessments thereon; and likewise, in case of default in the payment of any maintenance fund assessment, the county treasurer shall advertise and sell any property concerning which such default is suffered. Said advertisements and sales shall be made at the same time and in the same manner, under all the same conditions and penalties, and with the same effect, provided by general law for sales of real estate in default of payment of general taxes. Lands sold for delinquent taxes or assessments under this article may be bid in, by, or for the conservancy district in like manner and like effect, including the issuance of a deed, as is provided by law with respect to lands bid in, by, or for cities and towns.

(7) All collections made by the county treasurer upon such assessment records in any calendar month shall be accounted for and paid over to the treasurer of the district on or before the tenth day of the next succeeding calendar month, with separate statements of all such collections for each item of property assessed.

**Cross references:** For procedure to increase tax levy beyond statutory limits, see § 29-1-302; for Schedule Form VIII, see § 37-8-101.

**37-5-111. Manner of collection - tax sale - certificate of purchase - tax deed.**

(1) Lands sold for delinquent assessments under articles 1 to 8 of this title shall be struck off to the conservancy district or bid in for the conservancy district, in like manner and effect, including issuance of a deed therefor, as provided by law with respect to lands struck off to, or bid in for, counties, cities, or towns as the case may be; but when a certificate of purchase has been issued to the conservancy district with respect to any lands, no certificate of purchase for subsequent assessments shall be issued with respect to the same lands, except to the conservancy district, until all assessments represented by certificates of purchase held by the conservancy district have been redeemed or paid.

(2) No holder of such certificate of purchase, other than the conservancy district, shall be entitled to a tax deed thereon, except upon payment of all assessments subsequent to such certificate of purchase, which are due and unpaid or unredeemed, at the time of issuance of the tax deed; and the tax deed so issued to such holder shall be subject to future unpaid assessments. Any such holder of a certificate of purchase may at any time after three years from issuance thereof present the same to the county treasurer, together with all subsequent certificates held by him, as evidence of subsequent payment of assessments, and request the county treasurer to issue one tax deed thereon; and one tax deed shall be issued accordingly in the same manner as other tax deeds.

(3) The conservancy district may at any time after three years from issuance of any such certificate of purchase held by the district present the same to the county treasurer, together with all subsequent certificates of purchase held by it as evidence of unpaid subsequent assessments, and request the county treasurer to issue one tax deed thereon; and one deed shall be issued accordingly in the same manner as other tax deeds; but such tax deed shall not prejudice the parity of any existing lien for general taxes. Upon the delivery of the tax deed, the conservancy district shall have and enjoy all the rights of an owner in fee simple to the lands described therein; but no sale of such land shall be made by the district except subject to the lien of assessments due and unpaid subsequent to the issuance of the tax deed to the district, as well as future unpaid assessments, nor shall the district convey such property by deed with covenants of warranty, nor shall any sale of such property be made for less than the principal amount of the original assessment thereon, remaining due and unpaid, unless such sale is approved by an order of the district court in which the organization proceeding of the district is pending.

(4) The conservancy district by resolution of its board of directors may sell, assign, and deliver any such certificates held by the district for such sum as the board of directors may determine and authorize; but no such sale or assignment shall be made which does not include all certificates held by the district with respect to the same land. Upon presentation and surrender of such certificates by the assignee thereof to the county treasurer, such officer shall accept the same in payment of the assessment represented thereby, unless such purchaser requests a tax deed thereon as provided in this section. No such assignment shall be made by the district for less than the principal sum represented by the certificate assigned, except upon order approving the assignment, made by the district court wherein the organization proceedings of the district is pending.

**Source:** L. 45: p. 541, § 1. CSA: C. 138, § 175(1). CRS 53: § 30-5-11. C.R.S. 1963: § 29-5-11.

**37-5-112. Collection by civil action.** In addition to all other remedies for collection of assessments provided by this article, and cumulative therewith, the conservancy district may at any time after three years from the issuance of any certificate of purchase held by the district bring a civil action to foreclose the lien for assessments represented by all certificates of purchase held by the district with respect to the same land and for other relief with respect to such land as provided by the Colorado rules of civil procedure then in effect for the foreclosure of liens on real property; but no statute of limitation shall be applicable to the rights of the conservancy district arising from any assessment; and no decree, or sale



of lands thereunder, shall be made except subject to the lien of future unpaid installments of assessments. The county treasurer shall be made a party to any action of the conservancy district authorized by this section.

**Source:** L. 45: p. 542, § 2. CSA: C. 138, § 175(2). CRS 53: § 30-5-12. C.R.S. 1963: § 29-5-12.

**37-5-113. Bond of county treasurer.** Before receiving the assessment record, the treasurer of each county in which lands or other property of the district is located shall execute to the conservancy district a bond with at least two good and sufficient sureties, or a corporate surety company, the cost of which shall be paid by the district in a sum not less than the probable amount to be collected by him, and which he may have in his custody for the district at any one time, during any one year, the amount of which said bond shall be fixed by order of the district court based thereon, conditioned that said treasurer shall, as provided in this article, pay over and account for all assessments so collected by him. Said bond after approval by the board of directors shall be deposited with the secretary of the district who shall be custodian thereof, and who shall produce the same for inspection and use as evidence whenever and wherever lawfully required to do so.

**Source:** L. 22: p. 60, § 51. C.L. § 9565. L. 31: p. 215, § 1. CSA: C. 138, § 176. CRS 53: § 30-5-13. C.R.S. 1963: § 29-5-13.

**37-5-114. Lien of conservancy assessments.** All conservancy assessments provided for in articles 1 to 8 of this title, together with all interest thereon and all penalties for default in payment of the same and all costs in collecting the same, shall, from the date of filing the certificate of the preliminary fund assessment with the board of county commissioners, and the construction fund assessment record and maintenance fund assessment record, mentioned in this article, in the office of the treasurer of the county wherein the lands and properties are situated, until paid, constitute a perpetual lien on said lands and property on a parity with the tax lien for general state, county, city, town, or school taxes, and no sale of such land or property to enforce any general state, county, city, town, or school tax or other lien shall extinguish the perpetual lien of such assessments.

**Source:** L. 22: p. 61, § 52. C.L. § 9566. CSA: C. 138, § 177. L. 45: p. 543, § 3. C.R.S. 53: § 30-5-14. C.R.S. 1963: § 29-5-14.

**37-5-115. Assessment records prima facie evidence.** The record of assessments contained in the respective assessment records of the district shall be prima facie evidence in all courts of all matters therein contained.

**Source:** L. 22: p. 61, § 53. C.L. § 9567. CSA: C. 138, § 178. CRS 53: § 30-5-15. C.R.S. 1963: § 29-5-15.

**37-5-116. Remedy for defective assessments.** If any assessment made under the provisions of articles 1 to 8 of this title proves invalid, the board of directors shall, by subsequent or amended acts or proceedings, promptly and without delay remedy all defects or irregularities, as the case may require, by making and providing for the collection of new assessments or otherwise.

**Source:** L. 22: p. 61, § 54. C.L. § 9568. CSA: C. 138, § 179. CRS 53: § 30-5-16. C.R.S. 1963: § 29-5-16.

**37-5-117. Duties of officers of public corporations as to assessments.** (1) Whenever, under the provisions of articles 1 to 8 of this title, an assessment is levied against a public corporation, as defined in said articles, and is finally determined, it is the duty of the



governing or taxing body of such public corporation immediately to take all the legal and necessary steps to provide for the payment of the same. It is the duty of the said governing or taxing body of such public corporation in its next annual levy succeeding said determination to levy and assess a tax by a uniform rate upon all the taxable property within the boundaries of said public corporation and certify the same to the treasurer of the county in which such corporation is located, whose duty it is to receive and collect the same for the benefit of the conservancy district, in like manner and with like remedies and penalties as provided in this article for collection of other assessments.

(2) Nothing in this section shall prevent the assessment of the real estate of other corporations or persons situated within the corporate limits of such public corporation which may be subject to assessment for special benefits to be received.

(3) In the event of any dissolution or disincorporation of any conservancy district organized pursuant to the provisions of articles 1 to 8 of this title, such dissolution or disincorporation shall not affect the lien of any assessment for benefits imposed pursuant to the provisions of articles 1 to 8 of this title, or the liability of any lands in such district to the levy of any future assessments for the purpose of paying the principal of and interest upon any bonds issued under this article, and in that event, or in the event of any failure on the part of the officers of any district to qualify and act, or in the event of any resignations or vacancies in office which prevent action by the said district or by its proper officers, it is the duty of the county treasurer and of all other officers charged in any manner with the duty of assessing, levying, and collecting taxes for public purposes in any county, municipality, or political subdivision in which such land shall be situated to perform all acts which may be necessary and requisite to the collection of any such assessment which may have been imposed and to the levying, imposing, and collecting of any assessment which it may be necessary to make for the purpose of paying the principal and interest of said bonds.

(4) Any holder of any bonds issued pursuant to the provisions of articles 1 to 8 of this title, or any person or officer being a party in interest, may either at law or in equity by suit, action, or mandamus, enforce and compel performance of the duties required by articles 1 to 8 of this title of any of the officers or persons mentioned in articles 1 to 8 of this title.

**Source:** L. 22: p. 61, § 55. C.L. § 9569. CSA: C. 138, § 180. CRS 53: § 30-5-17. C.R.S. 1963: § 29-5-17.

#### ANNOTATION

**The constitutional limitation of § 8 of art. XI, Colo. Const., concerning taxation, does not apply to improvements** to be paid for out of special assessments. *People ex rel. Setters v. Lee*, 72 Colo. 598, 213 P. 583 (1923).

**City cannot pay this assessment by a special assessment of its own.** The debt or obligation resting on a city by reason of the levy of an

assessment made against it by the conservancy district would not be met by a special assessment of such city itself, but the city must pay its assessment by the levy of a tax at a uniform rate upon all the taxable property within its boundaries. *People ex rel. Setters v. Lee*, 72 Colo. 598, 213 P. 583 (1923).

**37-5-118. Penalty for failure of treasurer to pay over tax.** If any county treasurer or other person entrusted with the collection of any assessment made under the provisions of articles 1 to 8 of this title refuses, fails, or neglects to make prompt payment of the assessments, or any part thereof, collected under said articles to the treasurer of the district upon his presentation of a proper demand, then he shall pay a penalty of ten percent on the amount of his delinquency. Such penalty shall become due and payable at once, and both he and his sureties shall be liable therefor on his bond as provided for in said articles.

**Source:** L. 22: p. 63, § 56. C.L. § 9570. CSA: C. 138, § 181. CRS 53: § 30-5-18. C.R.S. 1963: § 29-5-18.

**37-5-119. Surplus funds and annual reports.** (1) Any surplus funds in the treasury of the district may be used for retiring bonds, reducing the rate of assessment, or for

accomplishing any other of the legitimate objects of the district.

(2) At least once a year, or oftener if the court orders, the board of directors shall make a report to the court of its proceedings and an accounting of receipts and disbursements to that date, which shall be filed with the clerk of the court. Thereupon, the court shall order the auditing of said accounts by competent public accountants, who shall file their report thereon with the clerk of the court.

**Source:** L. 22: p. 63, § 57. C.L. § 9571. CSA: C. 138, § 182. CRS 53: § 30-5-19. C.R.S. 1963: § 29-5-19.

**37-5-120. Compensation of officials.** (1) Each member of the board of directors shall receive for attendance at each meeting a sum fixed by order of the court and shall receive such sum per day and his necessary expenses for the time actually employed in the performance of his duties.

(2) When the interests of the district so require, the board of directors by resolution may designate one of its members as executive director in charge of construction, maintenance, and the general business affairs of the district and fix a reasonable monthly compensation therefor in proportion to the per diem rate and in lieu thereof as to the director so designated. Such executive director shall be at all times subject to the direction of the board of directors.

(3) Each appraiser, including temporary special appraisers, shall receive a sum per day to be approved by the court for the time actually employed in the performance of his duties.

(4) Each county treasurer shall retain for his services one percent of the amount collected by him on assessments, except assessments paid by public corporations, but all other services required of courts, county treasurers, or other public officers under articles 1 to 8 of this title shall be performed as part of their official duties, and without additional compensation.

**Source:** L. 22: p. 63, § 58. C.L. § 9572. CSA: C. 138, § 183. L. 45: p. 543, § 4. CRS 53: § 30-5-20. L. 61: p. 297, § 1. C.R.S. 1963: § 29-5-20.

ARTICLE 6

Intercorporate Relations and Jurisdiction

- |           |                             |           |                             |
|-----------|-----------------------------|-----------|-----------------------------|
| 37-6-101. | Lands in more than one dis- | 37-6-103. | Subdistricts.               |
|           | trict.                      | 37-6-104. | Remedy for injury by a dis- |
| 37-6-102. | Union of districts.         |           | trict.                      |

**37-6-101. Lands in more than one district.** (1) The same land may be included in more than one district and be subject to the provisions of articles 1 to 8 of this title for each district in which it may be included; but no district shall be organized under articles 1 to 8 of this title in whole or in part within the territory of a district already organized under said articles until the court having jurisdiction of the original conservancy district determines, upon application, whether the purposes of said articles will best be accomplished by the organization of an additional district or whether such conditions demand that the territory proposed to be organized into an additional district shall be organized as part of the existing district. Such application shall fulfill all the requirements of a petition for a district as set forth in section 37-2-102.

(2) Upon application, if the court determines that the organization of such territory as a part of the original district should not be ordered, then proceedings may be had before any court of competent jurisdiction for the formation of an additional district in accordance with the provisions of articles 1 to 8 of this title. Any person whose signature has been subscribed to said application may within ten days after such decision withdraw his signature therefrom, and if at the expiration of said period there remain sufficient subscribers to said petition to satisfy the requirements of section 37-2-102, and in case such court determines that the territory described in such application, if organized for the purpose of a conservancy district, should be included within the original district, like proceedings shall thereupon be



had with respect to the territory and the owners thereof as in the case of a petition for the formation of a district. Upon the hearing, if it appears that the purpose of articles 1 to 8 of this title would be subserved by the organization of such territory as part of the original district, the court shall by its findings, duly entered of record, enter a decree accordingly.

**Source:** L. 22: p. 64, § 59. C.L. § 9573. CSA: C. 138, § 184. CRS 53: § 30-6-1. C.R.S. 1963: § 29-6-1.

**37-6-102. Union of districts.** (1) In case two or more districts have been organized under articles 1 to 8 of this title in a territory which, in the opinion of the directors of each of the districts, should constitute but one district, the board of directors of the districts may petition the court for an order uniting said districts into a single district; but if such districts are contiguous, such petition may be signed and presented by the directors of any one of such contiguous districts. Said petition shall be filed in the office of the clerk of the district court in and for that county which has the greatest valuation of real property within the districts sought to be included, as shown by the tax rolls of the respective counties. Said petition shall set forth facts showing that the purposes of articles 1 to 8 of this title would be subserved by the union of said districts and that such union would promote the economical execution of the purposes for which the districts were organized.

(2) Upon the filing of said petition the court shall by order fix a time and place of hearing, and thereupon the clerk shall give notice by publication or by personal service to the boards of directors of the districts which it is desired to unite with the district of the petitioners. Such notice shall contain the time and place where the hearing on the petition will be had and the purpose of the same, and under the provisions of section 37-2-105, in case the said two or more districts sought to be united severally include a part of the territory within two or more counties. Such hearing shall be had in accordance with the provisions of articles 1 to 8 of this title as to the hearing upon petition for the formation of a conservancy district.

(3) After the hearing, if the court finds that the averments of the petition are true and that the said districts, or any of them, should be united, it shall so order, and thereafter such districts shall be united into one district and proceed as such. The court shall designate the corporate name of such united district, and such further proceedings shall be taken as provided for in articles 1 to 8 of this title. The court shall in such order appoint the directors of such united district who shall thereafter have such powers and be subject to such regulations as are provided for directors in districts created in the first instance. All legal proceedings already instituted by or against any of such constituent districts may be revived and continued against such united district by an order of court substituting the name of such united district for such constituent districts, and such proceedings shall then continue accordingly.

(4) Instead of organizing a new district from such constituent districts, the court may, in its discretion, direct that one or more of such districts described in the petition be included in another of said districts, which other shall continue under its original corporate name and organization, or it may direct that the district or districts so absorbed shall be represented on the board of directors of the original district, designating what members of the board of directors of the original district shall be retired from the new board and what members representing the included district or districts shall take their places; or it may direct that the included district or districts shall become subdistricts of the main district.

**Source:** L. 22: p. 65, § 60. C.L. § 9574. CSA: C. 138, § 185. CRS 53: § 30-6-2. C.R.S. 1963: § 29-6-2.

**37-6-103. Subdistricts.** (1) Whenever it is desired to construct improvements wholly within or partly within and partly without any district organized under articles 1 to 8 of this title, which improvements will affect only a part of said district, for the purpose of accomplishing such work, subdistricts may be organized upon petition of the owners of real property, within or partly within and partly without the district, which petition shall fulfill



the same requirements concerning the subdistricts as the petition outlined in section 37-2-102 is required to fulfill concerning the organization of the main district and shall be filed with the clerk of the district court and shall be accompanied by a bond as provided for in section 37-2-103. All proceedings relating to the organization of such subdistricts shall conform in all things to the provisions of said articles relating to the organization of districts. Whenever the court by its order duly entered of record declares and decrees the subdistricts to be organized, the clerk of said court shall thereupon give notice of such order to the directors of the district, who shall thereupon act also as directors of the subdistrict. Thereafter, the proceedings in reference to the subdistrict shall in all matters conform to the provisions of said articles; except that, in the appraisal of benefits and damages for the purposes of such subdistricts, in the issuance of bonds, in the levying of assessments, and in all other matters affecting only the subdistrict, the provisions of said articles shall apply to the subdistrict as though it were an independent district, and it shall not, in these things, be amalgamated with the main district.

(2) The board of directors, board of appraisers, chief engineer, attorney, secretary, and other officers, agents, and employees of the district shall, insofar as it may be necessary, serve in the same capacities for such subdistrict, and contracts and agreements between the main district and subdistrict may be made in the same manner as contracts and agreements between two districts. The distribution of administration expense between the main district and subdistrict shall be in proportion to the interests involved and the amount of service rendered, such division to be made by the board of directors with the right of appeal to the court establishing the district. This section shall not be held to prevent the organization of independent districts for local improvements under other laws within the limits of a district organized under articles 1 to 8 of this title.

**Source:** L. 22: p. 67, § 61. C.L. § 9575. CSA: C. 138, § 186. CRS 53: § 30-6-3. C.R.S. 1963: § 29-6-3.

**37-6-104. Remedy for injury by a district.** (1) In case any person or public corporation, within or without any district organized under articles 1 to 8 of this title, may be injuriously affected with respect to property rights in any manner whatsoever by any act performed by any official or agent of such district, or by the execution, maintenance, or operation of the official plan, and except as otherwise provided in article 10 of title 24, C.R.S., and in case no other method of relief is offered under articles 1 to 8 of this title, the remedy shall be as follows: The person or public corporation seeking relief shall petition the court before which said district was organized for an appraisal of damages sufficient to compensate for such injuries. The court shall thereupon direct the board of appraisers of the district to appraise said damages and injuries and to make a report to the court on or before the time named in the order of the court. Upon the filing of such report, the court shall cause notice to be given to the petitioner and to the directors of the district of a hearing on said report. At the time of such hearing, the court shall consider said report of said appraisers and may ratify said report or amend it as the court may deem equitable or may return it to the said board of appraisers and require them to prepare a new report. Upon the filing of an order of the court approving said report of said appraisers, with such modifications as it may have made, said order shall constitute a final adjudication of the matter, unless it is appealed in the manner provided in this article, within twenty days.

(2) Appeal from said order to a jury may be had as provided in this article, in case of condemnation proceedings, by the petitioners, by the directors of the district, or by any person or corporation adversely affected by the report of the appraisers. No damages shall be allowed under this section which would not otherwise be allowed by law; but nothing in this section shall be construed to deprive any person or public corporation of the remedy of injunction in the case of prospective irreparable injury.

**Source:** L. 22: p. 68, § 62. C.L. § 9576. CSA: C. 138, § 187. CRS 53: § 30-6-4. C.R.S. 1963: § 29-6-4. L. 71: p. 1212, § 4.

## ARTICLE 7

## Police Powers and Regulations

37-7-101.	District protection.	37-7-103.	Liability for damages - pen-
37-7-102.	Injury to survey marks - pen-		alty - jurisdiction.
	alty.	37-7-104.	Penalty for fraud.

**37-7-101. District protection.** The board of directors has the right to police and protect the works of the district, to prevent persons, vehicles, or livestock from passing over the works of the district, and to prevent the doing of any act which would result in damage thereto.

**Source:** L. 22: p. 69, § 63. C.L. § 9577. CSA: C. 138, § 188. CRS 53: § 30-7-1. C.R.S. 1963: § 29-7-1.

**37-7-102. Injury to survey marks - penalty.** The willful destruction, injury, or removal of any bench marks, witness marks, stakes, or other reference marks, placed by the surveyors or engineers of the district or by contractors in constructing the works of the district, is a misdemeanor, punishable by a fine of not more than one hundred dollars. The original field notes of surveys shall be the permanent property of the district.

**Source:** L. 22: p. 69, § 64. C.L. § 9578. CSA: C. 138, § 189. CRS 53: § 30-7-2. C.R.S. 1963: § 29-7-2.

**37-7-103. Liability for damages - penalty - jurisdiction.** (1) All persons and corporations, public or private, shall be liable for damages done to works of the district by themselves, their agents, or their employees or by their livestock. Any person guilty of willful damage is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than five hundred dollars and costs and shall be liable for all damages and costs. The board of directors has authority to repair such damage at the expense of the person or corporation causing the same.

(2) In all cases declared misdemeanors by articles 1 to 8 of this title, the county court of the county in which the offense is committed has jurisdiction thereof and, upon complaint being made as required by law, may issue a warrant directed to any proper officer of his county for the arrest of any person so charged with such misdemeanor, and, upon the arrest of such person, the county judge before whom such person is brought for trial shall hear and determine the cause and, if he finds the accused guilty, shall assess the fine as prescribed in articles 1 to 8 of this title.

**Source:** L. 22: p. 69, § 65. C.L. § 9579. CSA: C. 138, § 190. CRS 53: § 30-7-3. C.R.S. 1963: § 29-7-3. L. 64: p. 220, § 43.

**37-7-104. Penalty for fraud.** The making of profit, directly or indirectly, by any officer of any district organized under articles 1 to 8 of this title or by any other public officer within the state out of any contracts entered into by the district or the use of any money belonging to the district by loaning it or otherwise using it or by depositing the same in any manner contrary to law or by removal of any money by any such officer or with his or her consent and placing it elsewhere than is prescribed either by law or by the official acts of the board of directors for the purpose of profit is prohibited. Any person who violates this section commits a class 6 felony and shall be punished as provided in section 18-1.3-401, C.R.S., and the officer offending shall be liable personally and upon his or her official bond for all losses to such district and for all profits realized by such unlawful use of moneys.

**Source:** L. 22: p. 70, § 66. C.L. § 9580. CSA: C. 138, § 191. CRS 53: § 30-7-4. C.R.S. 1963: § 29-7-4. L. 77: Entire section amended, p. 884, § 64, effective July 1,



1979. L. 89: Entire section amended, p. 850, § 133, effective July 1. L. 2002: Entire section amended, p. 1553, § 333, effective October 1.

**Editor’s note:** The effective date for amendments made to this section by chapter 216, L. 77, was changed from July 1, 1978, to April 1, 1979, by chapter 1, First Extraordinary Session, L. 78, and was subsequently changed to July 1, 1979, by chapter 157, § 23, L. 79. See *People v. McKenna*, 199 Colo. 452, 611 P.2d 574 (1980).

**Cross references:** For the legislative declaration contained in the 2002 act amending this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

ARTICLE 8

Schedule of Forms

37-8-101. Forms.

**37-8-101. Forms.** The following forms illustrate the character of the procedure contemplated by articles 1 to 8 of this title and, if substantially complied with, with changes to meet particular requirements, shall be held to meet requirements of articles 1 to 8 of this title:

FORM I.

Notice of Hearing on Petition.

To All Persons Interested:  
Public Notice Is Hereby Given:

1. That on the ..... day of ....., 20..., pursuant to the provisions of the conservancy law of Colorado, there was filed in the office of the clerk of the district court sitting in and for ..... county, Colorado, the petition of ..... and others for the establishment of a conservancy district to be known as ..... conservancy district.

(Here insert the purpose.)

2. That the lands sought to be included in said district comprise lands in ..... and ..... counties, Colorado, described as follows:

(Here insert description.)

3. That a public hearing on said petition will be had in said court on ..... the ..... day of ..... at the hour of ..... o'clock ....M., by the district court sitting in and for ..... county, at the court house in the city of ..... county, Colorado.

All persons and public corporations owning or interested in real estate within the territory hereinbefore described will be given the opportunity to be heard at the time and place above specified.

Dated ..... Colorado ..... 20.... .

Clerk of the district court sitting in and for ..... county, Colorado.

FORM II.

Finding on Hearing.

STATE OF COLORADO )  
 )  
County of..... ) ss.

IN THE DISTRICT COURT SITTING IN AND FOR ..... COUNTY.  
In the Matter of  
..... Conservancy District.



## Findings and Decree on Hearing.

On this ..... day of ....., 20.... this cause coming on for hearing upon the petition of .... and others, for the organization of a conservancy district under the conservancy act of the state of Colorado, the court, after a full hearing, now here finds:

1. That said petition has been signed and presented in full conformity with the conservancy law of Colorado.
2. That the allegations of said petition are true.
3. That no protesting petition has been filed (or if filed has been dismissed).
4. That this court has jurisdiction of the parties to, and the subject matter of, this proceeding.
5. That the purposes for which said district is established are:

(Insert the purposes, e.g., a system of flood prevention.)

6. That a public necessity exists for the construction of the proposed work.
7. That the territory to be included in the proposed district and the boundaries of said district are as follows:

(Here insert boundaries of district.)

8. That the said territory last above described should be constituted and created a conservancy district under the conservancy law of Colorado under the corporate name of ..... conservancy district.

Wherefore, it is by the court ordered, adjudged and decreed:

That the territory as above described be and the same hereby is constituted and created a conservancy district under the conservancy law of Colorado under the corporate name of ..... conservancy district, with its office or principal place of business at ..... in ..... county, Colorado. (If directors are appointed at the same time.) And the following persons are hereby appointed directors of said conservancy district ..... for the term of one year, ..... for the term of three years, ..... for the term of five years, who are hereby directed to qualify and proceed according to law.

9. For consideration of other matters herein, this cause is retained on the docket of this court.

By the court,

.....  
Judge.

## FORM III.

## Notice to Property Owners to Pay Assessments.

..... Conservancy District.

To All Persons Interested:

Public Notice Is Hereby Given:

1. That on the ..... day of ....., 20.... the board of directors of ..... conservancy district duly levied for the account of the construction fund of said district, an assessment upon all the property in said district in the aggregate sum of ....., and has caused the same to be extended upon the construction fund assessment record of said district, and that said record is now in the hands of the treasurer of the said district for collection.
2. That the entire assessment against any parcel of land may be paid to the said treasurer of the district at any time on or prior to ....., 20.... without costs and without interest.
3. That as soon after the ..... day of ....., 20.... as conveniently may be, the board of directors of said district will divide the uncollected portion of said assessment into

convenient installments and will issue bonds bearing interest not exceeding six percent per annum in anticipation of the collection of the several installments of said assessment, pursuant to the conservancy law of Colorado.

.....  
President.

(Seal)

Attest:

.....

Secretary.

FORM IV.  
Bonds and Coupons.  
(Form of Bond.)

No.....

\$ .....

UNITED STATES OF AMERICA.  
State of Colorado.  
..... Conservancy District.  
Conservancy Bond.

Know All Men by These Presents, That ..... conservancy district, a legally organized conservancy district of the state of Colorado, acknowledges itself to owe and for value received hereby promises to pay bearer ..... dollars, on the first day of ....., 20.... with interest thereon from the date hereof until paid at the rate of ..... percent per annum, payable ....., 20.... and semiannually thereafter on the first day of ..... and of ..... in each year on presentation and surrender of the annexed interest coupons as they severally become due. Both the principal of and the interest on this bond are hereby made payable in lawful money of the United States of America, at ..... and .....

This bond is one of a series of bonds issued by ..... conservancy district for the purpose of paying the cost of constructing a system for flood prevention (or for other works) for said district, and in anticipation of the collection of the several installments of an assessment duly levied upon lands within said district and benefited by said improvement in strict compliance with the conservancy law of Colorado, and pursuant to an order of the board of directors of said district, duly made and entered of record.

And it is hereby certified and recited that all acts, conditions and things required to be done in locating and establishing said district and in equalizing appraisals of benefits and in levying assessments against lands benefited thereby, and in authorizing, executing and issuing this bond, have been legally had, done and performed in due form of law; that the total amount of bonds issued by said district does not exceed ninety percent of the assessments so levied and unpaid at the time said bonds are issued, and does not exceed any legal limitation imposed by law.

And for the performance of all the covenants and stipulations of this bond and of the duties imposed by law upon said district for the collection of the principal of and the interest upon said assessment and the application thereof to the payment of this bond and the interest thereon, and for the levying of such other and further assessments as are authorized by law and as may be required for the prompt payment of this bond and the interest thereon, the full faith, credit and resources of said ..... conservancy district are hereby irrevocably pledged.

In Testimony Whereof, The Board of directors of ..... conservancy district has caused this bond to be signed by its president and sealed with the corporate seal of said

President.

Secretary.

No. ....

On the first day of ....., 20.... .

..... conservancy district promises to pay to the bearer ..... dollars, in lawful money of the United States of America, at ..... or at ..... at the holder's option, being semiannual interest due on that date on its conservancy bond dated ....., 20....

(Facsimile Signature.)

Treasurer.

No.....

### Form of Notice of Enlargement of District.

STATE OF COLORADO

)

) ss.

County of.....)

In the District Court in and for  
..... County, Colorado.

In the Matter of

Conservancy District.

## Notice of Enlargement of District.

To All Persons (and Public Corporations, if any) Interested:

Public Notice is Hereby Given:

1. That heretofore on the ..... day of ....., 20... the district court sitting in and for ..... county, Colorado, duly entered a final decree constituting and creating ..... conservancy district and appointing a board of directors therefor.
2. That thereafter this court duly appointed



to be the board of appraisers for said district. That said board of appraisers on the ..... day of ....., 20.... filed their report recommending that the following lands, not originally included in the district, be added thereto.

(Here describe generally the lands which the report  
of the board of appraisers recommends should be  
added to the district.)

3. That on ..... the ..... day of ....., 20.... (or as soon hereafter as the convenience of the court will permit) at the court house in ..... of ..... Colorado, the district court sitting in and for ..... county, Colorado, will hear all persons and public corporations who are owners of or interested in the property described in this notice upon the question whether said lands should be added to and included in said ..... conservancy district.

.....

Clerk of the district court sitting in and for ..... county, Colorado.

FORM VI.  
STATE OF COLORADO. .... CONSERVANCY DISTRICT.  
CONSERVANCY APPRAISAL RECORD. .... COUNTY.

Index Number	Owners Name	Description			Record			Action Taken by Appraisers, Court, and Jury. On the First Line Carry Action by Appraisers; Second Line, Court; Third Line, Jury.					Matters Reported to Court under Section 37-4-105
		Part (Part)	T. (Sub)	R. (Blk.)	Section (Lot No.)	Acres or Area	Book	Page	Appraised Value for Purchase of Fee	Amount Fixed for Value of Easement	Amount Fixed for Damages	Amount Fixed for Benefits	
									A \$	\$	\$	\$	
									C \$	\$	\$	\$	
									J \$	\$	\$	\$	
									A \$	\$	\$	\$	
									C \$	\$	\$	\$	
									J \$	\$	\$	\$	

FORM VII.

Notice of Hearing on Appraisals.

STATE OF COLORADO )

) ss.

County of..... )

In the District Court Sitting in and for

..... County, Colorado.

In the Matter of

.....

Conservancy District.

Notice of Hearing on Appraisals.

To All Persons and Public Corporations Interested:

Public Notice Is Hereby Given:

1. That heretofore on the ..... day of ....., 20.... the district court sitting in and for ..... county, Colorado, duly entered a decree, constituting and creating ..... conservancy district and appointing a board of directors therefor.
2. That thereafter this court duly appointed
- .....
- .....
- .....

the board of appraisers for said district. That said board of appraisers on ..... day of ....., 20.... filed their appraisal of benefits and damages. The land affected by such appraisal is described as follows:

(Here insert general description of land appraised.)

(It will be sufficient to state: "All land lying in the ..... ward of the city of .....,," or "All land abutting on ..... street in the city of .....,," or "All land lying west of ..... river and east of ..... railroad in section ..... township ..... range .....,," or any general description pointing out the lands involved.)

The said appraisal of benefits and damages and of land to be taken is now on file in the office of the clerk of this court.

3. All public corporations and all persons, owners of or interested in the property described in said report, whether as benefited property or as property taken or damaged (whether said taken or damaged property lies within or without said district), desiring to contest the appraisals as made and returned by the board of appraisers, must file their objections in said court on or before the .... day of ....., 20..., and a hearing on said appraisal will be held in this court on the ..... day of ....., 20.... at the hour of ..... o'clock ....M., in the county of ....., Colorado, at which time an opportunity will be afforded all objectors to be heard upon their several objections.

.....

Clerk of the district court sitting in and for ..... county, Colorado.

Dated at ....., Colorado ..... day of ....., 20...



FORM VIII.

Certificate of Levy of Assessments.

1. For Construction Fund Assessment Record.

STATE OF COLORADO

)

) ss.

County of.....)

To the Treasurer of ..... County, Colorado:

This is to certify that by virtue and under the authority of the conservancy law of Colorado, the board of directors of ..... conservancy district has levied the sum of ..... dollars for the account of the construction fund of said district, which said assessment bears interest as provided by law and is payable as set forth in the construction fund assessment record to which this certificate is appended.

The assessments above specified shall be collectible and payable in the sums therein specified at the time that the state and county taxes are due and collectible, and you are directed and ordered to demand and collect such assessments at the time that the state and county taxes are due on the same land, and the construction fund assessment record to which this certificate is appended shall be your authority to make such collection.

Witness the signature of the president of said district, attested by the seal thereof, attested by the signature of its secretary, this ..... day of ....., 20....

.....

President.

(Seal)

Attest: ..... Secretary.

The construction fund assessment record shall be in substantially the following form:

CONSTRUCTION FUND ASSESSMENT RECORD OF  
..... CONSERVANCY DISTRICT, ..... COUNTY.

No.	Name of Owner	Description of Item of Property Appraised and Assessed	Total Amount of Benefits Appraised Against Each Item of Property	Assessment Levied Against Each Item of Property to Which Benefits Have Been Appraised						Assessments Paid Within Sixty Days				Bond Fund Installments to be Collected by the County Treasurer									
				1st Assess.	2nd Assess.	3rd Assess.	Assess. No.	Amt.	Date	Name of Person Making Payment	Installments Due 20 .....					Installments Due 20 .....							
											Assess. No.	Prin.	Int.	Amount	Date Paid	Name of Person Making Payment	Assess. No.	Prin.	Int.	Amount	Date Paid	Name of Person Making Payment	
				\$	\$	\$	1 2 3				1 2 3	\$ \$ \$	\$ \$ \$	\$ \$ \$	1 2 3	\$ \$ \$	\$ \$ \$	\$ \$ \$					

2. For Maintenance Fund Assessment Record.

STATE OF COLORADO )  
 ) ss.  
County of..... )

To the Treasurer of ..... County, Colorado:  
This is to certify that by virtue and under the authority of the conservancy law of Colorado, the board of directors of ..... conservancy district has levied the sum of ..... dollars, for the account of the maintenance fund for the year 20.... .  
The amounts of said levies upon the several parcels of land upon which the same are imposed are set forth in the maintenance fund assessment record to which this certificate is appended.

The said assessments set forth in the maintenance fund record, to which this certificate is appended, shall be collectible and payable the present year in the sums therein specified at the time that the state and county taxes are due and collectible, and you are directed and ordered to demand and collect such assessments at the time that the state and county taxes are due on the same land, and the maintenance fund assessment record to which this certificate is appended shall be your authority to make such collection.

Witness the signature of the president of the district, attested by the seal thereof, attested by the signature of its secretary, this ..... day of ....., 20.... .

.....  
President.

(Seal)  
Attest:  
.....  
Secretary.

The maintenance fund assessment record shall be in substantially the following form:

MAINTENANCE FUND ASSESSMENT RECORD OF .....  
CONSERVANCY DISTRICT ..... COUNTY For the Year ..... (Due in  
the Year ....., at the Same Times General Taxes Are Due.)

No.	Name of Owner	Description of Property	Total Maintenance Assessments Levied Against each Item of Property	1st and 2nd Half	Amount	Date Paid	Payments Name of Person Making Payment
				1st Half	\$		
				2nd Half	\$		
				1st Half	\$		
				2nd Half	\$		

Source: L. 22: p. 74, § 75. C.L. § 9589. CSA: C. 138, § 199. CRS 53: § 30-8-1. C.R.S. 1963: § 29-8-1.

ANNOTATION

**Law reviews.** For article, “When Corporate Stock Becomes Real Estate”, see 21 Dicta 53 (1944).  
**The article does not require any particular form of notice.** This section gives forms which shall “illustrate the character of the procedure”. People ex rel. Setters v. Lee, 72 Colo. 598, 213 P. 583 (1923).



## DRAINAGE AND DRAINAGE DISTRICTS

### ARTICLE 20

#### Organization of Districts

**Cross references:** For mine drainage districts, see article 51 of title 34; for irrigation drainage districts, see § 37-43-122; for internal improvement districts, see article 44 of this title.

37-20-101.	Legislative declaration.	37-20-111.	Election - notice - contents.
37-20-102.	Petition - maps - committee.	37-20-112.	Three directors - representation.
37-20-103.	Petition accompanied by bond.	37-20-113.	Polling place - precincts.
37-20-104.	Cash in lieu of bond.	37-20-114.	Judges of election.
37-20-105.	Expenses reimbursed - when.	37-20-115.	Publication of election notice.
37-20-106.	Petition - notice - publication.	37-20-116.	Qualification of voters.
37-20-107.	Hearing of petition.	37-20-117.	Canvass of votes - result.
37-20-108.	Change boundaries - limitations.	37-20-118.	Order filed with county clerk and recorder.
37-20-109.	Order establishing district.	37-20-119.	Officers to qualify.
37-20-110.	Establishment without election.	37-20-120.	Validity of organization.
		37-20-121.	Actions - judicial notice - validity.

**37-20-101. Legislative declaration.** It is declared by the general assembly that the reclamation by drainage of lands not at present cultivatable or useful or fully so will be conducive to the public health, convenience, utility, or welfare. The owners of agricultural lands susceptible of drainage by the same general system of works may propose the organization of a drainage district by presenting to the board of county commissioners of the county where the larger portion of said lands lie a petition giving the name of the proposed district and praying that the board of county commissioners cause the question of the organization of said district to be submitted to a vote of the owners of the lands lying within the boundaries thereof or that a drainage system may be established without election, as provided in section 37-20-110.

**Source:** L. 11: p. 311, § 1. C.L. § 2107. CSA: C. 57, § 1. CRS 53: § 47-1-1. C.R.S. 1963: § 47-1-1.

### ANNOTATION

**Law reviews.** For article, "Legal Classification of Special District Corporate Forms in Colorado", see 45 Den. L.J. 347 (1968). For article, "What Constitutes 'Benefits' for Urban Drainage Projects", see 51 Den. L.J. 551 (1974). For comment, "Water: Statewide or Local Concern? City of Thornton v. Farmers Reservoir & Irrigation Co.", see 56 Den. L.J. 625 (1979).

**A drainage district is not a mere subdivision of the state or state agency** for public purposes and may be sued. *Colo. Inv. & Realty Co. v. Riverview Drainage Dist.*, 83 Colo. 468, 266 P. 501 (1928).

**The primary purpose of drainage districts is to benefit the land owners** by making their lands productive, or more productive, as the case may be, and therefore more valuable. The benefit to the public, though substantial, is inci-

dental to the main purpose sought to be accomplished. *Colo. Inv. & Realty Co. v. Riverview Drainage Dist.*, 83 Colo. 468, 266 P. 501 (1928).

**The drainage act does not contemplate the inclusion within a drainage district of lands which would not be benefited by the drainage system, and the inclusion of which would not be conducive to the public welfare.** *Coates v. Bd. of Comm'rs*, 71 Colo. 241, 205 P. 943 (1922).

**The land owners are permitted, not compelled, to organize drainage districts.** *Colo. Inv. & Realty Co. v. Riverview Drainage Dist.*, 83 Colo. 468, 266 P. 501 (1928).

**For sufficient complaint to restrain inclusion in drainage district**, see *Coates v. Bd. of Comm'rs*, 71 Colo. 241, 205 P. 943 (1922).

**37-20-102. Petition - maps - committee.** (1) The petition may be in more than one part for convenience in obtaining signatures if each part is the same in substance. When the several parts of said petition, with the signatures thereto attached, are together presented to the board of county commissioners, they shall be considered as one petition. Said petition shall be signed by a majority of the owners of said lands, whether residents or nonresidents of said county, as well as by the owners in the aggregate of a majority of the total number of acres of land sought to be included in said district and shall contain a general description of the boundaries of said proposed district and a statement that the lands within said proposed district are not at present cultivatable or useful or fully so and that they can be made more productive or useful by drainage.

(2) The petition shall be accompanied by a map drawn to scale of not less than two inches to the mile, giving the names of the owners of each tract of land appearing of record and proposed to be embraced in said district. The petitioners shall select and name in said petition a committee of three or more of said petitioners to present such petition to the board of county commissioners and to give notice thereof as provided in section 37-20-106.

(3) The equalized county assessment roll next preceding the presentation of a petition for the organization of a drainage district is sufficient evidence of title for the purpose of articles 20 to 30 of this title, but other evidence may be received including receipts or other evidence of the rights of entrymen of lands under any law of the United States or of this state, and such entrymen shall be competent signers of such petition, and the lands on which said entries have been made by entrymen for the purpose of said petition shall be considered as owned by them. Articles 20 to 30 of this title shall apply to said lands to the extent of the rights of such entrymen and shall bind said lands as other lands in the district when the title of the state or the United States is divested.

**Source:** L. 11: p. 312, § 2. L. 13: p. 252, § 1. L. 15: p. 296, § 1. C.L. § 2108. CSA: C. 57, § 2. CRS 53: § 47-1-2. C.R.S. 1963: § 47-1-2.

**37-20-103. Petition accompanied by bond.** The petition shall be accompanied by a good and sufficient bond with sureties to be approved by the said board of county commissioners in a penal sum double the amount of the probable cost of organizing said district, conditioned for the payment of all costs incurred in said proceedings in case said organization shall not be effected.

**Source:** L. 11: p. 312, § 3. C.L. § 2109. CSA: C. 57, § 3. CRS 53: § 47-1-3. C.R.S. 1963: § 47-1-3.

**37-20-104. Cash in lieu of bond.** In lieu of a bond the board of county commissioners, in its discretion, may require the petitioners to pay in advance to the county treasurer from time to time such sums of money as in the opinion of the board of county commissioners will be required for the costs and expenses of organizing said district.

**Source:** L. 11: p. 312, § 4. C.L. § 2110. CSA: C. 57, § 4. CRS 53: § 47-1-4. C.R.S. 1963: § 47-1-4.

**37-20-105. Expenses reimbursed - when.** In case the district is organized, the expenses incurred by the county shall be paid to the county by said district, and all advances made by the petitioners to the county treasurer shall be refunded by the county to the petitioners, who shall have advanced the same.

**Source:** L. 11: p. 313, § 5. C.L. § 2111. CSA: C. 57, § 5. CRS 53: § 47-1-5. C.R.S. 1963: § 47-1-5.

**37-20-106. Petition - notice - publication.** Prior to the presentation of the petition to the board of county commissioners, the petition shall be published in some newspaper of general circulation in the county where said petition will be presented, for at least two



weeks, together with a notice signed by the committee selected by the petitioners and named in said petition, giving the time and place of the presentation of the same to the board of county commissioners.

**Source:** L. 11: p. 313, § 6. C.L. § 2112. CSA: C. 57, § 6. CRS 53: § 47-1-6. C.R.S. 1963: § 47-1-6.

**Cross references:** For publication of legal notices, see part 1 of article 70 of title 24.

**37-20-107. Hearing of petition.** At the time and place designated in the notice, if it appears that the notice of presentation of the petition has been given as required by section 37-20-106 and that said petition has been signed by the number of petitioners required by section 37-20-102, the board of county commissioners shall hear said petition and applications for the exclusion of lands from said district and applications for the inclusion of lands therein and may adjourn such hearing from time to time not exceeding four weeks in all.

**Source:** L. 11: p. 313, § 7. C.L. § 2113. CSA: C. 57, § 7. CRS 53: § 47-1-7. C.R.S. 1963: § 47-1-7.

#### ANNOTATION

**Board need not put persons who appear before them under oath.** Boards of county commissioners are not courts nor a part of the judicial department, and, unless there is some

requirement in the statute to that effect, they are not required to put under oath those who appear before them in hearings. *Coates v. Bd. of Comm'rs*, 74 Colo. 374, 221 P. 1090 (1923).

**37-20-108. Change boundaries - limitations.** The board of county commissioners may make such changes in the boundaries of the proposed district as may be necessary by including therein upon the application of the owners thereof of other lands susceptible of drainage by the proposed system, or which will be benefited by the system of drainage, and by excluding therefrom lands mentioned in the petition which in the opinion of the board of county commissioners will not be susceptible of drainage thereby or will not be benefited by the system of drainage, but the board of county commissioners shall not exclude from said district any lands described in the petition which, in the opinion of the board, are susceptible of drainage by the system or will be benefited thereby.

**Source:** L. 11: p. 313, § 8. C.L. § 2114. CSA: C. 57, § 8. CRS 53: § 47-1-8. C.R.S. 1963: § 47-1-8.

**37-20-109. Order establishing district.** When the boundaries of any proposed drainage district have been determined, the board of county commissioners shall make an order allowing the prayer of the petition, defining and establishing the boundaries and designating the name of the proposed district.

**Source:** L. 11: p. 314, § 9. C.L. § 2115. CSA: C. 57, § 9. CRS 53: § 47-1-9. C.R.S. 1963: § 47-1-9.

**37-20-110. Establishment without election.** When the prayer of the petition is that a drainage system be established without holding an election and it appears that a large portion of the land which will be benefited by the proposed drainage system is unoccupied land or so many of the owners of land to be benefited thereby are not residents upon the land that an election would be impracticable or would entail an undue expense, the board of county commissioners is authorized, at any regular or special session, to cause a system of drainage to be constructed and to exercise all the powers conferred upon boards of directors of drainage districts, and to continue to exercise the powers and perform the duties of boards



of directors until a petition is presented signed by the owners of the larger portion of the lands, or their duly authorized agents, praying that an election may be called to elect directors for the district. Then the board of county commissioners shall call an election for that purpose and as soon as the result of said election is determined, the board of county commissioners shall cease to have or exercise the duties of directors of a drainage district.

**Source:** L. 11: p. 314, § 10. C.L. § 2116. CSA: C. 57, § 10. CRS 53: § 47-1-10. C.R.S. 1963: § 47-1-10.

**37-20-111. Election - notice - contents.** (1) When the petition prays that an election shall be held, the board of county commissioners shall order an election to be held within the proposed drainage district for the purpose of determining whether or not said district shall be organized and shall cause to be published a notice of said election which shall contain:

- (a) The name of the proposed district;
- (b) The boundaries thereof;
- (c) The polling places;
- (d) The names of the judges of election;
- (e) The names of three or more persons eligible for directors of said district;
- (f) The date of said election.

(2) Said notice shall require the electors to cast ballots which shall contain the words: "Drainage District - Yes" or "Drainage District - No". Said notice shall be signed by the chairman of the board of county commissioners and attested by the county clerk and recorder under the seal of the county.

**Source:** L. 11: p. 314, § 11. C.L. § 2117. CSA: C. 57, § 11. CRS 53: § 47-1-11. C.R.S. 1963: § 47-1-11.

**37-20-112. Three directors - representation.** There shall be elected three directors who shall be owners of land within said district; but the board of county commissioners may divide and if requested in said petition shall divide said district into three divisions, as nearly equal as conveniently may be, which shall be numbered one, two, and three, respectively, and in that event, the voters of each division shall elect one director, who shall be the owner of land within said division, and the three thus elected shall be the directors of said district.

**Source:** L. 11: p. 315, § 12. C.L. § 2118. CSA: C. 57, § 12. CRS 53: § 47-1-12. C.R.S. 1963: § 47-1-12.

**37-20-113. Polling place - precincts.** The board of county commissioners shall designate a polling place within said district and, if necessary, shall establish a convenient number of election precincts within said district, define the boundaries thereof, and designate the polling place in each precinct.

**Source:** L. 11: p. 315, § 13. C.L. § 2119. CSA: C. 57, § 13. CRS 53: § 47-1-13. C.R.S. 1963: § 47-1-13.

**37-20-114. Judges of election.** The board of county commissioners shall appoint for each precinct, from the qualified electors who are owners of lands therein, three judges of election who shall exercise the powers and duties usually performed by judges of election in this state.

**Source:** L. 11: p. 315, § 14. C.L. § 2120. CSA: C. 57, § 14. CRS 53: § 47-1-14. C.R.S. 1963: § 47-1-14.

**Cross references:** For powers and duties of judges of election, see article 6 of title 1.

**37-20-115. Publication of election notice.** The notice shall be published at least two weeks preceding the election in a newspaper of general circulation within the county; and a like notice shall be published in each county within which any portion of the district may lie.

**Source:** L. 11: p. 315, § 15. C.L. § 2121. CSA: C. 57, § 15. CRS 53: § 47-1-15. C.R.S. 1963: § 47-1-15.

**Cross references:** For publication of legal notices, see part 1 of article 70 of title 24.

**37-20-116. Qualification of voters.** Every owner of land within said district, who is a citizen of the United States or has declared his intention to become a citizen of the United States and is a resident of the state of Colorado, shall be entitled to vote at such election in the precinct where he resides, or if a nonresident of the precinct, then in the precinct within which the greater portion of his land lies.

**Source:** L. 11: p. 315, § 16. C.L. § 2122. CSA: C. 57, § 16. CRS 53: § 47-1-16. C.R.S. 1963: § 47-1-16.

**37-20-117. Canvass of votes - result.** The board of county commissioners shall meet on the second Monday following the election and proceed to canvass the votes cast thereat. If it appears that a majority of the votes cast are "Drainage District - Yes", the board of county commissioners shall make an order declaring that said drainage district is duly organized under the name theretofore designated and that the persons who receive the highest number of votes respectively are duly elected directors of said district.

**Source:** L. 11: p. 316, § 17. C.L. § 2123. CSA: C. 57, § 17. CRS 53: § 47-1-17. C.R.S. 1963: § 47-1-17.

**37-20-118. Order filed with county clerk and recorder.** The board of county commissioners shall cause a certified copy of the order, together with a copy of the plat of the district, to be filed with the county clerk and recorder of each county in which any portion of the district lies, and thereafter no land within the district shall be included within the boundaries of any other drainage district without the consent of the owner of the lands sought to be embraced within such other district.

**Source:** L. 11: p. 316, § 18. C.L. § 2124. CSA: C. 57, § 18. CRS 53: § 47-1-18. C.R.S. 1963: § 47-1-18.

**37-20-119. Officers to qualify.** On and after the date of such filing, the organization of said district shall be complete, and the officers thereof shall forthwith enter upon the duties of their respective offices, upon qualifying according to law, and shall hold their respective offices until their successors are elected and qualified.

**Source:** L. 11: p. 316, § 19. C.L. § 2125. CSA: C. 57, § 19. CRS 53: § 47-1-19. C.R.S. 1963: § 47-1-19.

**37-20-120. Validity of organization.** No action shall be brought or maintained or defense made affecting the validity of the organization of said district, unless the same has been commenced or made within one year after the entry of said order.

**Source:** L. 11: p. 316, § 20. C.L. § 2126. CSA: C. 57, § 20. CRS 53: § 47-1-20. C.R.S. 1963: § 47-1-20.

**37-20-121. Actions - judicial notice - validity.** In all actions, suits, and judicial proceedings in any court of this state, the court shall take judicial notice of the organization



and existence of any drainage district of this state, from and after the filing for record in the office of the county clerk and recorder of the certified copy of the order of the board of county commissioners mentioned in section 37-20-117. A certified copy of said order shall be prima facie evidence in all actions, suits, and proceedings in any court of this state of the regularity and legal sufficiency of all acts, matters, and proceedings therein recited and set forth. Any such drainage district, in regard to which any such order may be entered and such certified copy thereof so filed for record, which has exercised the rights and powers of such a district and which has in office a board of directors exercising the duties of its office and the legality or regularity of the formation or organization of which shall not have been questioned by proceedings in quo warranto instituted in the district court of the county in which such district or the greater portion thereof is situated, within one year from the date of such filing, shall be conclusively deemed to be a legally and regularly organized, established, and existing drainage district within the meaning of articles 20 to 30 of this title. The due and lawful formation and organization of said district shall not thereafter be questioned in any action, suit, or proceeding whether brought under the provisions of articles 20 to 30 of this title or otherwise.

**Source:** L. 11: p. 328, § 74. C.L. § 2127. CSA: C. 57, § 21. CRS 53: § 47-1-21. C.R.S. 1963: § 47-1-21.

## ARTICLE 21

### Directors - Duties - Elections

37-21-101.	Directors to exercise powers.	37-21-113.5.	Sale of district property.
37-21-102.	Meetings of directors.	37-21-114.	Construction of system - contracts.
37-21-103.	Meetings public - quorum.	37-21-115.	Notice of election.
37-21-104.	President - secretary - seal.	37-21-116.	Hours of voting.
37-21-105.	Directors - election.	37-21-117.	Judges of election.
37-21-106.	Directors to qualify.	37-21-118.	Judges - vacancies filled by voters.
37-21-107.	Failure of director to qualify.		
37-21-108.	Director's bond.	37-21-119.	Oaths - judges and clerks.
37-21-109.	Directors - secretary - salary.	37-21-120.	Count of ballots - returns.
37-21-110.	Powers of board.	37-21-121.	Canvass of returns.
37-21-111.	Right to enter upon land in district.	37-21-122.	Tie vote determined by lot.
37-21-112.	Office of district.	37-21-123.	Statement of result.
37-21-113.	Property to vest in district.	37-21-124.	Certificate of election.
		37-21-125.	Vacancies.

**37-21-101. Directors to exercise powers.** The board of directors is vested with all powers necessary to accomplish the purposes for which the district was organized, including the power to optimize drainage and recharge of water within the district. No enumeration of particular powers granted shall be construed to impair any general grant of power specified in this article, nor shall the grant of particular powers be construed to limit any such general grant to a power of the same class as the particular powers so enumerated.

**Source:** L. 11: p. 316, § 22. C.L. § 2129. CSA: C. 57, § 23. CRS 53: § 47-2-2. C.R.S. 1963: § 47-2-2. L. 88: Entire section amended, p. 1225, § 1, effective March 17.

**37-21-102. Meetings of directors.** The board of directors shall hold a regular meeting in the office of the drainage district on the first Tuesday in January, April, July, and October and such special meetings as may be required for the proper transaction of business. Special meetings shall be called by the president of the board or any director. All special meetings of the board shall be held at locations which are within the boundaries of the district or which are within the boundaries of any county in which the district is located, in whole or in part, or in any county so long as the meeting location does not exceed twenty miles from the district boundaries. The provisions of this section governing the location of meetings



may be waived only if the proposed change of location of a meeting of the board appears on the agenda of a regular or special meeting of the board and if a resolution is adopted by the board stating the reason for which a meeting of the board is to be held in a location other than under the provisions of this section and further stating the date, time, and place of such meeting.

**Source:** L. 11: p. 317, § 24. C.L. § 2131. CSA: C. 57, § 25. CRS 53: § 47-2-4. C.R.S. 1963: § 47-2-4. L. 90: Entire section amended, p. 1502, § 14, effective July 1.

**37-21-103. Meetings public - quorum.** Meetings of the board of directors shall be public, and two directors shall constitute a quorum for the transaction of business. On all questions requiring a vote there shall be a concurrence of at least two directors. The record of the board shall be open to the inspection of the public during business hours.

**Source:** L. 11: p. 317, § 25. C.L. § 2132. CSA: C. 57, § 26. CRS 53: § 47-2-5. C.R.S. 1963: § 47-2-5.

**37-21-104. President - secretary - seal.** The board of directors shall elect a president from the members of the board and shall appoint a secretary and adopt a drainage district seal.

**Source:** L. 11: p. 316, § 21. C.L. § 2128. CSA: C. 57, § 22. CRS 53: § 47-2-1. C.R.S. 1963: § 47-2-1.

#### ANNOTATION

**Law reviews.** For article, "Legal Classification of Special District Corporate Forms in Colorado", see 45 Den. L.J. 347 (1968).

**37-21-105. Directors - election.** The regular election of directors of drainage districts shall be held on the first Tuesday after the first Monday in January of each alternate year, at which three directors shall be elected. The three persons receiving the highest number of votes shall be the directors for the next succeeding two years and until their respective successors are elected and qualified.

**Source:** L. 11: p. 318, § 30. C.L. § 2137. CSA: C. 57, § 31. CRS 53: § 47-2-10. C.R.S. 1963: § 47-2-10.

**37-21-106. Directors to qualify.** Within ten days after receiving a certificate of election as provided in section 37-21-124, each of said directors shall take and subscribe the official oath and file the same together with his official bond in the office of the county clerk and recorder of the county where the organization of the district was effected and thereupon assume the duties of his office.

**Source:** L. 11: p. 318, § 31. C.L. § 2138. CSA: C. 57, § 32. CRS 53: § 47-2-11. C.R.S. 1963: § 47-2-11.

**37-21-107. Failure of director to qualify.** In the event that a person elected as director of a drainage district fails or refuses to qualify within the time prescribed in this article, a vacancy shall exist and the board of county commissioners of the county where the office of the drainage district is located shall appoint a director who shall hold the office until the next regular district election, and, upon filing his oath and bond, the term of office of the director whose successor was to be elected shall end.

**Source:** L. 11: p. 328, § 73. C.L. § 2139. CSA: C. 57, § 33. CRS 53: § 47-2-12. C.R.S. 1963: § 47-2-12.

**37-21-108. Director's bond.** Each director shall execute a bond in the penal sum of two thousand dollars with sureties approved by the county judge of the county where said organization was effected and file the same in the office of the county clerk and recorder of said county. Said bond shall be in the form prescribed by law for county officers, making the drainage district obligee therein.

**Source:** L. 11: p. 318, § 32. C.L. § 2140. CSA: C. 57, § 34. CRS 53: § 47-2-13. C.R.S. 1963: § 47-2-13.

**Cross references:** For bonds of county officers, see § 30-10-110.

**37-21-109. Directors - secretary - salary.** Each director shall receive as compensation for his services a sum not in excess of six hundred dollars per annum, as fixed by the board. No director shall receive any compensation as an officer, engineer, attorney, employee, or other agent of the district. Nothing contained in this article shall be construed as preventing the board from authorizing the reimbursement of any director for expenses incurred and appertaining to the activities of the district. The salary of the secretary shall be fixed by resolution of the board.

**Source:** L. 11: p. 318, § 29. L. 21: p. 279, § 1. C.L. § 2136. CSA: C. 57, § 30. CRS 53: § 47-2-9. L. 63: p. 344, § 1. C.R.S. 1963: § 47-2-9. L. 73: p. 565, § 1.

**37-21-110. Powers of board.** The board of directors is authorized to take conveyances or assurances in the name of the drainage district for all property acquired by it and to institute and maintain any actions, proceedings, and suits necessary or proper in order fully to carry out the provisions of articles 20 to 30 of this title or to enforce, maintain, protect, or preserve any rights, privileges, and immunities created or acquired in pursuance thereof.

**Source:** L. 11: p. 317, § 28. C.L. § 2135. CSA: C. 57, § 29. CRS 53: § 47-2-8. C.R.S. 1963: § 47-2-8.

**37-21-111. Right to enter upon land in district.** The directors, agents, and employees of the drainage district have the right to enter upon any land in the district to make surveys and to locate drainage ditches and laterals.

**Source:** L. 11: p. 317, § 26. C.L. § 2133. CSA: C. 57, § 27. CRS 53: § 47-2-6. C.R.S. 1963: § 47-2-6.

**37-21-112. Office of district.** The office of the drainage district shall be located in the county where the organization is effected, at some fixed place to be determined by the board of directors of the drainage district.

**Source:** L. 11: p. 318, § 33. C.L. § 2141. CSA: C. 57, § 35. CRS 53: § 47-2-14. C.R.S. 1963: § 47-2-14.

**37-21-113. Property to vest in district.** The title to property acquired under the provisions of articles 20 to 30 of this title shall vest in such drainage district in its corporate name. Said property shall be held by such district in trust for, and is hereby dedicated and set apart for, the uses and purposes set forth in articles 20 to 30 of this title and shall be exempt from taxation. The board of directors is authorized to hold, use and acquire, manage, occupy, and possess said property.

**Source:** L. 11: p. 317, § 27. C.L. § 2134. CSA: C. 57, § 28. CRS 53: § 47-2-7. C.R.S. 1963: § 47-2-7.



**37-21-113.5. Sale of district property.** The board of directors of such drainage district has the power to sell and transfer by proper conveyance any real estate or personal property belonging to the district when, in the opinion of the board, such property is no longer needed by such district; except that no parcel of real estate with a fair market value of more than twenty-five thousand dollars shall be sold or transferred unless the question of the proposed sale or transfer is submitted to the qualified voters of the district at an election held thereon and is approved by a majority of the qualified voters of the district voting at such election. Such election shall be held in the same manner as an election for dissolution of the district pursuant to the provisions of article 29 of this title insofar as such provisions are practicable.

**Source: L. 83:** Entire section added, p. 1385, § 1, effective March 22.

**37-21-114. Construction of system - contracts.** (1) The board of directors may cause surveys to be made for ditches for drainage works and rights-of-way for said district; may cause drainage or irrigation ditches, work, rights-of-way, and other property necessary for said district to be laid out, constructed, purchased, and acquired by condemnation or otherwise; and may appropriate, divert, and use waters for beneficial purposes, including any water gathered in or discharged by the works of any such district, under the same rules as to ownership, title, appropriation, priority, and adjudication of priorities as are applicable to individuals. The district shall file applications for water rights, changes of water rights, and plans for augmentation as provided in section 37-92-302.

(2) The board of directors has no power to make any contract or authorize any expenditure involving more than fifty thousand dollars unless such contract or expenditure is authorized, approved, and ratified in writing by owners of land in said drainage district equal in number to a majority of the votes cast at the last district election; and no contract or expenditure involving more than one hundred thousand dollars shall be made or be binding unless the question of making said contract or expenditure has been submitted and said expenditure authorized at an election in said district. The board of directors shall not violate the spending limitations specified in section 29-1-301, C.R.S.

(3) The board of directors has the power and authority, without advertising for bids as required by section 37-24-101, to enter into contracts either with the state of Colorado or with the United States, or both, jointly, for any and all surveys, plans, and specifications for a proposed drainage ditch, system, or works and also for the construction in whole or in part of such drainage ditch, system, or works. Such contracts shall provide for the payment by such drainage district to the state of Colorado or the United States, or both, as the case may be, of the actual cost of making such surveys, plans, and specifications and the actual cost of construction of such drainage ditch, system, or works, by such amounts as shall be agreed upon in such contracts. Any such contracts shall not become effective and binding upon any such drainage district until the question of making such contracts is submitted to and authorized at an election of the qualified electors of said district.

**Source: L. 11:** p. 316, § 23. **L. 15:** p. 294, § 1. **C.L. § 2130.** **L. 23:** p. 279, § 1. **CSA:** C. 57, § 24. **CRS 53:** § 47-2-3. **L. 55:** p. 292, § 1. **C.R.S. 1963:** § 47-2-3. **L. 73:** p. 1403, § 35. **L. 88:** (2) amended, p. 1225, § 2, effective March 17.

#### ANNOTATION

**Payments and taxes for construction work not authorized more than statutory limit are void.** Directors of a drainage district, after advertising for bids pursuant to § 37-24-101, entered into a contract for the construction of a drainage system which was signed by a majority

of the landowners in the district. The work was not completed under the contract and the district board authorized the expenditure of more than statutory limit. In these circumstances district warrants issued in payment for the construction work are void, as is also a tax levy and sale



based upon the involved expenditure. *Swedlund v. Denver Joint Stock Land Bank*, 108 Colo. 400, 118 P.2d 460 (1941).

**Courts will correct an abuse committed by directors of a drainage district** under the guise of discretionary powers. *Olney Springs Drainage Dist. v. Auckland*, 83 Colo. 510, 267 P. 605 (1928).

**Directors of a drainage district who attempt to act beyond the scope of their official powers held properly restrained by injunction.** *Olney Springs Drainage Dist. v. Auckland*, 83 Colo. 510, 267 P. 605 (1928).

**37-21-115. Notice of election.** Fifteen days prior to any election held subsequent to the organization of a drainage district, the secretary shall cause notices specifying the polling place of each precinct to be posted in three public places in each precinct, giving the hour and place of holding the election, and at the same time shall post a general election notice of said election in the office of said drainage district.

**Source:** L. 11: p. 318, § 34. C.L. § 2142. CSA: C. 57, § 36. CRS 53: § 47-2-15. C.R.S. 1963: § 47-2-15.

**37-21-116. Hours of voting.** The polls shall be opened at eight a.m. and be kept open until six p.m. of the day of election.

**Source:** L. 11: p. 319, § 38. C.L. § 2146. CSA: C. 57, § 40. CRS 53: § 47-2-19. C.R.S. 1963: § 47-2-19.

**37-21-117. Judges of election.** Prior to the time for posting said notices, the board of directors shall appoint three judges of election in each precinct, each of whom shall be a landowner within said precinct, and one of whom shall act as clerk of the election.

**Source:** L. 11: p. 319, § 35. C.L. § 2143. CSA: C. 57, § 37. CRS 53: § 47-2-16. C.R.S. 1963: § 47-2-16.

**37-21-118. Judges - vacancies filled by voters.** If the board of directors fails to appoint judges or the appointees fail to attend at the hour designated for opening the polls on the morning of election, the voters of the precinct present at that hour may appoint one or more judges to supply the places of those absent.

**Source:** L. 11: p. 319, § 36. C.L. § 2144. CSA: C. 57, § 38. CRS 53: § 47-2-17. C.R.S. 1963: § 47-2-17.

**37-21-119. Oaths - judges and clerks.** Any judge or clerk of election may administer and certify oaths required to be administered during the progress of an election. Before opening the polls, each judge and clerk shall take and subscribe an oath faithfully to perform the duties imposed upon him by law. Any qualified elector of the precinct may administer and certify said oath.

**Source:** L. 11: p. 319, § 37. C.L. § 2145. CSA: C. 57, § 39. CRS 53: § 47-2-18. C.R.S. 1963: § 47-2-18.

#### ANNOTATION

**Law reviews.** For article, "The Unused Colorado Enforcement Statute", see 21 Rocky Mt. L. Rev. 385 (1949).

**37-21-120. Count of ballots - returns.** After the closing of the polls, the judges of election shall forthwith proceed to count the ballots and make returns of the results of the election. It is the duty of the clerk forthwith to deliver the returns duly certified to the board of directors of the drainage district, together with the ballots cast.

**Source:** L. 11: p. 319, § 39. C.L. § 2147. CSA: C. 57, § 41. CRS 53: § 47-2-20. C.R.S. 1963: § 47-2-20.

**37-21-121. Canvass of returns.** The board of directors shall meet at the office of the drainage district on the first Monday after an election and canvass the returns. If at the time of the meeting the returns have been received from all the precincts, the board of directors shall proceed to canvass the returns. If returns have not been received from all precincts, the canvass shall be postponed from day to day until the returns have all been received or until six postponements have been made. The canvass shall be made in public by opening the returns and counting the votes of the district for each person voted for and for or against each question submitted at such election and declaring the results thereof. The board shall declare elected the person receiving the highest number of votes for each office and shall declare the result of the vote on any question submitted to the voters.

**Source:** L. 11: p. 319, § 40. C.L. § 2148. CSA: C. 57, § 42. CRS 53: § 47-2-21. C.R.S. 1963: § 47-2-21.

**37-21-122. Tie vote determined by lot.** In the event that at any regular or special election two or more persons receive the same number of votes and one is elected thereby, the election shall be determined by lot under direction of the county judge of the county in which the office of the drainage district is kept.

**Source:** L. 11: p. 320, § 41. C.L. § 2149. CSA: C. 57, § 43. CRS 53: § 47-2-22. C.R.S. 1963: § 47-2-22.

**37-21-123. Statement of result.** (1) As soon as the result of any election is declared, the secretary of the board of directors shall enter in the record of the board of directors and file with the county clerk and recorder of the county in which the office of said district is located a statement of the result.

(2) Said statement shall contain:

- (a) A copy of the published notice of said election;
- (b) The names of the judges of election;
- (c) The number of votes cast in the district and in each precinct of the district;
- (d) The office to which each person was elected;
- (e) The number of votes cast in each precinct for each person;
- (f) The number of votes cast in the district for each person;
- (g) The names of the persons elected;
- (h) The result of any question submitted to the voters at said election.

**Source:** L. 11: p. 320, § 42. C.L. § 2150. CSA: C. 57, § 44. CRS 53: § 47-2-23. C.R.S. 1963: § 47-2-23.

**37-21-124. Certificate of election.** The secretary shall forthwith deliver to each person elected a certificate of election, signed by the secretary and authenticated with the seal of the drainage district.

**Source:** L. 11: p. 320, § 43. C.L. § 2151. CSA: C. 57, § 45. CRS 53: § 47-2-24. C.R.S. 1963: § 47-2-24.

**37-21-125. Vacancies.** In case of a vacancy in the board of directors by death, removal, or inability from any cause to properly discharge the duties of a director, the board of county

commissioners of the county where the office of said district is located shall appoint a director who shall hold his office until the next regular election in said district and until his successor is elected and qualified.

**Source:** L. 11: p. 320, § 44. C.L. § 2152. CSA: C. 57, § 46. CRS 53: § 47-2-25. C.R.S. 1963: § 47-2-25.

ARTICLE 22

Treasurer - Duties

37-22-101.	Treasurer of drainage district.	37-22-106.	Claims verified - order of
37-22-102.	Duties of treasurer.		payment.
37-22-103.	Remittances to district trea- surer.	37-22-107.	Registry of warrants - vouch- ers.
37-22-104.	Payment only on warrants.	37-22-108.	Treasurer's reports.
37-22-105.	Warrants - no funds - interest.		

**37-22-101. Treasurer of drainage district.** The county treasurer of the county in which the office of the drainage district is kept shall be ex officio treasurer of the drainage district and shall be liable on his official bond for the safety and disbursement of the funds of said drainage district which may come into his hands. The county treasurer shall receive as his sole compensation for the collection of taxes levied for the benefit of such drainage district such an amount as the board of directors of said district may allow, as provided in section 30-1-102, C.R.S., which compensation shall be considered as a part of the regular fees of the office of the county treasurer to be accounted for by him to the county.

**Source:** L. 11: p. 320, § 45. C.L. § 2153. L. 23: p. 277, § 1. CSA: C. 57, § 47. CRS 53: § 47-3-1. C.R.S. 1963: § 47-3-1. L. 71: p. 325, § 1.

ANNOTATION

**Law reviews.** For article, "Legal Classification of Special District Corporate Forms in Colorado", see 45 Den. L.J. 347 (1968).

**37-22-102. Duties of treasurer.** The treasurer shall collect, receive, and receipt for all moneys belonging to said drainage district. It is the duty of the county treasurer of each county in which any drainage district is located in whole or in part to collect and receipt for all assessments levied in the same manner and at the same time and upon the same receipt as is required in the collection of taxes upon real estate for county purposes.

**Source:** L. 11: p. 321, § 46. C.L. § 2154. CSA: C. 57, § 48. CRS 53: § 47-3-2. C.R.S. 1963: § 47-3-2.

**Cross references:** For collection of taxes, see article 10 of title 39.

**37-22-103. Remittances to district treasurer.** The county treasurer of each county comprising a portion only of a drainage district, on the first Monday of each month, shall remit to the treasurer of the drainage district all moneys belonging to said drainage district. The board of directors is authorized to pay all legal claims against said district by warrants drawn on the district treasurer, as provided in section 37-22-104.

**Source:** L. 11: p. 321, § 47. C.L. § 2155. CSA: C. 57, § 49. CRS 53: § 47-3-3. C.R.S. 1963: § 47-3-3.



**37-22-104. Payment only on warrants.** The treasurer of the drainage district shall pay out of the funds of said district only upon warrants ordered by the board of directors of the drainage district, signed by its president and attested by its secretary, under the seal of the drainage district.

**Source:** L. 11: p. 321, § 48. C.L. § 2156. CSA: C. 57, § 50. CRS 53: § 47-3-4. C.R.S. 1963: § 47-3-4.

**37-22-105. Warrants - no funds - interest.** When any warrants of a drainage district are presented to the treasurer and there are no funds in his hands to pay the same, he shall stamp the same in the same manner as ordinary county warrants are stamped, and they shall draw interest at the rate of six percent per annum from the date of their presentation until paid.

**Source:** L. 11: p. 321, § 49. C.L. § 2157. CSA: C. 57, § 51. CRS 53: § 47-3-5. C.R.S. 1963: § 47-3-5.

#### ANNOTATION

**Law reviews.** For article, "Collecting Pre- and Post- Judgment Interest in Colorado: A Primer", see 15 Colo. Law. 753 (1986). For

article, "An Update of Appendices from Collecting Pre- and Post-Judgment Interest in Colorado", see 15 Colo. Law. 990 (1986).

**37-22-106. Claims verified - order of payment.** All claims against a drainage district shall be verified as required in the case of claims against counties, and the directors and secretary of the drainage district are authorized to administer oaths to the parties verifying said claims. The district treasurer shall keep a register in which he shall enter each warrant presented for payment, giving the date and amount of the warrant, to whom payable, the date of the presentation for payment, the date of payment, and the amount paid, and all warrants shall be paid in the order of their presentation for payment to the district treasurer and when paid shall be canceled across the face. All warrants shall be drawn payable to the claimant or bearer.

**Source:** L. 11: p. 321, § 50. C.L. § 2158. CSA: C. 57, § 52. CRS 53: § 47-3-6. C.R.S. 1963: § 47-3-6.

**37-22-107. Registry of warrants - vouchers.** The secretary shall keep a registry of all warrants drawn by order of the board of directors showing the date, amount, name of payee, and for what purposes drawn, and no warrant shall be issued except upon an itemized voucher duly verified stating the services rendered or material furnished the district and by whom ordered or contracted.

**Source:** L. 11: p. 322, § 51. C.L. § 2159. CSA: C. 57, § 53. CRS 53: § 47-3-7. C.R.S. 1963: § 47-3-7.

**37-22-108. Treasurer's reports.** At each regular meeting of the directors of a drainage district and more often when required, the treasurer shall report in writing the amount of money on hand, the amount received since his last report, and the amounts paid out, with a list of warrants presented since the last report. Said report shall be sworn to and filed with the secretary of the board of directors.

**Source:** L. 11: p. 322, § 52. C.L. § 2160. CSA: C. 57, § 54. CRS 53: § 47-3-8. C.R.S. 1963: § 47-3-8.

**ARTICLE 23****Assessment for Benefits**

37-23-101.	Assessments according to benefits.	37-23-108.	Assessment list.
37-23-101.5.	Determination of special benefits - factors considered.	37-23-109.	Alternative method of assessment.
37-23-102.	Objections to classification - hearing.	37-23-110.	Owner may except - hearing.
37-23-103.	Corrections - appeal - bond.	37-23-111.	Tax levies - how made.
37-23-104.	Hearing on appeal - special jury.	37-23-112.	Levy for alternative plan.
37-23-105.	Effect of appeal.	37-23-113.	Assessments - how made.
37-23-106.	Modified classification filed.	37-23-114.	State tax laws to apply.
37-23-107.	Special assessments - apportionment.	37-23-115.	Sale of property taxed.
		37-23-116.	President to execute deed.
		37-23-117.	Proceeds of sale.
		37-23-118.	Directors to perfect title.

**37-23-101. Assessments according to benefits.** (1) As soon as the plans for a drainage system have been determined and before the actual work of drainage is begun or bonds voted, the board of directors shall proceed to make special assessments for benefits by classifying the lands in the district in tracts of forty acres, more or less, according to the legal or recognized subdivisions on a graduated scale to be numbered according to the benefits to be received by the contemplated drainage. The tracts of land which will receive most and about equal benefits shall be marked one hundred, and such as are adjudged to receive less benefits shall be marked with a lesser number denoting its percent of benefit. This classification when established shall remain as a basis for the levy of taxes as may be needed for the lawful and proper purposes of the drainage district.

(2) In any district where a classification has once been made and the board of directors believes from experience and results that such former classification is not fairly adjusted on the several tracts of land according to benefits which may be adjusted by new or additional assessments, then the board of directors shall disregard such former classification and make a new classification in accordance with justice and right. When the classification is completed it shall be properly tabulated or shown by a map, or both, and filed in the office of the secretary of the district for inspection.

**Source:** L. 11: p. 322, § 53. L. 13: p. 253, § 2. C.L. § 2161. CSA: C. 57, § 55. CRS 53: § 47-4-1. C.R.S. 1963: § 47-4-1.

**ANNOTATION**

**Law reviews.** For article, "Legal Classification of Special District Corporate Forms in Colorado", see 45 Den. L.J. 347 (1968). For article, "What Constitutes 'Benefits' for Urban Drainage Projects", see 51 Den. L.J. 551 (1974).

**Total cost of constructing and maintaining drainage system is borne by assessment of lands benefited and not by the public generally.** Colo. Inv. & Realty Co. v. Riverview Drainage Dist., 83 Colo. 468, 266 P. 501 (1928).

**District's authority to tax should be strictly construed.** Irrigation districts and drainage districts are substantially identical in character;

they have no general taxing powers; the taxes they levy are local assessments, and their authority relative thereto is limited and should be strictly construed. Henry Wilcox & Son v. Riverview Drainage Dist., 93 Colo. 115, 25 P.2d 172 (1933).

**Under this section and § 37-23-108, there can be no cumulative or additional levy on lands upon which taxes were paid to meet the deficiency caused by others which did not.** Henry Wilcox & Son v. Riverview Drainage Dist., 93 Colo. 115, 25 P.2d 172 (1933).

**37-23-101.5. Determination of special benefits - factors considered.** (1) The term "benefit", for the purposes of assessing a particular property within a drainage system improvement district, includes, but is not limited to, the following:

(a) Any increase in the market value of the property;



(b) The provision for accepting the burden from specific dominant property for discharging surface water onto servient property in a manner or quantity greater than would naturally flow because the dominant owner made some of his property impermeable;

(c) Any adaptability of property to a superior or more profitable use;

(d) Any alleviation of health and sanitation hazards accruing to particular property or accruing to public property in the improvement district, if the provision of health and sanitation is paid for wholly or partially out of funds derived from taxation of property owners of the improvement district;

(e) Any reduction in the maintenance costs of particular property or of public property in the improvement district, if the maintenance of the public property is paid for wholly or partially out of funds derived from taxation of property owners of the improvement district;

(f) Any increase in convenience or reduction in inconvenience accruing to particular property owners, including the facilitation of access to and travel over streets, roads, and highways;

(g) Recreational improvements accruing to particular property owners as a direct result of drainage improvement.

**Source:** L. 75: Entire section added, p. 998, § 5, effective July 1.

**37-23-102. Objections to classification - hearing.** The board of directors shall cause to be personally served upon all parties residing in the district and owning land to be affected by the proposed drainage system, or other property liable to be taxed, a written or printed notice of the time when, and place where, it will meet to hear any objections that may be made to classifications of lands on the graduated scale. The notice shall be served in case of residence in the district not less than three days before the time set for hearing, by delivering a copy thereof to the party to be served. In the event that such copy cannot be personally delivered to the party to be served, then such notice shall be served in the manner provided for the service of summons in the Colorado rules of civil procedure. The board of directors shall cause to be sent by mail, at least ten days before the time set for said hearing, such notice to all owners who do not reside in the district whose land is affected, in case their post-office address is known to the board of directors or can be ascertained by the use of reasonable diligence. In case the land of any nonresident or of anyone whose residence is unknown is affected, then publication shall be made in some newspaper published in said county for three successive weeks prior to the time of such hearing, the publication to be made after a resolution of the board of directors has been duly passed determining the names of those landowners within the district who are nonresidents of the state or whose residence is unknown, and such meeting to hear objections may be adjourned from day to day by public announcement of the board of directors made at the meeting, until all objections are heard. All persons duly notified of the first day of meeting shall take cognizance of all adjournments without further notice. The affidavit of any creditable person that he has posted or served the notice required and the certificate of the publishers of such newspaper as to such publication shall be sufficient evidence of such facts.

**Source:** L. 11: p. 322, § 54. L. 13: p. 254, § 2. C.L. § 2162. CSA: C. 57, § 56. CRS 53: § 47-4-2. C.R.S. 1963: § 47-4-2.

**Cross references:** For service of process, see C.R.C.P. 4; for publication of legal notices, see part 1 of article 70 of title 24.

#### ANNOTATION

**Law reviews.** For note, "A Survey of Colorado Water Law", see 47 Den. L.J. 226 (1970).

**37-23-103. Corrections - appeal - bond.** At the time of meeting for review, the board of directors shall hear whatsoever objections may be urged by any person interested, and,



if satisfied that any injustice has been done in the classification of the several tracts of land or any of them, it shall correct the same in accordance with what is right, but if not so satisfied, it shall leave the classification as first made and enter an order to that effect. Any person appearing and urging objections who is not satisfied with the decision of the board of directors may appeal from its decision to the district court of the county in which the lands affected are situated, within ten days after the decision of the board of directors is rendered, by filing with the county clerk and recorder a bond with security conditioned to pay such taxes as are finally levied upon the land in question, and the costs occasioned by the appeal, in case the board of directors is sustained by the court.

**Source:** L. 11: p. 322, § 55. L. 13: p. 255, § 2. C.L. § 2163. CSA: C. 57, § 57. CRS 53: § 47-4-3. C.R.S. 1963: § 47-4-3. L. 64: p. 248, § 119.

**37-23-104. Hearing on appeal - special jury.** (1) Appeals taken to the district court may be heard at the discretion of the court; except that ten days shall intervene from the time of taking the appeal and the date set for hearing. The costs of such appeal, at the discretion of the court, may be divided between the drainage district and the owner of the land who may appeal from the classification of the board of directors. It is the duty of the district court to cause to be summoned six landowners living outside of the drainage district, who are not interested in any lands or work in said district, or of kin to any of the parties interested, to meet at the courthouse at a time set by the court for hearing any appeal that may be taken from the decision of the board of directors. The six landowners shall be men who have some knowledge of the costs and benefits of farm drainage and shall be sworn as a special jury to try the case on appeal. Should any of said landowners fail to appear at the time named, or should any of those summoned be rejected under the exercise of the usual right of challenge, the court may cause to be summoned any other qualified landowner to fill such vacancy, or the case may be tried by three qualified jurors if both parties to the suit so agree.

(2) Whenever the special jury summoned to hear appeals has been sworn, it is the duty of the court to lay before them the classifications as determined by the drainage district board of directors, and they shall examine the same and hear allegations and testimony in opposition to and in support of the same and, if requested by either party to the appeal, may visit the district and view the lands. If they find the tracts of land in question are marked too high or too low in the classification, they shall correct the errors; but, if no injustice has been done, they shall confirm the classification as made by the board of directors. Their final determination shall be made in writing and filed with the records of the court.

(3) The classification when established shall also be recorded with other papers on the drainage record. Appellate review of the final decision of the district court, entered pursuant to the decision of the special jury, may be had in an appellate court as in other civil actions and pursuant to the Colorado appellate rules.

**Source:** L. 13: p. 255, § 2. C.L. § 2164. CSA: C. 57, § 58. CRS 53: § 47-4-4. C.R.S. 1963: § 47-4-4. L. 64: p. 249, § 120.

#### ANNOTATION

**Law reviews.** For note, "A Survey of Colorado Water Law", see 47 Den. L.J. 226 (1970).

**37-23-105. Effect of appeal.** The taking of any appeal by any persons shall not operate to delay the collection of any tax from which no appeal has been taken or delay the progress of the work or the issuing of any bonds.

**Source:** L. 13: p. 257, § 2. C.L. § 2165. CSA: C. 57, § 59. CRS 53: § 47-4-5. C.R.S. 1963: § 47-4-5.

**37-23-106. Modified classification filed.** The board of directors shall modify said classification so that it conforms to the changes made therein in the hearings before said board, and the secretary of the district shall certify and file said classification of property of the district so modified, properly tabulated or shown by a map, or both, with the county clerk and recorder of each county in which the district is located, and, if through any appeal said classification is modified, the board shall then modify the classification, and the secretary of the district shall certify and file the same so modified with the county clerk and recorder of each county in which the district is located.

**Source:** L. 13: p. 257, § 2. C.L. § 2166. CSA: C. 57, § 60. CRS 53: § 47-4-6. C.R.S. 1963: § 47-4-6.

**37-23-107. Special assessments - apportionment.** (1) The board of directors, on or before July 1 in each year, shall determine the amount of money required to meet the current expenses of the coming year, including cost of construction, maintenance, operating and ordinary expenses, deficiency in the payment of expenses already incurred, bond interest unpaid, the amount of bonded indebtedness, and the principal or interest which will fall due during said coming year, and by resolutions shall order such amount of money to be raised by special assessment upon the lands of the district, as may be necessary to raise the sum of money so determined. Such amount shall be apportioned among the several tracts in the name of the owner when known according to acreage of each and its figure of this classification on the graduated scale, so that each tract may bear its equal burden in proportion to benefits.

(2) The board shall make out a special assessment roll, designated in this article as “tax list”, setting down in separate columns the owners’ names when known, and when unknown stating “unknown”, a description of the land, the number denoting the classification, and the tax: That for current expenses and that for bonded indebtedness and interest thereon shall be in separate columns. When completed the list shall be filed with the secretary of the district.

(3) The tax list may be substantially as follows:

SPECIAL ASSESSMENT TAX LIST OF -- (here insert name of district).

TAX LEVIED										
OWNER'S NAME		Description of Land			No. Classification	Current Expenses		Bonded Indebtedness and Interest		Remarks
Sec.	Tp.	R.	Acres		on Scale	Dol.	Cts.	Dol.	Cts.	

**Source:** L. 13: p. 257, § 2. C.L. § 2167. CSA: C. 57, § 61. CRS 53: § 47-4-7. C.R.S. 1963: § 47-4-7.

**37-23-108. Assessment list.** The assessment list shall be completed on or before July 15, and, on the first Tuesday of August in each year and from day to day thereafter, Sundays excepted, the board of directors shall sit to hear complaints and to correct errors in said assessment until all complaints filed with the secretary or presented to the board have had an opportunity to be heard and determined. The classification of any lands on the graduated scale shall not be changed or determined at said hearings.

**Source:** L. 13: p. 258 § 2. C.L. § 2168. CSA: C. 57, § 62. CRS 53: § 47-4-8. C.R.S. 1963: § 47-4-8.



**37-23-109. Alternative method of assessment.** (1) As an alternative method for the assessment of the lands in the district and in lieu of the method of assessment provided by sections 37-23-101 to 37-23-108, the board of directors may adopt the following method for the assessment of the benefits derived from the system of drainage adopted:

(a) As soon as the plans for a drainage system have been determined and before the actual work of drainage is begun or bonds voted, the board of directors shall assess the amount of benefits which, by means of the contemplated drainage, will accrue to each tract of land comprising forty acres, more or less, according to the legal or recognized subdivisions. The assessed benefits shall represent the increased value which, in the judgment of the directors, will accrue to the lands in the district because of the contemplated drainage. The board of directors shall prepare a report of its findings which shall be arranged in tabular form, the columns of which shall be headed as follows: Column 1, "Owner of property assessed"; column 2, "Description of property assessed"; column 3, "Number of acres assessed"; column 4, "Amount of benefits assessed". The board of directors shall also estimate the cost of the works set out in the plans for the drainage system, which estimate shall include the probable expenses of district organization and administration. Said report shall be signed by the president of the district with the seal of the district thereto affixed, and attested by the secretary, and one copy thereof shall be filed by the secretary in the office of the county clerk and recorder of the county where the organization is effected and one copy thereof in the office of the district.

(b) Upon the filing of the report, the secretary of the district shall give notice thereof by causing publication to be made in some newspaper published in each county in which lands affected are located. Such notice shall be in substantially the following form:

"Notice of filing of directors' report of  
assessments of benefits for .....  
drainage district.

Notice is hereby given to all persons interested in the following described land in .... county (or counties), in the state of Colorado (here describe the respective tracts of land) included within .... drainage district, that the board of directors of said district have assessed the benefits to be received by each tract of land in the district by the contemplated system of drainage adopted for said district, and have filed their report of such assessments in the office of the county clerk and recorder of ..... county, Colorado, and in the office of the district on the ..... day of ....., A.D., 20...., and you, and each of you, are hereby notified that you may examine said report and file exceptions with the secretary of the district to all or any part thereof, on or before the ..... day of ....., A.D., 20.... .

.....  
Secretary."

Source: L. 19: p. 394, § 1. C.L. § 2169. CSA: C. 57, § 63. CRS 53: § 47-4-9. C.R.S. 1963: § 47-4-9.

**37-23-110. Owner may except - hearing.** (1) Any owner of land in said drainage district may file exceptions to said report or to any assessment for benefits within ten days after the last day of publication of the notice provided for in this article. All exceptions shall be heard by the board of directors and determined in a summary manner so as to carry out liberally the purposes of articles 20 to 30 of this title and the needs of the district; and if it appears to the satisfaction of the board, after hearing and determining all exceptions which may in writing be filed, that the estimated cost of constructing the improvement contemplated in the plans for the drainage system is less than the benefits assessed against the land in the district, then the board of directors shall approve and confirm the report as originally filed or as modified and amended after such hearing.

(2) The secretary of the district shall transmit the directors' report as finally confirmed to the county clerk and recorder of each county in which lands in the district may be located or affected by said report, where the same shall become a permanent record. Appeals may be taken from the decision of the board of directors in the same manner and with the same



effect as provided in sections 37-23-103 to 37-23-105, and the board of directors shall modify said assessment of benefits so that the same shall conform to the changes made therein by reason of such appeal and shall certify and file the same with the county clerk and recorder of each county in which the district is located.

(3) Where the works set out in the plan for a drainage system of any drainage district are found insufficient to reclaim in whole or in part any or all of the land within the district, the board of directors may formulate new or amended plans, containing new ditches or other works or providing for the enlargement of existing ditches or other works, and additional assessments may be made in conformity with the provisions of this section, the same to be made in proportion to the increased benefits accruing to the lands within the district because of such additional works.

(4) After the list of lands with the assessed benefits has been filed in the office of the county clerk and recorder, the board of directors, without any unnecessary delay, shall levy a tax on such portion of said benefits on all lands in the district to which benefits have been assessed, as may be found necessary by the board of directors to pay the costs of the completion of the proposed plan for the drainage system and in carrying out the objects of the district, plus ten percent for emergencies.

**Source:** L. 19: p. 394, § 1. C.L. § 2169. CSA: C. 57, § 63. CRS 53: § 47-4-10. C.R.S. 1963: § 47-4-10.

**37-23-111. Tax levies - how made.** (1) The tax shall be apportioned to and levied on each tract of land in said district in proportion to the benefits assessed and not in excess thereof, and, in case bonds are issued, the amount of the interest, as estimated by said board of directors, which will accrue on such bonds shall be included and added to the tax, but the interest to accrue on such bonds shall not be construed as a part of the cost of construction in determining whether or not the expenses and costs of making said improvements are or are not equal to or in excess of the benefits assessed.

(2) In case bonds are issued, said tax shall be divided into such number of annual installments as will meet the requirements of and provide for the punctual payment of the interest upon and the principal of the bonds as the same accrue. In case the proceeds of the original tax levy are not sufficient to pay the principal of and the interest upon all of the bonds which may at any time be issued, then the board of directors shall make such additional levies upon the benefits assessed, but not in excess thereof, as are necessary to pay such principal and interest. If it is found at any time that the amount of total taxes levied is insufficient to pay the cost of the works set out in the plan for a drainage system or to pay the cost of the additional work, the board of directors may make an additional levy to provide funds to complete the work; but the total of all such levies shall not exceed the total amount of benefits assessed.

(3) The secretary of the district, as soon as said total tax is levied, at the expense of the district, shall prepare a list of all taxes levied in the form of a well-bound book, which book shall be endorsed and named: "..... Drainage District Assessment Book", which endorsement shall also be printed or written at the top of each page in said book, and it shall be signed and certified by the president and secretary of the district, under the seal thereof, and the same shall thereafter become a permanent record in the office of said secretary, and a certified copy thereof shall be transmitted to the proper county assessor.

**Source:** L. 19: p. 394, § 1. C.L. § 2169. CSA: C. 57, § 63. CRS 53: § 47-4-11. C.R.S. 1963: § 47-4-11.

**Cross references:** For procedure to increase tax levy beyond statutory limits, see § 29-1-302.

## ANNOTATION

**Section contemplates punctual payment but hints at no remedy in case of failure.** Henry Wilcox & Son v. Riverview Drainage Dist., 93 Colo. 115, 25 P.2d 172 (1933).

**This section contains no authority for a cumulative or additional levy** to pay the original issue. Henry Wilcox & Son v. Riverview Drainage Dist., 93 Colo. 115, 25 P.2d 172 (1933).

**"Proceeds", used in this section, need not mean cash.** If such had been the legislative intent, it was easy to use the word and avoid confusion. "Proceeds" is whatever the levy produces. It may be cash, it may be tax sale certificates, it may be both. Henry Wilcox & Son v. Riverview Drainage Dist., 93 Colo. 115, 25 P.2d 172 (1933).

**37-23-112. Levy for alternative plan.** In case the board of directors adopts the alternative method of assessment of benefits provided by sections 37-23-109 to 37-23-111, and after a tax has been levied upon the benefits so assessed for the purpose of paying the costs of completion of the proposed plan for the drainage system and carrying out the objects of the district, thereafter taxes may be levied for the purposes of meeting the maintenance, operating, and ordinary expenses of the district for the coming year and any deficiency in the payment of such expenses already incurred, and such taxes shall be levied in the manner provided by sections 37-23-107 and 37-23-108, with the exception that the amounts of money to be raised shall be apportioned among the several tracts assessed in proportion to the benefits assessed thereon under section 37-23-111 and with the further exception that the amount to be raised for the purposes of meeting the interest upon and the principal of the bonds of the district as the same accrue, together with any deficiencies in the payment of the same, shall be determined in the manner provided by sections 37-23-109 to 37-23-111, and shall so appear in the assessment roll provided by section 37-23-107.

**Source:** L. 23: p. 280, § 2. CSA: C. 57, § 64. CRS 53: § 47-4-12. C.R.S. 1963: § 47-4-12.

**37-23-113. Assessments - how made.** (1) On or before September 1 in each year, the secretary shall transmit to the county assessor of each county a certified copy of so much of said assessment book as relates to land within the county of said county assessors, together with the certified copy of the order of the board of directors.

(2) Thereupon it is the duty of the county assessor, without expense to the drainage district, to assess and enter upon his records as assessor, in its appropriate column, the assessments so certified, which assessments shall be delivered to the county treasurer as part of the assessment roll in the same manner as general, state, and county taxes are certified by the county assessor to the county treasurer for collection.

**Source:** L. 11: p. 323, § 56. L. 21: p. 279, § 2. C.L. § 2170. CSA: C. 57, § 65. CRS 53: § 47-4-13. C.R.S. 1963: § 47-4-13.

**37-23-114. State tax laws to apply.** (1) The laws of this state for the collection of general taxes including the laws for the sale of property for taxes and the redemption of the same, except as modified in this section, shall apply and have full force and effect for the purposes of articles 20 to 30 of this title, and the provisions of said articles for collecting the same shall be deemed for the purpose of carrying into effect the police powers granted to drainage districts for the construction and maintenance of drainage systems and shall not be construed as imposing a special tax under the taxing power. In case of a sale of any lot or parcel of land or any interest therein for delinquent drainage district taxes or delinquent drainage district and other taxes, and there are no bids therefor on any of the days of such tax sale, the same shall be struck off to the drainage district in which such land is located for the amount of the taxes, interest, and costs thereon, and a certificate of sale shall be made out to the district therefor and delivered to its secretary, who shall file the same in the office of its board of directors and record the same in a book of public record to be kept by said board for such purpose, but no charge shall be made by the county treasurer for making such



certificate, and in such case he shall make an entry on his records "struck off to ..... drainage district" as well as an entry showing the amount of the taxes and interest thereon for which said lands were offered for sale, together with the cost attending such sale. No taxes assessed against any land so struck off to said district under the provisions of this section shall be payable until the same has been derived by the district from the sale or redemption of such lands.

(2) Such drainage district or its assignee shall be entitled to a tax deed for said lands, in the same manner and subject to the same equities as if a private purchaser at said tax sale, upon the payment to the county treasurer at the time of demanding said deed of such sum as the board of county commissioners of such county at any regular or special meeting may decide for the payment of any delinquent general taxes, and if said deed is demanded by any assignee of the drainage district, then such assignee shall also pay to the county treasurer such additional amount as may be specified by the board of directors of the drainage district, as payment for any delinquent drainage district taxes.

(3) In case the owner of said lot or parcel of land, or interest therein, desires to redeem the same at any time before said tax deed is issued, the same may be done in the same manner as provided by law, in case said lot or parcel of land, or interest therein, has been purchased by a bidder at said tax sale or has been struck off to the county, and in such case the county treasurer shall forthwith issue a certificate of redemption therefor and notify the secretary of said fact, who shall thereupon make a suitable transfer entry upon his record aforesaid, and return the certificate of sale to the county treasurer for cancellation.

(4) In case any person desires to obtain such certificate of purchase so issued to said drainage district, the same may be done in the same manner as provided by law in case said lot or parcel of land, or interest therein, had been purchased by a bidder at said tax sale or had been struck off to the county, upon payment to the county treasurer of the required amount in cash, or in cash together with warrants not in excess of the drainage district and redemption fund tax, or in cash and in warrants and bonds and coupons respectively, not in excess of said respective funds.

(5) After any certificate of sale or tax deed has been issued to any drainage district, such drainage district or any assignee thereof may at any time commence an action in the district court in the county wherein the major portion of said drainage district lies, for the purpose of determining the validity of said tax sale. Such action shall be conducted in the same manner as an action to quiet title to real estate under the laws of the state; and after the final determination of such action, the validity of the taxes for which the property was sold and the legality of the proceedings taken in the sale of the property involved shall be incontestable between all persons and parties whatsoever.

**Source:** L. 11: p. 323, § 58. L. 21: p. 275, § 1. C.L. § 2172. CSA: C. 57, § 66. CRS 53: § 47-4-14. C.R.S. 1963: § 47-4-14.

**Cross references:** For collection of taxes and tax sales, see articles 10 and 11 of title 39.

#### ANNOTATION

**Treasurer's deed issued at sale for failure to pay drainage assessment conveys land and water rights.** This section confers upon drainage districts the power to assess water rights pertinent to lands in the district for drainage purposes, and a treasurer's deed to land issued in

default of payment of assessments levied for such purposes conveys not only the land, but the water rights pertinent thereto including those represented by shares of stock. *Comstock v. Olney Springs Drainage Dist.*, 97 Colo. 416, 50 P.2d 532 (1935).

**37-23-115. Sale of property taxed.** The board of directors of any drainage district may sell, dispose of, and convey, on behalf of such district, any real property to which such drainage district may take title by tax deed under the provisions of section 37-23-114, as said board may by resolution direct, either at public or private sale, at such price and upon such terms as said board may determine, and without any authorization from the electors of such district.



**Source:** L. 29: p. 535 § 1. CSA: C. 57, § 67. CRS 53: § 47-4-15. C.R.S. 1963: § 47-4-15.

**37-23-116. President to execute deed.** The president of the board of directors of such drainage district, when authorized by resolution of the board of directors, is empowered to execute, acknowledge, and deliver any deeds of conveyance necessary to convey such real property to the purchaser thereof. The deed of conveyance shall be attested by the secretary of such drainage district under its seal, and when so executed such deed of conveyance shall be held to convey the entire title of such drainage district to the purchaser thereof.

**Source:** L. 29: p. 535, § 2. CSA: C. 57, § 68. CRS 53: § 47-4-16. C.R.S. 1963: § 47-4-16.

**37-23-117. Proceeds of sale.** The proceeds of such sales shall be paid into such fund of the drainage district as its board of directors by resolution may direct.

**Source:** L. 29: p. 536, § 3. CSA: C. 57, § 69. CRS 53: § 47-4-17. C.R.S. 1963: § 47-4-17.

**37-23-118. Directors to perfect title.** The board of directors of any such drainage district is authorized to take such steps in the name of and on behalf of the district as it deems necessary in order to perfect the title of such drainage district to any lands to which it has taken title by tax deed and for that purpose may procure and take deeds of conveyance or other assurances of title from the holders of record or other titles to such lands and may institute actions for the purpose of quieting title to such real estate as against the claims of any other persons, associations, or corporations.

**Source:** L. 29: p. 536, § 4. CSA: C. 57, § 70. CRS 53: § 47-4-18. C.R.S. 1963: § 47-4-18.

## ARTICLE 24

### Construction of System

37-24-101.	Construction - bids - advertising.	37-24-105.	Compensation for property taken.
37-24-102.	Contractor - bond - engineer.	37-24-106.	Right-of-way across state lands.
37-24-103.	Right of eminent domain.	37-24-107.	No officer interested in contract.
37-24-104.	Additional powers - eminent domain.		

**37-24-101. Construction - bids - advertising.** After adopting a plan for a drainage system and providing for the payment of the same, or a designated part thereof by assessment or bonds, the board of directors shall give notice, by publication not less than twenty days prior to the date of opening proposals in a newspaper published in the county where the office of the drainage district is kept and in such other newspaper as may be deemed advisable, calling for bids for the construction of said work or any portion thereof; if less than the whole, then the portion of said system to be constructed shall be described in the notice. The notice shall set forth where the plans and specifications may be seen and that sealed proposals will be received at the office of the drainage district and a contract let to the lowest responsible bidder, giving the time and place for opening the proposals, which, at said time and place, shall be opened in public. The board of directors may enter into a contract with the lowest responsible bidder for the construction of the whole or any portion of the work mentioned in the notice, or may reject any and all bids and readvertise for proposals, or may proceed to construct the work under the supervision of the board of directors, and in that event all material shall be purchased from the lowest responsible bidders after proposals have been invited and notice thereof published.

**Source:** L. 11: p. 323, § 59. C.L. § 2173. CSA: C. 57, § 74. CRS 53: § 47-5-1. C.R.S. 1963: § 47-5-1.

**Cross references:** For publication of legal notices, see part 1 of article 70 of title 24.

#### ANNOTATION

**Law reviews.** For article, "Legal Classification of Special District Corporate Forms in Colorado", see 45 Den. L.J. 347 (1968).

**Board must submit proposed expenditures even if work is done under its own supervision.** The board of directors of a drainage district is not absolved from submitting a proposed expenditure of more than \$10,000 to the owners

of land within the district through an election as provided by § 37-21-114, even though the board proceeded to do construction work under its own supervision, as provided under this section, after releasing a contractor who had contracted to do such work. *Swedlund v. Denver Joint Stock Land Bank*, 108 Colo. 400, 118 P.2d 460 (1941).

**37-24-102. Contractor - bond - engineer.** The person to whom a contract may be awarded shall execute a bond in the penal sum of not less than ten percent of the contract price, with surety to be approved by the board of directors, payable to the drainage district, conditioned for the faithful performance of the contract. All work shall be done under the direction and to the satisfaction of the engineer employed by the drainage district subject to approval by the board of directors.

**Source:** L. 11: p. 324, § 60. C.L. § 2174. CSA: C. 57, § 75. CRS 53: § 47-5-2. C.R.S. 1963: § 47-5-2.

**37-24-103. Right of eminent domain.** The board of directors has the power to construct the works across any watercourse, street, avenue, highway, railway, canal, or ditch which the route of such drainage system or any branch thereof intersects or crosses. If any railroad company, or the owners and controllers of said property, thing, or franchise so to be crossed, or the owner of land necessary for said drainage district, and the board of directors cannot agree upon the amount to be paid therefor, or the points or the manner of said crossings, the same shall be ascertained and determined in all respects as is provided by law in respect to the taking of land for public uses, by the exercise of the right of eminent domain, which right is hereby conferred on drainage districts.

**Source:** L. 11: p. 327, § 70. C.L. § 2175. CSA: C. 57, § 76. CRS 53: § 47-5-3. C.R.S. 1963: § 47-5-3.

**Cross references:** For eminent domain proceedings, see articles 1 to 7 of title 38.

#### ANNOTATION

**Law reviews.** For article, "Eminent Domain in Colorado", see 29 Dicta 313 (1952).

**37-24-104. Additional powers - eminent domain.** All drainage districts incorporated under the laws of this state have, in addition to all rights and powers granted by statute prior to March 22, 1921, the right and power under the laws of this state to cross lands outside the boundaries of said drainage district with any part of the system of drainage works including the drainage ditch or canal thereof.

**Source:** L. 21: p. 284, § 1. C.L. § 2177. CSA: C. 57, § 78. CRS 53: § 47-5-5. C.R.S. 1963: § 47-5-5.

**37-24-105. Compensation for property taken.** Said drainage district shall make due and just compensation for such right-of-way and the damages occasioned by the construc-

tion and operation of its works, and, where the compensation for the property sought to be taken or damaged cannot be agreed upon by the parties interested, or in case the owner of the property is incapable of consenting, or his name or residence is unknown, or he is a nonresident of the state, the compensation to be paid for such right-of-way and damages occasioned by the construction and operation of such drainage works shall be determined by proceedings in eminent domain in the manner provided by law for the exercise of the right of eminent domain.

**Source:** L. 21: p. 284, § 2. C.L. § 2178. CSA: C. 57, § 79. CRS 53: § 47-5-6. C.R.S. 1963: § 47-5-6.

**37-24-106. Right-of-way across state lands.** The right-of-way is given, dedicated, and set apart to locate, construct, and maintain drainage systems and works in, over, through, across, or upon any of the lands which are the property of the state.

**Source:** L. 11: p. 327, § 71. C.L. § 2176. CSA: C. 57, § 77. CRS 53: § 47-5-4. C.R.S. 1963: § 47-5-4.

**37-24-107. No officer interested in contract.** No director or officer of a district shall be interested directly or indirectly in any contract awarded or to be awarded by the board or in the profits thereof, nor shall he or she receive any gratuity or bribe. For any violation of this provision, such officer or director commits a class 6 felony and shall be punished as provided in section 18-1.3-401, C.R.S., and such conviction shall work a forfeiture of his or her office.

**Source:** L. 11: p. 327, § 72. C.L. § 2179. CSA: C. 57, § 80. CRS 53: § 47-5-7. C.R.S. 1963: § 47-5-7. L. 77: Entire section amended, p. 884, § 65, effective July 1, 1979. L. 89: Entire section amended, p. 850, § 134, effective July 1. L. 2002: Entire section amended, p. 1553, § 334, effective October 1.

**Editor's note:** The effective date for amendments made to this section by chapter 216, L. 77, was changed from July 1, 1978, to April 1, 1979, by chapter 1, First Extraordinary Session, L. 78, and was subsequently changed to July 1, 1979, by chapter 157, § 23, L. 79. See *People v. McKenna*, 199 Colo. 452, 611 P.2d 574 (1980).

**Cross references:** For the legislative declaration contained in the 2002 act amending this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

## ARTICLE 25

### Bonds

37-25-101.	Bond issue - purposes - election.	37-25-106.	Additional bonds - election - priority.
37-25-102.	Notice of election - form of ballot.	37-25-107.	Sale of bonds - procedure.
37-25-103.	Bonds - issuance - interest.	37-25-108.	Sale of bonds - rejection of bids.
37-25-104.	Denomination - coupons - record.	37-25-109.	Liability for bonds and interest.
37-25-105.	Bonds maturing in less than twenty years.	37-25-110.	Confirmation of bonds.

**37-25-101. Bond issue - purposes - election.** For the purpose of constructing a drainage system and necessary works for any drainage district and acquiring the necessary property and rights therefor, of paying the first year's interest upon the bonds authorized in this article, and of otherwise carrying out the provisions of articles 20 to 30 of this title, the



board of directors of any drainage district may estimate and determine the amount of money necessary to be raised for such purposes and is empowered to call a special election to determine whether or not bonds of said district shall be issued in the amount so determined.

**Source:** L. 11: p. 324, § 61. C.L. § 2180. CSA: C. 57, § 81. CRS 53: § 47-6-1. C.R.S. 1963: § 47-6-1.

#### ANNOTATION

**Law reviews.** For article, "Legal Classification of Special District Corporate Forms in Colorado", see 45 Den. L.J. 347 (1968).

**37-25-102. Notice of election - form of ballot.** A notice of such election shall be given by posting notices in three public places in each election precinct in said district for at least twenty days and by publication of such notice in some newspaper published in the county where the office of the drainage district is required to be kept once a week for at least three successive weeks. The notice shall specify the time of holding the election and the amount of bonds proposed to be issued, and said election shall be held and the results thereof determined and declared in all respects as nearly as possible in conformity with the provisions of sections 37-21-105 to 37-21-108, 37-21-112, and 37-21-115 to 37-21-124 governing the election of directors. No informalities in conducting such election shall invalidate the same if the election has been otherwise fairly conducted. At such election the ballots shall contain the words "Bonds - Yes" or "Bonds - No".

**Source:** L. 11: p. 324, § 62. C.L. § 2181. CSA: C. 57, § 82. CRS 53: § 47-6-2. C.R.S. 1963: § 47-6-2.

**Cross references:** For publication of legal notices, see part 1 of article 70 of title 24.

**37-25-103. Bonds - issuance - interest.** (1) If a majority of the votes cast is "Bonds - Yes", the board of directors shall immediately cause bonds in such amount to be issued payable in series as follows: At the expiration of eleven years, not less than five percent of the whole amount of said bonds; at the expiration of twelve years, not less than six percent of the whole amount of said bonds; at the expiration of thirteen years, not less than seven percent of the whole amount of said bonds; at the expiration of fourteen years, not less than eight percent of the whole amount of said bonds; at the expiration of fifteen years, not less than nine percent of the whole amount of said bonds; at the expiration of sixteen years, not less than ten percent of the whole amount of said bonds; at the expiration of seventeen years, not less than eleven percent of the whole amount of said bonds; at the expiration of eighteen years, not less than thirteen percent of the whole amount of said bonds; at the expiration of nineteen years, not less than fifteen percent of the whole amount of said bonds; and, at the expiration of twenty years, a percentage sufficient to pay off the remainder of said bonds.

(2) The several enumerated percentages shall be of the entire amount of the bond issue.

(3) Each bond must be payable at the given time for its entire amount and not for a percentage.

(4) The said bonds shall bear interest at the rate of not to exceed eight percent per annum payable semiannually on June 1 and December 1 of each year. The principal and interest shall be payable at the office of the county treasurer of the county in which the organization of the district was effected and at such other place as the board of directors may designate in such bond.

**Source:** L. 11: p. 325, § 63. L. 21: p. 280, § 3. C.L. § 2182. CSA: C. 57, § 83. CRS 53: § 47-6-3. C.R.S. 1963: § 47-6-3.

**37-25-104. Denomination - coupons - record.** The bonds shall be of the denomination of one hundred dollars or five hundred dollars, negotiable in form, executed in the name of the district, and signed by the president and secretary, and the seal of the district shall be affixed thereto. The bonds shall be numbered consecutively and bear the date of their issue. Coupons for the interest shall be attached to each bond bearing the lithographed signatures of the president and secretary. The bonds shall express on their face that they are issued by the authority of articles 20 to 30 of this title. The secretary shall keep a record of the bonds sold, their number, date of sale, the price received, and the name of the purchaser.

**Source:** L. 11: p. 326, § 64. C.L. § 2183. CSA: C. 57, § 84. CRS 53: § 47-6-4. C.R.S. 1963: § 47-6-4.

**37-25-105. Bonds maturing in less than twenty years.** Any drainage district, by a majority vote of the legal electors of said district, may provide for the issuance of bonds that will mature in any number of years less than twenty and arrange for the payment thereof in series as provided in section 37-25-103.

**Source:** L. 11: p. 326, § 65. C.L. § 2184. CSA: C. 57, § 85. CRS 53: § 47-6-5. C.R.S. 1963: § 47-6-5.

**37-25-106. Additional bonds - election - priority.** When the money provided by any previous issue of bonds has become exhausted by authorized expenditures and it becomes necessary to raise additional money for such purposes, additional bonds may be issued by submitting the question at a special election to the qualified voters of said district and otherwise complying with the provisions of this article in respect to an original issue of bonds. The lien for taxes, for the payment of the interest and principal of any previous bond issue, shall be a prior lien to that of any subsequent bond issue.

**Source:** L. 11: p. 326, § 66. C.L. § 2185. CSA: C. 57, § 86. CRS 53: § 47-6-6. C.R.S. 1963: § 47-6-6.

#### ANNOTATION

**This section makes no provision for additional levies to meet additional issues.** Henry

Wilcox & Son v. Riverview Drainage Dist., 93 Colo. 115, 25 P.2d 172 (1933).

**37-25-107. Sale of bonds - procedure.** The board of directors may sell bonds from time to time in such quantities as may be necessary and most advantageous to raise the money to carry out the objects and purposes of articles 20 to 30 of this title. Before making any sale, the board, by resolution, shall declare its intention to sell a specified amount of the bonds and the day and hour and place of such sale and shall cause such resolution to be entered in the minutes and notice of the sale to be given by publication thereof for at least twenty days in a daily newspaper published in the city of Denver and in any other newspaper at its discretion.

**Source:** L. 11: p. 326, § 67. C.L. § 2186. CSA: C. 57, § 87. CRS 53: § 47-6-7. C.R.S. 1963: § 47-6-7.

**Cross references:** For publication of legal notices, see part 1 of article 70 of title 24.

**37-25-108. Sale of bonds - rejection of bids.** The notice shall state that sealed proposals will be received by the board of directors at the office of the drainage district for the purchase of the bonds until the day and hour named in the resolution. At the time appointed, the board shall open the proposals and award the purchase of the bonds to the highest responsible bidder, or it may reject all bids.

**Source:** L. 11: p. 326, § 68. L. 21: p. 281, § 4. C.L. § 2187. CSA: C. 57, § 88. CRS 53: § 47-6-8. C.R.S. 1963: § 47-6-8.

**37-25-109. Liability for bonds and interest.** The bonds and the interest thereon shall be paid from annual assessments upon the real property within the drainage district, and said property shall be and remain liable to be assessed for such payments. Such bonds and coupons shall be receivable in payment of the assessments levied in payment of the interest and the redemption of the bonds.

**Source:** L. 11: p. 327, § 69. C.L. § 2188. L. 31: p. 326, § 1. CSA: C. 57, § 89. CRS 53: § 47-6-9. C.R.S. 1963: § 47-6-9.

ANNOTATION

**Water rights for irrigation are real property.** Comstock v. Olney Springs Drainage Dist., 97 Colo. 416, 50 P.2d 531 (1935).

**Bonds are secured by lien on irrigated land.** Considering all the pertinent provisions of articles 22 to 33 of this title and the purpose sought to be accomplished, it is evident that the

general assembly intended that the bonds should be secured by a lien upon irrigated land. It is inconceivable that investors would purchase the bonds if they were secured by a lien on only dry land. Comstock v. Olney Springs Drainage Dist., 97 Colo. 416, 50 P.2d 531 (1935).

**37-25-110. Confirmation of bonds.** Whether or not said bonds or any of them have been sold or disposed of, the board of directors of a drainage district may commence special proceedings in the district court of the county where the office of the drainage district is kept, in and by which the proceedings of said board of said district providing for and authorizing the issue and sale of the bonds of said district may be judicially examined, approved, and confirmed. The proceeding thereon shall be in conformity with the law regulating like proceedings for the examination, approval, and confirmation of the organization and bonds of irrigation districts.

**Source:** L. 11: p. 329, § 76. C.L. § 2193. CSA: C. 57, § 94. CRS 53: § 47-6-10. C.R.S. 1963: § 47-6-10.

**Cross references:** For confirmation proceedings of irrigation districts, see §§ 37-41-151 to 37-41-155.

ARTICLE 26

Refunding Bonds

37-26-101.	Refunding bonds may be issued.	37-26-111.	Assessment to pay bonds and interest.
37-26-102.	Refunding bonds issued - when.	37-26-112.	Collection and record of assessment.
37-26-103.	Elections.	37-26-113.	Assessments on a parity with general taxes.
37-26-104.	Maturity and form.	37-26-114.	Money applied proportionately - when.
37-26-105.	Mature serially.	37-26-115.	Matured bonds used for paying assessments.
37-26-106.	Refunding bonds exchanged - when.	37-26-116.	Construction of article.
37-26-107.	Consent of unknown bondholders.	37-26-117.	Manner of releasing lands from lien.
37-26-108.	Bondholders to offer to exchange bonds.	37-26-118.	Expenses not released.
37-26-109.	District to file verified return - decree.	37-26-119.	District may change classification.
37-26-110.	Bondholders deemed to have notice.		



**37-26-101. Refunding bonds may be issued.** The board of directors of any drainage district in this state has the power, under the conditions in this article, to issue negotiable coupon bonds to be denominated “refunding bonds” for the purpose of paying, redeeming, or compromising outstanding bonds of the district and any unpaid matured interest on such outstanding bonds, whether such outstanding bonds are due or not, or payable at the option of the district or by consent of the bondholders, and whether such bonds are outstanding or are issued on or after April 24, 1933. Such refunding bonds shall not exceed in amount the principal sum of the bonds outstanding and the unpaid matured interest thereon at the time of the issue of the refunding bonds. The rate of interest on such refunding bonds shall not exceed the rate on the bonds so refunded, and in no event shall interest exceed six percent per annum. Such refunding bonds may be issued and used to redeem or compromise all or any part of one or more issues of bonds outstanding at the time of refunding, together with unpaid matured interest thereon.

**Source:** L. 33: p. 450, § 1. CSA: C. 57, § 95. CRS 53: § 47-7-1. C.R.S. 1963: § 47-7-1.

#### ANNOTATION

**Law reviews.** For article, “Legal Classification of Special District Corporate Forms in Colorado”, see Den. L.J. 347 (1968).

**37-26-102. Refunding bonds issued - when.** Such refunding bonds shall be issued in lieu of the bonds and interest refunded; shall evidence the same indebtedness; shall be supported by the same liens, assessments, appraised benefits, and levies; and, except as to time of payments, amounts, and rates of interest, shall be payable therefrom in the same manner as the bonds refunded, but said refunding bonds shall not constitute a blanket indebtedness or lien on lands within such drainage district unless provided for on the face of the bonds.

**Source:** L. 33: p. 451, § 2. CSA: C. 57, § 96. CRS 53: § 47-7-2. C.R.S. 1963: § 47-7-2.

**37-26-103. Elections.** Whenever it is desired to issue refunding bonds, the board of directors of the district shall call a special election of the qualified voters of said district at which there shall be submitted the question of issuing refunding bonds, or the question may be submitted at a general election in the district. Said election shall be held and the result thereof determined and declared in all respects as nearly as possible in conformity with the provisions of sections 37-21-105 to 37-21-108, 37-21-112, and 37-21-115 to 37-21-124 governing the election of drainage district directors; but no informalities in conducting such election shall invalidate the same if the election has been otherwise fairly conducted. Notice of said election shall be published in three consecutive weekly issues of a newspaper of general circulation in the district, and a copy of said notice shall be posted for fifteen days in three public places in the district. Said notice shall specify the time and places of holding said election; the bonds and interest to be refunded; and the amount and maturity of and the rate of interest on the proposed refunding bonds. Every owner of land within said district who is a citizen of the United States or has declared his intention to become a citizen of the United States, and is a resident of the state of Colorado, shall be entitled to vote at such election in the precinct where he resides, or if a nonresident of the district, then in the precinct within which the greater portion of his land lies. At such election the ballots shall contain the words “Refunding Bonds - Yes” and “Refunding Bonds - No”, and the voter

shall place a cross mark (X) opposite the words expressing his choice. If a majority of the votes cast are "Refunding Bonds - Yes", bonds may be issued in accordance with the proposition submitted.

**Source:** L. 33: p. 451, § 3. CSA: C. 57, § 97. CRS 53: § 47-7-3. C.R.S. 1963: § 47-7-3.

**Cross references:** For publication of legal notices, see part 1 of article 70 of title 24.

**37-26-104. Maturity and form.** Whenever refunding bonds are authorized, the board of directors shall provide therefor by resolution designating the date, denomination, rate of interest, maturity, one or more places of payment within or without the state of Colorado, and the form of such bonds. Such bonds shall be executed by the president and attested by the secretary, countersigned by the district treasurer, and sealed with the seal of the district. The interest accruing on such bonds shall be evidenced by semiannual interest coupons bearing the original or facsimile signature of the president. The district treasurer shall make a record of all refunding bonds issued in a book to be kept in his office for that purpose.

**Source:** L. 33: p. 452, § 4. CSA: C. 57, § 98. CRS 53: § 47-7-4. C.R.S. 1963: § 47-7-4.

**37-26-105. Mature serially.** The refunding bonds shall mature serially, the first payment to be in not more than five years and the last payment in not more than thirty-five years from the date of the bonds; but each bond issued shall be redeemable at the option of the district five years prior to its maturity and on any interest-paying date thereafter. Interest on any bond called for payment shall cease thirty days after publication of a notice of call in a newspaper published or of general circulation in the district. Consistently with the denomination of the bonds issued, maturities shall be in substantially equal annual amounts of principal, or in such amounts as will require substantially equal annual assessments for principal and interest throughout the period, commencing not later than five years after the date of the bonds.

**Source:** L. 33: p. 453, § 5. CSA: C. 57, § 99. CRS 53: § 47-7-5. C.R.S. 1963: § 47-7-5.

**37-26-106. Refunding bonds exchanged - when.** The refunding bonds may be exchanged for the outstanding bonds and interest so refunded, or they may be sold, in which latter event, the proceeds shall be used solely for the purpose of paying the principal of and the interest on the bonds refunded, and for improvement of the district. In no event shall the principal amount of refunding bonds issued exceed the amount of outstanding bonds and matured interest coupons surrendered and canceled simultaneously with the issuance of refunding bonds. Any exchange or sale of refunding bonds shall be made in such manner as to cause no loss of interest to the district.

**Source:** L. 33: p. 453, § 6. CSA: C. 57, § 100. CRS 53: § 47-7-6. C.R.S. 1963: § 47-7-6.

**37-26-107. Consent of unknown bondholders.** If the board of directors of any drainage district issuing or intending to issue refunding bonds desires to obtain the constructive consent of unknown and nonconsenting holders of bonds or claims for interest thereon desired to be retired or refunded under this article, such board of directors, before selling or otherwise disposing of any such refunding bonds, shall declare by resolution its intention of selling or otherwise disposing of the same and shall cause such resolution to be entered on its minutes and shall cause notice of sale or other disposition to be given by publication thereof at least once a week for four consecutive weeks in three newspapers



published in the state of Colorado, one of which shall be a newspaper published in the city of Denver and one of which shall be a newspaper published in the county in which the office of the board of directors is situated.

**Source:** L. 33: p. 454, § 7. CSA: C. 57, § 101. CRS 53: § 47-7-7. C.R.S. 1963: § 47-7-7.

**37-26-108. Bondholders to offer to exchange bonds.** (1) Before authorizing the issuance of such refunding bonds, the board of directors, if it desires to obtain such constructive consent, shall require that the known holders, or their representatives, of not less than eighty percent of the total in amount of all of such bonds or unpaid interest which is to be retired or refunded shall submit to said board for its acceptance an offer to deliver and surrender up all such bonds or interest coupons in exchange for bonds or cash, not exceeding the maximum amount of the total of such bonds and unpaid interest, or to accept in full payment of all such outstanding bonds, interest, and interest coupons so held by any person, association, firm, or corporation a sum of money or refunding bonds representing the proportion which such total proposed refunding bond issue or cash bears to such total outstanding bonds and interest proposed to be refunded, satisfied, and discharged, based on the par value of such proposed refunding bonds or cash. Such creditors and owners of such bonds and interest of such district shall agree to absorb the loss between the amount of such total outstanding bonds and interest and the amount of refunding bonds, at par, or cash, and to receive such refunding bonds, or cash, in full payment, satisfaction and discharge of such outstanding bonds and interest. Such known creditors or their representatives shall agree to make such proper pro rata distribution of such refunding bonds or cash or the proceeds from the sale thereof or cash as shall be required to retire and discharge said total outstanding bonds and interest proposed to be refunded. Such offer shall be in writing and shall be irrevocable when once submitted to said board until after said board has the opportunity to authorize the issuance, sale, or delivery of refunding bonds to replace and discharge such outstanding bonds and interest on acceptance of such offer.

(2) Any litigation which is sought to or which will restrain or prevent said board from issuing and delivering such refunding bonds shall not subject said offer to revocation until after the same is concluded and such board has a reasonable time thereafter in which to issue, sell, or deliver such refunding bonds, and said offer shall be deemed accepted by said board upon such delivery. For the purpose of obtaining the constructive consent of the unknown holders of said bonds and interest, whether bonds or interest coupons, or interest on bonds, and of such holders of such bonds and interest due thereon, who have not given their consent in writing, said board of directors of said drainage district shall file in the district court of the county in which is located the office of said drainage district a petition in rem, duly verified by the oath of the president or secretary of said district, in which shall be set forth the plan theretofore adopted by such district for retiring or refunding such bonds and interest due thereon of the district proposed to be retired or refunded. Said petition shall further recite what percentage in amount, and which percentage shall not be less than eighty percent of the holders of said bonds, and interest thereon to be retired or refunded, have filed their written consent to said proposed plan, and shall further set forth what steps have been taken to obtain the consent of all nonconsenting holders of such bonds, or interest thereon to be retired or refunded. Upon the presentation of said petition to the judge of said district court, either in open court or in chambers, said judge shall authorize said district to publish and said district shall cause to be published, at least once in each of three newspapers published within the state of Colorado, to be by the court designated, one of which papers shall be published in the county in which the office of the board of directors is situated, and one which shall be a newspaper published in the city of Denver, a notice describing the substance of the terms of settlement under which the bonds or interest coupons of the district are to be surrendered, refunded, satisfied, compromised, exchanged, or discharged under the provisions of this article.

(3) Said notice shall contain a general description of the bonds and interest coupons to be refunded and retired, and the amount thereof, and also a general description of the refunding bonds to be issued and shall require all holders of such bonds or interest coupons



so to be retired and refunded to file in said matter of said petition in said district court their written dissent from, or objection to, said proposed plan of settlement in said notice described; and, if such dissent in writing shall not be filed in said court within ninety days from the date of the first publication of said notice, the owners and holders of such bonds or interest coupons failing to file such dissent or objection shall be deemed to have consented to said refunding, compromise, or settlement of said indebtedness under the terms and conditions set forth in said notice. After the expiration of ninety days from the date of the first publication of said notice, the holders of said bonds or interest coupons so failing to file their objections and protests with said court will be deemed to have consented to said refunding, compromise, or settlement of said indebtedness under the terms set forth in said notice; and such failure within said time to file such objections and protests with said court shall be the equivalent of the offer in writing signed by known consenting holders of such bonds or interest coupons.

**Source:** L. 33: p. 454, § 7. CSA: C. 57, § 102. CRS 53: § 47-7-8. C.R.S. 1963: § 47-7-8.

**Cross references:** For publication of legal notices, see part 1 of article 70 of title 24.

**37-26-109. District to file verified return - decree.** (1) After the expiration of ninety days from the date of the first publication of said notice, said district shall file in the proceeding in said district court its verified return of its acts under the order of the court theretofore made, attaching thereto affidavits of the printers or publishers of said newspapers of the publication of said notice in three newspapers.

(2) Thereupon said court shall forthwith hear said cause and shall enter a decree of court adjudging that all owners and holders of said bonds, or interest coupons to be retired or refunded by said plan and proceeding of the district, who have not within ninety days after the date of the first publication of said notice filed in said court their written dissent and objections to the proceedings have consented that their said bonds or interest coupons be retired or refunded under the proposed plan. In the decree the court shall direct the officers of said district to deposit with the Colorado water conservation board, as trustee for the persons entitled thereto, the pro rata part of the cash or refunding bonds which, under said settlement, belongs to the holders of said bonds, claims for interest, or interest coupons whose consent was so obtained by said court proceedings.

(3) Said decree shall further provide that, upon the payment of said money or bonds or interest coupons to the Colorado water conservation board as trustee, said bonds or interest coupons so held by said holders shall be deemed paid and no longer an obligation of said district and that, upon the surrender to the Colorado water conservation board of said bonds, together with the unpaid interest coupons belonging to same, the Colorado water conservation board shall pay on demand to said holders their pro rata part of the moneys or bonds so deposited with it as trustee and shall mark said bonds canceled and deliver same to the drainage district.

**Source:** L. 33: p. 457, § 7. CSA: C. 57, § 103. CRS 53: § 47-7-9. C.R.S. 1963: § 47-7-9. L. 91: (2) and (3) amended, p. 892, § 22, effective June 5.

**37-26-110. Bondholders deemed to have notice.** All holders of said bonds or interest coupons to be retired or refunded shall be deemed to have notice of all steps and proceedings had.

**Source:** L. 33: p. 458, § 7. CSA: C. 57, § 104. CRS 53: § 47-7-10. C.R.S. 1963: § 47-7-10.

**37-26-111. Assessment to pay bonds and interest.** The refunding bonds and interest thereon shall be paid from annual assessments levied upon the real property within the district, and such real property shall be and remain liable to be assessed for such payments.

Except when refunding bonds are issued for unpaid matured interest, no existing lien or liability created by an original issue of bonds shall be increased by issuing bonds to refund such original bonds. The board of directors of any district issuing refunding bonds shall take the same steps and adopt the same proceedings with respect to ordering and certifying such annual assessments, and county officers shall collect and enforce the same in the same manner as provided by law for the levy, certification, and collection of assessments for the payment of bonds refunded and interest thereon; except that amounts for principal and interest shall be ordered, certified, and collected separately.

**Source:** L. 33: p. 458, § 8. CSA: C. 57, § 105. CRS 53: § 47-7-11. C.R.S. 1963: § 47-7-11.

**37-26-112. Collection and record of assessment.** The county treasurer shall collect said assessments at the time of and simultaneously with the collection of general taxes, but the property owner may pay the general and school taxes separately from the drainage district assessments. The county treasurer shall keep a separate record of principal and interest payments. Assessments for interest shall not be construed to be part of the cost of construction or a charge against any benefits theretofore appraised.

**Source:** L. 33: p. 459, § 9. CSA: C. 57, § 106. CRS 53: § 47-7-12. C.R.S. 1963: § 47-7-12.

**Cross references:** For collection of taxes, see article 10 of title 39.

**37-26-113. Assessments on a parity with general taxes.** The lien of assessments to pay refunding bonds and the interest thereon shall be on a parity with the lien of general taxes, and no sale of property for the nonpayment of general taxes shall extinguish the lien of such assessments. Except as provided by this article, the lien of any assessment levied against appraised benefits or otherwise for the payment of an original issue of bonds and interest thereon shall continue and persist for the benefit of the owners of refunding bonds, which owners shall be subrogated to all the rights and remedies of the owners of bonds refunded; except that if there is a reduction in the amount of outstanding bonds there shall be a corresponding reduction in the amount of the lien.

**Source:** L. 33: p. 459, § 10. CSA: C. 57, § 107. CRS 53: § 47-7-13. C.R.S. 1963: § 47-7-13.

**37-26-114. Money applied proportionately - when.** In the event there shall not be sufficient funds to the credit of a district for the payment in full of an installment of principal or interest when due, the district treasurer shall apply the money in the respective funds in proportionate payments on all bonds or coupons then due, endorsing on the bonds or coupons a notation showing the payments made. After respective maturities, the district treasurer shall make disbursements whenever he has sufficient funds to pay five percent of the total principal or twenty-five percent of the total interest due at maturity.

**Source:** L. 33: p. 460, § 11. CSA: C. 57, § 108. CRS 53: § 47-7-14. C.R.S. 1963: § 47-7-14.

**37-26-115. Matured bonds used for paying assessments.** Refunding bonds of any maturity may be used at face value in paying assessments levied to pay the principal of refunding bonds, if bonds so used have all future due coupons thereto attached and no credit shall be allowed for such coupons. Interest coupons maturing in any year may be used at face value in paying interest assessments which become due and payable in that year.

**Source:** L. 33: p. 460, § 12. CSA: C. 57, § 109. CRS 53: § 47-7-15. C.R.S. 1963: § 47-7-15.



**37-26-116. Construction of article.** Nothing in this article shall be construed to prevent any financial assistance which any drainage district may secure by an agreement with the owners of its outstanding bonds or by any lawful means other than those specified in this article.

**Source:** L. 33: p. 460, § 13. CSA: C. 57, § 110. CRS 53: § 47-7-16. C.R.S. 1963: § 47-7-16.

**37-26-117. Manner of releasing lands from lien.** (1) Any tract of land or part thereof in any drainage district issuing refunding bonds may be released from the lien of assessments to pay such bonds in the following manner:

(a) (I) If the bonds to be refunded were issued upon the basis of an assessment for benefits pursuant to the provisions of sections 37-23-101 to 37-23-106, the proportionate share of the outstanding debt chargeable to the particular tract to be released shall be determined by the board of directors of the district on application by the landowner.

(II) In making its determination the board shall take into consideration the basis of assessment on the land in question, the total authorized outstanding debt refunded, the amount of land involved in relation to the total amount of land in the district subject to assessment, the unpaid assessments against the particular land, and all other matters necessary for a proper computation and shall add thereto ten percent of such amount. The board shall make and enter in its records a certificate of such determination, and a certified copy thereof shall be delivered to the district treasurer, who shall accept refunding bonds of any maturity at face value or cash, or both, in full payment of the final amount so determined. At the time of any such payment, the district treasurer shall issue a receipt which shall be filed in the office of the county assessor and may be recorded in the office of the county clerk and recorder of the county in which the land is situate. After any such payment, the particular land shall be forever released and discharged from the lien on the bonds evidencing the particular debt and all assessments levied or to be levied to pay the principal thereof and the interest thereafter due.

(b) If at or prior to the time of the issuance of the bonds to be refunded benefits were appraised pursuant to the provisions of sections 37-23-109 to 37-23-111, any particular tract of land or part thereof may be released upon payment of refunding bonds of any maturity at face value or cash, or both, in an amount equal to any unpaid interest then due plus the benefits appraised against the land, deducting principal amounts theretofore paid. The procedure for releasing land and the effect thereof shall be the same as prescribed in paragraph (a) of this subsection (1).

(c) (I) Any tract of land or part thereof may be released pursuant to a written agreement between the district and its bondholders, under which a landowner may pay an amount less than his proportionate share, if the same is determined under paragraph (a) of this subsection (1), or less than the benefits appraised against his land, deducting principal amounts theretofore paid, the same is determined under paragraph (b) of this subsection (1). Any such agreement may provide for a general revision, reduction, or cancellation of classifications, assessments, or appraised benefits, but there shall be no increase thereof without the written consent of the landowner affected thereby.

(II) Except as provided by any such written agreement, the procedure for releasing land and the effect thereof shall be the same as prescribed in paragraph (b) of this subsection (1). A certified copy of any such agreement shall be filed with the district treasurer and with the assessor of each county in which the district is located.

**Source:** L. 33: p. 460, § 14. CSA: C. 57, § 111. CRS 53: § 47-7-17. C.R.S. 1963: § 47-7-17.

**37-26-118. Expenses not released.** No release of land under section 37-26-117 shall relieve such land from paying its proportionate share of maintenance and operating expenses of the district.



**Source:** L. 33: p. 462, § 15. CSA: C. 57, § 112. CRS 53: § 47-7-18. C.R.S. 1963: § 47-7-18.

**37-26-119. District may change classification.** Any district intending to issue bonds pursuant to this article may revise, reduce, or cancel classifications of land, assessments, or assessments of or for benefits in substantially the same manner as provided by the laws existing at the time of the original classification or assessments; but no parcel of land shall ever be liable for the payment of an amount greater than the amount for which the land was liable under its original classification or assessment, and the total assessments levied shall not be less than the principal amount of refunding bonds to be issued. Thereafter the qualified voters of the district may vote refunding bonds based upon such reclassification or reassessment of or for benefits. Refunding bonds so authorized may be exchanged on a compromise basis for outstanding bonds and unpaid matured interest thereon, with such owners thereof as may be willing to make such exchange. The rate of interest on such refunding bonds shall not exceed the rate on the bonds refunded, and in no event shall such rate exceed six percent per annum. Refunding bonds issued in accordance with this section shall be secured only by their proportionate share of such new classifications or assessments, and that fact shall be set forth on the face of each refunding bond issued.

**Source:** L. 33: p. 463, § 16. CSA: C. 57, § 113. CRS 53: § 47-7-19. C.R.S. 1963: § 47-7-19.

## ARTICLE 27

### Inclusion of Lands in District

37-27-101. Inclusion of contiguous land. 37-27-102. Cities and towns included.

**37-27-101. Inclusion of contiguous land.** Upon petition of the owner of a tract of land and the payment of a sum equal to the past due assessments upon the same after a classification thereof upon a graduated scale by the board of directors as provided in section 37-23-101, so that the tract is upon an equal footing with other lands of the district, the board of directors may authorize the inclusion of any tract of land contiguous to the existing boundaries of said district and capable of being drained by said drainage system, and thereupon said lands shall become liable for all future assessments which may become due or are levied for drainage purposes within said drainage district, and the cost of any such proceeding for the inclusion of land shall be borne by the applicant.

**Source:** L. 11: p. 328, § 75. L. 13: p. 258, § 3. C.L. § 2190. CSA: C. 57, § 91. CRS 53: § 47-8-1. C.R.S. 1963: § 47-8-1.

## ANNOTATION

**Law reviews.** For article, "Legal Classification of Special District Corporate Forms in Colorado", see 45 Den. L.J. 347 (1968).

**37-27-102. Cities and towns included.** The lands within the boundaries of any city or town organized and existing under the general laws of this state or under article XX of the state constitution requiring drainage in whole or in part and susceptible of drainage by the drainage ditch, system, or works of any drainage district or proposed drainage district organized or proposed to be organized pursuant to the laws of the state of Colorado relating to the formation of drainage districts may be included within and made a part of any such drainage district upon the presentation to the board of directors of such district, or to the proper board of county commissioners, in case such district has not been organized, of a petition for such inclusion signed by a majority of the owners of such lands, whether residents or nonresidents of such city or town, as well as by the owners in the aggregate of

the majority of the total number of acres of such land to be included, exclusive of the land occupied by public streets and alleys, public parks, and any other lands owned by any municipality. Such city or town shall bear the expense of the drainage of all area included with the streets, alleys, public parks, or other lands owned by it. It is the duty of the city council or board of trustees of such city or town to annually certify the amount necessary to pay the drainage assessments as authorized by said drainage district to the taxing tribunal, with instructions to such taxing tribunal to make a levy against the taxable property within such city or town for such purpose as provided by law in other cases of special assessment. Any inclusion of the lands within any city or town shall be subject to all of the provisions and conditions of articles 20 to 30 of this title.

**Source:** L. 15: p. 292, § 1. C.L. § 2192. CSA: C. 57, § 93. CRS 53: § 47-8-2. C.R.S. 1963: § 47-8-2.

ARTICLE 28

Voluntary Districts

37-28-101.	Formation of voluntary dis- tricts.	37-28-102.	Method of organization.
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**37-28-101. Formation of voluntary districts.** Whenever the owners of lands which may require a combined system of drainage shall unanimously and mutually agree upon a system of drainage and the character of work necessary to be done to drain their lands and the amount of money each shall contribute towards said proposed works, they may reduce their agreement to writing specifying the boundary lines of said voluntary district and the lands therein, in one hundred sixty acre tracts or smaller tracts if necessary, giving the names of the owners of each tract of land specifying the work which they propose shall be done, the name of the drainage district, and also the names of three persons among their number who shall act as directors until the annual election, and they may agree upon any other lawful matter or thing which they may deem pertinent to the work proposed.

**Source:** L. 11: p. 329, § 77. C.L. § 2194. CSA: C. 57, § 114. CRS 53: § 47-9-1. C.R.S. 1963: § 47-9-1.

ANNOTATION

**Law reviews.** For article, “Legal Classification of Special District Corporate Forms in Colorado”, see 45 Den. L.J. 347 (1968).

**37-28-102. Method of organization.** (1) Said owners shall submit such agreement to the board of county commissioners of the county wherein the major part of the lands proposed to be included in such district may be situated and shall submit therewith a plat of the land giving a general description of the same, and the said board of county commissioners as soon thereafter as may be practicable shall carefully consider all questions involved and shall make a personal inspection of the land proposed to be included in said voluntary district or may employ some competent engineer or surveyor to examine and report to said board on the same, and the expense of such surveyor or engineer, including any expense that the board of county commissioners may incur in the examination of such project, shall be paid by the parties to such voluntary agreement, and the board of county commissioners may require a deposit to be made with the county treasurer of the county to protect the county against such expense.

(2) If such board of county commissioners is satisfied that the plan proposed is practicable and will be conducive to the public health, convenience, utility, or welfare and that the agreement submitted is fair and equitable in all respects considering the benefits which the respective lands will receive from such voluntary drainage system, then the board



of county commissioners shall enter an order upon their records approving such agreement and shall file the same with the accompanying plat in the office of the county clerk and recorder of said county. If such district extends into more than one county, a certified copy of the agreement and plat, together with a certified copy of the said order of the board of county commissioners, shall be filed by the parties to such agreement with the county clerk and recorder of such other counties, and thereupon the said drainage district shall be fully organized and established and have all the powers of drainage districts. The directors so named in said agreement shall then possess all the powers and proceed in like manner as before designated in the case of directors of districts organized by petition, and the agreement provided for in this article shall constitute a charter of authority of such voluntary district, and all lands subscribed to and voluntarily included in said district shall be considered as a unit or but one tract of land in the determination of any question or right or duty as between said voluntary district and any lands outside thereof, whether lying above, below, or adjacent to said district.

**Source:** L. 11: p. 329, § 78. C.L. § 2195. CSA: C. 57, § 115. CRS 53: § 47-9-2. C.R.S. 1963: § 47-9-2.

## ARTICLE 29

### Dissolution of Districts

- 37-29-101.      Dissolution - procedure.  
37-29-102.      Canvass of votes - order of  
                         dissolution.

**37-29-101. Dissolution - procedure.** Whenever a majority of the owners of land within a drainage district representing also a majority of the whole number of acres of land within the district petitions the board of directors to call a special election for the purpose of submitting to the qualified electors of said drainage district a proposition to dissolve such district, it is the duty of such board of directors, upon proof that all claims and bills of the district of every kind or nature whatsoever have been fully paid, to call an election for the purpose of submitting the question of the dissolution of such district to the qualified voters thereof and to cause a notice setting forth the object of such election to be posted in the office of the district and in six public places within such district and to be published in some newspaper of general circulation and published in each county in which any portion of said district may lie for a period of thirty days prior to said election. Said notice shall set forth the time and place for holding said election in each precinct within said district. It is the duty of the board of directors to prepare ballots to be used at such elections on which shall be written or printed the words "For dissolution" and "Against dissolution" and to appoint judges and clerks of elections as in other elections of the district. No district shall be dissolved which has claims, bills, bonds, or indebtedness outstanding or unpaid, and the attempted dissolution of such a district shall be null, void, and of no force and effect.

**Source:** L. 11: p. 330, § 79. C.L. § 2196. CSA: C. 57, § 116. CRS 53: § 47-10-1. C.R.S. 1963: § 47-10-1.

**Cross references:** For publication of legal notices, see part 1 of article 70 of title 24.

### ANNOTATION

**Law reviews.** For article, "Legal Classification of Special District Corporate Forms in Colorado", see 45 Den. L.J. 347 (1968).

**37-29-102. Canvass of votes - order of dissolution.** (1) The board of directors, upon the day specified in the notice of election as the day for the canvassing of the vote of such



election, shall proceed to canvass the votes cast at said election, and if it appears from such canvass that a majority of the ballots cast at said election were “For dissolution”, then the board of directors shall forthwith make and enter in their records an order declaring said district to be duly dissolved and disorganized, which order shall contain a complete copy of said petition for dissolution, including the signatures thereto attached and a duly authenticated copy of the published notice of such election, together with copies of the publisher’s affidavit of publication. The order shall state that an election was called and set for the ..... day of ....., A. D., ....., that on said day the election was held and that so many votes, stating the number, were cast for dissolution and so many votes were cast against dissolution.

(2) Said board of directors shall cause a copy of said order, duly certified by the president and attested by the secretary of the board of directors under the seal of the district, to be filed for record in the office of the county clerk and recorder of each county within which any portion of such district extends, and it is the duty of said county clerk and recorders to forthwith file and record said certified copies, whereupon said district shall be dissolved and shall cease to exist.

(3) If it appears upon the canvass of said vote so cast at the election that a majority of the votes were against dissolution, then the board of directors shall declare the proposition lost and shall thereupon enter an order to that effect in the records of the district but shall not file such order with the county clerk and recorders of the counties into which such district extends.

**Source:** L. 11: p. 331, § 80. C.L. § 2197. CSA: C. 57, § 117. CRS 53: § 47-10-2. C.R.S. 1963: § 47-10-2.

ARTICLE 30

Drainage of State Lands

37-30-101.	Definitions.	37-30-104.	Lessee advance assessments.
37-30-102.	Drainage for state lands.	37-30-105.	Assessments become part of permanent fund.
37-30-103.	Board or purchaser as free-holder.		

**37-30-101. Definitions.** As used in this article, unless the context otherwise requires:

(1) “Drainage assessment” means any tax, assessment, or charge levied on account of the construction, maintenance, and operation of the drainage project.

(2) “Drainage district” means an organization formed under the drainage district law of this state.

(3) “Drainage project” includes legally organized drainage districts and enterprises of persons, corporations, or associations having for their object the drainage of land.

(4) “Treasurer” means the proper officer of the drainage project authorized to receive payments of drainage assessments.

**Source:** L. 15: p. 384, § 1. C.L. § 2200. CSA: C. 57, § 119. CRS 53: § 47-11-1. C.R.S. 1963: § 47-11-1.

**37-30-102. Drainage for state lands.** For the purpose of securing drainage for state lands, the state board of land commissioners is authorized to enter into contracts with any person, corporation, association, or drainage district providing for such drainage and to petition all such lands into drainage districts at the time of or after the formation of such districts. The state board of land commissioners has full power to secure to such person, corporation, association, or drainage district so furnishing drainage of state lands the payment of the cost of drainage upon state lands. In no case shall the state board of land commissioners have any power to use any of the school funds, either principal or interest, or cash fund for any such purpose.

**Source:** L. 15: p. 384, § 2. C.L. § 2201. CSA: C. 57, § 120. CRS 53: § 47-11-2. C.R.S. 1963: § 47-11-2.

**37-30-103. Board or purchaser as freeholder.** If any such land is included in any drainage project, the state board of land commissioners shall be considered in all respects a freeholder so long as the lands remain unsold, but as soon as any of such land is sold, whether occurring before or after the time such land is included in such drainage project, the purchaser shall from the time of his purchase be considered as such freeholder and entitled to all the rights of the freeholder whether or not he has completed his payments to the state board of land commissioners. In no case shall any interest or title of the state to lands be made liable or subjected to any claim for any drainage assessment by reason of the including of any such state land in any drainage project.

**Source:** L. 15: p. 385, § 3. C.L. § 2202. CSA: C. 57, § 121. CRS 53: § 47-11-3. C.R.S. 1963: § 47-11-3.

**37-30-104. Lessee advance assessments.** When the state lands included in a drainage project are leased, the state board of land commissioners in its discretion may require the lessee to pay to the state board of land commissioners an amount annually, to cover in whole or in part the drainage assessments. The additional amount so paid shall be used to pay in whole or in part the drainage assessments.

**Source:** L. 15: p. 386, § 7. C.L. § 2206. CSA: C. 57, § 125. CRS 53: § 47-11-4. C.R.S. 1963: § 47-11-4.

**37-30-105. Assessments become part of permanent fund.** Whenever the state board of land commissioners shall pay drainage district assessments on land not under certificate of purchase, then, upon sale of such land, all money received therefor shall become a part of the permanent fund.

**Source:** L. 33: p. 449, § 5. CSA: C. 57, § 73. CRS 53: § 47-11-5. C.R.S. 1963: § 47-11-5.

**Cross references:** For disposition of proceeds from sale of state land, see § 36-1-134.

ANNOTATION

**Law reviews.** For article, “Eminent Domain in Colorado”, see 29 Dicta 313 (1952).

ARTICLE 31

Grand Valley Drainage District

37-31-101.	Public necessity of drainage district in Grand Valley.	37-31-109.	Regular election - directors elected.
37-31-102.	Grand Valley drainage district created - boundaries - inclusion of land.	37-31-110.	Election precincts.
37-31-103.	Successor to Grand Junction drainage district.	37-31-111.	Judges of election.
37-31-104.	Government of district.	37-31-112.	Appointment of substitute judges.
37-31-105.	General powers of district.	37-31-113.	Oath of judge of election.
37-31-106.	Nomination of directors.	37-31-114.	No registration of voters.
37-31-107.	General election laws apply - rules.	37-31-115.	Canvass of vote - certificate of election.
37-31-108.	Call and notice of election.	37-31-116.	In case of tie determination by lot.
		37-31-117.	Contest of election.

37-31-118.	Powers of board.	37-31-138.	General tax laws apply.
37-31-119.	Purposes of district - powers of board of directors.	37-31-139.	Certification of property values.
37-31-120.	Meetings of directors.	37-31-140.	District tax on tax list and included in warrant.
37-31-121.	Meetings public - quorum - records.	37-31-141.	Certification and levy of tax.
37-31-122.	Directors may sell bonds.	37-31-142.	Title to property - tax exemption.
37-31-123.	No director interested in contract.	37-31-143.	General tax exemptions apply.
37-31-124.	Directors may contract - with whom.	37-31-144.	Election on bonds.
37-31-125.	Vacancy on board of directors.	37-31-145.	Procedure of holding of election.
37-31-126.	Bonds of directors.	37-31-146.	Majority vote bonds issued. (Repealed)
37-31-127.	Right of entry to survey.	37-31-147.	Majority vote bonds issued - form of bonds and coupons.
37-31-128.	Treasurer of district.	37-31-148.	Authorization of different series of payments.
37-31-129.	Salary and expenses of officers.	37-31-149.	Contents of notice - sale.
37-31-130.	Location of office.	37-31-150.	Levy of tax for payment.
37-31-131.	Funds paid on warrant.	37-31-151.	Judicial confirmation of bonds.
37-31-132.	Warrants not paid draw interest.	37-31-152.	Right of eminent domain.
37-31-133.	Claims against district verified. (Repealed)	37-31-153.	Publication of notice for bids.
37-31-134.	Register of warrants - when issued. (Repealed)	37-31-154.	Contractor's bond - engineer to supervise.
37-31-135.	Treasurer to report.	37-31-155.	Use of existing drainage works.
37-31-136.	Treasurer's fees.	37-31-156.	Sale of district property.
37-31-137.	Property taxable and service fees chargeable by district.	37-31-157.	Proof of existence of district.

**37-31-101. Public necessity of drainage district in Grand Valley.** It is declared that the seepage conditions existing in the territory described in section 37-31-102 are peculiar to that particular territory and affect in a peculiar manner the people residing and owning property within said district. It is further declared that torrential storms affect the territory in said district in an adverse manner. It is further declared that the construction of a suitable drainage works for the protection of urban and rural property within said district will promote the health, comfort, safety, convenience, and welfare of all the people residing or owning property within said district and that the construction of said drainage works is therefore a governmental function conferring a general benefit upon all of the people residing or owning property within said district.

**Source:** L. 23: p. 283, § 1. CSA: C. 57, § 127. L. 37: p. 519, § 1. CRS 53: § 47-12-1. C.R.S. 1963: § 47-12-1. L. 83: Entire section amended, p. 1386, § 1, effective June 1.

**37-31-102. Grand Valley drainage district created - boundaries - inclusion of land.**

(1) There is hereby created the Grand Valley drainage district. Said district is declared to be a body corporate under the laws of Colorado and by said name may sue and defend any actions, suits, and proceedings. Said district, situate in the county of Mesa, Colorado, shall be comprised of the district now known as Grand Junction drainage district and is included within, and may expand beyond, the following boundaries: Beginning at a point bearing south twenty-nine degrees, thirty minutes west, five hundred fifty-five feet from the east quarter corner of section three, in township eleven south of range ninety-eight west of the sixth principal meridian, in Mesa county, Colorado, said point being identical with the headgate of that certain canal heretofore known and designated as canal No. 2 of the High Line Mutual Irrigation Company, as shown by the plat thereof of record in the office of the clerk and recorder of said Mesa county, Colorado, in ditch plat book three, at pages 14 and 15, said canal being now generally known and designated as the "stub ditch" of the Mesa county irrigation district, and running thence westerly along the northerly bank or line of



said canal No. 2, now known as the stub ditch, to the point where the northerly line or bank of said canal intersects the west line of the northwest quarter of section five, in township one south of range one east of the Ute principal meridian; thence south along said west line to the northerly bank or line of that certain canal heretofore known and designated as canal No. 1 of the High Line Mutual Irrigation Company, said canal being now commonly known and designated as the Price ditch, of the Palisade irrigation district; thence southwesterly along the northerly line or bank of said Price ditch to the intersection thereof with the "Indian Waste", in the southeast quarter of section six, in township one south of range one east of the Ute principal meridian; thence along the west side or line of said "Indian Waste" in a general southerly direction to the intersection of said west line or bank with the northerly line or bank of the Grand Valley canal in the northeast quarter of section seven in township one south of range one east of the Ute principal meridian; thence along the northerly line or bank of said Grand Valley canal of the Grand Valley Irrigation Company, including under the name "Grand Valley Canal" that part thereof sometimes known and designated as "The Grand Valley High Line" ditch or canal of the Grand Valley Irrigation Company, to the end of said Grand Valley canal, also sometimes known as "The High Line Canal" of the Grand Valley Irrigation Company, said point being the beginning of that certain ditch or canal of the Grand Valley Irrigation Company commonly known and designated as the Kiefer extension ditch or canal, in section thirty-six in township two north of range three west of the Ute principal meridian; thence along the right line or bank of said Kiefer extension ditch or canal to the end thereof, the same being at a point on the northerly bank of the Grand river, now the Colorado river, in section ten, in township one north of range three west of the Ute principal meridian; thence up and along the northerly line or bank of said Grand river, now the Colorado river, to the point of beginning; including all the territory embraced and included within the corporate limits of the town of Palisade. The boundaries of the district shall exist entirely within the boundaries of Mesa county.

(2) Upon petition of the owner of a tract of land located within Mesa county and capable of receiving benefit from the district, the board of directors may authorize the inclusion of said tract within the district. The petition shall describe the boundaries of said tract of land and shall be signed by the petitioner.

(3) Within thirty days following the filing of such petition, the board of directors shall fix a time and place for a public hearing and conduct said hearing on the petition, at which time all objections thereto shall be presented in writing. Failure of any person to object in writing shall be held as an assent on his part to the inclusion of such tract of land in the drainage district. If the petition is granted, the board shall make an order to that effect, and the property involved shall be included in the district. After inclusion of the tract within the district, the owner of said tract shall become liable for all future assessments within said drainage district.

**Source:** L. 23: p. 283, § 2. CSA: C. 57, § 128. L. 37: p. 520, § 2. CRS 53: § 47-12-2. C.R.S. 1963: § 47-12-2. L. 83: Entire section amended, p. 1386, § 2, June 1. L. 2007: (1) amended, p. 156, § 1, effective January 1, 2008.

**37-31-103. Successor to Grand Junction drainage district.** The Grand Valley drainage district shall be the successor to the Grand Junction drainage district and all rights, causes of action, records, uncollected revenues, taxes, and assessments, and all other property of the said Grand Junction drainage district shall accrue to and become the property of the Grand Valley drainage district, and all valid indebtedness and obligations of the Grand Junction drainage district, as well as the contract obligations with the United States, shall be assumed, paid, and carried out by the Grand Valley drainage district.

**Source:** L. 23: p. 286, § 4. CSA: C. 57, § 130. CRS 53: § 47-12-4. C.R.S. 1963: § 47-12-4. L. 2007: Entire section amended, p. 157, § 2, effective January 1, 2008.

**37-31-104. Government of district.** The district shall be managed and controlled by a board of three members known as the board of directors. The district shall be divided into

three divisions with the same boundaries as the three divisions of the Grand Valley drainage district. The voters of each division shall elect one director from electors residing in said division. In the case of the inclusion of any tract of land within the district pursuant to section 37-31-102 (2), at least thirty days prior to the next succeeding regular election, the board of directors shall issue an order redividing such district into three divisions, as nearly equal in size as may be practicable.

**Source:** L. 23: p. 287, § 5. CSA: C. 57, § 131. CRS 53: § 47-12-5. C.R.S. 1963: § 47-12-5. L. 83: Entire section amended, p. 1388, § 3, effective June 1. L. 2007: Entire section amended, p. 157, § 3, effective January 1, 2008.

**37-31-105. General powers of district.** (1) The board is vested with all powers necessary for the accomplishment of the purposes for which this district is organized and capable of being delegated by the general assembly of the state of Colorado, and no enumeration of particular powers granted shall be construed to impair any general grant of power contained in this article or to limit any such grant to a power of the same class as those so enumerated.

(2) The board may also participate in the formulation and implementation of nonpoint source water pollution control programs related to agricultural practices in order to implement programs required by or authorized under federal law and section 25-8-205 (5), C.R.S., enter into contracts and agreements, accept funds from any federal, state, or private source, receive grants or loans, participate in education and demonstration programs, construct, operate, maintain, or replace facilities, and perform such other activities and adopt such rules and policies as the board deems necessary or desirable in connection with nonpoint source water pollution control programs related to agricultural practices.

**Source:** L. 23: p. 293, § 29. CSA: C. 57, § 155. CRS 53: § 47-12-29. C.R.S. 1963: § 47-12-29. L. 98: Entire section amended, p. 121, § 1, effective March 24.

**37-31-106. Nomination of directors.** Nominations for membership on said board shall be made by petitions signed by not less than twenty-five qualified electors. Said petitions shall be signed and the residence address of the signers affixed thereon, and the petitions shall be sworn to in the same manner as provided by law for petitions for nominations for state and county officers. Said petitions shall be filed at least twenty days before the election with the secretary of the board, and a list of the nominees so selected shall be published by the board with its election notice.

**Source:** L. 23: p. 290, § 15. CSA: C. 57, § 141. CRS 53: § 47-12-15. L. 61: p. 367, § 2. C.R.S. 1963: § 47-12-15.

**37-31-107. General election laws apply - rules.** The board is empowered to make such rules and regulations for the holding of said elections as will carry out the purposes of this article and shall furnish all the necessary supplies and equipment for holding said elections, and the laws of the state of Colorado providing for general elections, not provided for in this article and not provided for by said board in said rules, shall govern.

**Source:** L. 23: p. 290, § 16. CSA: C. 57, § 142. CRS 53: § 47-12-16. C.R.S. 1963: § 47-12-16.

**Cross references:** For rule-making procedures, see article 4 of title 24; for general election laws, see title 1.

**37-31-108. Call and notice of election.** At least twenty days before any election, the board, by resolution, shall call such election, shall designate the polling places in each precinct, and shall name the judges of election. The board shall also give notice of the time



of such election by publication of a notice of election in some newspaper of general circulation published in said district by two insertions of said notice one week apart, the last insertion to be at least three days before the election.

**Source: L. 23:** p. 289, § 13. **CSA:** C. 57, § 139. **CRS 53:** § 47-12-13. **C.R.S. 1963:** § 47-12-13.

**Cross references:** For publication of legal notices, see part 1 of article 70 of title 24.

**37-31-109. Regular election - directors elected.** (1) The regular election in said district for the purpose of electing a board of directors shall be held on the first Tuesday after the first Monday of May of each year, beginning with 2008, at which time one director shall be elected for a term of three years. Any director whose term expires before May 2008 shall remain in office until the election of directors in May 2008. Persons residing within each division and qualified to vote at general county elections shall be entitled to vote for the director representing that division.

(2) Special elections may be held on the first Tuesday after the first Monday in February, May, October, or December, except for ballot issue elections, which may be held only in a state general election, the regular district election, on the first Tuesday in November of odd-numbered years, or by mail ballot.

**Source: L. 25:** p. 239, § 1. **CSA:** C. 57, § 133. **CRS 53:** § 47-12-7. **C.R.S. 1963:** § 47-12-7. **L. 2007:** Entire section amended, p. 157, § 4, effective January 1, 2008.

**37-31-110. Election precincts.** The board of directors shall establish a convenient number of election precincts within said district, define the boundaries thereof, and designate the polling places thereof.

**Source: L. 23:** p. 288, § 8. **CSA:** C. 57, § 134. **CRS 53:** § 47-12-8. **C.R.S. 1963:** § 47-12-8.

**37-31-111. Judges of election.** The board of directors shall appoint three judges of election in each precinct, each of whom shall be a qualified elector residing within said precinct.

**Source: L. 23:** p. 288, § 9. **CSA:** C. 57, § 135. **CRS 53:** § 47-12-9. **C.R.S. 1963:** § 47-12-9.

**37-31-112. Appointment of substitute judges.** If the board of directors fails to appoint judges or the appointees fail to attend at the hour designated for opening the polls on the morning of election, the voters of the precinct present at that hour may appoint one or more judges to take the places of those absent.

**Source: L. 23:** p. 288, § 10. **CSA:** C. 57, § 136. **CRS 53:** § 47-12-10. **C.R.S. 1963:** § 47-12-10.

**37-31-113. Oath of judge of election.** Any judge of election may administer and certify oaths required to be administered during the progress of an election. Before opening the polls each judge shall take and subscribe an oath faithfully to perform the duties imposed upon him by law. Any qualified elector of the precinct may administer and certify said oath.

**Source: L. 23:** p. 288, § 11. **CSA:** C. 57, § 137. **CRS 53:** § 47-12-11. **C.R.S. 1963:** § 47-12-11.



**37-31-114. No registration of voters.** No registration shall be required for any election, but no person shall be entitled to vote without the qualifications prescribed in section 37-31-109. Any judge of election or any voter at the polls has the right of challenging anyone seeking to vote at said election on the ground of said person's disqualification; and, before such challenged person is entitled to vote, he shall take an oath, to be administered by one of the judges of election, to the effect that he is a qualified elector to vote at said election. Anyone making a false oath at said election is guilty of perjury in the second degree. The polls for said election shall be open in each of the precincts from 7 a.m. to 7 p.m., and, after said polls are closed, the judges of said election shall canvass the votes and make returns thereof, one copy to be retained by said judges and the other certified to the board of directors.

**Source:** L. 23: p. 288, § 12. CSA: C. 57, § 138. CRS 53: § 47-12-12. L. 61: p. 367, § 1. C.R.S. 1963: § 47-12-12. L. 72: p. 559, § 16. L. 79: Entire section amended, p. 1351, § 1, effective July 1.

**Cross references:** For perjury in the second degree, see § 18-8-503.

**37-31-115. Canvass of vote - certificate of election.** Within seven days after said election, the board shall meet at the office of the drainage district for the purpose of canvassing the vote cast at said election, and shall issue a certificate of election to the candidate receiving the highest number of votes for said office, and shall file a statement of the result of said election in the clerk and recorder's office of Mesa county, Colorado. Within ten days after receiving a certificate of election, the director certified to be elected shall take and subscribe the official oath and file the same, together with his official bond, in the office of the county clerk and recorder of Mesa county, Colorado, and thereupon assume the duties of his office.

**Source:** L. 25: p. 240, § 1. CSA: C. 57, § 140. CRS 53: § 47-12-14. C.R.S. 1963: § 47-12-14.

**37-31-116. In case of tie determination by lot.** In the event that, at any regular or special election, two or more persons receive the same number of votes and one is elected thereby, the election shall be determined by lot under direction of the county judge of the said county of Mesa.

**Source:** L. 23: p. 291, § 18. CSA: C. 57, § 144. CRS 53: § 47-12-18. C.R.S. 1963: § 47-12-18.

**37-31-117. Contest of election.** The election of any person declared duly elected as a director at any election may be contested by any qualified elector residing within the division from which such director was chosen, upon the grounds provided for such contest for the election of county officers by the general law of the state, and any district judge has jurisdiction to hear and determine said contest, said contest to be conducted in the same manner, under the same rules and procedure, and with like effect as is provided by law for the contest of county officers.

**Source:** L. 23: p. 290, § 17. CSA: C. 57, § 143. CRS 53: § 47-12-17. C.R.S. 1963: § 47-12-17.

**Cross references:** For contest of election of county officers, see § 1-11-212.

**37-31-118. Powers of board.** The board of directors is authorized to take conveyances or assurances in the name of the drainage district for all property acquired by it, and to institute and maintain any actions, proceedings, and suits at law or in equity, necessary or

proper to fully carry out the provisions of this article or to enforce, maintain, protect, or preserve any rights, privileges, and immunities created by this article or acquired in pursuance thereof.

**Source:** L. 23: p. 293, § 28. CSA: C. 57, § 154. CRS 53: § 47-12-28. C.R.S. 1963: § 47-12-28.

**37-31-119. Purposes of district - powers of board of directors.** The purposes for which the district is organized are to construct, operate, and maintain systems of drains and drainage works sufficient to reclaim and protect all lands and property within said district from seepage, waste waters, and storm waters. The board of directors may cause surveys to be made for ditches and drainage works and rights-of-way for said district and may cause drainage ditches, works, rights-of-way, and other property necessary for said district to be laid out, constructed, purchased, and acquired by condemnation or otherwise.

**Source:** L. 23: p. 297, § 42. CSA: C. 57, § 168. CRS 53: § 47-12-42. L. 61: p. 368, § 3. C.R.S. 1963: § 47-12-42. L. 83: Entire section amended, p. 1388, § 4, effective June 1.

**37-31-120. Meetings of directors.** The board of directors shall hold its regular meetings in the office of the drainage district on the first Tuesday in January, April, July, and October and such special meetings as may be required for the proper transaction of business. Special meetings shall be called by the president of the board or by any director. All special meetings of the board shall be held at locations which are within the boundaries of the district or which are within the boundaries of any county in which the district is located, in whole or in part, or in any county so long as the meeting location does not exceed twenty miles from the district boundaries. The provisions of this section governing the location of meetings may be waived only if the proposed change of location of a meeting of the board appears on the agenda of a regular or special meeting of the board and if a resolution is adopted by the board stating the reason for which a meeting of the board is to be held in a location other than under the provisions of this section and further stating the date, time, and place of such meeting.

**Source:** L. 23: p. 292, § 24. CSA: C. 57, § 150. CRS 53: § 47-12-24. C.R.S. 1963: § 47-12-24. L. 90: Entire section amended, p. 1502, § 15, effective July 1.

**37-31-121. Meetings public - quorum - records.** Meetings of the board of directors shall be public, and two directors shall constitute a quorum for the transaction of business. On all questions requiring a vote there shall be a concurrence of at least two directors. The record of the board shall be open to the inspection of the public during business hours.

**Source:** L. 23: p. 292, § 25. CSA: C. 57, § 151. CRS 53: § 47-12-25. C.R.S. 1963: § 47-12-25.

**Cross references:** For provisions relating to open meetings, see part 4 of article 6 of title 24.

**37-31-122. Directors may sell bonds.** The board of directors may sell bonds from time to time in such quantities as may be necessary and most advantageous to raise money to carry out the objects and purposes of this article. Before making any sale, the board, by resolution, shall declare its intention to sell a specified amount of bonds, and the day, hour, and place of such sale, and shall cause such resolution to be entered in the minutes and notice of the sale to be given by the publication thereof in two consecutive insertions in a daily newspaper published in said district, and in any other newspaper, at the discretion of the board.

**Source:** L. 23: p. 301, § 50. CSA: C. 57, § 176. CRS 53: § 47-12-50. C.R.S. 1963: § 47-12-50.

**Cross references:** For publication of legal notices, see part 1 of article 70 of title 24.

**37-31-123. No director interested in contract.** No director or officer of the district shall be interested directly or indirectly, in any manner, in any contract awarded or to be awarded by the board or in the profits thereof, nor shall he or she receive any gratuity or bribe; and for any violation of this provision such officer commits a class 6 felony and shall be punished as provided in section 18-1.3-401, C.R.S., and such conviction shall work a forfeiture of his or her office.

**Source:** L. 23: p. 303, § 54. CSA: C. 57, § 180. CRS 53: § 47-12-54. C.R.S. 1963: § 47-12-54. L. 77: Entire section amended, p. 884, § 66, effective July 1, 1979. L. 89: Entire section amended, p. 850, § 135, effective July 1. L. 2002: Entire section amended, p. 1553, § 335, effective October 1.

**Editor's note:** The effective date for amendments made to this section by chapter 216, L. 77, was changed from July 1, 1978, to April 1, 1979, by chapter 1, First Extraordinary Session, L. 78, and was subsequently changed to July 1, 1979, by chapter 157, § 23, L. 79. See *People v. McKenna*, 199 Colo. 452, 611 P.2d 574 (1980).

**Cross references:** For the legislative declaration contained in the 2002 act amending this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

**37-31-124. Directors may contract - with whom.** The board of directors has the power, without advertising for bids, to enter into a contract upon such terms as the board may regard as equitable, with any individual, partnership, corporation, or governmental entity or an irrigation or drainage district organized under the laws of this state or with more than one or with all of said parties, for the making of any surveys, plans, and specifications for a proposed drainage ditch, system, or works, or for the construction in whole or in part of such drainage ditch, system, or works, or for the joint use of any drainage ditch or drainage facilities; but no such contract involving an expenditure by said district of an amount in excess of twenty-five percent of the district's budget shall become effective and binding unless the question of making such contract has been submitted to and authorized at a general or special election of the qualified electors of the district.

**Source:** L. 23: p. 304, § 56. CSA: C. 57, § 182. CRS 53: § 47-12-56. C.R.S. 1963: § 47-12-56. L. 79: Entire section amended, p. 1351, § 2, effective July 1. L. 83: Entire section amended, p. 1388, § 5, effective June 1.

**37-31-125. Vacancy on board of directors.** In case of a vacancy in the board of directors by failure of any person named or elected to the office to qualify, or by death, removal, or inability from any cause to properly discharge the duties of a director, the board of county commissioners of Mesa county, Colorado, shall appoint a director who shall hold his office until the next regular election in said district and until his successor is elected and qualified.

**Source:** L. 23: p. 291, § 19. CSA: C. 57, § 145. CRS 53: § 47-12-19. C.R.S. 1963: § 47-12-19.

**37-31-126. Bonds of directors.** Each director shall execute a bond in the penal sum of two thousand dollars, with sureties approved by the county judge of Mesa county, Colorado, and file the same in the office of the county clerk and recorder of said county. Said bonds shall be in the form prescribed by law for county officers making the drainage district obligee therein.

**Source:** L. 23: p. 287, § 6. CSA: C. 57, § 132. CRS 53: § 47-12-6. C.R.S. 1963: § 47-12-6.



**37-31-127. Right of entry to survey.** The directors, agents, and employees of the drainage district have the right to enter upon any land in the district to make surveys and to locate drainage ditches and laterals.

**Source:** L. 23: p. 292, § 26. CSA: C. 57, § 152. CRS 53: § 47-12-26. C.R.S. 1963: § 47-12-26.

**37-31-128. Treasurer of district.** The board of directors shall choose one of its members to serve as treasurer of the board and may choose one of its members to serve as secretary of the board. The secretary and treasurer may be one person, and if such is the case, he shall be a member of the board. The treasurer shall execute a bond in a sum to be determined by the board of directors, with a corporate surety authorized and licensed to do business in this state as surety, and shall file the same in the office of the county clerk and recorder of Mesa county.

**Source:** L. 23: p. 291, § 20. CSA: C. 57, § 146. CRS 53: § 47-12-20. C.R.S. 1963: § 47-12-20. L. 79: Entire section R&RE, p. 1352, § 3, effective July 1.

**37-31-129. Salary and expenses of officers.** Each director shall receive as per diem compensation for his or her services a sum not in excess of one hundred dollars per day, but not to exceed one thousand six hundred dollars per annum, as fixed by the board, together with actual and necessary expenses incurred in the performance of his or her duties. No director shall receive any compensation as an officer, engineer, attorney, employee, or other agent of the district. Nothing contained in this article shall be construed as preventing the board from authorizing the reimbursement of any director for expenses incurred and appertaining to the activities of the district. The salary of the secretary shall be fixed by resolution of the board of directors.

**Source:** L. 23: p. 291, § 21. CSA: C. 57, § 147. L. 51: p. 356, § 1. CRS 53: § 47-12-21. C.R.S. 1963: § 47-12-21. L. 73: p. 565, § 2. L. 79: Entire section amended, p. 1352, § 4, effective July 1. L. 98: Entire section amended, p. 121, § 2, effective March 24. L. 2007: Entire section amended, p. 158, § 5, effective January 1, 2008.

**37-31-130. Location of office.** The office of the drainage district shall be located in the county of Mesa, at a place to be determined by the board of directors of the drainage district. The board of directors shall elect a president from the members of the board, appoint a secretary who may or may not be a director, and adopt a seal.

**Source:** L. 23: p. 292, § 22. CSA: C. 57, § 148. CRS 53: § 47-12-22. C.R.S. 1963: § 47-12-22.

**37-31-131. Funds paid on warrant.** The treasurer of the drainage district shall pay out of the funds of the district only upon warrants ordered by the board of directors of the drainage district, signed by its president and attested by its secretary, under the seal of the drainage district.

**Source:** L. 23: p. 293, § 30. CSA: C. 57, § 156. CRS 53: § 47-12-30. C.R.S. 1963: § 47-12-30.

**37-31-132. Warrants not paid draw interest.** When any warrants of the drainage district are presented to the treasurer and there are no funds in his hands to pay the same, he shall stamp the same in the same manner as ordinary county warrants are stamped, and said warrants shall draw interest at the rate of six percent per annum from the date of their presentation until paid.

**Source:** L. 23: p. 294, § 31. **CSA:** C. 57, § 157. **CRS 53:** § 47-12-31. **C.R.S. 1963:** § 47-12-31.

#### ANNOTATION

**Law reviews.** For article, "Collecting Pre- and Post-Judgment Interest in Colorado: A Primer", see 15 Colo. Law. 753, (1986). For

article, "An Update of Appendices from Collecting Pre- and Post-Judgment Interest in Colorado", see 15 Colo. Law. 990 (1986).

#### **37-31-133. Claims against district verified. (Repealed)**

**Source:** L. 23: p. 294, § 32. **CSA:** C. 57, § 158. **CRS 53:** § 47-12-32. **C.R.S. 1963:** § 47-12-32. **L. 75:** Entire section amended, p. 223, § 78, effective July 16. **L. 79:** Entire section repealed, p. 1352, § 5, effective July 1.

#### **37-31-134. Register of warrants - when issued. (Repealed)**

**Source:** L. 23: p. 294, § 33. **CSA:** C. 57, § 159. **CRS 53:** § 47-12-33. **C.R.S. 1963:** § 47-12-33. **L. 79:** Entire section repealed, p. 1352, § 5, effective July 1.

**37-31-135. Treasurer to report.** At each regular meeting of the board of directors of the drainage district and at such other times as may be required by the board, the treasurer shall report in writing the amount of money on hand, the amount received since his last report, and the amount paid out, with a list of warrants presented since the last report. Said report shall be sworn to and filed with the secretary of the board of directors.

**Source:** L. 23: p. 295, § 34. **CSA:** C. 57, § 160. **CRS 53:** § 47-12-34. **C.R.S. 1963:** § 47-12-34.

**37-31-136. Treasurer's fees.** The county treasurer of Mesa county, Colorado, shall charge and receive for duties required of him to be performed and for handling the taxes of said district the same fees and commissions as are paid to him under the laws of Colorado upon school taxes in counties of the first class.

**Source:** L. 23: p. 296, § 41. **CSA:** C. 57, § 167. **CRS 53:** § 47-12-41. **C.R.S. 1963:** § 47-12-41.

**Cross references:** For fees of county treasurer, see § 30-1-102.

**37-31-137. Property taxable and service fees chargeable by district.** (1) In order to carry out the purposes of the district and the provisions of this article, the board of directors has the following powers:

(a) Within the limits of the Grand Valley drainage district, to levy taxes of the same kinds and classes upon the taxable property, real, personal, or mixed, which is subject to taxation for state and county purposes in accordance with the laws of this state;

(b) To designate specially benefited areas within the district as improvement districts and to levy, collect, and cause to be collected assessments fixed against real property in any such improvement district within the district;

(c) To fix and, from time to time, increase or decrease and collect and cause to be collected rates, fees, and other service charges pertaining to the facilities of the district and to pledge revenues derived from such service charges for the payment of district securities. The board of directors may enforce the collection of such revenues by civil action or by any other means provided by law. Service charges may include, without limitation, minimum charges and charges for availability of the facilities or services relating to the facilities of the district. Such service charges may be charged to and collected in advance or otherwise

by the district at any time or from time to time from any person owning real property within the district or from any occupancy of such property which directly or indirectly is, or has been, or will be connected with the district drainage system. Such service charges, as nearly as the district deems practicable and equitable, shall be reasonable and uniform for the same type, class, and amount of use. Reasonable penalties may be fixed for any delinquencies, including, without limitation, interest on delinquent service charges from any date due at a rate of not more than one percent per month, or fraction thereof, reasonable attorney fees, and other costs of collection. The district may prescribe and, when necessary, revise a schedule of such service charges.

**Source:** L. 23: p. 295, § 35. CSA: C. 57, § 161. CRS 53: § 47-12-35. C.R.S. 1963: § 47-12-35. L. 83: Entire section R&RE, p. 1389, § 6, effective June 1. L. 2007: (1)(a) amended, p. 158, § 6, effective January 1, 2008.

**37-31-138. General tax laws apply.** The laws of this state for the collection of the general taxes, including the laws for the sale of property for taxes and the redemption of the same, shall apply and have full force and effect for the purposes of this article.

**Source:** L. 23: p. 296, § 38. CSA: C. 57, § 164. CRS 53: § 47-12-38. C.R.S. 1963: § 47-12-38.

**Cross references:** For collection of taxes, tax sales, and redemption, see articles 10, 11, and 12 of title 39.

**37-31-139. Certification of property values.** It is the duty of the county assessor of Mesa county, Colorado, in making his return each year, to designate the property situated within the limits of the said district and to certify to the board of directors of the said drainage district the total valuation for assessment of all taxable property within the district.

**Source:** L. 23: p. 295, § 36. CSA: C. 57, § 162. CRS 53: § 47-12-36. C.R.S. 1963: § 47-12-36.

**37-31-140. District tax on tax list and included in warrant.** It is the duty of the county assessor of Mesa county, Colorado, as soon as the assessment roll is ready in each year for the extension of the taxes, to extend the same upon the tax list of the current year in a separate column properly headed in the same manner as other taxes are extended, carrying said district tax into the general total of all taxes for the year, and he shall include the said district taxes in his general warrant to the county treasurer for collection.

**Source:** L. 23: p. 295, § 37. CSA: C. 57, § 163. CRS 53: § 47-12-37. C.R.S. 1963: § 47-12-37.

**37-31-141. Certification and levy of tax.** The board of directors of the Grand Valley drainage district shall, in accordance with the schedule prescribed by section 39-5-128, C.R.S., certify to the board of county commissioners a statement showing the aggregate amount which, in the judgment of said drainage board, is necessary to raise from the taxable property of said district to create a fund for any of the purposes of said district. It is the duty of the board of county commissioners to levy, at the same time that other taxes are levied, such rate as will produce the aggregate amount so certified.

**Source:** L. 23: p. 296, § 39. CSA: C. 57, § 165. CRS 53: § 47-12-39. C.R.S. 1963: § 47-12-39. L. 87: Entire section amended, p. 1408, § 8, effective April 22. L. 2007: Entire section amended, p. 158, § 7, effective January 1, 2008.

**37-31-142. Title to property - tax exemption.** The title to property acquired under the provisions of this article shall vest in such drainage district in its corporate name. Said



property shall be held by such district in trust for and is dedicated and set apart for the uses and purposes set forth in this article and shall be exempt from taxation, and the board of directors is authorized to hold, use and acquire, manage, occupy, and possess said property.

**Source:** L. 23: p. 293, § 27. CSA: C. 57, § 153. CRS 53: § 47-12-27. C.R.S. 1963: § 47-12-27.

**37-31-143. General tax exemptions apply.** Property exempt under the constitution and laws of Colorado from the payment of taxes shall be exempt from the payment of taxes in the Grand Valley drainage district.

**Source:** L. 23: p. 296, § 40. CSA: C. 57, § 166. CRS 53: § 47-12-40. C.R.S. 1963: § 47-12-40. L. 2007: Entire section amended, p. 158, § 8, effective January 1, 2008.

**Cross references:** For property tax exemptions, see article 3 of title 39.

**37-31-144. Election on bonds.** For the purpose of constructing a drainage system and necessary works for the drainage district and acquiring the necessary property and rights-of-way therefor, of paying the first year's interest on the bonds authorized in this article, and of otherwise carrying out the provisions of this article, the board of directors of the drainage district may estimate and determine the amount of money necessary to be raised for such purposes and is empowered to call a special election, at which election shall be submitted to the qualified taxpaying electors of the drainage district the question of whether or not the bonds of said district shall be issued in the amount so determined.

**Source:** L. 23: p. 298, § 45. CSA: C. 57, § 171. CRS 53: § 47-12-45. C.R.S. 1963: § 47-12-45.

**37-31-145. Procedure of holding of election.** A notice of such election shall be given as provided in this article. The notice shall specify the time of holding the election and the amount of bonds proposed to be issued. The election shall be held and the results determined and declared as nearly as possible in conformity with the provisions of this article governing the election of directors. No informalities in conducting such election shall invalidate the same if the election has been otherwise fairly conducted. At such election the ballots shall contain the words "Bonds - Yes" or "Bonds - No".

**Source:** L. 23: p. 299, § 46. CSA: C. 57, § 172. CRS 53: § 47-12-46. C.R.S. 1963: § 47-12-46.

**37-31-146. Majority vote bonds issued. (Repealed)**

**Source:** L. 23: p. 299, § 47. CSA: C. 57, § 173. CRS 53: § 47-12-47. C.R.S. 1963: § 47-12-47. L. 98: Entire section repealed, p. 122, § 3, effective March 24.

**37-31-147. Majority vote bonds issued - form of bonds and coupons.** If the majority of the votes cast is "Bonds - Yes", the board of directors shall issue negotiable coupon bonds of the district. Bonds shall bear interest at a rate or rates such that the net effective interest rate of the issue of bonds does not exceed the maximum net effective interest rate authorized, payable semiannually, and shall be due and payable serially, either annually or semiannually, commencing not later than three years and extending not more than twenty years from date. The form and terms of said bonds, including provisions for their payment and redemption, shall be determined by the board. If the board so determines, such bonds may be redeemable prior to maturity upon payment of a premium, not exceeding three percent of the principal thereof. Said bonds shall be executed in the name of and on behalf of the district and signed by the president with the seal of the district affixed thereto and

attested by the secretary. Said bonds shall be in such denominations as the board shall determine, and the bonds and coupons thereto attached shall be payable to bearer. Interest coupons shall bear the original or facsimile signature of the president.

**Source:** L. 23: p. 300, § 48. CSA: C. 57, § 74. CRS 53: § 47-12-48. C.R.S. 1963: § 47-12-48. L. 98: Entire section amended, p. 122, § 4, effective March 24.

**37-31-148. Authorization of different series of payments.** The drainage district may by a majority vote of the legal electors of said district provide for the issuance of bonds that will mature in any number of years not to exceed forty and arrange for the payment thereof in series.

**Source:** L. 23: p. 301, § 49. CSA: C. 57, § 175. CRS 53: § 47-12-49. C.R.S. 1963: § 47-12-49.

**37-31-149. Contents of notice - sale.** The notice shall state that sealed proposals will be received by the board of directors at the office of the drainage district for the purchase of the bonds until the day and hour named in the resolution. At the time appointed, the board shall open the proposals and award the purchase of the bonds to the highest responsible bidder or may reject all bids; thereafter, if all bids are rejected, the board may readvertise or sell said bonds at private sale.

**Source:** L. 23: p. 301, § 51. CSA: C. 57, § 177. CRS 53: § 47-12-51. C.R.S. 1963: § 47-12-51.

**37-31-150. Levy of tax for payment.** For the half-yearly interest accruing on such bonds actually issued and delivered, the board of directors of said district shall levy annually a sufficient tax to fully discharge such interest, and, for the ultimate redemption of such bonds, they shall levy annually such tax upon all the taxable property of such district as will create a yearly fund sufficient to pay the bonds maturing in such year. All taxes for interest on and for the redemption of such bonds shall be paid in cash only and shall be kept by the district treasurer as a special fund to be used in payment of interest on, and for the payment of, such bonds annually, and such tax shall be levied and collected as other taxes. If the board of directors of the district fails to levy and certify such taxes to the board of county commissioners of Mesa county, it nevertheless is the duty of such board of county commissioners to levy such taxes.

**Source:** L. 23: p. 301, § 52. CSA: C. 57, § 178. CRS 53: § 47-12-52. C.R.S. 1963: § 47-12-52.

**37-31-151. Judicial confirmation of bonds.** The board of directors of the drainage district may commence special proceedings in the district court of Mesa county, Colorado, in and by which the proceedings of said board in said district, providing for and authorizing the issue and sale of the bonds of said district, whether said bonds have or have not been sold or disposed of, may be judicially examined, approved, and confirmed, and the proceedings shall be in conformity with the law regulating like proceedings for the examination, approval, and confirmation of the organization and bonds of irrigation districts.

**Source:** L. 23: p. 305, § 59. CSA: C. 57, § 185. CRS 53: § 47-12-59. C.R.S. 1963: § 47-12-59.

**Cross references:** For confirmation proceedings of irrigation districts, see §§ 37-41-151 to 37-41-155.

**37-31-152. Right of eminent domain.** The board of directors has the power to construct the said works across any watercourse, street, avenue, highway, railway, canal, or ditch which the route of such drainage system or any branch thereof intersects or crosses. If any railroad company or the owners and controllers of said property, thing, and franchise to be crossed or the owner of land necessary for said drainage district and the board of directors cannot agree upon the amount to be paid therefor, the same shall be ascertained and determined in all respects as is provided by law in respect to the taking of land for public uses by the exercise of the right of eminent domain, the right to the exercise of which is conferred on said drainage district. Such right of eminent domain shall be exercised in the manner prescribed by article 1 of title 38, C.R.S., provided a juror in such proceeding shall not be disqualified by reason of being a resident or taxpayer within said district.

**Source:** L. 23: p. 302, § 53. CSA: C. 57, § 179. CRS 53: § 47-12-53. C.R.S. 1963: § 47-12-53.

**37-31-153. Publication of notice for bids.** After adopting a plan for a drainage system, the board of directors may give notice by publication in a newspaper published within said district, in two consecutive publications of said newspaper, and in such other newspapers as may be deemed advisable, calling for bids for the construction of said work or any portion thereof; if less than the whole, then the portion of said system to be constructed shall be described in the notice. The notice shall set forth where the plans and specifications may be seen and that sealed proposals will be received at the office of the drainage district and a contract let to the lowest responsible bidder, giving the time and place for opening the proposals, which, at said time and place, shall be opened in public. The board of directors may enter into a contract, subject to the provisions of section 37-31-119, with the lowest responsible bidder for the construction of the whole or any portion of the work mentioned in the notice, or may reject all bids and readvertise for proposals, or may proceed to construct the work under the supervision of the board of directors.

**Source:** L. 23: p. 297, § 43. CSA: C. 57, § 169. CRS 53: § 47-12-43. C.R.S. 1963: § 47-12-43.

**37-31-154. Contractor's bond - engineer to supervise.** The person to whom the contract may be awarded shall execute a bond in the penal sum of not less than twenty percent of the contract price, with surety to be approved by the board of directors, payable to the drainage district and conditioned upon the faithful performance of the contract. All work shall be done under the direction and to the satisfaction of the engineer employed by the drainage district and subject to approval by the board of directors.

**Source:** L. 23: p. 298, § 44. CSA: C. 57, § 170. CRS 53: § 47-12-44. C.R.S. 1963: § 47-12-44.

**37-31-155. Use of existing drainage works.** If, after adopting plans for the drainage of the district, it is found that any ditch or drainage work has been constructed in whole or in part conforming with the general plan of drainage for the district, the board may contract for the use and control of such drainage ditch or work, which use and control may be exclusive in said district, or it may be in conjunction with those owning or controlling such ditch or drainage work.

**Source:** L. 23: p. 304, § 58. CSA: C. 57, § 184. CRS 53: § 47-12-58. C.R.S. 1963: § 47-12-58.

**Cross references:** For publication of legal notices, see part 1 of article 70 of title 24.



**37-31-156. Sale of district property.** The board of directors of said drainage district has the right to sell and transfer by proper conveyance any real estate or personal property belonging to said district when in the opinion of said board such property is no longer needed by the said district.

**Source:** L. 23: p. 304, § 57. CSA: C. 57, § 183. CRS 53: § 47-12-57. C.R.S. 1963: § 47-12-57.

**37-31-157. Proof of existence of district.** In all actions, suits, and judicial proceedings in any court in this state, the court shall take judicial notice of the organization and existence of the district from and after the filing for record in the office of the county clerk and recorder of Mesa county, Colorado, of a certified copy of the order of the board of directors of said district made at the time of the organization of the board. A certified copy of such order shall be prima facie evidence in all actions, suits, and proceedings in any court in this state of the regular and legal formation or organization of said district, and, if the formation or organization of said district has not been questioned by proceedings in quo warranto instituted in the district court of Mesa county, Colorado, within sixty days after the date of filing of such order, it shall be conclusive evidence of its due and lawful formation and organization. The said order shall state that no sufficient remonstrance was filed as in this article provided and that the Grand Valley drainage district was organized.

**Source:** L. 23: p. 303, § 55. CSA: C. 57, § 181. CRS 53: § 47-12-55. C.R.S. 1963: § 47-12-55. L. 2007: Entire section amended, p. 159, § 9, effective January 1, 2008.

ARTICLE 32

Bankruptcy of Districts

37-32-101.	Legislative declaration.	37-32-103.	Directors to adopt resolution.
37-32-102.	Irrigation or drainage districts authorized to file petition and carry out plan of composition.	37-32-104.	Issuance of new bonds.
		37-32-105.	Districts may cancel taxes or assessments.
		37-32-106.	Powers not limited by article.

**37-32-101. Legislative declaration.** The general assembly declares that this article is necessary by reason of general economic conditions now prevailing in the agricultural sections of this state. Said conditions make it impossible for the owners of land in many such districts to pay the general and special taxes and assessments levied against their property. As a result thereof the delinquencies seriously affect the ability of counties and other governmental agencies in which such districts are located to obtain the revenue necessary to conduct governmental functions. The relief afforded to such districts by this article is urgently necessary in order to permit the performance of local governmental functions of the state in those sections thereof in which such districts are located.

**Source:** L. 39: p. 446, § 7. CSA: C. 57, § 201. CRS 53: § 47-13-6. C.R.S. 1963: § 47-13-6.

**37-32-102. Irrigation or drainage districts authorized to file petition and carry out plan of composition.** Any irrigation or drainage district organized under the laws of the state of Colorado is authorized to take advantage of the provisions of an act of the congress of the United States entitled “An Act to establish a uniform system of bankruptcy throughout the United States.”, approved July 1, 1898, and all acts amendatory thereof or supplementary thereto. Any such district is hereby specifically authorized to file the petition mentioned in chapter 9 of the federal bankruptcy code of 1978 (Title 11 of the United States Code). Any such district is authorized to take any necessary requisite or proper action to

carry out the plan of composition filed with said petition, or any modification of such plan thereafter accepted in writing by such district, if such original or modified plan is also approved by the United States district court having jurisdiction of the matter.

**Source:** L. 39: p. 445, § 1. CSA: C. 57, § 195. CRS 53: § 47-13-1. C.R.S. 1963: § 47-13-1. L. 80: Entire section amended, p. 785, § 13, effective June 5.

**37-32-103. Directors to adopt resolution.** Before the filing of such petition, the board of directors of such district shall adopt a resolution authorizing the filing thereof.

**Source:** L. 39: p. 445, § 2. CSA: C. 57, § 196. CRS 53: § 47-13-2. C.R.S. 1963: § 47-13-2.

**37-32-104. Issuance of new bonds.** (1) If the plan of composition approved by the United States district court provides for the issuance of new bonds of such district and deposit thereof with such court, or such agency as it may appoint for the purpose, for the delivery of such new bonds to the creditors of the district in exchange for outstanding evidences of indebtedness of the district, such new bonds may be issued:

- (a) In the case of an irrigation district, under the provisions of sections 37-43-144 to 37-43-155, or under any other law; and
- (b) In the case of a drainage district, either:
  - (I) In the manner and with the rights of enforcement and privileges of payment provided for by article 25 of this title, insofar as applicable;
  - (II) Under the provisions of article 26 of this title, insofar as applicable; or
  - (III) Under any other law adopted after March 20, 1939.

**Source:** L. 39: p. 445, § 3. CSA: C. 57, § 197. CRS 53: § 47-13-3. C.R.S. 1963: § 47-13-3.

**37-32-105. Districts may cancel taxes or assessments.** In carrying out any such plan of composition of its indebtedness, any such district has power to cancel or reduce any taxes or assessments theretofore levied or made by said district for the purpose of raising money to pay the principal of or interest upon bonds or warrants sought to be refunded by such plan, upon any real property in such district, and to cancel or reduce any interest, penalties, or costs that may have accrued by reason of any delinquency in the payment of such taxes or assessments.

**Source:** L. 39: p. 446, § 4. CSA: C. 57, § 198. CRS 53: § 47-13-4. C.R.S. 1963: § 47-13-4.

**37-32-106. Powers not limited by article.** The enumeration of powers in this article shall not exclude powers not mentioned in this article which may be necessary for, or incidental to, the accomplishment of the purposes of this article and the carrying out of such plan of composition.

**Source:** L. 39: p. 446, § 5. CSA: C. 57, § 199. CRS 53: § 47-13-5. C.R.S. 1963: § 47-13-5.

## ARTICLE 33

### Marsh Land

- |            |                          |            |                             |
|------------|--------------------------|------------|-----------------------------|
| 37-33-101. | Draining marsh lands.    | 37-33-104. | May employ engineer - hear- |
| 37-33-102. | Lists of lands affected. |            | ing.                        |
| 37-33-103. | Bond.                    | 37-33-105. | Method of hearing.          |

37-33-106.	When improvement not feasible.	37-33-108.	Determination of cost - assessment.
37-33-107.	Majority to control.	37-33-109.	Irrigation district laws apply.

**37-33-101. Draining marsh lands.** Whenever any person or corporation desires to construct, enlarge, or extend a drainage ditch or drain for the purpose of draining and reclaiming seeped or marshy land included within any irrigation district in this state, it shall file with the board of directors of such irrigation district in which such improvements are to be located a petition signed by one or more of the landowners who own the major portion of the land which would be affected by the proposed improvement.

**Source:** L. 27: p. 305, § 1. CSA: C. 57, § 186. CRS 53: § 47-14-1. C.R.S. 1963: § 47-14-1.

**37-33-102. Lists of lands affected.** Said petition shall set forth the necessity and probable benefits of such drainage ditch or drain, together with a list of the lands affected by the proposed improvement and the names and addresses of the owners of such lands, and there shall be attached to said petition a plat showing the approximate direction, size, and length of said drainage ditch or drain.

**Source:** L. 27: p. 305, § 2. CSA: C. 57, § 187. CRS 53: § 47-14-2. C.R.S. 1963: § 47-14-2.

**37-33-103. Bond.** The petitioner shall give good and sufficient bond, payable to the irrigation district in which such lands are included and approved by the board of directors of such district, conditioned in case said drainage ditch or drain, from any cause whatsoever, is not constructed, to pay all expenses incurred by the irrigation district on account of said proposed improvement.

**Source:** L. 27: p. 306, § 3. CSA: C. 57, § 188. CRS 53: § 47-14-3. C.R.S. 1963: § 47-14-3.

**37-33-104. May employ engineer - hearing.** When such petition, plat, and bond are filed, the board of directors of said irrigation district in which such improvements are to be made shall proceed at once to view the line of the proposed drainage ditch or drain and the lands affected thereby, and, if in its opinion it is necessary, shall employ an engineer to prepare accurate surveys and estimates of the proposed work and shall set the day and place for hearing all interested parties, receiving protests, information, and any matter in relation to the proposed improvement, and shall notify all resident landowners affected by such improvement by personal service fifteen days prior to the date of such meeting. If personal service of such notice cannot be had, or if any of said landowners are nonresidents, then such notice shall be sent through the mail at least fifteen days prior to said meeting.

**Source:** L. 27: p. 306, § 4. CSA: C. 57, § 189. CRS 53: § 47-14-4. C.R.S. 1963: § 47-14-4.

**37-33-105. Method of hearing.** All persons whose lands may be affected may appear at the time specified for said meeting before said board of directors and present such testimony and affidavits as shall relate to the proposed drainage system or ditch with such recommendations as to them shall seem pertinent and necessary.

**Source:** L. 27: p. 306, § 5. CSA: C. 57, § 190. CRS 53: § 47-14-5. C.R.S. 1963: § 47-14-5.

**37-33-106. When improvement not feasible.** If the board of directors finds that the proposed improvement is not feasible, it shall so determine, and the costs and expenses incurred shall be paid by the original petitioners as provided under their bond.



**Source:** L. 27: p. 307, § 6. CSA: C. 57, § 191. CRS 53: § 47-14-6. C.R.S. 1963: § 47-14-6.

**37-33-107. Majority to control.** If, however, the improvements petitioned for are found feasible and of use and benefit to the owners representing a major portion of the lands affected and in the best interest of such landowners and such irrigation district, the board of directors is empowered to proceed with the construction of such improvements in the same manner as provided by the statutes of the state of Colorado; but, upon the hearing of said petition, the board of directors, on good cause shown, may exclude any of the lands mentioned and described in said petition which will not be benefited by the proposed improvement and may likewise, on petition of the owners, include such other lands as may be benefited thereby.

**Source:** L. 27: p. 307, § 7. CSA: C. 57, § 192. CRS 53: § 47-14-7. C.R.S. 1963: § 47-14-7.

**37-33-108. Determination of cost - assessment.** When the works have been completed and accepted by the board of directors, the board shall determine the total cost, damages, and other expenses and divide the same among the several tracts of land affected in proportion to the number of acres in each tract of land or according to the benefits received at the discretion of the board of directors of the district and shall certify to the county assessor, or assessors if such improvements are located in more than one county, a list of the lands affected and the total amount to be assessed against each tract. The assessor, or assessors if such improvements are located in more than one county, shall enter such assessment against each of the several tracts of land lying within his county in the same manner as other taxes, and the county treasurer of each county where such improvements or part thereof is made shall collect the same in the same manner, at the same time, and receipt for same in the same manner as other taxes for irrigation district purposes, and all moneys collected for and on account of such improvements shall be by said county treasurer credited to the general fund of such irrigation district.

**Source:** L. 27: p. 307, § 8. CSA: C. 57, § 193. CRS 53: § 47-14-8. C.R.S. 1963: § 47-14-8.

**37-33-109. Irrigation district laws apply.** In all cases not specifically provided for under this article, the laws of the state of Colorado relative to the operation, maintenance, and improvement of irrigation districts shall apply to improvements made under the authority of this article.

**Source:** L. 27: p. 308, § 9. CSA: C. 57, § 194. CRS 53: § 47-14-9. C.R.S. 1963: § 47-14-9.

**Cross references:** For irrigation district laws, see articles 40 to 44 of this title.

## **WATER CONSERVATION AND IRRIGATION DISTRICTS**

### **General and Administrative**

#### **ARTICLE 40**

##### **Public Agencies - Organizing for Conservation**

- 37-40-101. Legislative declaration.
- 37-40-102. Public agencies - powers of participation.

**37-40-101. Legislative declaration.** It is declared to be the policy of the state of Colorado to encourage transmission of information among agencies of the state of Colorado, political subdivisions of the state of Colorado, and private citizens and businesses of the state of Colorado concerning the conservation, protection, and development of the water resources of the state of Colorado and to coordinate the efforts of these entities and individuals in the field of water resource conservation, protection, and development; and participation in and support of organizations organized or existing for such purposes is declared to be a public purpose.

**Source:** L. 59: p. 835, § 1. CRS 53: § 149-10-1. C.R.S. 1963: § 150-9-1.

**37-40-102. Public agencies - powers of participation.** Agencies within the department of natural resources of the state of Colorado, quasi-municipal corporations, and political subdivisions of the state, including, but not exclusively, counties, towns, cities, city and counties, water conservancy districts, water conservation districts, water and sanitation districts, conservation districts, drainage districts, and special improvement districts are authorized to become members of organizations existing or to be organized within the state of Colorado, to assist in or contribute to the protection, conservation, and development of water within the state of Colorado. Any such organization shall be construed to be an instrumentality of the agencies and political subdivisions that are members thereof. No such organization shall be ineligible under this section by virtue of the fact that it also admits private individuals and organizations to membership.

**Source:** L. 59: p. 835, § 2. CRS 53: § 149-10-2. C.R.S. 1963: § 150-9-2. L. 2002: Entire section amended, p. 524, § 31, effective July 1.

## Conservation and Irrigation Districts

### ARTICLE 41

#### Irrigation District Law of 1905

**Cross references:** For general provisions affecting districts organized under this article, see article 43 of this title.

37-41-101.	Irrigation district - organization - purposes.	37-41-116.	Conveyances - suits.
37-41-102.	Petition.	37-41-117.	Bonds - contract - purposes - election.
37-41-103.	Presentation and allowance of petition.	37-41-118.	Sale of bonds - proceeds.
37-41-104.	Notice of election - qualifications of electors.	37-41-119.	Bonds - payment - lien.
37-41-105.	Canvass of votes - proclamation.	37-41-120.	Fiscal year - directors to fix levy.
37-41-106.	Directors - election - term.	37-41-121.	Assessor - assessment.
37-41-107.	Office of board - elections.	37-41-122.	Other taxes must be paid.
37-41-108.	Directors - secretary - salaries.	37-41-123.	Special tax levy.
37-41-109.	District treasurer - duties.	37-41-124.	Assessment - collection - redemption - deed.
37-41-110.	Duties of election officers.	37-41-125.	Construction - contracts.
37-41-111.	Canvass of votes.	37-41-126.	Claims - audit - payment - financial report.
37-41-112.	Records - vacancy and term of office.	37-41-127.	Funds for expenses.
37-41-113.	Board of directors - duties - contracts.	37-41-128.	Crossing streams, highways, railroads, state lands.
37-41-114.	Meetings - duties - eminent domain.	37-41-129.	Limit of indebtedness - emergency.
37-41-115.	Property - title.	37-41-130.	Insufficient supply - distribution.

37-41-131.	Compensation for property taken.	37-41-144.	Notice of filing petition.
37-41-132.	Boundaries - change - effect.	37-41-145.	Hearing of petition.
37-41-133.	Additional land admitted - petition.	37-41-146.	Order.
37-41-134.	Notice of filing - costs.	37-41-147.	Record - effect.
37-41-135.	Hearing of petition - assent.	37-41-148.	Division of districts.
37-41-136.	Payment of pro rata assessments.	37-41-149.	Dissolution of district - election.
37-41-137.	Inclusion or rejection of lands - protest.	37-41-150.	Canvass - record.
37-41-138.	Order - record - effect.	37-41-151.	Judicial examination of bonds and contracts.
37-41-139.	Records - evidence.	37-41-152.	Petition for judicial examination.
37-41-140.	Legal representatives petitioners.	37-41-153.	Notice of hearing.
37-41-141.	Redivision of district - election of officers.	37-41-154.	Answer - pleading.
37-41-142.	Lands may be excluded from district.	37-41-155.	Determination - costs.
37-41-143.	Petition for exclusion.	37-41-156.	Sale of realty not needed.
		37-41-157.	President to execute deeds.
		37-41-158.	Proceeds - where paid.
		37-41-159.	Findings of board conclusive.
		37-41-160.	Single election precincts.

**37-41-101. Irrigation district - organization - purposes.** (1) If a majority of the owners of the land within any district, whether residents or nonresidents, as well as the owners in the aggregate of a majority of the lands in such district desire to provide for the irrigation of the same and drainage work, or both, necessary to maintain the irrigability of the land within the district, they may propose the organization of an irrigation district under the provisions of this article. When so organized, each district shall have the powers conferred upon such irrigation district; except that where ditches, canals, or reservoirs have been constructed before May 3, 1905, such ditches, canals, reservoirs, and franchises, and the lands watered thereby, shall be exempt from the operation of this article, except such district shall be formed to purchase, acquire, lease, or rent such ditches, canals, and reservoirs and their franchises.

(2) An irrigation district may also be formed in order to cooperate, or a district formed prior to May 3, 1905, may cooperate, with the United States under the federal reclamation laws or any other federal laws enacted by the congress of the United States which do not conflict with the constitution and laws of the state of Colorado for the purposes of the construction of irrigation works, including drainage works necessary to maintain the irrigability of the land, or for the acquisition, purchase, extension, operation, or maintenance of constructed works, or for the assumption as principal or guarantor of indebtedness to the United States on account of district lands. When so cooperating with the United States, but only in such cases, the lands of the district in their entirety shall become and remain liable to assessment and levy annually until payment is made of all contract obligations due by the district to the United States.

(3) Except when cooperating with the United States, the liabilities of an irrigation district shall be a charge upon the land ratably, and taxes levied to pay such liabilities shall be local or special improvement assessments. Such a district shall also have power to take over the assets and assume the liabilities of water users' associations organized for cooperation with the United States under the provisions of the act of congress approved June 17, 1902 (32 Stat., 388), and acts amendatory thereof, in case a majority of the lands of each association shall be within such district, subject to the provisions that the shareholders of such association, by vote as provided by their articles of incorporation and bylaws, shall assent and agree that such assets and liabilities be so taken over. Entrymen upon public lands of the United States within the proposed district boundaries shall be deemed to be the owners of lands within the district for the purpose of becoming petitioners for the organization of such irrigation district and shall share all the privileges and obligations of private landowners within the district.

(4) All contracts between irrigation districts and the United States shall be recorded in the office of the clerk and recorder of the county in which the office of the irrigation district



is located; except that, where the district is located in more than one county, said contract shall be recorded with the clerk and recorder of each county in which the district or any part thereof is located.

**Source:** L. 05: p. 246, § 1. R.S. 08: § 3440. L. 21: p. 495, § 1. C.L. § 1960. CSA: C. 90, § 377. CRS 53: § 149-1-1. C.R.S. 1963: § 150-1-1.

## ANNOTATION

### I. General Consideration.

### II. Organization, Nature, and Powers of Districts.

### III. Land Irrigated Prior to Article.

## I. GENERAL CONSIDERATION.

**Law reviews.** For article, "Rights and Remedies of Irrigation District Bondholders", see 20 Dicta 137 (1943). For article, "When Corporate Stock Becomes Real Estate", see 21 Dicta 53 (1944). For article, "Irrigation Confirmation Proceedings", see 21 Dicta 140 (1944). For article, "Some Elements of Colorado Water Law", see 22 Rocky Mt. L. Rev. 343 (1950). For article, "Legal Problems in City Water Supply", see 22 Rocky Mt. L. Rev. 356 (1950). For article, "Seepage Rights in Foreign Waters", see 22 Rocky Mt. L. Rev. 407 (1950). For article, "Legal Classification of Special District Corporate Forms in Colorado", see 45 Den. L.J. 347 (1968).

**For constitutionality of this section,** see *Anderson v. Grand Valley Irrigation Dist.*, 35 Colo. 525, 85 P. 313 (1906); *Ahern v. Bd. of Dirs. of High Line Irrigation Dist.*, 39 Colo. 409, 89 P. 963 (1931); *In re Green City Irrigation Dist.*, 91 Colo. 202, 13 P.2d 1113 (1932).

**This section does not deprive landowners of their property without due process of law.** *Anderson v. Grand Valley Irrigation Dist.*, 35 Colo. 525, 85 P.313 (1906).

**This section, like other similar statutes, should be given a reasonable construction, bearing in mind that statutes imposing special taxes or burdens are strictly construed, and, in case of doubt, in favor of the taxpayer.** *Ahern v. Bd. of Dirs. of High Line Irrigation Dist.*, 39 Colo. 409, 89 P. 963 (1931).

**The object of this section, as even a casual reading shows, is compulsorily to provide means, at the expense of those landowners within the proposed district primarily benefited, for bringing into cultivation the arid lands of the state and making them highly productive by the process of irrigation.** *Anderson v. Grand Valley Irrigation Dist.*, 35 Colo. 525, 85 P. 313 (1906); *Holbrook Irrigation Dist. v. Adcock*, 127 Colo. 192, 255 P.2d 384 (1953).

**Applied in** *Riverside Irrigation Dist. v. Lamont*, 194 Colo. 320, 572 P.2d 151 (1977).

## II. ORGANIZATION, NATURE, AND POWERS OF DISTRICTS.

**Irrigation districts have been judicially declared to be public corporations.** *Anderson v. Grand Valley Irrigation Dist.*, 35 Colo. 525, 85 P. 313 (1906); *People ex rel. Weisbrod v. Lockard*, 26 Colo. App. 439, 143 P. 273 (1914); *Kiles v. Trinchera Irrigation Dist.*, 136 F. 2d 894 (10th Cir. 1943).

**Quo warranto will lie to test the validity of organization.** The assertion of the right, and the exercise thereof by individuals acting as directors of irrigation district, to use the public franchise so granted, when the district has not been lawfully and regularly organized, is in the nature of a violation of a public law, and any interested citizen ought to have the same right to a quo warranto proceeding to inquire into the authority of such individuals to act as if they had usurped, or intruded into, a public office. *People ex rel. Weisbrod v. Lockard*, 26 Colo. App. 439, 143 P. 273 (1914).

**Irrigation districts chiefly serve private purposes** and are for the benefit of private landowners. *Holbrook Irrigation Dist. v. First State Bank*, 84 Colo. 157, 268 P. 523 (1928); *Logan Irrigation Dist. v. Holt*, 110 Colo. 523, 133 P.2d 530 (1943).

**Irrigation districts are not exempt from taxation** as municipal corporations under § 4 of art. X, Colo. Const. *Logan Irrigation Dist. v. Holt*, 110 Colo. 523, 133 P.2d 530 (1943).

**Property of irrigation district is exempt from mechanics' lien,** as is property of all public corporations. *Fisher v. Pioneer Constr. Co.*, 62 Colo. 538, 163 P. 851 (1917).

**Districts have power to own property, to sue and be sued, and to sell bonds.** This act provides for the organization and operation of irrigation districts, and these districts have power to own property, to sue and be sued, to acquire and conduct an irrigation system, and to issue and sell their bonds for that purpose. *Norris v. Montezuma Valley Irrigation Dist.*, 248 F. 369 (8th Cir. 1918).

**An irrigation district is entitled to reclaim waters which escape by seepage from its works.** Acting with reasonable diligence it may maintain a bill to establish such right as against a stranger claiming the escaped waters and restrain him from asserting unlawful claims.

McKelvey v. North Sterling Irrigating Dist., 66 Colo. 11, 179 P. 872 (1919).

**Lands held by a receiver may be included.** Lands held by a receiver's receipt issued by a land office of the United States, no patent having issued, may be embraced within an irrigation district. Carson v. Cudworth, 26 Colo. App. 131, 140 P. 935 (1914).

### III. LAND IRRIGATED PRIOR TO ARTICLE.

**This section exempts all ditches theretofore constructed and not owned by the district and lands watered thereby.** Norris v. Montezuma Valley Irrigation Dist., 240 F. 825 (D. Colo. 1916).

**It was the purpose of this provision** to exempt lands from the burden of a bonded indebtedness created to furnish water to irrigate lands embraced in an irrigation district which were irrigated from a system in existence when the act took effect, unless the district was formed to acquire or lease such system. Wilder v. Bd. of Dirs. of S. Side Irrigation Dist., 55 Colo. 363, 135 P. 461 (1913).

**The provision for exemption from taxation found in § 37-41-121 is not more explicit** than the provision found in this section, whereby lands watered by ditches constructed before the passage of the act are exempted from the operation of the act, which includes the right of taxation. Nile Irrigation Dist. v. Gas. Sec. Co., 248 F. 861 (8th Cir. 1918).

**This provision depends upon certain questions of fact**, namely, that ditches, canals, and reservoirs have been constructed before the passage of the act and that they have sufficient capacity to water the land thereunder for which the water taken in such ditches, canals, and reservoirs is appropriated. Such district shall be formed to make purchase of such ditches, canals, reservoirs, and franchises. Montezuma Val-

ley Irrigation Dist. v. Longenbaugh, 54 Colo. 391, 131 P. 262 (1913).

**It does not of its own force exclude from the proposed district lands already provided with facilities for their irrigation**, which the district is not formed to acquire. If the proceedings for the organization for the district, and the definition of its boundaries, conform to the statute, one entitled to lands of the character described in the proviso is afforded opportunity to object to the inclusion thereof in the district, and if he fails to avail himself of the opportunity afforded by the statute, and permits the district to be so organized as to include such lands, then by force of the provisions made in other sections of the act he is concluded. Wilder v. Bd. of Dirs. of S. Side Irrigation Dist., 55 Colo. 363, 135 P. 461 (1913).

**A party may be estopped to avail himself of the advantages of this exemption.** Plaintiff sued to restrain the collection of irrigation district taxes upon certain lands, and for a decree that his lands were no part of an irrigation district. His complaint alleged, and the court found, that prior to the organization of the district, and ever since, he was the owner of water rights sufficient for the irrigation of his lands, and which he had always since applied to this purpose; and that the district was not formed to acquire such water rights, and had not acquired them; upon account of which facts the plaintiff claimed that he was within the proviso to this section. But plaintiff, with full knowledge of the situation, had signed the petition for the organization of the district, which, as therein defined, included the land described in his complaint. During two years following the organization of the district he had paid irrigation district taxes upon said land. Without objection from him, proceedings had been taken, and a decree entered under the act, declaring the validity of the district, and confirming an issue of district bonds. Hence he was estopped. Montezuma Valley Irrigation Dist. v. Longenbaugh, 54 Colo. 391, 131 P. 262 (1913).

**37-41-102. Petition.** (1) For the purpose of the establishment of an irrigation district as provided by this article, a petition shall be filed with the board of county commissioners of the county which embraces the largest acreage of the proposed district. The petition shall state:

(a) That it is the purpose of petitioners to organize an irrigation district under the provisions of this article;

(b) A general description of the boundaries of such proposed district;

(c) The means proposed to supply water for the irrigation of the lands embraced therein;

(d) The name proposed for such district; and

(e) A prayer that the board of county commissioners define and establish the boundaries of said proposed district and submit the question of the final organization of the same to the vote of the qualified electors of said proposed district.

(2) The petition shall be signed by a majority of the owners of said lands, whether residents or nonresidents, as well as by the owners in the aggregate of a majority of the total number of acres of land sought to be enclosed in said proposed district. The petitioners shall



elect from their number a committee of three to present such petition to the board of county commissioners. The petition shall also be accompanied by a good and sufficient bond, to be approved by the board of county commissioners, in double the amount of the probable cost of organizing such district, conditioned for the payment of all costs incurred in said proceedings in case said organization shall not be effected, but in case such district is so effected, then said expenses incurred by the board of county commissioners shall be paid back to said county by said district.

(3) Such petition shall be published for at least four weeks before the time at which the same is to be presented, in some newspaper of general circulation published in the county where the petition is to be presented, together with a notice signed by the committee of said petitioners giving the time and place of the presentation of the same to the board of county commissioners.

**Source:** L. 05: p. 246, § 2. R.S. 08: § 3441. L. 15: p. 298, § 2. C.L. § 1961. CSA: C. 90, § 378. CRS 53: § 149-1-2. C.R.S. 1963: § 150-1-2.

#### ANNOTATION

**Law reviews.** For note, "A Survey of Colorado Water Law", see 47 Den. L.J. 226 (1970).

**This section requires publication not only of a prescribed notice, but of the petition.** Ahern v. Bd. of Dirs. of High Line Irrigation Dist., 39 Colo. 409, 89 P. 963 (1931).

**The publication of this notice, as well as the petition, is an essential prerequisite** to conferring upon the board jurisdiction concerning the matter of the organization; such notice is in the nature of process, indeed the only process by which the property owners to be affected are notified and given an opportunity to present to the board their objections; in this matter the board sits as a court of special and limited jurisdiction; that the notice must be given by the petitioners themselves, and that both the notice and the petition must be published for the required length of time. Ahern v. Bd. of Dirs. of High Line Irrigation Dist., 39 Colo. 409, 89 P. 963 (1931).

**The object of the required publication is to notify landowners within the boundaries** of the proposed district, other than those who have signed the petition, that at a certain time and place the petition will be presented to the board of county commissioners for its action, as provided for in the statute, when and where they may attend to offer any objection they have. All these considerations should be in the minds of those who prepare and sign the notice. Ahern v. Bd. of Dirs. of High Line Irrigation Dist., 39 Colo. 409, 89 P. 963 (1931).

**There is no presumption that the notice was written at the time the petition was signed.** Ahern v. Bd. of Dirs. of High Line Irrigation Dist., 39 Colo. 409, 89 P. 963 (1931).

**Signatures to the petition are not signatures to the notice.** Ahern v. Bd. of Dirs. of High Line Irrigation Dist., 39 Colo. 409, 89 P. 963 (1931).

**These signatures to the petition are essential parts of the petition itself.** Indeed, the petition without the signatures is not a petition at all. Ahern v. Bd. of Dirs. of High Line Irrigation Dist., 39 Colo. 409, 89 P. 963 (1931).

**A party who has subscribed a petition cannot afterwards dispute the facts therein asserted,** even though his name is necessary to make up the required majority. Montezuma Valley Irrigation Dist. v. Longenbaugh, 54 Colo. 391, 131 P. 262 (1913).

**There is no necessity for addressing a petition to the board** and this section does not require it. Ahern v. Bd. of Dirs. of High Line Irrigation Dist., 39 Colo. 409, 89 P. 963 (1931).

**A committee appointed to make publication has authority to give the required notice.** Under this section it must be inferred that the committee was selected to give the notice required since the notice and petition are required to be published together. It is unreasonable to suppose they were authorized to make an insufficient publication, but rather to do all things necessary to make it complete. Lockard v. People ex rel. Weisbrod, 71 Colo. 213, 205 P. 944 (1922).

**Sufficiency of notice.** Where a notice says that "The undersigned as the committee duly authorized will present", etc., this shows the official capacity in which the signers were acting, and it is not material in what part of the notice this appears. Lockard v. People ex rel. Weisbrod, 71 Colo. 213, 205 P. 944 (1922).

**37-41-103. Presentation and allowance of petition.** (1) When such petition is presented and it appears that the notice of the presentation of said petition has been given as required by section 37-41-102 (3) and that said petition has been signed by the requisite number of petitioners as required by this article, the board of county commissioners shall



then proceed to define the boundaries of said proposed district from said petition and from such applications for the exclusion of lands therefrom and the inclusion of lands therein as may be made in accordance with the intent of this article. They may adjourn such examination from time to time, not exceeding three weeks in all, and by final order, duly entered, shall define and establish the boundaries of such proposed district; except that said board of county commissioners shall not modify such proposed boundaries described in the petition so as to change the objects of said petition or so as to exempt from the operation of this article any land within the boundaries proposed by the petition susceptible to irrigation by the same system of waterworks applicable to other lands in such proposed district; nor shall any land which will not in the judgment of the board be benefited by such proposed system be included in such district if the owner thereof makes application at a hearing to withdraw the same; also except that contiguous lands not included in said proposed district as described in the petition, upon application of the owners, may be included in such district upon such hearing.

(2) When the boundaries of any proposed district have been examined and defined, the board of county commissioners shall forthwith make an order allowing the prayer of said petition, defining and establishing the boundaries, and designating the name of such proposed district. Thereupon said board, by further order duly entered upon its record, shall call an election of the qualified electors of said district to be held for the purpose of determining whether such district shall be organized under the conditions of this article and, by such order, shall submit the names of one or more persons from each of the three divisions of said district to be voted for as directors therein. For the purposes of said election, the board of county commissioners shall divide said district into three divisions as nearly equal in size as may be practicable and shall provide that a qualified elector of each of said three divisions shall be elected as a member of the board of directors of said district by the qualified electors of the whole district.

(3) Each of said divisions shall constitute an election precinct, and three judges shall be appointed for each of such precincts, one of whom shall act as clerk of said election. In the hearing of any such petition the board of county commissioners shall disregard any informality therein, and, in case it denies the same or dismisses it for any reason on account of the provisions of this article not having been complied with, which are the only reasons upon which it shall have a right to refuse or dismiss the same, the board shall state its reasons in writing therefor in detail, which shall be entered upon its record. In case these reasons are not well founded, upon proper application therefor, an order in the nature of mandamus shall issue out of the district court of said county, compelling the board to act in compliance with this article, which order shall be heard within twenty days from the date of its issuance and which twenty days shall be excluded from the forty days given the board of county commissioners to act upon said petition. The officers of such district shall consist of three directors, a secretary, and a treasurer.

**Source:** L. 05: p. 247, § 3. R.S. 08: § 3442. C.L. § 1962. CSA: C. 90, § 379. CRS 53: § 149-1-3. C.R.S. 1963: § 150-1-3.

#### ANNOTATION

**Law reviews.** For article, "Legal Classification of Special District Corporate Forms in Colorado", see 45 Den. L.J. 347 (1968).

**This section affords opportunity to have land excluded from the district.** Under the second exception of subsection (1), opportunity is afforded those who desire to claim the exemption in § 37-41-101 to appear before the board and have their lands excluded from the district upon proper showing. *Wilder v. Bd. of Dirs. of S. Side Irrigation Dist.*, 55 Colo. 363, 135 P. 461 (1913).

**This construction renders § 37-41-101 and this section harmonious and consistent.** *Wilder v. Bd. of Dirs. of S. Side Irrigation Dist.*, 55 Colo. 363, 135 P. 461 (1913).

**An objection that lands will not be benefited must be made at time of organization.** The general rule under such irrigation statutes is that the objection that lands will not be benefited by inclusion in an irrigation district must be made by landowners at the time the district is organized, when a hearing is afforded for that purpose, or it will be waived. *Nile Irrigation*

Dist. v. Gas Sec. Co., 248 F. 861 (8th Cir. 1918).

**For exclusion of land from district that is incapable of cultivation**, see Nile Irrigation Dist. v. Gas Sec. Co., 248 F. 861 (8th Cir. 1918).

**The action of the board in excluding land may be reviewed.** Under this section, the action of the county commissioners in excluding lands, where there was an abuse of power but no fraud or bad faith, may be reviewed in a special proceeding by the board of directors of the irrigation district to determine the validity of the

organization and bond issue. Ahern v. Bd. of Dirs. of High Line Irrigation Dist., 39 Colo. 409, 89 P. 963 (1907).

**The action of the board in including land is res adjudicata.** The inclusion by the county commissioners of all the land in question in the original determination of the boundaries of the district amounts to res adjudicata upon the question whether it could be thus included. Yellow Jacket Irrigation Dist. v. Pleasant Valley Ranch Co., 78 Colo. 543, 243 P. 635 (1926).

**37-41-104. Notice of election - qualifications of electors.** (1) The board of county commissioners shall thereupon cause a notice embodying said orders in substance, signed by the chairman of the board of county commissioners and the clerk of said board, to be issued, given, and published, giving public notice of said election, the time and places thereof, and the matters submitted to the vote of the electors. The notice and order shall be published once a week for at least four weeks prior to such election in a newspaper of general circulation in said county, and if any portion of such proposed district lies within any other county, then such order and notice shall be published in a newspaper of general circulation published within each of the counties. No election, the purpose of which is to issue bonds or purchase sites, water rights, reservoirs, or rights-of-way, shall be held nor shall any bonds be issued or purchased or contract of purchase be made for reservoirs, water rights, sites, or works before the board of directors has submitted to the state engineer a complete and detailed plan of the project and a complete and detailed information of the property to be leased or purchased, and any other information required by the state engineer, and a decision rendered by him as to the feasibility of the project. No election thereon shall be held nor purchase contract or lease made until sixty days have expired after the rendition of such decision by the state engineer.

(2) At all elections held under the provisions of this article, every owner or entryman of agricultural or horticultural land within said district over the age of eighteen years who is a citizen of the United States, or has declared his intention to become a citizen of the United States, and is a resident of the state of Colorado and has paid property taxes upon real property located within said district during the calendar year preceding any such election shall be entitled to vote at such election in the precinct where he resides or, if a nonresident of the precinct, in the precinct within which the greater portion of his land is located. A corporation organized or qualified to do business in this state which owns agricultural or horticultural land within the district, and which has paid property taxes thereon, may authorize an agent, who satisfies the residency and age requirements of this subsection (2), to vote in its behalf at all elections held under the provisions of this article or to serve as a director of the district. Any such person so qualified to vote and who resides in any county into which said district extends shall be eligible to election as a director in and for the division in such district in which he is entitled to vote. All lands platted or subdivided into residence or business lots shall not be considered agricultural or horticultural land. The ballots to be used and cast at such election for the formation of such district shall be substantially as follows: "Irrigation District - Yes", and "Irrigation District - No", or words equivalent thereto, and shall also contain the names of the persons to be voted for as members of the board of directors of said district. Each elector may vote for three directors, one from each division, and shall indicate his vote by placing a marginal cross upon the ballot, for or against any question submitted or name voted upon, and opposite thereto, at any election held under this article.

**Source:** L. 05: p. 249, § 4. L. 07: p. 488, § 1. R.S. 08: § 3443. L. 15: p. 209, § 3. L. 17: p. 292, § 2. C.L. § 1963. L. 31: p. 431, § 1. CSA: C. 90, § 380. CRS 53: § 149-1-4. C.R.S. 1963: § 150-1-4. L. 75: (2) amended, p. 223, § 79, effective July 16. L. 77: (2) amended, p. 1631, § 1, effective May 24.

**Cross references:** For publication of legal notices, see part 1 of article 70 of title 24.



## ANNOTATION

**It is within the exclusive power and province of the general assembly to fix and determine the qualification of voters** in all public and quasi-municipal corporations, and all reasonable provisions with reference thereto will be upheld. *People ex rel. Shaklee v. Milan*, 89 Colo. 556, 5 P.2d 249 (1931).

**The general assembly has prescribed qualifications for voting in irrigation districts.** The legislative department has recognized this principle of self-government, with reference to irrigation districts, and has accordingly prescribed certain qualifications for those who participate in the economic and elective matters of the district. *People ex rel. Shaklee v. Milan*, 89 Colo. 556, 5 P.2d 249 (1931).

**These qualifications must be complied with.** The election franchise in irrigation matters is a privilege, and one who would enjoy it must comply with all prescribed legislative requirements and qualifications. Under the existing irrigation district statutes concerning elections, a landowner has no right to vote in a precinct other than the one in which the greater portion of his land is located. *People ex rel. Shaklee v. Milan*, 89 Colo. 556, 5 P.2d 249 (1931).

**A person whose only title to real estate is a contract to purchase has no right to vote at an**

irrigation district election. *People ex rel. Shaklee v. Milan*, 89 Colo. 556, 5 P.2d 249 (1931).

**Owners of town lots within an irrigation district have no right to vote** at irrigation district elections by reason of such ownership where the lots are not used exclusively for agricultural or horticultural purposes. *People ex rel. Shaklee v. Milan*, 89 Colo. 556, 5 P.2d 249 (1931).

**The word "owner" means the person who has the dominion over the agricultural or horticultural land** with power to enjoy and do with it as he pleases, so long as he does not violate the law; it means the person who has the legal title to the land. *People ex rel. Shaklee v. Milan*, 89 Colo. 556, 5 P.2d 249 (1931).

**Tenants in common hold several and distinct titles with unity of possession.** *People ex rel. Shaklee v. Milan*, 89 Colo. 556, 5 P.2d 249 (1931).

**For meaning of electors in the various acts,** see *People ex rel. Shaklee v. Milan*, 89 Colo. 556, 5 P.2d 249 (1931).

**The phrase, "during the calendar year preceding any such election",** means the year beginning January 1 and ending December 31. *People ex rel. Shaklee v. Milan*, 89 Colo. 556, 5 P.2d 249 (1931).

**37-41-105. Canvass of votes - proclamation.** (1) The board of county commissioners shall meet on the second Monday next succeeding such election and proceed to canvass the votes cast thereat. If, upon such canvass, it appears that at least a majority of said legal electors in said district have voted "Irrigation District - Yes", the said board, by an order entered on its minutes, shall declare such territory duly organized as an irrigation district under the name and style theretofore designated and shall declare the persons receiving, respectively, the highest number of votes for such several offices to be duly elected to such office. Said board shall cause a copy of such order, including a plat of said district, duly certified by the clerk of the board of county commissioners, to be immediately filed for record in the office of the county clerk and recorder of each county in which any portion of such lands are situated, and no board of county commissioners of any county, including any portion of such district, after the date of organization of such district, shall allow another district to be formed including any of the lands of such district without the consent of the board of directors thereof.

(2) From and after the date of such filing, the organization of such district shall be complete, and the officers thereof shall immediately enter upon the duties of their respective offices, upon qualifying in accordance with law, and shall hold such offices, respectively, until their successors are elected and qualified. For the purpose of the election, the board of county commissioners shall establish a convenient number of election precincts and polling places in said proposed district and define the boundaries thereof, which said precincts may thereafter be changed by the board of directors of such districts, who shall also appoint the judges of election for each such precinct, one of whom shall act as clerk of election.

**Source:** L. 05: p. 249, § 5. R.S. 08: § 3444. C.L. § 1964. CSA: C. 90, § 381. CRS 53: § 149-1-5. C.R.S. 1963: § 150-1-5.

**37-41-106. Directors - election - term.** (1) The regular election of said district for the purpose of electing a board of directors shall be held on the first Tuesday after the first



Monday in December of each year, at which time one director shall be elected for a term of three years; except that, at the first election held to choose the first board of directors after the organization of any district has been effected, the person having the highest number of votes shall continue in office for the full term of three years; the next highest for two years; and the next highest for one year. But if two or more persons have the same number of votes, then their term shall be determined by lot, under the direction of the county judge of the county wherein the organization of said district has been effected. The person receiving the highest number of votes for any office to be filled at such election is elected thereto.

(2) Within ten days after receiving their certificates of election provided for in section 37-41-112 (2), said officers shall take and subscribe the official oath and file the same in the office of the county clerk and recorder wherein the organization was effected and on January 1 following shall assume the duties of their respective offices. Each member of the board of directors shall execute an official bond in the sum of three thousand dollars, which bond shall be approved by the county judge of the county wherein such organization was effected, and shall be recorded in the office of the county clerk and recorder thereof. Such official bond may be signed by a surety company authorized to do business in the state of Colorado, in which case the district shall be liable for and shall pay premium on said bond. All official bonds shall be in form prescribed by law for official bonds for county officials; except that the obligee named in said bonds shall be to the district and shall be filed with the county clerk and recorder at the same time as the filing of the oath provided for in this section.

**Source:** L. 05: p. 250, § 6. L. 07: p. 489, § 2. R.S. 08: § 3445. L. 21: p. 503, § 1. C.L. § 1965. CSA: C. 90, § 382. CRS 53: § 149-1-6. C.R.S. 1963: § 150-1-6.

#### ANNOTATION

**The usurpation of a franchise is a public wrong which may be corrected by quo warranto.** *Lockard v. People ex rel. Hasselbush*, 80 Colo. 31, 250 P. 152 (1926).

**Quo warranto lies to test the title of directors of irrigation districts.** *Kepley v. People ex rel. Everson*, 76 Colo. 233, 230 P. 804 (1924); *Lockard v. People ex rel. Hasselbush*, 80 Colo. 31, 250 P. 152 (1926).

**Persons claiming to have been elected may be joined in the action.** In an action in quo warranto involving title to the offices of directors of an irrigation district, realtors who were residents of the district and claiming to have been lawfully elected were properly joined as complainants in the action. *Lockard v. People ex rel. Hasselbush*, 80 Colo. 31, 250 P. 152 (1926).

**Failure of the complainant to designate the divisions of the district is immaterial.** In an action in quo warranto involving the offices of irrigation district directors, the contention that the complaint is uncertain in failing to designate the several divisions of the district where realtors resided held immaterial. *Lockard v. People*

*ex rel. Hasselbush*, 80 Colo. 31, 250 P. 152 (1926).

**A doubt as to the legality of election is no excuse for old directors holding over.** In an action in quo warranto, the mere fact that respondents — holdover directors — doubted the legality of the proceedings by which realtors claimed to be elected directors of an irrigation district, held no reason for their trying to extend their tenure of office, nor for withholding certificates of election from realtors, without attempting to show the invalidity of the election. *Lockard v. People ex rel. Hasselbush*, 80 Colo. 31, 250 P. 152 (1926).

**Directors held to be usurpers of office.** In an action in mandamus by irrigation district directors to compel a levy of taxes for district purposes, under the facts disclosed, a majority of the directors held to be mere intruders and usurpers in office. *Kerber Creek Irrigation Dist. v. Woodard*, 76 Colo. 219, 230 P. 807 (1924).

**For allegations in complaint being sufficient,** see *Lockard v. People ex rel. Hasselbush*, 80 Colo. 31, 250 P. 152 (1926).

**37-41-107. Office of board - elections.** (1) The office of the board of directors shall be located in the county where the organization was effected.

(2) Fifteen days before any election held under this article subsequent to the organization of the district, the secretary, who shall be appointed by the board of directors, shall cause notice to be posted in three public places in each election precinct, specifying the polling places of each precinct and the time and place of holding the election; and he shall also post a general notice of the same in the office of said board, which shall be established and kept at some fixed place to be determined by said board in said county. In lieu of such

posting, said notice may be published once a week for at least three weeks (four weekly publications) prior to such election in a newspaper of general circulation in each county in which the district is located.

(3) Prior to the time for posting the notices, or the publication thereof, the board shall appoint from each precinct, from the electors thereof, three judges, one of whom shall act as clerk, who shall constitute a board of election for such precinct. If the board fails to appoint a board of election, or the members appointed do not attend the opening of polls on the morning of election, the electors of the precinct present at that hour may appoint the board of election or supply the place of an absent member thereof.

(4) The board of directors, in its order appointing the board of election, shall designate the hour and the place in the precinct where the election shall be held.

(5) Each judge of election shall receive as compensation the sum of up to one hundred dollars per day, to be paid by the district.

**Source:** L. 05: p. 251, § 7. R.S. 08: § 3446. L. 21: p. 504, § 2. C.L. § 1966. CSA: C. 90, § 383. L. 53: p. 408, § 1. CRS 53: § 149-1-7. L. 59: p. 827, § 1. C.R.S. 1963: § 150-1-7. L. 77: (5) amended, p. 1632, § 2, effective May 24. L. 2006: (5) amended, p. 71, § 1, effective July 1.

**37-41-108. Directors - secretary - salaries.** Each member of the board of directors may receive compensation at the rate of up to one hundred dollars per day while attending meetings and shall be reimbursed for his or her actual and necessary expenses while engaged in official business. No director or officer named in this article shall be interested, directly or indirectly, in any manner, in any contract awarded or to be awarded by the board or in the profits to be derived therefrom, nor shall he or she receive any bonds, gratuity, or bribe. For any violation of this section, such officer commits a class 6 felony and shall be punished as provided in section 18-1.3-401, C.R.S. He or she shall also forfeit his or her office upon conviction.

**Source:** L. 05: p. 264, § 27. R.S. 08: § 3466. L. 21: p. 505, § 3. C.L. § 2005. CSA: C. 90, § 404. CRS 53: § 149-1-28. L. 59: p. 828, § 2. L. 61: p. 842, § 1. C.R.S. 1963: § 150-1-28. L. 77: Entire section amended, p. 1632, § 3, effective May 24; entire section amended, p. 885, § 67, effective July 1, 1979. L. 89: Entire section amended, p. 850, § 136, effective July 1. L. 2002: Entire section amended, p. 1553, § 336, effective October 1. L. 2006: Entire section amended, p. 71, § 2, effective July 1.

**Editor's note:** The effective date for amendments made to this section by chapter 216, L. 77, was changed from July 1, 1978, to April 1, 1979, by chapter 1, First Extraordinary Session, L. 78, and was subsequently changed to July 1, 1979, by chapter 157, § 23, L. 79. See *People v. McKenna*, 199 Colo. 452, 611 P.2d 574 (1980).

**Cross references:** For the legislative declaration contained in the 2002 act amending this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

## ANNOTATION

**Requirements of section must be satisfied before removal from office.** The constitution makes no provision for the forfeiture of and removal from office of an irrigation officer, but this section does and its requirements must be satisfied before such forfeiture and removal take place. *Burkholder v. People ex rel. Nazarene*, 59 Colo. 99, 147 P. 347 (1915).

**The court has no power to create a forfei-**

**ture and no power to declare a forfeiture, where none already exists.** The forfeiture must exist in fact before the action of quo warranto is commenced. The common law is not paramount to the statutes, and they must define and point out the cause or causes of forfeiture and removal, else none exist. *Burkholder v. People ex rel. Nazarene*, 59 Colo. 99, 147 P. 347 (1915).

**Conviction of offense is necessary before**



**removal from office.** An officer of an irrigation district is not to be excluded from his office for the offenses denounced in this section until conviction thereof. The commission of the offense,

without conviction, is not sufficient. *Burkholder v. People ex rel. Nazarene*, 59 Colo. 99, 147 P. 347 (1915).

**37-41-109. District treasurer - duties.** (1) The county treasurer of the county in which is located the office of an irrigation district shall be and is hereby constituted ex officio district treasurer of said district. The county treasurer shall be liable upon his official bond and to indictment and criminal prosecution for malfeasance, misfeasance, or failure to perform any duty prescribed as that of the county treasurer or district treasurer, as is provided by law in other cases as that of the county treasurer. The treasurer shall collect, receive, and receipt for all moneys belonging to said district. It is the duty of the county treasurer of each county in which any irrigation district is located in whole or in part to collect and receipt for all taxes levied as provided in section 37-41-123 in the same manner and at the same time and on the same receipt as is required in the collection of taxes upon real estate for county purposes; except that such county treasurer shall receive in payment of the general fund tax, for the year in which said taxes are payable, warrants drawn against said general fund, the same as so much lawful money of the United States, if such warrant does not exceed the amount of the general fund tax which the person tendering the same owes; further except that such county treasurer shall receive in payment of the district bond fund taxes, for the year in which said taxes are payable, interest coupons or bonds of said irrigation district maturing within the year said taxes are payable the same as so much lawful money of the United States, if such interest coupons or bonds do not exceed the amount of district bonds funds tax which the person tendering the same owes.

(2) The county treasurer of each county comprising a portion only of the irrigation district, excepting the county treasurer of the county in which the office of said district is located, on the first Monday of every month, shall remit to the district treasurer all moneys, warrants, coupons, or bonds theretofore collected or received by him on account of said district. Every county treasurer shall keep a bond fund account and a general fund account. The bond fund account shall consist of all moneys received on account of interest and principal of bonds issued by said district. Said accounts for interest and principal shall be kept separate. The general fund shall consist of all moneys or general fund warrants received by the collection of taxes or otherwise. The district treasurer shall pay out of said bond fund, when due, the interest and principal of the bonds of said district at the time and place specified in said bonds and shall pay out of said general fund only upon the order of the district, signed by the president and countersigned by the secretary of said district. The district treasurer, on the fifteenth day of each month, shall report to the secretary of the district the amount of money in his hands to the credit of said respective funds, the amount of warrants paid during the previous month, and the amount of registered warrants if any. All such district taxes collected and paid to the county treasurers shall be received by said treasurers in their official capacity, and they shall be responsible for the safekeeping, disbursement, and payment thereof the same as for other moneys collected by them as such treasurers.

**Source:** L. 05: p. 260, § 21. L. 07: p. 490, § 3. R.S. 08: § 3460. L. 17: p. 306, § 11. L. 19: p. 483, § 1. C.L. § 1998. CSA: C. 90, § 398. CRS 53: § 149-1-22. C.R.S. 1963: § 150-1-22.

**Cross references:** For failure of county treasurers to perform duties, see § 30-10-726.



## ANNOTATION

- I. General Consideration.
- II. Receipt and Payment of Coupons.
- III. Compensation of Treasurer.

## I. GENERAL CONSIDERATION.

**This section being explicit does not admit of interpretation beyond its express letter,** and must be administered as we find it, and it would be an act of judicial legislation to give to it any construction other than the plain meaning which the language indicates. *Chicago Title & Trust Co. v. Patterson*, 65 Colo. 534, 178 P. 13 (1918).

**The proceeds of the assessments made are to be kept in a distinct "bond fund"** with separate interest and principal accounts and that all other income of the district is to be kept in a "general fund", from which all other district expenses and expenditures are to be paid. *Gas Sec. Co. v. Nile Irrigation Dist.*, 293 F. 365 (8th Cir. 1923).

**Proceeds from judgment recovered go into general fund.** A bondholder is not entitled to a decree applying the proceeds of a judgment recovered against a contractor for construction of irrigation ditches for breach of contract to the construction of irrigation improvements since, by this section, the money goes into the general fund, to be expended for any legitimate purpose. *Gas Sec. Co. v. Nile Irrigation Dist.*, 293 F. 365 (8th Cir. 1923).

**A bondholder is limited to the fund provided by this section,** and cannot subject other funds of the district to payment of his bonds. *Gas Sec. Co. v. Nile Irrigation Dist.*, 293 F. 365 (8th Cir. 1923).

**The county treasurer, as ex officio treasurer of the district, has a duty to collect the taxes levied,** place all money received on account of principle and interest of bonds issued by the district in a separate account, from which he shall pay the principle and interest as it becomes due. *Denver-Greeley Valley Irrigation Dist. v. McNeil*, 80 F.2d 929 (10th Cir. 1936).

**A county treasurer may not lawfully demand, receive, and receipt for all other taxes against the lands, leaving district taxes uncollected.** *Moore v. Gas Sec. Co.*, 278 F. 111 (8th Cir. 1921).

## II. RECEIPT AND PAYMENT OF COUPONS.

**The proviso as to payment by coupons applies to anyone having the right to make payment** of such taxes, which includes the holder of a previous tax sale certificate. *Orchard Mesa Farms Co. v. Canon*, 61 Colo. 347, 157 P. 192 (1916); *Bd. of Comm'rs v. Heath*, 87 Colo. 204, 286 P. 107 (1930).

**Coupons from the bonds of an irrigation district are a lawful tender for the district tax levied for the year in which such coupons mature,** but which tax is collected in the year next succeeding. *Chicago Title & Trust Co. v. Patterson*, 65 Colo. 534, 178 P. 13 (1918).

**"Maturing within the year" means year in which tax is levied.** No other year is mentioned in this section except the year in which the taxes were levied, hence it would do violence to the plain language of this section, in the ordinary and accepted meaning, to say that "maturing within the year" can apply to other coupons or bonds than those maturing within the year in which the tax was levied. Neither can there be any legitimate inference that this language can refer to any other year than the one in which the tax is levied. In fact the inference if any there should be must be to the contrary. *Chicago Title & Trust Co. v. Patterson*, 65 Colo. 534, 178 P. 13 (1918).

**The treasurer is not required to pay the coupons in the order of presentation,** but the fund is to be allotted to all holders of coupons who present them within a reasonable time after they are due. *Norris v. Montezuma Valley Irrigation Dist.*, 248 F. 369 (8th Cir. 1918).

**The weight of authority is that there should be no distinction made** and that all have a reasonable time within which to present their coupons for payment without losing their rights. *Thomas v. Patterson*, 61 Colo. 547, 159 P. 34 (1916).

**When funds are insufficient, bonds are paid off proportionately.** When coupons are presented for payment, and there is not sufficient funds in the hands of the treasurer which can be applied to the payment of all the coupons of the bond issue from which they were taken to pay them in full, such proportion of such funds may be applied on the coupons presented as are payable out of the funds in the hands of the treasurer in the ratio they bear to the sum total of the coupons to which such funds must be applied. *Thomas v. Patterson*, 61 Colo. 547, 159 P. 34 (1916).

## III. COMPENSATION OF TREASURER.

**The statute fixes the maximum and minimum of the fee allowed the treasurer,** not leaving it entirely to the discretion of the district. *Bd. of Comm'rs v. Otero Irrigation Dist.*, 56 Colo. 515, 139 P. 546 (1914).

**The compensation allowed is a fee and it is the only fee that can be charged.** *Bd. of Comm'rs v. Otero Irrigation Dist.*, 56 Colo. 515, 139 P. 546 (1914).

**No commissions are charged on proceeds from sale of district bonds.** The proceeds of the sale of the bonds of an irrigation district come

into the hands of the treasurer of the county in which the office of the district is located, not as county treasurer, but as ex officio treasurer of the district. No commissions are to be charged thereon. *Bd. of Comm'rs v. Otero Irrigation Dist.*, 56 Colo. 515, 139 P. 546 (1914).

**Commissions are to be collected upon irrigation district taxes**, according to the rate prescribed by § 30-1-102, and go into the fee fund and pass thence to the treasurer on account of his salary. *Bd. of Comm'rs v. Otero Irrigation Dist.*, 56 Colo. 515, 139 P. 546 (1914).

**37-41-110. Duties of election officers.** (1) One of the judges shall be chairman of the election board and may:

(a) Administer all oaths required in the progress of an election;  
(b) Appoint judges and clerks if during the progress of the election any judge or clerk ceases to act. Any member of the board of election, or any clerk thereof, may administer and certify oaths required to be administered during the progress of an election.

(2) Before opening the polls, each member of the board must take and subscribe an oath to faithfully perform the duties imposed upon him by law. Any elector of the precinct may administer and certify such oath. The polls must be opened at 9 a.m. on the day of election and be kept open until 7 p.m. on the same day. It is the duty of the clerk of the board of election to forthwith deliver the returns duly certified to the board of directors of the district.

**Source:** L. 05: p. 251, § 8. R.S. 08: § 3447. C.L. § 1967. CSA: C. 90, § 384. CRS 53: § 149-1-8. C.R.S. 1963: § 150-1-8. L. 77: (2) amended, p. 1632, § 4, effective May 24.

**37-41-111. Canvass of votes.** No lists, tally paper, or certificates returned from any election shall be set aside or rejected for want of form if they can be satisfactorily understood. The board of directors must meet at its usual place of meeting on the first Monday after election and canvass the returns. If at the time of meeting the returns from each precinct in the district in which the polls were open have been received, the board of directors must then and there proceed to canvass the returns; but, if all the returns have not been received, the canvass must be postponed from day to day until the returns have been received or until six postponements have been had. The canvass must be made in public and by opening the returns and counting the votes of the district for each person voted for and by declaring the results thereof. The board shall declare elected the person receiving the highest number of votes so returned for each office and also declare the result of any question submitted.

**Source:** L. 05: p. 252, § 9. R.S. 08: § 3448. C.L. § 1968. CSA: C. 90, § 385. CRS 53: § 149-1-9. C.R.S. 1963: § 150-1-9.

**37-41-112. Records - vacancy and term of office.** (1) The secretary of the board of directors, as soon as the result of any election held under the provisions of this article is declared, shall enter in the records of such board and file with the county clerk and recorder of the county in which the office of said district is located a statement of such results, which statement shall show:

(a) A copy of the publication notice of said election;  
(b) The names of the judges of said election;  
(c) The whole number of votes cast in the district and in each precinct of the district;  
(d) The names of the persons voted for;  
(e) The offices voted for;  
(f) The number of votes given in each precinct for each of such persons;  
(g) The number of votes given in the district for each of such persons;  
(h) The names of the persons declared elected;  
(i) The result declared on any question submitted in accordance with the majority of the votes cast for or against such question.

(2) The board of directors shall declare elected the person having the highest number of votes given for each office and also the result of any question submitted. The secretary shall immediately make out and deliver to such person a certificate of election, signed by



him and authenticated with the seal of the board. In case of a vacancy in the board of directors by death, removal, or inability from any cause to properly discharge the duties as such director, the vacancy shall be filled by appointment by the remaining members of the board, and, upon their failure or inability to act within thirty days after such vacancy occurs, then, upon petition of five electors of said district, the board of county commissioners of the county where the office of said board of directors is situate shall fill such vacancy. Any director so appointed shall hold his office until the next general election of said district and until his successor is elected and qualified.

**Source:** L. 05: p. 252, § 10. R.S. 08: § 3449. C.L. § 1969. CSA: C. 90, § 386. CRS 53: § 149-1-10. C.R.S. 1963: § 150-1-10.

#### ANNOTATION

**In filling "a vacancy" in the board of directors, the "remaining members" who are authorized to fill it must act as a board.** Two members constitute a quorum. There can be no valid meeting of a board without a quorum. One member of a board consisting of three members cannot constitute himself a quorum when the other two are absent. *Kepley v. People ex rel. Everson*, 76 Colo. 233, 230 P. 804 (1924).

**A vacancy can be filled only where there are two remaining members.** The use of the singular "vacancy" indicates that the filling by the board of "a vacancy" in the board can be done only where there are two "remaining members" qualified to act. The board, therefore, is unable to fill a vacancy if there is only one

qualified member. *Kepley v. People ex rel. Everson*, 76 Colo. 233, 230 P. 804 (1924).

**In the event of more than one vacancy, or where there are two vacancies in a board consisting of three members, only the board of county commissioners is competent to fill them.** The language itself clearly indicates this where it says that the county commissioners shall fill "such vacancy or vacancies", which means that where there is more than one vacancy, only the county board can fill them, and the county board may also fill one vacancy, when the irrigation board fails or is unable to act within 30 days. *Kepley v. People ex rel. Everson*, 76 Colo. 233, 230 P. 804 (1924).

**37-41-113. Board of directors - duties - contracts.** (1) The directors, having duly qualified, shall organize as a board, elect a president from their number, and appoint a secretary. The board has power and it is its duty to adopt a seal, manage and conduct the affairs and business of the district, make and execute all necessary contracts, employ such agents, attorneys, officers, and employees as may be required and prescribe their duties, and establish equitable rules and regulations for the distribution and use of water among the owners of said land. The board shall generally perform all such acts as shall be necessary to fully carry out the purposes of this article.

(2) Said board may also enter into any obligation or contract with the United States for the construction or operation and maintenance of the necessary works for the delivery and distribution of water therefrom, or for drainage of district lands, or for the assumption, as principal or guarantor, of indebtedness to the United States on account of district lands, or for the temporary rental of water under the provisions of the federal reclamation act and all acts amendatory thereof or supplementary thereto or any other federal laws which do not conflict with the constitution and laws of the state of Colorado and the rules and regulations established thereunder, or the board may contract with the United States for a water supply under any act of congress providing for or permitting such contract and may convey to the United States as partial or full consideration therefor water rights or other property of the district. In case contract has been made with the United States, bonds of the district may be deposited with the United States at ninety-five percent of their par value, to the amount to be paid by the district to the United States under any such contract, the interest on said bonds, if bearing interest, to be provided for by assessment and levy, as in the case of other bonds of the district, and regularly paid to the United States to be applied as provided in such contract, and, if bonds of the district are not so deposited, it is the duty of the board of directors to include, as part of any levy or assessment now provided for by law, an amount sufficient to meet each year all payments accruing under the terms of any such contract. Districts cooperating with the United States may rent or lease water to private



lands, entrymen, or municipalities in the neighborhood of the district in pursuance of contract with the United States and under terms and conditions not inconsistent with the laws of Colorado.

(3) Such board has the power, in addition to the means to supply water to said district proposed by the petition submitted for the formation of said district, to construct, acquire, purchase, or condemn any canals, ditches, reservoirs, reservoir sites, water, water rights, rights-of-way, or other property necessary for the use of the district or to acquire by condemnation, or otherwise, the right to enlarge any ditch, canal, or reservoir already constructed or partly constructed. In case of the purchase of any property by said district, when it shall be proposed by the board of directors to purchase a system of irrigation already constructed, or partially constructed, and to enlarge and complete the same adequate to the needs of the district, the board in such case may embody in one contract the matter of the purchase, the enlargement, and the completion of such irrigation system without inviting bids for such construction and completion; and, in case of the purchase of such property by said district, the bonds of the district provided for in section 37-41-117 may be used at their par value in payment without previous offer of such bonds for sale.

(4) No contract involving a consideration exceeding two hundred fifty thousand dollars and not exceeding four hundred thousand dollars shall be binding unless such contract has been authorized and ratified in writing by not less than one-third of the legal electors of said district according to the number of votes cast at the last district election; nor shall any contract in excess of four hundred thousand dollars be binding until such contract has been authorized and ratified at an election in the manner provided for the issue of bonds.

(5) Where the compensation to be paid by the district to the owner of any property which the board of directors of an irrigation district is authorized to take by proceedings in eminent domain has been finally determined to be in excess of twenty-five thousand dollars, sufficient time shall be given by the courts for the submission to and determination by the electors of the district, at a regularly called election in the district, of the question of whether the district shall pay said compensation or shall abandon such condemnation proceedings. If the electors shall authorize the payment of such compensation, the necessary additional time shall be given the district to pay such compensation, either by levy and collection of assessments against the lands of the district, or by the issue and sale of bonds of the district, or by both such methods as may be determined at a district election. Where the compensation to be paid shall be more than ten thousand dollars and less than twenty-five thousand dollars, the district board may elect to pay such compensation or abandon such condemnation proceedings upon authorization in writing by not less than one-third of the legal electors of said district according to the number of votes cast at the last district election.

(6) The rules and regulations shall be printed in convenient form, as soon as the same are adopted, for distribution in the district. All waters distributed shall be apportioned to each landowner pro rata to the lands assessed under this article within such district. But all water which has been acquired by the district by virtue of the laws of Colorado may be distributed and apportioned according to the terms of any contract entered into between the district and the United States, until the obligation due the United States is paid or the obligation to pay is discharged in any manner. Nothing in this article shall be deemed or construed to grant or relinquish to the United States any of the sovereign rights of the state of Colorado in and to the waters within its borders, or its exclusive authority over and jurisdiction and control of said waters, and the diversion, appropriation, and use thereof nor in any manner change the methods of appropriation thereof.

(7) The board of directors has power to lease or rent the use of water, or contract for the delivery thereof, to occupants of other lands within or without the said district at such prices and on such terms as it deems best, but the rental shall not be less than one and one-half times the amount of the district tax for which said land would be liable if held as a freehold. No vested prescriptive right to the use of such water shall attach to said land by virtue of such lease or such rental; except that any landowner in said district, with the consent of the board of directors, may assign the right to the whole or any portion of the water so apportioned to him for any one year where practicable to any other bona fide landowner, to be used in said district for use on his land for said year, but such owner shall have paid all amounts due on assessments upon all such lands.

(8) The board of directors further has power to lease or rent the use of water, or to contract for the delivery thereof, to settlers upon or occupants of the public domain, whose entries shall not have been subordinated to the district through compliance with the act of congress approved August 11, 1916, on the terms as provided in this section; except that, in such case, the board of directors has the further power to make a contract on behalf of the district with such settler or occupant to the effect that such settler or occupant, upon receiving full title to his lands and upon the payment of his proportionate share of the bond assessments as provided in section 37-41-136, shall include his lands within said district and, upon such inclusion, shall be entitled to all the rights and privileges of a member of said district. Before the execution of such contract the board of directors shall cause notice of such contract to be given substantially as provided in section 37-41-134, with such changes in the form of the notice as may be necessary, and a hearing upon said contract and all objections thereto shall be had as provided in section 37-41-135. If upon said hearing the board of directors deems it not for the best interests of the district to execute said contract, it by order shall refuse to execute said contract; but, if it deems it for the best interests of the district that said contract be executed, the board may execute said contract, and, in such case, said contract shall be valid and binding upon all parties thereto; and, when the said settler or occupant shall have complied with said contract and obtained title to his lands, upon proof of such compliance and obtaining of title, and without any further notice or hearing upon the matter, the board shall enter an order of inclusion of said lands as provided in section 37-41-137, but, if within thirty days from the execution of said contract a majority of the qualified electors of the district protest in writing to said board against the execution of said contract, the contract shall be held for naught and shall not be binding upon any party thereto.

**Source:** L. 05: p. 253, § 11. R.S. 08: § 3450. L. 09: p. 422, § 1. L. 17: p. 293, § 3. L. 19: p. 470, § 3450. L. 21: p. 497, § 1. C.L. § 1970. CSA: C. 90, § 387. CRS 53: § 149-1-11. C.R.S. 1963: § 150-1-11. L. 71: p. 1346, § 1. L. 2006: (4) amended, p. 71, § 3, effective July 1.

#### ANNOTATION

**Law reviews.** For note, "A Survey of Colorado Water Law", see 47 Den. L.J. 226 (1970).

**This section protects all property owners within district.** This section was intended not merely for the protection of the electors who might vote, but for the protection of all of the property owners in the district. *Colo. Irrigation Constr. Co. v. Nile Irrigation Dist.*, 69 Colo. 366, 194 P. 609 (1920).

**An irrigation district may contract for the doing of the work for the district or it may contract for the delivery of a complete system of irrigation.** *Gas Sec. Co. v. Antero & Lost Park Reservoir Co.*, 259 F. 423 (8th Cir. 1919).

**If it adopts the former plan, it must secure public bids for doing the work and follow certain other requirements.** *Gas Sec. Co. v. Antero & Lost Park Reservoir Co.*, 259 F. 423 (8th Cir. 1919).

**The legislative act under which a district is organized authorizes the acquisition by purchase or condemnation of rights-of-way for ditches, canals, etc., by the district.** *North Sterling Irrigation Dist. v. Knifton*, 137 Colo. 40, 320 P.2d 968 (1958).

Irrigation districts have the statutory right, under certain circumstances, to exercise the

power of eminent domain. *Riverside Irrigation Dist. v. Lamont*, 194 Colo. 320, 572 P.2d 151 (1977).

**This section gives the district board full power to conduct the business of the district,** to make all necessary contracts, employ agents and attorneys, and to perform all acts necessary to carry out the purpose of the irrigation statute. *Interstate Trust Co. v. Steele*, 65 Colo. 99, 173 P. 873 (1918).

**The board has power to employ attorneys to protect the rights and look after the interests of the district** as a public corporation, but not to represent the individual directors in defending their right to hold a public office. *Ellis v. Moses*, 76 Colo. 214, 230 P. 802 (1924).

**The board does not have power to employ attorneys to represent them as individuals in responding to, or defending against, a charge instituted by the people that they are usurpers, or to charge against the district the amount of the attorney fee which these individuals agreed to pay.** *Ellis v. Moses*, 76 Colo. 214, 230 P. 802 (1924).

**The directors may not employ one of their number as secretary, or superintendent, of the district.** Warrants issued to a director for his



salary in such position are void. *Interstate Trust Co. v. Steele*, 65 Colo. 99, 173 P. 873 (1918).

**The board is without power to materially change plans authorized by the electors.** Where the electors of an irrigation district vote to purchase an irrigation system to be completed according to certain plans and specifications prepared by an engineer, the district board is without power to authorize material changes in the plans and any contract entered into by the members thereof materially changing the system from that authorized by the electors, is illegal. *Antero & Lost Park Reservoir Co. v. Lowe*, 69 Colo. 409, 194 P. 945 (1921).

**Acceptance of work by an irrigation district board under a void contract is without effect.** *Colo. Irrigation Constr. Co. v. Nile Irrigation Dist.*, 69 Colo., 366, 194 P. 609 (1920).

**Action of two directors is valid.** The absence of one of three directors of an irrigation district, he having had notice of the meeting, does not invalidate the action of the other two. *Lockard v. People ex rel. Hasselbush*, 80 Colo. 31, 250 P. 152 (1926).

**In view of the general powers given to the board, the requirement of § 37-41-126 that**

**claims be verified is not mandatory.** Thus, the omission to verify does not deprive the board of the power given it by this section. *Interstate Trust Co. v. Steele*, 65 Colo. 99, 173 P. 873 (1918).

**Warrants issued by a district are valid in the hands of a holder in good faith.** Warrants of an irrigation district issued in payment of an obligation for which the district was liable are valid in the hands of one who receives them in the usual course of business, without notice of any defect in the title. *Interstate Trust Co. v. Steele*, 65 Colo. 99, 173 P. 873 (1918).

**While a warrant drawn by irrigation district directors is presumed to be lawful, the treasurer may overcome the presumption in an action in mandamus against him to compel payment or registration.** *Ellis v. Moses*, 76 Colo. 214, 230 P. 802 (1924).

**Discretion exercised by the board, unless abused, cannot be reviewed by the court at the instance of a taxpayer.** *Antero & Lost Park Reservoir Co. v. Lowe*, 69 Colo. 409, 194 P. 945 (1921).

**37-41-114. Meetings - duties - eminent domain.** The board of directors shall hold a regular quarterly meeting in its office on the first Tuesday in January, April, July, and October and such special meetings as may be required for the proper transaction of business. All special meetings shall be called by the president of the board or any two directors. All meetings of the board must be public, and two members shall constitute a quorum for the transaction of business and, on all questions requiring a vote, there shall be a concurrence of at least two members of said board. All special meetings of the board shall be held at locations which are within the boundaries of the district or which are within the boundaries of any county in which the district is located, in whole or in part, or in any county so long as the meeting location does not exceed twenty miles from the district boundaries. The provisions of this section governing the location of meetings may be waived only if the proposed change of location of a meeting of the board appears on the agenda of a regular or special meeting of the board and if a resolution is adopted by the board stating the reason for which a meeting of the board is to be held in a location other than under the provisions of this section and further stating the date, time, and place of such meeting. All records of the board must be open to the inspection of any elector during business hours. The board and its agents and employees shall have the right to enter upon any land in the district, to make surveys, and to locate and construct any canal and the necessary laterals. Said board shall also have the right to acquire all lands, water rights, franchises, and other property necessary for the construction, use, maintenance, repair, and improvement of its canals, ditches, reservoirs, and waterworks and shall also have the right by purchase or condemnation to acquire rights-of-way for the construction or enlargement of any of its ditches, canals, or reservoirs and lands for reservoir sites.

**Source:** L. 05: p. 254, § 12. R.S. 08: § 3451. C.L. § 1971. CSA: C. 90, § 388. CRS 53: § 149-1-12. C.R.S. 1963: § 150-1-12. L. 90: Entire section amended, p. 1502, § 16, effective July 1.

**Cross references:** For condemnation proceedings, see articles 1 to 7 of title 38.



## ANNOTATION

**Law reviews.** For article, "Eminent Domain in Colorado", see 29 Dicta 313 (1952). For note, "A Survey of Colorado Water Law", see 47 Den. L.J. 226 (1970).

**Under this section the district is given the right to enter and take land for irrigation works, but is nowhere absolved from the obligation to pay.** It may purchase, condemn, or settle, but it must pay. San Luis Valley Irrigation Dist. v. Noffsinger, 85 Colo. 202, 274 P. 827 (1929).

**Owner of land must be paid for right-of-way for ditches.** Where a right-of-way for a ditch has been condemned and the ditch constructed and maintained on the ground for years, it constitutes a taking of the property for which the owner must be paid. Henry L. Doherty & Co. v. Steele, 71 Colo. 33, 204 P. 77 (1922).

**Applied** in Trinchera Ranch Co. v. Trinchera Irrigation Dist., 89 Colo. 170, 300 P. 614 (1931); Riverside Irrigation Dist. v. Lamont, 194 Colo. 320, 572 P.2d 151 (1977).

**37-41-115. Property - title.** The title to all property acquired under this article shall immediately and by operation of law vest in such irrigation district in its corporate name, and shall be held by such district in trust for and is hereby dedicated and set apart for the uses and purposes set forth in this article, and shall be exempt from all taxation as provided in section 3 of article X of the state constitution. The board is hereby authorized to hold, use and acquire, manage, occupy, and possess said property as provided in this article; except that when any district contemplated in this article finds it necessary to procure and acquire a supply of water from outside the boundaries of this state, then it shall be lawful for said district to contract and pay for the same in the same manner as other property acquired by the district is purchased and paid for. Any property acquired by the district may be conveyed to the United States insofar as the same may be needed for the construction, operation, or maintenance of works by the United States for the benefit of the district under any contract that may be entered into by the United States pursuant to this article.

**Source:** L. 05: p. 255, § 13. R.S. 08: § 3452. L. 17: p. 297, § 5. C.L. § 1972. CSA: C. 90, § 389. CRS 53: § 149-1-13. C.R.S. 1963: § 150-1-13.

## ANNOTATION

**The general assembly cannot extend § 3 of art. X, Colo. Const., which exempts from separate taxation ditches, canals, and flumes owned and used by individuals or corporations for irrigating their own lands exclusively.** The enactments of such statutes are unauthorized exercises of legislative power, and the portion of this section insofar as it attempts to exempt the

property of irrigation districts from taxation, is unconstitutional and void. Logan Irrigation Dist. v. Holt, 110 Colo. 253, 133 P.2d 530 (1942).

**For inability of district to abandon project after expenditures have been made,** see Gas Sec. Co. v. Antero & Lost Park Reservoir Co., 259 F. 423 (8th Cir. 1919).

**37-41-116. Conveyances - suits.** (1) The said board is hereby authorized to take conveyances or assurances for all property acquired by it under the provisions of this article in the name of such irrigation district for the purposes expressed in this article, and to institute and maintain any actions and proceedings, and suits at law or in equity, necessary or proper in order to fully carry out the provisions of this article, or to enforce, maintain, protect, or preserve any rights, privileges, and immunities created by this article or acquired in pursuance thereof. In all courts, actions, suits, or proceedings, the board may sue, appear, and defend in person or by attorneys and in the name of such irrigation district. Judicial notice shall be taken in all actions, suits, and judicial proceedings in any court of this state of the organization and existence of any irrigation district of this state from and after the filing for record in the office of the county clerk and recorder of the certified copy of the order of the board of county commissioners mentioned in section 37-41-103. A certified copy of said order shall be prima facie evidence in all actions, suits, and proceedings in any court of this state of the regularity and legal sufficiency of all acts, matters, and proceedings therein recited and set forth.

(2) Any such irrigation district, in regard to which any such order has been entered and

such certified copy thereof so filed for record, and which has exercised or shall exercise the rights and powers of such a district, and which shall have in office a board of directors exercising the duties of their office, and the legality or regularity of the formation or organization of which shall not have been questioned by proceedings in quo warranto instituted in the district court of the county in which such district or the greater portion thereof is situated within one year from the date of such filing, shall be conclusively deemed to be a legally and regularly organized, established, and existing irrigation district within the meaning of this article; and its due and lawful formation and organization shall not thereafter be questioned in any action, suit, or proceeding whether brought under the provisions of this article or otherwise.

**Source:** L. 05: p. 255, § 14. R.S. 08: § 3453. C.L. § 1973. CSA: C. 90, § 390. CRS 53: § 149-1-14. C.R.S. 1963: § 150-1-14.

#### ANNOTATION

**For irrigation districts being subject to rules of civil procedure,** see North Sterling

Irrigation Dist. v. Dickman, 66 Colo. 8, 178 P. 559 (1919).

**37-41-117. Bonds - contract - purposes - election.** (1) For the purpose of constructing or purchasing or acquiring necessary reservoir sites, reservoirs, water rights, canals, ditches, and works and of acquiring the necessary property and rights therefor; for the assumption of indebtedness to the United States or for entering into a contract with the United States or any agency thereof or water right owners for district lands; for the purpose of paying the first year's interest upon the bonds authorized in this article; and for otherwise carrying out the provisions of this article, the board of directors of any such district, as soon after such district has been organized as may be practicable, shall estimate and determine the amount of money necessary to be raised for such purposes and shall forthwith call a special election, at which election shall be submitted to the electors of such district possessing the qualifications prescribed by this article the question of whether or not the bonds of said district shall be issued in the amount so determined and, if applicable, whether the contract shall be approved.

(2) A notice of such election must be given by posting notices in three public places in each election precinct in said district for at least twenty days and also by publication of such notice in some newspaper published in the county where the office of the board of directors of such district is required to be kept, once a week for at least three successive weeks. Such notice shall specify the time of holding the election, the amount of bonds proposed to be issued, and, if applicable, the dollar amount of the contract to be entered into, and said election must be held and the result thereof determined and declared in all respects as nearly as possible in conformity with the provisions of this article governing the election of officers. No informalities in conducting such election shall invalidate the same if the election shall have been otherwise fairly conducted.

(3) At such election the ballots shall contain the words, if applicable, "Bonds - Yes" or "Bonds - No" or, if applicable, "Contract - Yes" or "Contract - No", or words equivalent thereto. If a majority of the legal electors who are freeholders and taxpayers or entrymen qualified as provided in this article within said district voting at said election have voted "Bonds - Yes" or "Contract - Yes", the board of directors shall immediately cause bonds in such amount to be issued and payable in series with such rate of interest as may be required to market said bonds as irrigation district bonds or cause the contract to be executed by the president and the secretary of the district.

(4) The principal and interest shall be payable at the office of the county treasurer of the county in which the organization of the district was effected and at such other place as the board of directors may designate in such bond. Said bonds shall be in denominations as may be determined by the board of directors and shall be negotiable in form, executed in the name of the district, and signed by the president and secretary, and the seal of the district shall be affixed thereto. Bonds deposited with the United States may call for the payment of such interest not exceeding the going rate for irrigation district bonds, may be of such



denominations and may call for the repayment of the principal at such times as may be agreed upon between the district and the secretary of the interior, and, where the contract provides, may likewise call for the repayment of the principal at such times as may be agreed upon. Said bonds shall be numbered consecutively as issued and bear date at the time of their issue. Coupons for the interest shall be attached to each bond bearing the lithographed signatures of the president and secretary. Said bonds shall express on their faces that they are issued by the authority of this article, stating its title and date of approval.

(5) The secretary shall keep a record of the bonds sold, their number, date of sale, the price received, and the name of the purchaser; but any such district, by a majority vote of the legal electors of said district voting at said election, may provide for the issuance of bonds that will mature in any number of years less than thirty and arrange for the payment thereof in series. When the money provided by any previous issue of bonds has become exhausted by expenditures authorized therefrom and it becomes necessary to raise additional money for such purposes, additional bonds may be issued by submitting the question at a special election to the qualified voters of said district and otherwise complying with the provisions of this section in respect to an original issue of such bonds. The lien for taxes, for the payment of the interest and principal of any bond issue, or for any indebtedness under any contract with the United States or any agency thereof or another financial institution shall be a prior lien to that of any subsequent bond issue or under subsequent contract.

(6) If a contract is proposed to be made with the United States and bonds are not to be deposited with the United States in connection therewith, the question to be submitted to the voters at such special election is whether a contract shall be entered into with the United States or any agency thereof or any financial institution. The notice of election shall state the maximum amount of money payable to the United States for construction or other purposes, exclusive of penalties and interest, and the water rights and other property, if any, to be conveyed to the United States, any agency thereof, or another financial institution as provided in section 37-41-113. The ballots for such election shall contain the words "Contract with the United States or agency thereof or financial institution - Yes", and "Contract with the United States or agency thereof or financial institution - No", or words equivalent thereto.

**Source:** L. 05: p. 256, § 15. R.S. 08: § 3454. L. 17: p. 298, § 6. C.L. § 1983. CSA: C. 90, § 391. CRS 53: § 149-1-15. C.R.S. 1963: § 150-1-15. L. 77: Entire section amended, p. 1633, § 1, effective June 2.

#### ANNOTATION

**Law reviews.** For note, "A Survey of Colorado Water Law", see 47 Den. L.J. 226 (1970).

**The constructions placed on this and the following sections by the supreme court of Colorado are binding on the federal courts.** Denver-Greeley Valley Irrigation Dist. v. McNeil, 80 F.2d 929 (10th Cir. 1936).

**Violation of rule was nonprejudicial where majority of qualified electors voted in favor of bond issue.** The violation of this rule was nonprejudicial to plaintiff, where it appeared that the whole number of qualified electors entitled to vote at the election for a second bond issue was 10, and that at least six who voted "Yes" possessed the requisite qualifications, so that a majority voted in favor of the bond issue. Wilder v. Bd. of Dirs. of S. Side Irrigation Dist., 55 Colo. 363, 135 P. 461 (1913).

**The power given to the irrigation district to issue its bonds, when exercised, imposed an obligation upon the district to levy a sufficient**

tax to pay such bonds as they became due unless the constitution or statutes of the state forbade. Norris v. Montezuma Valley Irrigation Dist., 248 F. 369 (8th Cir. 1918).

**This section becomes a part of the contract with the bondholders.** The bondholders must be held to have taken the bonds with the understanding and agreement that they were only entitled to the principal and the annual interest, and that no interest on the principal of the bonds or on the coupons was provided for or could be recovered after their maturity. In re Green City Irrigation Dist., 91 Colo. 202, 13 P.2d 1113 (1932).

**One is entitled to a judgment against the district, but not entitled to execution unless perchance to reach moneys in the treasury which may have been collected from assessments levied in accordance with the underlying statute.** She must look to the revenue provided by statute for the payment of her bonds. Divide Creek



Irrigation Dist. v. Hollingsworth, 72 F.2d 859 (10th Cir. 1934).

**Where bonds recite that all acts and things required to be done to render their issuance lawful have been done, the district cannot assert, against an innocent purchaser for value, that they were improvidently issued, or issued for a purpose not contemplated by the statute or election notice, or that those to whom they were issued did not live up to agreements contemporaneously made.** Divide Creek Irrigation Dist. v. Hollingsworth, 72 F.2d 859 (10th Cir. 1934).

**A third person having knowledge of infirmities in bonds should return them.** In an action for the return of irrigation district bonds, a third party to whom they were delivered, having full knowledge of their infirmities, should return them, regardless of the relations existing between himself and the party to whom they were originally delivered. Henry L. Doherty & Co. v. Steele, 71 Colo. 33, 204 P. 77 (1922).

If bonds of an irrigation district are so wrongfully delivered that they ought to be returned, then they to whom they are delivered should return them, and they cannot relieve themselves of the obligation by transferring them to others, whether those others be holders in due course or not. Henry L. Doherty & Co. v. Steele, 71 Colo. 33, 204 P. 77 (1922).

**The fact that the district is not liable on bonds which were wrongfully delivered is one**

**reason why they should be returned.** Henry L. Doherty & Co. v. Steele, 71 Colo. 33, 204 P. 77 (1922).

**It was not error to enter judgment for the par value of bonds in case they could not be returned to the district.** Henry L. Doherty & Co. v. Steele, 71 Colo. 33, 204 P. 77 (1922).

**The delivery of certain rights-of-way of nominal value to an irrigation district held not a sufficient consideration for a transfer of bonds of the district of the face value of \$250,000.** Henry L. Doherty & Co. v. Steele, 71 Colo. 33, 204 P. 77 (1922).

**This section provides that, so far as a second issue of bonds is concerned, the same procedure must be gone through as is provided for the first issue.** This means everything concerning them. Thomas v. Patterson, 61 Colo. 547, 159 P. 34 (1916).

**In order to be different liens for taxes, there must be different levies for these taxes.** The proviso of this section says "the lien for taxes" not "the lien on taxes" and, in order to be different liens for taxes, there must be different levies for these taxes. Somewhat similar conditions pertaining to different liens for taxes have been recognized in different cases, some of which are cited, not as authority upon this question, but as referring to the subject and as recognizing a distinction between different liens for taxes for different purposes. City & County of Denver v. Keeler, 48 Colo. 54, 108 P. 998 (1910); Thomas v. Patterson, 61 Colo. 547, 159 P. 34 (1916).

**37-41-118. Sale of bonds - proceeds.** The board may sell bonds from time to time in such quantities as may be necessary and most advantageous to raise the money for the construction or purchase of canals, reservoir sites, reservoirs, and water rights and works and otherwise to fully carry out the object and purposes of this article. Before making any sale, the board, at a meeting, by resolution, shall declare its intention to sell a specified amount of the bonds and the day and hour and place of such sale and shall cause such resolution to be entered in the minutes and notice of the sale to be given by publication thereof at least twenty days in a daily newspaper published in the city of Denver and in any other newspaper at its discretion. The notice shall state that sealed proposals will be received by the board at its office, for the purchase of the bonds, until the day and hour named in the resolution. At the time appointed, the board shall open the proposals and award the purchase of the bonds to the highest responsible bidder and may reject all bids. The board in no event shall sell any of said bonds for less than ninety-five percent of the face value thereof. In case no bid is made and accepted, the board of directors is hereby authorized to use said bonds for the purchase of canals, reservoir sites, reservoirs, and water rights and works, or for the construction of any canal, reservoir, and works; but such bonds shall not be so disposed of at less than ninety-five percent of the face value thereof.

**Source:** L. 05: p. 258, § 16. R.S. 08: § 3455. C.L. § 1984. CSA: C. 90, § 392. CRS 53: § 149-1-16. C.R.S. 1963: § 150-1-16.

#### ANNOTATION

**Law reviews.** For note, "A Survey of Colorado Water Law", see 47 Den. L.J. 226 (1970).

**Bonds create trust relation requiring investment in irrigation.** Where a district put

forth an issue of bonds payable "to bearer", obviously intended for a negotiable security to be purchased by the investing public, and stating upon their faces that they were "a lien upon all the real property in said district", the clear intention of the parties, acted upon by the bondholders through purchase of the bonds, created a relation of trust, the terms of which were that the district would invest such funds in the irrigation of the lands in the district. *Gas Sec. Co. v. Antero & Lost Park Reservoir Co.*, 259 F. 423 (8th Cir. 1919).

**The district shall require sufficient assessment, levy, and collection to actually pay debt.** A statutory obligation of a municipal cor-

poration or quasi-municipal corporation to pay its debt, or to fix a rate of levy necessary to provide the amount of money required to pay its debt, is not satisfied by an assessment and rate of levy sufficient to pay the debt if the taxes are collected, but requires that there be a sufficient assessment and levy and collection of the taxes as levied to actually pay the debt. *Norris v. Montezuma Valley Irrigation Dist.*, 248 F. 369 (8th Cir. 1918).

**The warrant, bond, and coupon indebtedness is not a lien** against any of the lands within the irrigation district. *Kiles v. Trinchera Irrigation Dist.*, 136 F.2d 894 (10th Cir. 1943).

**37-41-119. Bonds - payment - lien.** The bonds, and the interest thereon, and all payments due or to become due to the United States under any contract between the district and the United States accompanying which bonds of the district have not been deposited with the United States shall be paid by revenue derived from an annual assessment upon the real property of the district, and the real property of the district shall be and remain liable to be assessed for such payments. Public lands of the United States within any district shall be subject to taxation for all purposes of this article to the extent provided by the act of congress approved August 11, 1916, upon full compliance therewith by the district.

**Source:** L. 05: p. 259, § 17. R.S. 08: § 3456. L. 17: p. 302, § 7. C.L. § 1985. CSA: C. 90, § 393. CRS 53: § 149-1-17. C.R.S. 1963: § 150-1-17.

#### ANNOTATION

The provisions of this section measure the obligations of the district and the property owners therein. *Divide Creek Irrigation Dist. v. Hollingsworth*, 72 F.2d 859 (10th Cir. 1934).

This section calls for a construction which creates a lien by necessary implication without express language to that effect. *Thomas v. Patterson*, 61 Colo. 547, 159 P. 34 (1916).

Upon default in payment of interest, sole remedy of bondholder is mandamus. Under the provisions of this section, the sole remedy of the holder of the bonds of an irrigation district, if default is made in the payment of interest, is by mandamus. *Henrylyn Irrigation Dist. v. Thomas*, 64 Colo. 413, 173 P. 541 (1918); *Alpha Corp. v. Denver-Greeley Valley Irrigation Dist.*, 110 Colo. 179, 132 P.2d 448 (1942); *Kiles v. Trinchera Irrigation Dist.*, 136 F.2d 894 (10th Cir. 1943).

An ordinary action demanding judgment for money will not lie. *Henrylyn Irrigation Dist. v. Thomas*, 64 Colo. 413, 173 P. 541 (1918); *Alpha Corp. v. Denver-Greeley Valley Irrigation Dist.*, 110 Colo. 179, 132 P.2d 448 (1942); *Kiles v. Trinchera Irrigation Dist.*, 136 F.2d 894 (10th Cir. 1943).

Under this section, bonds shall be paid by annual assessments on the lands in the district sufficient to pay the principal and the interest of the bonds. *Gas Sec. Co. v. Nile Irrigation Dist.*, 293 F. 365 (8th Cir. 1923).

The method provided by the act for the payment of the bonds and interest is exclusive, and the court cannot require the board to depart from the method prescribed for it in the act. *Norris v. Montezuma Valley Irrigation Dist.*, 240 F. 825 (D. Colo. 1916).

The statute makes no provision for interest after the obligations are due, and bondholders must be held to have acquired their bonds and coupons with that understanding. *Denver-Greeley Valley Irrigation Dist. v. McNeil*, 80 F.2d 929 (10th Cir. 1934).

The lien of the bonds is exhausted upon sale of the lands at a tax sale after default in a assessment made to satisfy the entire indebtedness on the bonds. *Sumers v. Bd. of County Comm'rs*, 117 Colo. 57, 184 P.2d 144 (1947).

The courts of the United States are not deprived of the power to enforce the right because it is rooted in a state statute which prescribes a different method of enforcement in the state courts. *Divide Creek Irrigation Dist. v. Hollingsworth*, 72 F.2d 859 (10th Cir. 1934).

A nonresident may enforce right in federal court. While appellee's right is measured by this section and the Colorado decisions construing it, neither state statute nor decision can prevent appellee, a nonresident, from enforcing that right in the courts of the United States, nor control the procedure of such courts. *Divide Creek Irrigation Dist. v. Hollingsworth*, 72 F.2d 859 (10th Cir. 1934).



**Mandamus available in federal court only after right has ripened into judgment.** In the federal courts mandamus is an ancillary remedy, available in such instances as this, only after the right has ripened into judgment. An action to adjudicate the existence of the right is a necessary step in the enforcement of that right by mandamus. *Divide Creek Irrigation Dist. v. Hollingsworth*, 72 F.2d 859 (10th Cir. 1934).

**Where there are two issues of bonds, and single levy of taxes, to pay** "the interest which

may become due on the bonds of the district" during a specified year, largely in excess of the interest due on the first issue, but not sufficient to discharge what accrues upon the two, the tax collected is to be apportioned to the holders of the two issues, in the proportion that the total amount collected bears to the total amount of the interest falling due during the year. *Thomas v. Patterson*, 61 Colo. 547, 159 P. 34 (1916).

**37-41-120. Fiscal year - directors to fix levy.** The fiscal year of each irrigation district in this state shall commence on January 1 in each year. It is the duty of the board of directors on or before October 15 in each year to determine the amount of money required to meet the maintenance, operating, and current expenses for the ensuing fiscal year and to certify by resolution to the board of county commissioners of the county in which the office of the district is located said amount, together with any additional amount which may be necessary to meet any deficiency in the payment of said expenses theretofore incurred. The board of directors may fix the amount payable for any tract containing one acre or less and, if so, similarly shall certify this amount to the board of county commissioners. The board of directors shall also fix the amount payable by each tract within any district with which the United States has made a contract and shall certify the same to the board of county commissioners, and the amount so fixed shall be in accordance with the federal reclamation laws and the public notices, orders, and regulations issued thereunder and shall be in compliance with any contracts made by the United States with any owners of said lands and in compliance further with the contracts between the district and the United States. The obligation of every irrigation district contracting with the United States shall be deemed a district debt. Said resolution shall be termed the annual appropriation resolution for the next fiscal year, and no expenditure to be paid out of such fund shall exceed in any one year the amounts fixed for such expenses in the annual appropriation resolution, except as provided in section 37-41-129.

**Source:** L. 05: p. 259, § 18. R.S. 08: § 3457. L. 13: p. 384, § 1. L. 15: p. 302, § 1. L. 17: p. 302, § 8. C.L. § 1994. CSA: C. 90, § 394. CRS 53: § 149-1-18. L. 63: p. 1000, § 1. C.R.S. 1963: § 150-1-18.

#### ANNOTATION

**The power given under the act was to assess special improvement taxes only; therefore it is constitutional.** *Interstate Trust Co. v. Montezuma Valley Irrigation Dist.*, 66 Colo. 219, 181 P. 123 (1919).

**Section provides for local improvements or special assessments.** In no sense can it be said that, under the act in question, the assessments to pay the bonds are to be levied or collected in order that one may take another's property for his own exclusive use. Nor does it follow that the method must be assimilated to and follow exactly the mode provided in the constitution for the assessment and collection of taxes for general state purposes. The nature of the assessments is not for local improvements, which, however, eventuate in the advancement of the public good, and such assessments and collections can be lawfully made. *Interstate Trust Co. v. Montezuma Valley Irrigation Dist.*, 66 Colo. 219, 181 P. 123 (1919).

**Irrigation district bonds, bond interest, and warrant liens are special assessment liens and not blanket liens,** and cumulative tax levies for the purpose of paying such irrigation district indebtedness cannot be made or enforced. *Alpha Corp. v. Denver-Greeley Valley Irrigation Dist.*, 110 Colo. 179, 132 P.2d 448 (1942).

**The additional amount which may be levied under this section is not for the purpose of paying current warrants,** and has nothing to do with it, and the warrants issued in payment of the current expense would be no more entitled to be paid out of this fund than would the previous warrants out of the levy for current expense. *Eberhart v. Canon*, 61 Colo. 340, 157 P. 189 (1916).

**District cannot add to the yearly expenses an amount sufficient to pay warrants of preceding years.** The phrase, "deficiency in the payment of said expenses theretofore incurred",



does not empower, and does not purport to empower, the district to add to the yearly expenses, by cumulative levies, an amount sufficient to cover unpaid warrants for the expenses of preceding years. To strain the intent of the statute to this construction would be to compel only a portion of the landowners, perhaps but one of them, to bear the whole burden of the district. This is not only inconsistent with and contrary to the theory of special assessments, which is that assessments shall be in proportion to the benefits conferred, but amounts to confiscation in the guise of taxes for local improvements. *Interstate Trust Co. v. Montezuma Valley Irrigation Dist.*, 66 Colo. 219, 181 P. 123 (1919).

**Section requires that the directors anticipate and certify the amounts necessary** but, appreciating the uncertainties that might arise from determining these questions in advance, the general assembly attempted to meet them by the latter portion of this section in providing that, upon the following year, such additional amount might be raised as is necessary to meet any deficiency in the payment of the expenses theretofore incurred. *Eberhart v. Canon*, 61 Colo. 340, 157 P. 189 (1916); *Henrylyn Irrigation Dist. v. Thomas*, 66 Colo. 296, 181 P. 979 (1919).

**Writ compelling directors to certify amount to the commissioners must show prior demand and refusal.** Where it is sought to compel the directors of an irrigating district to certify to the county commissioners the amount

necessary to pay interest on outstanding bonds of such district, the writ must show prior demand and refusal. *Henrylyn Irrigation Dist. v. Thomas*, 66 Colo. 296, 181 P. 979 (1919).

**The owner of a minority of the bonds of an irrigation district is entitled to mandamus to compel the directors** of the district to determine the amount of money required to discharge his holdings, and certify the same to the county commissioners. He is entitled to satisfaction of the bonds which he holds and is not required to go further. *Henrylyn Irrigation Dist. v. Thomas*, 66 Colo. 300, 181 P. 980 (1919).

**If action appears injurious to other holders, they must complain.** If, when mandamus is awarded, the action of the board appears injurious to the holders of other bonds outstanding, it is for these holders to complain. *Henrylyn Irrigation Dist. v. Thomas*, 66 Colo. 300, 181 P. 980 (1919).

**Holders of unpaid warrants of preceding years may take land at tax sale in lieu of warrants.** When all assessments required by law have been levied, the district is not empowered to add to the yearly expense by a cumulative levy, to cover warrants issued for the expenses of preceding years. The holders of warrants issued in preceding years, and which remain unpaid, by reason of the defaults of the taxpayers, may take the land itself at the tax sale, in lieu of the warrant. *Interstate Trust Co. v. Montezuma Valley Irrigation Dist.*, 66 Colo. 219, 181 P. 123 (1919).

**37-41-121. Assessor - assessment.** (1) It is the duty of the county assessor of any county embracing the whole or a part of any irrigation district to assess and enter upon his records as assessor in its appropriate column the assessment of all real estate, including public lands subject to assessment under the act of congress of August 11, 1916, exclusive of improvements, situate, lying, and being within any irrigation district in whole or in part of such county. Immediately after said assessment has been extended as provided by law, the assessor shall make returns of the total amount of such assessment to the board of county commissioners of the county in which the office of said district is located. All lands within the district, for the purpose of taxation under this article, shall be valued by the assessor at the same rate per acre; but in no case shall any land be taxed, or subject to taxation, for irrigation district purposes under this article, or under any other law relative to irrigation districts, which, by reason of location or the broken uneven surface, or unsuitable character or quality of the soil, is unsuitable for irrigation and cultivation, or which, from any natural cause, is not capable of irrigation and cultivation, except at a financial loss, nor shall tracts of land of one acre or less be taxed for irrigation purposes if the board of directors of the irrigation district has fixed an amount payable for each of said tracts. If the amount of water available from the water system of the irrigation district is wholly insufficient for the successful growing and maturing of crops on the entire acreage of lands within the district and susceptible of irrigation therefrom, that fact may be alleged and, upon being established by proofs, shall entitle the owner of lands that have never been cultivated and irrigated from the water system of such irrigation district to the relief provided for in this article.

(2) In all cases where any such land is included in any irrigation district under any law relative to irrigation districts and assessed for irrigation district purposes, it may be excluded from such irrigation district and relieved from such assessments for irrigation district purposes by order of the board of directors of the irrigation district, upon written

petition of the owner, verified as pleadings are required to be verified. The petition shall state the grounds upon which the relief is asked and shall also show that the land has never been cultivated and irrigated and is incapable of cultivation by irrigation from the irrigation system of the irrigation district, and that the petitioner did not participate in the organization of the districts; and, upon hearing before the board of directors on such petition, the allegations thereof must be supported by evidence. Notice of the filing of such petition and of the time and place of hearing thereon shall be given for the length of time and in the manner as provided in section 37-41-144.

(3) The action of the board of directors upon such petitions, as well as the action of the board of county commissioners in including such land in such irrigation district and the subsequent taxing of such lands for irrigation district purposes, shall be subject to review and correction by any court of competent jurisdiction, but the owner of any such land shall be deemed to have waived, relinquished, and lost his right to relief under this section as to such land or such portion of it as he has cultivated and irrigated from the irrigation system of such irrigation district; where a contract has been entered into between the United States and any irrigation district, the district boundaries shall not be changed, nor shall lands be exempted from taxation except upon written consent of the secretary of the interior filed with the official records of the district, nor in case of such a contract shall the foregoing provisions of this section requiring the assessor to value all lands within such district at the same rate per acre be applicable, but in such case the county assessor shall assess such district land in accordance with the certificate provided for in section 37-41-120 and in compliance with the terms of such contract between the United States and the district.

**Source:** L. 05: p. 259, § 19. R.S. 08: § 3458. L. 15: p. 304, § 1. L. 17: p. 303, § 9. C.L. § 1995. L. 25: p. 323, § 1. CSA: C. 90, § 395. CRS 53: § 149-1-19. L. 63: p. 1001, § 2. C.R.S. 1963: § 150-1-19.

#### ANNOTATION

**The liabilities of the district are a charge upon the land ratably**, with the acre as the unit, on which basis assessments are determined according to benefits. *Interstate Trust Co. v. Montezuma Valley Irrigation Dist.*, 66 Colo. 219, 181 P. 123 (1919); *Alpha Corp. v. Denver-Greeley Valley Irrigation Dist.*, 110 Colo. 179, 132 P.2d 448 (1942).

**This section looks to uniformity of assessment per acre** for the payment of the district's indebtedness. *Norris v. Montezuma Valley Irrigation Dist.*, 248 F. 369 (8th Cir. 1918).

**This section does not provide that a uniform amount shall be collected per acre**, but that the lands shall be valued by the assessor at the same rate per acre. *Norris v. Montezuma*

*Valley Irrigation Dist.*, 248 F. 369 (8th Cir. 1918).

**This section gives the county assessor the power and imposes on him the duty to make the annual assessment only on the lands to be benefited.** *Norris v. Montezuma Valley Irrigation Dist.*, 240 F. 825 (D. Colo. 1916).

**Taxes of irrigation district enforced as in case of other taxes.** Taxes regularly assessed and levied for a duly organized and lawfully existing irrigation district are of equal dignity with other taxes and should be respected, and the collection thereof enforced, as in the case of other taxes. *Nile Irrigation Dist. v. English*, 60 Colo. 406, 153 P. 760 (1915).

**37-41-122. Other taxes must be paid.** The owner of such land, at the time of filing such petition and before the order of the board of directors of the district or the decree of court excluding such land from the district goes into effect, shall pay to the county treasurer of the county in which such land is situated all taxes, other than taxes for irrigation district purposes, levied or assessed thereon, together with any interest, penalties, and fees as are or may be by law properly chargeable thereon.

**Source:** L. 15: p. 306, § 2. C.L. § 1996. CSA: C. 90, § 396. CRS 53: § 149-1-20. C.R.S. 1963: § 150-1-20.

**37-41-123. Special tax levy.** (1) It is the duty of the board of county commissioners of the county in which is located the office of any irrigation district, immediately upon



receipt of the returns of the total assessment of said district and upon the receipt of the certificates of the board of directors certifying the total amount of money required to be raised, to fix the rate of levy necessary to provide said amount of money and to fix the rate necessary to provide the amount of money required to pay the interest and principal of the bonds of said district as the same shall become due; to fix the rate necessary to provide the amount of money required for any other purposes as provided in this article and which is to be raised by the levy of assessments upon the real property of said district; and to certify said respective rates to the board of county commissioners of each county embracing any portion of said district. The rate of levy necessary to raise the required amount of money on the valuation for assessment of the property of said district shall be increased fifteen percent to cover delinquencies.

(2) For the purposes of said district it is the duty of the board of county commissioners of each county in which any irrigation district is located in whole or in part, at the time of making levy for county purposes, to make a levy at the rates above specified upon all real estate in said district within their respective counties and, in case of contract with the United States, in the amounts and on the tracts as fixed and certified by the board of directors as prescribed in section 37-41-120. If the board of directors of an irrigation district has certified the amount payable for any tract of one acre or less, it is the duty of the board of county commissioners of each county in which the irrigation district is located, in whole or in part, also to levy such amount against each of such tracts. All taxes levied under this article are special taxes.

**Source:** L. 05: p. 260, § 20. R.S. 08: § 3459. L. 17: p. 305, § 10. C.L. § 1997. CSA: C. 90, § 397. CRS 53: § 149-1-21. L. 63: p. 1002, § 3. C.R.S. 1963: § 149-1-21.

**Cross references:** For procedure to increase tax levy beyond statutory limits, see § 29-1-302.

## ANNOTATION

I. General Consideration.

II. Rights and Remedies of Bondholder.

### I. GENERAL CONSIDERATION.

**The tax levied under this section is a special tax.** Henrylyn Irrigation Dist. v. Thomas, 66 Colo. 296, 181 P. 979 (1919).

**Special taxes may be, and frequently are, public taxes as well,** that is, taxes levied for a public purpose. Frequently the term "special" is used simply as a designation or for the purposes of classification. McCord Mercantile Co. v. McIntyre, 25 Colo. App. 376, 138 P. 59 (1914).

**The authority for levying the special irrigation district tax is the same as the authority for levying the general public revenue tax,** i.e., it proceeds from the same source. McCord Mercantile Co. v. McIntyre, 25 Colo. App. 376, 138 P. 59 (1914).

**This section does not undertake to limit the amount of the levy the board may make.** This section granting power to the county board to estimate and fix the amount of the levy in no way undertakes to limit the amount of the levy they may make. Norris v. Montezuma Valley Irrigation Dist., 248 F. 369 (8th Cir. 1918).

**The failure of the means of payment prescribed by statute does not extinguish the debt** for which such provision is made. Michi-

gan Trust Co. v. Otero Irrigation Dist., 76 Colo. 441, 232 P. 919 (1925).

**Reason for 15 percent levy.** The general assembly is presumed to have knowledge of the fact that, under any system of taxation by assessment hitherto devised, a portion of the taxpayers neglect to pay the taxes levied against their property for a long period after they become due. In partial recognition of this fact, this section provides that the county board shall increase the rate of levy on an irrigation district 15 percent to cover delinquencies. Norris v. Montezuma Valley Irrigation Dist., 248 F. 369 (8th Cir. 1918).

**Such levy cannot be used to discharge the proportionate obligation of those who do not pay.** The 15 percent levy "to cover delinquencies" provided by this section cannot be made, and the amount collected cannot be used, to discharge the proportionate obligation of those who do not pay their district taxes. Bd. of Comm'rs v. Heath, 87 Colo. 204, 286 P. 107 (1930).

**The 15 percent levy must be limited so as to cover delinquencies in maintenance, operating, current, and other expenses of the district.** The holder of district bonds has no claim upon the funds arising from such levy for the payment of his bonds or interest thereon. Bd. of Comm'rs v. Heath, 87 Colo. 204, 286 P. 107 (1930).

**The property of one landowner shall not become liable for the assessments for other lands where the owners fail or refuse to pay.** *Bd. of Comm'rs v. Heath*, 87 Colo. 204, 286 P. 107 (1930).

**Taxes to pay warrants could not be pyramided so as eventually to compel those who paid to carry the burden of those who failed.** *Interstate Trust Co. v. Montezuma Valley Irrigation Dist.*, 66 Colo. 219, 181 P. 123 (1919); *Bd. of Comm'rs v. Heath*, 87 Colo. 204, 286 P. 107 (1930).

**Additional levy upon all property because of failure of some to pay their portion may be valid.** It is a common provision in state constitutions and statutes that assessments or levies for taxation shall be uniform upon the same class of subjects or by value. Such provisions are not violated when, after the lapse of a reasonable time and after reasonable efforts have been made to collect the first levy, an additional levy is made upon all the property in the district because of the failure of some of the taxpayers to pay their portions of the first levy. *Norris v. Montezuma Valley Irrigation Dist.*, 248 F. 369 (8th Cir. 1918).

**Where sufficient assessment is made to pay annual interest on bonds, the board cannot reassess lands which have paid.** When an assessment has been levied by the county board on the lands of a district to pay the annual interest on the district bonds, and it is sufficient in amount, the board has no power to reassess lands which have paid the assessment to make up a deficiency caused by the failure of other lands to pay. *Norris v. Montezuma Valley Irrigation Dist.*, 240 F. 825 (D. Colo. 1916).

**Such assessments are only sustainable when the benefits received by the property assessed are proportionate to the burden placed upon it.** *City & County of Denver v. Kennedy*, 33 Colo. 80, 80 P. 122 (1905); *Norris v. Montezuma Valley Irrigation Dist.*, 240 F. 825 (D. Colo. 1916).

## II. RIGHTS AND REMEDIES OF BONDHOLDER.

**Sole remedy of bondholder upon default in payment of interest is mandamus.** Under the provisions of this section, the sole remedy of the holder of the bonds of an irrigation district, if default be made in the payment of interest, is by mandamus. *Henrylyn Irrigation Dist. v. Thomas*, 64 Colo. 413, 173 P. 541 (1918); *Norris v. Montezuma Valley Irrigation Dist.*, 248 F. 369

(8th Cir. 1918); *Kiles v. Trinchera Irrigation Dist.*, 136 F.2d 894 (10th Cir. 1943).

**An ordinary action demanding judgment for money will not lie.** *Henrylyn Irrigation Dist. v. Thomas*, 64 Colo. 413, 173 P. 541 (1918); *Rio Grande Junction Ry. v. Orchard Mesa Irrigation Dist.*, 64 Colo. 334, 171 P. 367 (1918); *Kiles v. Trinchera Irrigation Dist.*, 136 F.2d 894 (10th Cir. 1943).

**If it is not the plain duty of the board to make a levy, action of mandamus will be dismissed.** In an action in mandamus to compel county commissioners to levy a tax for irrigation district purposes, it is held that, if it was not the plain legal duty of the board to make the levy, the action was properly dismissed. *Kerber Creek Irrigation Dist. v. Woodard*, 76 Colo. 219, 230 P. 807 (1924).

**Board cannot be compelled to complete legal duty if what they have done satisfies petitioner's legal demands.** In an action in mandamus to compel the levy and collection of taxes for the payment of irrigation district bonds, the petitioner cannot lawfully compel the county officials to do their complete legal duty even although they have neglected to do it completely, if what they have done is sufficient to satisfy his legal demands. *Bd. of Comm'rs v. Heath*, 79 Colo. 429, 246 P. 794 (1926).

**If an irrigation district has money or property aside from the specific fund to be raised by a tax levy, it can be subjected to the payment of its outstanding negotiable bonds and coupons which have not been paid because of inability to collect the special tax.** *Michigan Trust Co. v. Otero Irrigation Dist.*, 76 Colo. 441, 232 P. 919 (1925).

**Although board has exhausted legal method to gather a fund to pay, this does not constitute a payment.** Where the board of directors of the district complied with the statute and performed its duty by making a sufficient levy of taxes which, if paid by the taxpayers, would have discharged the obligations evidenced by its negotiable bonds and coupons or a judgment rendered thereon, even though the district board has done all that it may lawfully do to gather a fund to pay, this does not constitute a payment or discharge of the debt. *Michigan Trust Co. v. Otero Irrigation Dist.*, 76 Colo. 441, 232 P. 919 (1925); *Kiles v. Trinchera Irrigation Dist.*, 136 F.2d 894 (10th Cir. 1943).

**Though the particular method of payment proves abortive, a debt remains an obligation of the district until it is paid.** *Michigan Trust Co. v. Otero Irrigation Dist.*, 76 Colo. 441, 232 P. 919 (1925).

**37-41-124. Assessment - collection - redemption - deed.** (1) The revenue laws of this state for the assessment, levying, and collection of taxes on real estate for county purposes, as modified in this section, shall be applicable for the purposes of this article, including the enforcement of penalties and forfeiture for delinquent taxes. However, in case of sale of any lot or parcel of land, or any interest therein, for delinquent irrigation district



taxes or delinquent irrigation district and general taxes, when there are no bids therefor on any of the days of such tax sale, the same shall be struck off to the irrigation district in which such land is located for the amount of the taxes, interest, and costs thereon, and a certificate of sale shall be made out to said district therefor and delivered to its secretary, who shall file the same in the office of its board of directors and record the same in a book of public record to be kept by said board for such purpose, but no charge shall be made by the county treasurer for making such certificate, and in such case he shall make the entry "struck off to ..... irrigation district" on his records, as well as an entry showing the amount of the general irrigation district taxes and interest thereon, respectively, for which said lands were offered for sale, together with the cost attending such sale.

(2) No taxes assessed against any land so struck off to said district under the provisions of this section shall be payable until the same has been derived by the district from the sale or redemption of such lands. Such irrigation district or its assignee shall be entitled to a tax deed for said lands in the same manner and subject to the same equities as if a private purchaser at said tax sale, upon the payment to the county treasurer at the time of demanding said deed of such sum as the board of county commissioners of such county at any regular or special meeting may decide.

(3) In case the owner of said lot or parcel of land, or interest therein, desires to redeem the same at any time before said tax deed shall be issued, the same may be done in the same manner as is provided by law to be done, in case said lot or parcel of land, or interest therein, had been purchased by a bidder at said tax sale or had been struck off to the county. In such case the county treasurer shall forthwith issue a certificate of redemption therefor and notify the district secretary of said fact, who shall thereupon make a suitable transfer entry upon his record and return the certificate of sale to the county treasurer for cancellation.

(4) In case any person desires to obtain such certificate of purchase so issued to said irrigation district, the same may be done in the same manner as provided by law to be done in case said lot or parcel of land, or interest therein, had been purchased by a bidder at said tax sale or had been struck off to the county, upon payment to the county treasurer of the required amount in cash, or in cash together with warrants not in excess of the district general fund tax, or in cash and interest coupons or bonds not in excess of the irrigation district and redemption fund tax, or in cash and in warrants and bonds, respectively, not in excess of said respective funds.

(5) No action for possession of or to quiet title to land sold for taxes shall lie on behalf of the owner or claimant of the fee title as against the holder of the tax deed or his grantee claiming title or color of title thereunder in any case wherein the taxes or any part thereof for which said land was sold were levied for the maintenance, operating, and current expenses of an irrigation district or to pay the interest or principal of the bonds of such district, unless such action is brought within five years after the execution and delivery of the deed by the treasurer and the recording thereof, any law to the contrary notwithstanding. As a condition precedent to the right of such owner or claimant of the fee title to maintain his said suit for possession or to quiet title as against the person in possession under color of title, or as against the claimant of title to vacant and unoccupied land under a tax deed giving color of title to lands in an irrigation district, the plaintiff, at the time of filing his complaint, shall pay to the clerk of the court in which such proceedings are instituted, for the benefit of and to be paid to the person entitled thereto in case the plaintiff prevails in such suit, the amount of all taxes, interest, expenses, and penalties, including the amount of subsequent taxes paid on account of such sale which may have been paid thereunder, with interest on the whole of such sum at eight percent per annum.

(6) In any case in which the claimant has title or color of title to land in an irrigation district under a tax deed duly recorded, and brings his suit for possession of or to quiet title to such lands, the invalidity or alleged invalidity or insufficiency of the tax deed shall not be a sufficient defense after the expiration of five years from and after the execution, delivery, and record of said tax deed, nor, if such defense is pleaded prior to the expiration of said five years, shall the invalidity or insufficiency of the tax deed be considered by the court as a defense, unless defendant shall first deposit with the clerk of the court in which said suit is brought, a sufficient amount to pay the taxes, interest, expenses, and penalties,

including the amount of subsequent taxes and interest at eight percent per annum, paid on account of such tax sale, for the benefit of and to be paid to the person entitled thereto, when ascertained by the judgment in said suit.

**Source:** L. 05: p. 262, § 22. R.S. 08: § 3461. L. 15: p. 315, § 1. C.L. § 1999. CSA: C. 399, CRS 53: § 149-1-23. C.R.S. 1963: § 150-1-23.

#### ANNOTATION

**This section is not authority for the registration of interest coupons** like county warrants, if there are no funds to discharge them. *Thomas v. Patterson*, 61 Colo. 547, 159 P. 34 (1916).

**Lands sold to the county for taxes** are excepted from the provisions of this section. Such lands are not to be sold at all for taxes until by redemption or sale the county is made whole. *Henrylyn Irrigation Dist. v. Patterson*, 65 Colo. 385, 176 P. 493 (1918).

**This section calls for a construction which creates a lien by necessary implication** without express language to that effect. *Thomas v. Patterson*, 61 Colo. 547, 159 P. 34 (1916).

**This section was evidently for the purpose of assisting counties to secure purchasers at tax sales** for lands in irrigation districts, in order to better enable not only the state and counties, but such districts, to secure their taxes, so that their affairs may not be crippled by the failure of landowners to pay them. *Delta Land & Orchard Co. v. Zaninetti*, 64 Colo. 268, 170 P. 964 (1918).

**A purchaser at a tax sale, of lands included within an irrigation district, may pay therefor in part with bonds and warrants of the district**, under the provisions of § 37-41-109. *Tew v. Phillips*, 73 Colo. 408, 216 P. 525 (1923).

**The provisions of this section are written into a contract of tenancy** and the tenant is bound thereby. *Pendleton v. Mosca Irrigation Dist.*, 89 Colo. 209, 1 P.2d 99 (1931).

**The landlord cannot, by the simple device of a long-term lease, either evade the payment of the tax during the term or deprive the holder of the tax deed of the rights accorded him by this section.** *Pendleton v. Mosca Irrigation Dist.*, 89 Colo. 209, 1 P.2d 99 (1931).

**In an action in ejectment by an irrigation district based on tax deeds**, defendant could not assert the invalidity of the tax deeds as a

defense if he failed and refused to tender and deposit with the clerk of the court money to pay taxes, etc., under this section. *Pendleton v. Mosca Irrigation Dist.*, 89 Colo. 209, 1 P.2d 99 (1931).

**There is nothing in this section which gives the holder of a tax deed to vacant and unoccupied land any enlarged or other or different rights or remedies in a suit to quiet title under a tax deed than obtain generally.** *Gibson v. Interior Realty & Inv. Co.*, 70 Colo. 5, 201 P. 680 (1921).

**The purport and effect of the provision is merely to limit the rights of the fee holder as to the circumstances and conditions under which he may make a defense.** *Gibson v. Interior Realty & Inv. Co.*, 70 Colo. 5, 201 P. 680 (1921).

**Owner must pay tax title claimant amount for which lands were sold with interest.** This section extends the substance of the equitable doctrine that, as a prerequisite to a recovery of lands by the owner against one claiming under an invalid tax deed, he must pay the tax title claimant the amount for which the lands were sold, with interest, etc., to suits by tax deed claimants for possession of lands in irrigation districts, by providing that before the owner can question the validity or regularity of the tax deed, he must pay the amount of the taxes, etc. *Delta Land & Orchard Co. v. Zaninetti*, 64 Colo. 268, 170 P. 964 (1918).

**In an action for the recovery of lands in an irrigation district under a tax deed, judgment may, under this section, be given so that defendant may, within a time limited, pay into court the tax and interest evidenced by the deed, and the cost of its execution and record, and that in default of such payment plaintiff is declared the owner of the land and entitled to possession even though the deed is void upon its face.** *Delta Land & Orchard Co. v. Zaninetti*, 64 Colo. 268, 170 P. 964 (1918).

**37-41-125. Construction - contracts.** (1) After adopting a plan for the construction of canals, reservoirs, and works, the board of directors shall give notice, by publication thereof, for not less than twenty days, in a newspaper published in each of the counties into which any such irrigation district extends, provided a newspaper is published therein, and in such other newspapers as it may deem advisable, calling for bids for the construction of said work or any portion thereof. If less than the whole work is advertised, then the portion so advertised must be particularly described in such notice. The notice shall set forth that plans and specifications can be seen at the office of the board, and that the board will receive



sealed proposals therefor, and that the contract will be let to the lowest responsible bidder, stating the time and the place for opening the proposals, which, at said time and place, shall be opened in public. As soon as convenient thereafter the board shall let said work, either in portions or as a whole, to the lowest responsible bidder, or it may reject any or all bids and readvertise for proposals, or it may proceed to construct the work under its own superintendence.

(2) Contracts for the purchase of material shall be awarded to the lowest responsible bidder. The persons to whom a contract may be awarded shall enter into a bond, with good and sufficient sureties, to be approved by the board, payable to said district for its use, for not less than ten percent of the amount of the contract price, conditioned for the faithful performance of said contract. The work shall be done under the direction and to the satisfaction of the engineer in charge and be approved by the board. The provisions of this section shall not apply in the case of any contract between the district and the United States; except that, before any contract for construction work shall be entered into between the United States and the district, plans and specifications covering the proposed work shall be prepared and filed with the secretary of the district.

**Source:** L. 05: p. 262, § 23. R.S. 08: § 3462. L. 17: p. 308, § 12. C.L. § 2001. CSA: C. 90, § 400. CRS 53: § 149-1-24. C.R.S. 1963: § 150-1-24.

#### ANNOTATION

**An irrigation district may contract for a complete irrigation system.** Gas Sec. Co. v. Antero & Lost Park Reservoir Co., 259 F. 423 (8th Cir. 1919).

**District may require other security besides the required bond.** The fact that a district was required to take a bond from the contractors for the faithful performance of the contract is no reason why it could not otherwise protect itself by retaining a certain amount of the monthly estimate or provide in the contract for such other protection as it might require. Noonan v. Stein, 56 Colo. 64, 136 P. 1181 (1913).

**The bond may become valueless.** The requirement of this section in no way militates against the construction which was upon the contract, but to the contrary, although not disclosed in the record, it evidently was a wise precaution upon behalf of the district to make other provisions for its protection, as it is conceded that the bond taken in this case has be-

come practically valueless. The record shows that the contractors are insolvent. Noonan v. Stein, 56 Colo. 64, 136 P. 1181 (1913).

**This protection is for the sole benefit of the district.** The contract gave to the district the right to retain the fund for the purposes of protecting it generally against all breaches of the contract, and claims of every kind and nature growing out of it, and that this was done solely for the benefit of the district; hence, it was not such a fund as was specifically set apart for the payment of the unpaid bills of the contractors. Noonan v. Stein, 56 Colo. 64, 136 P. 1181 (1913).

**Bonds must be returned if irrigation system is not constructed.** If bonds were delivered as an advance payment in contemplation of the completion of a contract for the construction and delivery of an irrigation system, which was never fulfilled, equity requires the return of the bonds. Henry L. Doherty & Co. v. Steele, 71 Colo. 33, 204 P. 77 (1922).

**37-41-126. Claims - audit - payment - financial report.** Except with respect to claims coming within the provisions of article 10 of title 24, C.R.S., no claims shall be paid by the district treasurer until the same shall have been allowed by the board, and only upon warrants signed by the president and countersigned by the secretary, which warrants shall state the date authorized by the board and for what purposes. If the district treasurer has insufficient funds on hand to pay such warrant when presented for payment, he shall endorse thereon "not paid for want of funds, this warrant draws interest from date at six percent per annum", and endorse thereon the date when so presented, over his signature, and from the time of such presentation until paid such warrant shall draw interest at the rate of six percent per annum; but when there is the sum of one hundred dollars or more in the hands of the treasurer, it shall be applied upon said warrant. All claims against the district shall be verified the same as required in the case of claims filed against counties in this state, and the secretary of the district is hereby authorized to administer oaths to the parties verifying said claims the same as the county clerk and recorder or notary public might do.

The district treasurer shall keep a register in which he shall enter each warrant presented for payment, showing the date and amount of such warrant, to whom payable, the date of the presentation for payment, the date of payment, and the amount paid in redemption thereof, and all warrants shall be paid in the order of their presentation for payment to the district treasurer. All warrants shall be drawn payable to the claimant or bearer, the same as county warrants.

**Source:** L. 05: p. 262, § 24. R.S. 08: § 3463. C.L. § 2002. CSA: C. 90, § 401. CRS 53: § 149-1-25. C.R.S. 1963: § 150-1-25. L. 71: p. 1216, § 16.

#### ANNOTATION

**The requirement that claims be verified is not mandatory** in view of the broad provisions of § 37-41-111. *Interstate Trust Co. v. Steele*, 65 Colo. 99, 173 P. 873 (1918).

**The failure to verify claims is not jurisdictional.** *Interstate Trust Co. v. Steele*, 65 Colo. 99, 173 P. 873 (1918).

**37-41-127. Funds for expenses.** For purposes of defraying the expenses of the organization of the district, and the care, operation, management, repair, and improvement of all canals, ditches, reservoirs, and works, including salaries of officers and employees, the board may either fix rates of tolls and charges and collect the same of all persons using said canal and water for irrigation or other purposes, and in addition thereto may provide, in whole or in part, for the payment of such expenditures by levy of assessments therefor as provided in section 37-41-123, or by both tolls and assessment. In case the money raised by the sale of bonds issued is insufficient, and in case bonds are unavailable for the completion of the plans of works adopted, it is the duty of the board of directors to provide for the completion of said plans by levy of an assessment therefor in the same manner in which levy of assessments is made for the other purposes provided for in section 37-41-120.

**Source:** L. 05: p. 263, § 25. R.S. 08: § 3464. C.L. § 2003. CSA: C. 90, § 402. CRS 53: § 149-1-26. C.R.S. 1963: § 150-1-26.

**37-41-128. Crossing streams, highways, railroads, state lands.** The board of directors has the power to construct the said works across any stream of water, watercourse, street, avenue, highway, railway, canal, ditch, or flume which the route of said canal may intersect or cross. If such railroad company and said board, or the owners and controllers of said property, thing, or franchise so to be crossed, cannot agree upon the amount to be paid therefor, or the points or the manner of said crossings, the same shall be ascertained and determined in all respects as is provided in respect to the taking of land for public uses. The right-of-way is hereby given, dedicated, and set apart to locate, construct, and maintain said works or reservoirs over, through, or upon any of the lands which are now or may be the property of the state.

**Source:** L. 05: p. 264, § 26. R.S. 08: § 3465. C.L. § 2004. CSA: C. 90, § 403. CRS 53: § 149-1-27. C.R.S. 1963: § 150-1-27.

**37-41-129. Limit of indebtedness - emergency.** The board of directors or other officers of the district shall have no power to incur any debt or liability whatever, either by issuing bonds or otherwise, in excess of the express provisions of this article, nor shall they add to the expenditure of any one fiscal year anything over and above the amount provided for in the annual appropriation resolution relating to that year, and any debt or liability incurred in excess of these provisions shall be and remain absolutely void; except that said expenditures may be increased in emergency cases if the same are authorized in writing by a number of district electors equal to one-half the number who voted at the last annual district election.



**Source:** L. 05: p. 264, § 28. R.S. 08: § 3467. L. 15: p. 314, § 1. C.L. § 2006. CSA: C. 90, § 405. CRS 53: § 149-1-29. C.R.S. 1963: § 150-1-29.

**37-41-130. Insufficient supply - distribution.** In case the volume of water in any canal, reservoir, or other works in any district shall not be sufficient to supply the continual wants of the entire district susceptible of irrigation therefrom, then it is the duty of the board of directors to distribute all available water upon certain or alternate days to different localities, as it may in its judgment think best for the interests of all parties concerned.

**Source:** L. 05: p. 264, § 29. R.S. 08: § 3468. C.L. § 2007. CSA: C. 90, § 406. CRS 53: § 149-1-30. C.R.S. 1963: § 150-1-30.

#### ANNOTATION

**If water is insufficient for all, it must be prorated.** Norris v. Montezuma Valley Irrigation Dist., 240 F. 825 (D. Colo. 1916).

**37-41-131. Compensation for property taken.** Nothing contained in this article shall be deemed to authorize any person to divert the waters of any river, creek, stream, canal, or reservoir to the detriment of any person having a prior right to the waters of such river, creek, stream, canal, or reservoirs, unless previous compensation is ascertained and paid therefor under the laws of this state, authorizing the taking of private property for public use.

**Source:** L. 05: p. 265, § 30. R.S. 08: § 3469. C.L. § 2008. CSA: C. 90, § 407. CRS 53: § 149-1-31. C.R.S. 1963: § 150-1-31.

**37-41-132. Boundaries - change - effect.** The boundaries of any irrigation district organized under the provisions of this article may be changed in the manner prescribed in sections 37-41-132 to 37-41-148; but such change of the boundaries of the district shall not impair or affect its organization, or its rights in or to property, or any of its rights or privileges of whatsoever kind or nature; nor shall it affect, impair, or discharge any contract, obligation, lien, or charge for or upon which it was or might become liable or chargeable had such change of its boundaries not been made; except that, in case a contract has been made between the district and the United States as provided in section 37-41-113, no change shall be made in the boundaries of the district, and the board of directors shall make no order changing the boundaries of the district until the secretary of the interior shall assent thereto in writing and such assent is filed with the board of directors.

**Source:** L. 05: p. 265, § 31. R.S. 08: § 3470. L. 17: p. 309, § 13. C.L. § 2009. CSA: C. 90, § 408. CRS 53: § 149-1-32. C.R.S. 1963: § 150-1-32.

#### ANNOTATION

**This and the following sections provide for changing the boundaries of a district after its organization,** and allowing, under certain con-

ditions, contiguous territory to be included therein. Montezuma Valley Irrigation Dist. v. Longenbaugh, 54 Colo. 391, 131 P. 262 (1913).

**37-41-133. Additional land admitted - petition.** The holder of title, or color of title, of any land adjacent to or situated within the boundaries of any irrigation district or irrigable from the ditches, canals, and irrigation works of the district may file with the board of directors of said district a petition in writing, praying that such lands be included in such district. The petition shall describe the tracts or body of land owned by the petitioners, but such description need not be more particular than is required when such lands are entered by the county assessor in the assessment book. Such petition shall be deemed to give the

assent of the petitioners to the inclusion in said district of the lands described in the petition, and such petition must be acknowledged in the same manner that conveyances of land are required to be acknowledged.

**Source:** L. 05: p. 265, § 32. R.S. 08: § 3471. L. 11: p. 468, § 1. C.L. § 2010. CSA: C. 90, § 409. CRS 53: § 149-1-33. C.R.S. 1963: § 150-1-33.

#### ANNOTATION

**The effect of a petition by an entryman of the public lands is also to give his assent to such inclusion,** when he has earned the right to a patent, and has made no objection either to the

formal inclusion of his lands or to the confirmation of the issue of bonds. Nile Irrigation Dist. v. Gas Sec. Co., 248 F. 861 (8th Cir. 1918).

**37-41-134. Notice of filing - costs.** The secretary of the board of directors shall cause notice of the filing of such petition to be given and published once each week for three successive weeks in a newspaper published in the county where the office of said board is situate, which shall state the filing of such petition, the names of the petitioners, a description of the lands mentioned in said petition, and the prayer of said petitioners and that all persons interested may appear at the office of said board at a time named in said notice, and show cause, in writing, why the petition should not be granted. The time specified in the notice at which it shall be required to show cause shall be the regular meeting of the board next after the expiration of the time for the publication of the notice. The petitioners shall advance to the secretary sufficient money to pay the estimated cost of all proceedings under such petition before the secretary shall be required to give such notice.

**Source:** L. 05: p. 266, § 33. R.S. 08: § 3472. C.L. § 2011. CSA: C. 90, § 410. CRS 53: § 149-1-34. C.R.S. 1963: § 150-1-34.

**37-41-135. Hearing of petition - assent.** The board of directors, at the time and place mentioned in said notice, or at such time to which the hearing of said petition may adjourn, shall proceed to hear the petition, and all objections thereto, presented in writing by any person, showing cause why said petition should not be granted. The failure of any person interested to show cause, in writing, shall be deemed as an assent on his part to the inclusion of such lands in said district as prayed for in said petition.

**Source:** L. 05: p. 266, § 34. R.S. 08: § 3473. C.L. § 2012. CSA: C. 90, § 411. CRS 53: § 149-1-35. C.R.S. 1963: § 150-1-35.

**37-41-136. Payment of pro rata assessments.** The board of directors to whom such petition is presented may require, as a condition precedent to the granting of the same, that the petitioners shall severally pay to such district such respective sums, as nearly as the same can be estimated by the board, as petitioners or their grantors would have been required to pay to such district as assessments for the payment of its pro rata share of all bonds and the interest thereon, which may have previously thereto been issued by said district, or for the payment of the pro rata share of the cost of construction under any contract between the district and the United States accompanying which bonds of the district have not been deposited with the United States as provided in this article, had such lands been included in such district at the time the same was originally formed, or when said bonds were so issued, or when said contract with the United States was executed. In case unentered public land is proposed to be annexed to the district, the board of directors of the district, instead of requiring such payment as a condition precedent, may assess such charge against such unentered public land upon the records of the district to be collected in the manner authorized by the act of congress of August 11, 1916.



**Source:** L. 05: p. 266, § 35. R.S. 08: § 3474. L. 17: p. 310, § 14. C.L. § 2013. CSA: C. 90, § 412. CRS 53: § 149-1-36. C.R.S. 1963: § 150-1-36.

#### ANNOTATION

**Payment may be waived.** The provision of this section requiring payment by the petitioner is for the benefit of the district, is not a condition

precedent, and may be waived by the board. Nile Irrigation Dist. v. Gas Sec. Co., 248 F. 861 (8th Cir. 1918).

**37-41-137. Inclusion or rejection of lands - protest.** The board of directors if it deems it not for the best interests of the district to include therein the lands mentioned in the petition, by order, shall reject the petition, but if it deems it for the best interests of the district that said lands be included, the board may order that the district be so changed as to include therein the lands mentioned in the said petition. The order shall describe the entire boundaries of the district with the lands so included, if the district boundaries are changed thereby, and for that purpose the board may cause a survey to be made of such portion of such boundaries as may be deemed necessary. However, if within thirty days from the making of such order a majority of the qualified electors of the district protest in writing to said board against the inclusion of such lands in said district, said order shall be held for naught, and such lands shall not be included therein. In the case of inclusion of government land according to the provisions of section 37-41-113, said protest must be made within thirty days of the date of the execution of the contract provided for in said section.

**Source:** L. 05: p. 266, § 36. R.S. 08: § 3475. L. 09: p. 425, § 2. C.L. § 2014. CSA: C. 90, § 413. CRS 53: § 149-1-37. C.R.S. 1963: § 150-1-37.

**37-41-138. Order - record - effect.** Upon the allowance of such petition and in case no protest has been filed with the board within thirty days after the entry of said order, a certified copy of the order of the board of directors making such change, and a plat of such district showing such change, certified by the president and secretary, shall be filed for record in the office of the clerk and recorder of each county in which are situate any of the lands of the district, and the district shall remain an irrigation district, as fully to every intent and purpose as if the lands which are included in the district by the change of the boundaries had been included therein at the organization of the district; and said district as so changed and all the lands therein shall be liable for all existing obligations and indebtedness of the organized district.

**Source:** L. 05: p. 267, § 37. R.S. 08: § 3476. C.L. § 2015. CSA: C. 90, § 414. CRS 53: § 149-1-38. C.R.S. 1963: § 150-1-38.

**37-41-139. Records - evidence.** Upon the filing of the copies of the order and the plat as provided in section 37-41-138, the secretary shall record the petition in the minutes of the board. The minutes, or a certified copy thereof, shall be admissible in evidence with the same effect as the petition.

**Source:** L. 05: p. 267, § 38. R.S. 08: § 3477. C.L. § 2016. CSA: C. 90, § 415. CRS 53: § 149-1-39. C.R.S. 1963: § 150-1-39.

**37-41-140. Legal representatives petitioners.** A guardian, an executor, or an administrator of an estate, who is appointed as such under the laws of this state and who, as such guardian, executor, or administrator, is entitled to the possession of the lands belonging to the estate which he represents, upon being thereunto authorized by the proper court on behalf of his ward or the estate which he represents, may sign and acknowledge the petition and may show cause why the boundaries of the district should not be changed.

**Source:** L. 05: p. 267, § 39. R.S. 08: § 3478. C.L. § 2017. CSA: C. 90, § 416. CRS 53: § 149-1-40. C.R.S. 1963: § 150-1-40.

**37-41-141. Redivision of district - election of officers.** In case of the inclusion of any land within any district by proceedings under this article, at least thirty days prior to the next succeeding general election, the board of directors shall make an order redividing such district into three divisions, as nearly equal in size as may be practicable, which shall be numbered first, second, and third, and one director shall thereafter be elected by each division. For the purposes of election the board of directors shall establish a convenient number of election precincts in said districts and define the boundaries thereof, which said precincts may be changed from time to time as the board may deem necessary.

**Source:** L. 05: p. 268, § 40. R.S. 08: § 3479. C.L. § 2018. CSA: C. 90, § 417. CRS 53: § 149-1-41. C.R.S. 1963: § 150-1-41.

**37-41-142. Lands may be excluded from district.** (1) Any tract of land included within the boundaries of any such district at or after its organization, under the provisions of this article, may be excluded therefrom in the manner prescribed in sections 37-41-142 to 37-41-148, but such exclusion of land from the district shall not impair or affect its organization or its rights in or to property or any of its rights or privileges of whatever kind or nature; nor shall such exclusion affect, impair, or discharge any contract, obligation, lien, or charge for or upon which it would or might become liable or chargeable had such land not been excluded from the district.

(2) If the board of directors of an irrigation district organized under this article finds and by resolution of the board declares that the irrigation district taxes assessed against any tract of land, in such irrigation district, have not been paid for three consecutive years and further finds that it would be for the best interests of such district and the landowners and members thereof and the lienholders thereon, if any, that such lands so in default in the payment of irrigation district taxes be excluded from such irrigation district, it shall be conclusively presumed that any such lands are unproductive and unfruitful and should be excluded from such irrigation district, and the board of directors may by resolution order such exclusions and cause a copy of such resolution certified by the secretary of such irrigation district to be filed and recorded in the office of the county clerk and recorder of the county in which such lands are located, and thereupon without further proceedings all such lands shall be excluded from such irrigation district and dropped from the list of district lands for all purposes.

(3) Any water or water rights owned or controlled by the district theretofore appertaining or allocated to such lands so in default may be reallocated to lands then remaining in such district, or other and different productive lands may be included in such district in lieu thereof.

**Source:** L. 05: p. 268, § 41. R.S. 08: § 3480. C.L. § 2019. L. 29: p. 422, § 1. CSA: C. 90, § 418. CRS 53: § 149-1-42. C.R.S. 1963: § 150-1-42.

#### ANNOTATION

**Decisions of board of directors of an irrigation district have the effect of judgments** in matters over which it has jurisdiction. *Yellow Jacket Irrigation Dist. v. Pleasant Valley Ranch Co.*, 78 Colo. 543, 243 P. 635 (1926).

**The decisions are binding on all parties and their privies in estate.** The board of directors of an irrigation district is the tribunal designated by this section to determine the question of inclusion or exclusion of territory; its decision is binding upon all parties and their privies

in estate, and the question cannot be again raised between the same parties and their privies except upon some ground which has arisen since the former decision. *Yellow Jacket Irrigation Dist. v. Pleasant Valley Ranch Co.*, 78 Colo. 543, 243 P. 635 (1926).

**Estoppel to deny ownership after making application for exclusion.** Where a party, claiming to be the owner, makes application to the board of directors of an irrigation district to exclude lands therefrom, neither he nor his priv-



ies in estate can thereafter deny the ownership.  
Yellow Jacket Irrigation Dist., v. Pleasant Valley  
Ranch Co., 78 Colo. 543, 243 P. 635 (1926).

**37-41-143. Petition for exclusion.** The owner in fee of any lands constituting a portion of any irrigation district may file, with the board of directors of the district, a petition praying that such lands may be excluded and taken from said district. The petition shall describe the lands which the petitioners desire to have excluded, but the description of such lands need not be more particular than required when lands are entered in the assessment book by the county assessor. Such petition must be acknowledged in the same manner and form as is required in case of a conveyance of land.

**Source:** L. 05: p. 268, § 42. R.S. 08: § 3481. C.L. § 2020. CSA: C. 90, § 419. CRS 53: § 149-1-43. C.R.S. 1963: § 150-1-43.

**Cross references:** For acknowledgments in the conveyance of land, see article 35 of title 38.

**37-41-144. Notice of filing petition.** The secretary of the board of directors shall cause a notice of the filing of such petition to be published for at least three weeks in some newspaper published in the county where the office of the board of directors is situated, and if any portion of said district lies within another county, then said notice shall be so published in a newspaper published within each of said counties, or if no newspaper is published therein, then by posting such notice for the same time in at least three public places in said district, and, in case of the posting of said notices, one of said notices must be so posted on the lands proposed to be excluded. The notice shall state the filing of such petition, the names of the petitioners, a description of the lands mentioned in said petition, and the prayer of said petitioners, and it shall notify all persons interested to appear at the office of said board at a time named in said notice and to show cause in writing why said petition should not be granted. The time to be specified in the notice at which they shall be required to show cause shall be the regular meeting of the board next after the expiration of the time for the publication of the notice. The petitioner shall advance to the secretary sufficient money to pay the estimated cost of all proceedings under such petition before the secretary shall give such notice.

**Source:** L. 05: p. 269, § 43. R.S. 08: § 3482. C.L. § 2021. CSA: C. 90, § 420. CRS 53: § 149-1-44. C.R.S. 1963: § 150-1-44.

**Cross references:** For publication of legal notices, see part 1 of article 70 of title 24.

**37-41-145. Hearing of petition.** The board of directors, at the same time and place mentioned in the notice or at the time to which the hearing of said petition may be adjourned, shall proceed to hear the petition and all objections thereto presented in writing by any persons, showing cause why the prayer of said petitioner should not be granted. The filing of such petition with such board shall be deemed as an assent by each and all of such petitioners to the exclusion from such district of the lands mentioned in the petition, or any part thereof.

**Source:** L. 05: p. 269, § 44. R.S. 08: § 3483. C.L. § 2022. CSA: C. 90, § 421. CRS 53: § 149-1-45. C.R.S. 1963: § 150-1-45.

**37-41-146. Order.** The board of directors, if it deems it not for the best interest of the district that the lands mentioned in the petition, or some portion thereof, should be excluded from said district, shall order that said petition be denied; but if it deems it for the best interest of the district that the lands mentioned in the petition, or some portion thereof, be excluded from the district and if there are no outstanding bonds of the district, then the board may order the lands mentioned in the petition, or some defined portion thereof, to be

excluded from the district. However, if, within thirty days from the making of such order, a majority of the qualified electors of the district protest in writing to said board against the exclusion of such lands from said district, said order shall be held for naught, and such lands shall not be excluded therefrom. In case a contract has been made between the district and the United States, no change shall be made in the boundaries of the district unless the secretary of the interior shall assent thereto in writing and such assent is filed with the board of directors. Upon such assent, any lands excluded from the district shall be discharged from all liens in favor of the United States under contract with the United States or under bonds deposited with its agents.

**Source:** L. 05: p. 269, § 45. R.S. 08: § 3484. L. 17: p. 310, § 15. C.L. § 2023. CSA: C. 90, § 422. CRS 53: § 149-1-46. C.R.S. 1963: § 150-1-46.

#### ANNOTATION

**Applied** in Nile Irrigation Dist. v. Gas Sec. Co., 248 F. 861 (8th Cir. 1918).

**37-41-147. Record - effect.** Upon the allowance of such petition and in case no protest has been filed with the board within thirty days after the entry of said order, a certified copy of the order of the board of directors making such change and a plat of such district showing such change, certified by the president and secretary, shall be filed for record in the office of the clerk and recorder of each county in which are situate any of the lands of the district, and the district shall remain an irrigation district as fully to every intent and purpose as if the lands which are excluded by the change of the boundaries had not been excluded therefrom.

**Source:** L. 05: p. 270, § 46. R.S. 08: § 3485. C.L. § 2024. CSA: C. 90, § 423. CRS 53: § 149-1-47. C.R.S. 1963: § 150-1-47.

**37-41-148. Division of districts.** At least thirty days before the next general election of such district the board of directors thereof may make an order dividing said district into three divisions, as nearly equal in size as practicable, which divisions shall be numbered first, second, and third, and one director shall be elected for each division by the qualified electors of the whole district. For the purpose of election in such district, the said board of directors must establish a convenient number of election precincts and define the boundaries thereof, which said precincts may be changed from time to time, as the board of directors may deem necessary.

**Source:** L. 05: p. 270, § 47. R.S. 08: § 3486. C.L. § 2025. CSA: C. 90, § 424. CRS 53: § 149-1-48. C.R.S. 1963: § 150-1-48.

**37-41-149. Dissolution of district - election.** If a majority of the resident freeholders, representing a majority of the number of acres of the irrigable land in any irrigation district organized under this article, shall petition the board of directors to call a special election for the purpose of submitting to the qualified electors of said irrigation district a proposition to vote on the dissolution of said irrigation district, setting forth in said petition that all bills and claims of every nature whatsoever have been fully satisfied and paid, it is the duty of said directors, if they are satisfied that all claims and bills have been fully satisfied, to call an election, setting forth the object of the said election, and to cause notice of said election to be published in some newspaper in each of the counties in which said district is located, for a period of thirty days prior to said election, setting forth the time and place for holding said election in each of the three voting precincts in said district. It is also the duty of the directors to prepare ballots to be used at said election on which shall be written or printed the words: "For Dissolution - Yes", and "For Dissolution - No".



**Source:** L. 05: p. 270, § 48. R.S. 08: § 3487. C.L. § 2033. CSA: C. 90, § 425. CRS 53: § 149-1-49. C.R.S. 1963: § 150-1-49.

#### ANNOTATION

**No dissolution can take place unless and until all of the district's indebtedness is paid or liquidated or adequate security furnished** by the district to, and accepted by, its creditors.

In re Green City Irrigation Dist., 91 Colo. 202, 13 P.2d 1113 (1932); Kiles v. Trinchera Irrigation Dist., 136 F.2d 894 (10th Cir. 1943).

**37-41-150. Canvass - record.** The board of directors shall name a day for canvassing the vote, and if it appears that a majority of said ballots contain the words, "For Dissolution - Yes", then it shall be the duty of said board of directors to declare said district to be dissolved and to certify to the county clerk and recorders of the respective counties in which the district is situated (stating the number of signers to said petition) that said election was called and set for the ..... day of ..... (month of) ..... (year) and that said election was held and so many votes (stating the number) had been cast for, and so many votes (stating the number) had been cast against, said proposition, said certificate to bear the seal of the district and the signatures of the president and secretary of said board of directors. It is the duty of the said respective clerk and recorders to record all such certificates in the records of the respective counties. Should it appear that a majority of the votes cast at said election were "For Dissolution - No", then the board of directors shall declare the proposition lost and shall cause the result and the vote to be made a part of the records of said irrigation district.

**Source:** L. 05: p. 271, § 49. R.S. 08: § 3488. C.L. § 2034. CSA: C. 90, § 426. CRS 53: § 149-1-50. C.R.S. 1963: § 150-1-50.

**37-41-151. Judicial examination of bonds and contracts.** The board of directors of an irrigation district organized under the provisions of this article may commence special proceedings, in and by which the proceedings of said board and of said district providing for and authorizing the issue and sale of the bonds of said district, whether said bonds or any of them have or have not been sold or disposed of, may be judicially examined, approved, and confirmed. Special proceedings may be commenced by which the proceedings of the district providing for the authorization of a contract with the United States and the validity of said contract, and whether or not the said contract has been executed, may be judicially examined, approved, and confirmed.

**Source:** L. 05: p. 271, § 50. R.S. 08: § 3489. L. 17: p. 311, § 16. C.L. § 2050. CSA: C. 90, § 427. CRS 53: § 149-1-51. C.R.S. 1963: § 150-1-51.

#### ANNOTATION

**One, and perhaps the chief, object of proceedings under this section is thus to validate the bonds** by a decree in advance of their issue, thereby facilitating their sale and enhancing their value. Ahern v. Bd. of Dirs., 39 Colo. 409, 89 P. 963 (1907).

**Action of county commissioners in excluding lands may be reviewed.** Under this section the action of the county commissioners in excluding lands, where there was an abuse of power but no fraud or bad faith, may be reviewed in a special proceeding by the board of directors of the irrigation district to determine the validity of the organization and bond issue.

Ahern v. Bd. of Dirs., 39 Colo. 409, 89 P. 963 (1907).

**Directors must prove qualifications of signers of petition when in issue.** In a special proceeding under this section, where an issue is made concerning the qualifications of the signers of the petition presented to the county commissioners, the board of directors must prove such qualifications. Ahern v. Bd. of Dirs., 39 Colo. 409, 89 P. 963 (1907).

**Evidence actually produced before the court.** The board of directors cannot rely upon the decision of the county commissioners that, in the opinion of that body, proof of the quali-

fications of the signers of the petition presented to them was made; nor can it introduce in evidence transcripts or copies of the evidence heard before the county commissioners or before its own body to prove any of the issues in said proceeding, since the court must determine such questions upon evidence actually produced before it. *Ahern v. Bd. of Dirs.*, 39 Colo. 409, 89 P. 963 (1907).

**The best evidence.** In a special proceeding by the board of directors of an irrigation district to have the validity of its organization and bond issue determined, in proof of the qualifications of the signers of the petition presented to the county commissioners, affidavits of the circulators of the petition stating in general terms that the signers of the petition had the statutory qualifications were introduced in evidence, such circulators later testified to the same effect, and abstracts of title showing the record owners were also introduced in evidence. It was held that such documents were not admissible; that the rule requiring the best evidence was violated, without showing necessity for secondary

evidence; and that the large expense necessary to obtain the oral evidence or depositions of the signers, of itself, is no reason for dispensing with such evidence. *Ahern v. Bd. of Dirs.*, 39 Colo. 409, 89 P. 963 (1907).

**Decree confirming previous like issue is competent evidence of regular organization.** In a proceeding by an irrigation district under this and the following sections, seeking confirmation of a proposed issue of bonds, a decree of the court confirming a previous like issue is competent evidence of the regular organization of the district. *Wilder v. Bd. of Dirs.*, 55 Colo. 363, 135 P. 461 (1913).

**The supreme court passes upon the objections to the confirmatory decree** only so far as they bear upon the propositions whether the proceedings had for the organization of the district and the issuance of bonds thereby after the organization, are, or are not, in harmony with the constitutional and statutory provisions which they are said to violate. *Anderson v. Grand Valley Irrigation Dist.*, 35 Colo. 525, 85 P. 313 (1906).

**37-41-152. Petition for judicial examination.** The board of directors of the irrigation district shall file, in the district court of the county in which the lands of the district or some portion thereof are situated, a petition praying in effect that the proceedings may be examined, approved, and confirmed by the court. The petition shall state the facts showing the proceedings had for the issue and sale of said bonds, or for the authorization of a contract with the United States as the case may be, and shall state generally that the irrigation district was duly organized and that the first board of directors was duly elected, but the petition need not state the facts showing such organization of the district or the election of said first board of directors.

**Source:** L. 05: p. 272, § 51. R.S. 08: § 3490. L. 17: p. 312, § 17. C.L. § 2051. CSA: C. 90, § 428. CRS 53: § 149-1-52. C.R.S. 1963: § 150-1-52.

#### ANNOTATION

**Applied** in *Ahern v. Bd. of Dirs.*, 39 Colo. 409, 89 P. 963 (1907).

**37-41-153. Notice of hearing.** The court shall fix the time for the hearing of said petition and shall order the clerk of the court to give and publish a notice of the filing of said petition. The notice shall be given and published for three successive weeks in a newspaper published in the county where the office of the district is situated. The notice shall state the time and place fixed for the hearing of the petition and the prayer of the petitioners and that any person interested in the organization of said district or in the proceedings for the issue or sale of said bonds or in the making of a contract with the United States, on or before the day fixed for the hearing of said petition, may move to dismiss or answer said petition. The petition may be referred to and described in said notice as the petition of the board of directors of ..... irrigation district (giving its name), praying that the proceedings for the issue and sale of said bonds of said district, or that the proceedings for the authorization of a contract with the United States and the validity thereof, may be examined, approved, and confirmed by the court.

**Source:** L. 05: p. 272, § 52. R.S. 08: § 3491. L. 17: p. 312, § 18. C.L. § 2052. CSA: C. 90, § 429. CRS 53: § 149-1-53. C.R.S. 1963: § 150-1-53.



## ANNOTATION

**Applied** in Ahern v. Bd. of Dirs., 39 Colo. 409, 89 P. 963 (1907).

**37-41-154. Answer - pleading.** Any person interested in said district, or in the issue or sale of said bonds, or in the making of a contract with the United States may move to dismiss or answer said petition. The provisions of the Colorado rules of civil procedure respecting the motion to dismiss and answer to a complaint shall be applicable to a motion to dismiss and answer to said petition. The person so moving to dismiss and answering said petition shall be the defendant to the special proceeding, and the board of directors shall be the plaintiff. Every material statement of the petition not specifically controverted by the answer, for the purpose of said special proceeding, shall be taken as true, and each person failing to answer the petition shall be deemed to admit as true all the material statements of the petition. The rules of pleading and practice relating to appeals as provided by law and the Colorado appellate rules, which are not inconsistent with the provisions of this article, are applicable to the special proceedings provided for in this section.

**Source:** L. 05: p. 273, § 53. R.S. 08: § 3492. C.L. § 2053. CSA: C. 90, § 430. CRS 53: § 149-1-54. C.R.S. 1963: § 150-1-54.

## ANNOTATION

**Applied** in Ahern v. Bd. of Dirs., 39 Colo. 409, 89 P. 963 (1907).

**37-41-155. Determination - costs.** Upon the hearing of such special proceeding, the court shall find and determine whether the notice of the filing of the petition has been duly given and published for the time and in the manner prescribed in this article and shall have power and jurisdiction to examine and determine the legality and validity of, and approve and confirm, all of the proceedings for the organization of said district under the provisions of said article, from and including the petition for the organization of the district, and all other proceedings which may affect the legality or validity of said bonds, and the order of the sale and the sale thereof, and all of the proceedings, if any, for the authorization of a contract with the United States and the terms of said contract. The court, in inquiring into the regularity, legality, or correctness of said proceedings, shall disregard any error, irregularity, or omission which does not affect the substantial rights of the parties to said special proceedings. The court by decree may approve and confirm such proceedings in part and disapprove and declare illegal or invalid other or subsequent parts of the proceedings. The costs of the special proceedings may be allowed and apportioned between the parties, in the discretion of the court.

**Source:** L. 05: p. 273, § 54. R.S. 08: § 3493. L. 17: p. 313, § 20. C.L. § 2054. CSA: C. 90, § 431. CRS 53: § 149-1-55. C.R.S. 1963: § 150-1-55.

## ANNOTATION

**Applied** in Ahern v. Bd. of Dirs., 39 Colo. 409, 89 P. 963 (1907).

**37-41-156. Sale of realty not needed.** The board of directors of any irrigation district organized under and subject to the provisions of this article may sell, dispose of, and convey any real property of the irrigation district not needed for the use of such irrigation district nor essential to its operation, from time to time as said board by resolution may direct, either

by public or private sale, and without any appraisalment thereof, at such price and upon such terms as said board may determine, and without any authorization from the electors of such irrigation district.

**Source:** L. 25: p. 328, § 1. CSA: C. 90, § 508. CRS 53: § 149-1-56. C.R.S. 1963: § 150-1-56.

**37-41-157. President to execute deeds.** The president of the board of directors of any such irrigation district, when authorized by resolution of the board of directors, is empowered to execute, acknowledge, and deliver all deeds of conveyance necessary to convey such property to the purchaser thereof, such deed of conveyance to be attested by the secretary of such irrigation district under its seal, and when so executed such deed of conveyance shall be held to convey the entire title of such irrigation district to the purchaser thereof.

**Source:** L. 25: p. 328, § 2. CSA: C. 90, § 509. CRS 53: § 149-1-57. C.R.S. 1963: § 150-1-57.

**37-41-158. Proceeds - where paid.** The proceeds of such sale shall be paid into the general fund of such irrigation district.

**Source:** L. 25: p. 329, § 3. CSA: C. 90, § 510. CRS 53: § 149-1-58. C.R.S. 1963: § 150-1-58.

**37-41-159. Findings of board conclusive.** The board of directors by resolution shall find and determine that any such real property that it proposes to sell or dispose of is not needed for the use of such irrigation district and is not essential to its operation, and such finding and determination shall be conclusive upon such irrigation district, and the purchaser shall not be required to show or prove that such property is not needed for the use of such irrigation district or essential to its operation, and such purchaser shall not be required to see that any moneys paid in pursuance of said sale is paid into the general fund of such irrigation district.

**Source:** L. 25: p. 329, § 4. CSA: C. 90, § 511. CRS 53: § 149-1-59. C.R.S. 1963: § 150-1-59.

**37-41-160. Single election precincts.** In any election conducted by an irrigation district organized prior to March 3, 1953, the board of directors of such district may order, in its discretion, that the entire district shall constitute one election precinct. In such event the board shall establish one polling place in said precinct and shall appoint only three judges of election, who shall constitute a board of election, and all qualified voters voting at such election shall vote at the polling place so established.

**Source:** L. 53: p. 410, § 1. CRS 53: § 149-1-60. C.R.S. 1963: § 150-1-60.

**Cross references:** For elections that may be affected by this section, see articles 41 to 44 of this title.

## ARTICLE 42

### Irrigation District Law of 1921

**Cross references:** For single election precinct law, see § 37-41-160; for general provisions concerning irrigation districts organized under this article, see article 43 of this title.



37-42-101.	Petition for organization - schedule - bond.	37-42-123.	Rescission of action authorizing bonds.
37-42-102.	Date of hearing - notice.	37-42-124.	Construction of works - bids - notice - contract - bond.
37-42-103.	Preliminary report.	37-42-125.	Fiscal year - appropriation resolution.
37-42-104.	Hearing - adjournments.	37-42-126.	Assessment of lands - valuation.
37-42-105.	Adverse report - investigations.	37-42-127.	Levy to pay interest and expenses.
37-42-106.	Notice of organization meeting and election.	37-42-128.	Collection of assessments.
37-42-107.	Organization - meeting - voting.	37-42-129.	Warrants - interest - call.
37-42-108.	Directors - election.	37-42-130.	Call of bonds - surplus fund.
37-42-109.	Directors to file map.	37-42-131.	Payment of general expenses.
37-42-110.	Directors to organize - powers.	37-42-132.	Relief from bonded indebtedness.
37-42-111.	Meetings of directors - notice.	37-42-133.	Exclusion of land from district.
37-42-112.	District elections.	37-42-134.	Inclusion of land in district.
37-42-113.	Powers of district.	37-42-135.	District to lease surplus water.
37-42-114.	Landowners - evidence of ownership.	37-42-136.	Drainage of lands - surveys.
37-42-115.	Land board as landowner.	37-42-137.	Sale of surplus water - proceeds.
37-42-116.	Irrigation district commission created. (Repealed)	37-42-138.	Confirmation of organization and bonds.
37-42-117.	Directors to adopt plans.	37-42-139.	Dissolution of district - election.
37-42-118.	Bond election - ballots.	37-42-140.	Districts organized hereafter.
37-42-119.	Registered bonds. (Repealed)	37-42-141.	Ratification of irrigation district.
37-42-120.	Additional bonds.		
37-42-121.	Sale of bonds - notice.		
37-42-122.	Bonds - assessments.		

**37-42-101. Petition for organization - schedule - bond.** Whenever the landowners of any prescribed area within the state of Colorado desire to organize an irrigation district for the purposes named in this article, they may propose such organization by presenting to the board of county commissioners of the county within which said area, or the greater part thereof, lies a petition praying such organization, signed by a majority of such landowners, whether resident or not, owning in the aggregate a majority of the acreage of such area so proposed to be organized. Such petition shall contain a definite description by metes and bounds of the area included within the exterior boundaries of said proposed district and a description by legal subdivisions of the area proposed to be organized, together with a statement of the purposes of organization and the property and rights proposed to be acquired or constructed, and shall name a resident of the county of proposed organization as agent for the proposers of organization, who shall act as their representative until such time as organization has been completed. Accompanying this petition, a schedule shall be filed showing by legal subdivisions, with acreage, the land owned by each signer and the total acreage of the proposed district, together with a map of the proposed district and the proposed system for its irrigation or reclamation, drawn to such scale and in the manner required by such rules as are promulgated by the state engineer for such purpose. These instruments shall be accompanied by a bond approved by the board of county commissioners in such amount as it shall fix, conditioned that all costs of inspection and organization shall be paid by the bondsmen in case organization is not effected. Copies of all instruments and maps filed with the board of county commissioners under this article shall also be filed with the state engineer.

**Source:** L. 21: p. 517, § 1. C.L. § 2057. CSA: C. 90, § 432. CRS 53: § 149-2-1. C.R.S. 1963: § 150-2-1.

## ANNOTATION

**Law reviews.** For article, "Rights and Remedies of Irrigation District Bondholders", see 20 Dicta 137 (1943). For article, "When Corporate Stock Becomes Real Estate", see 21 Dicta 53 (1944). For article, "Irrigation Confirmation

Proceedings", see 21 Dicta 140 (1944). For article, "Legal Classification of Special District Corporate Forms in Colorado", see 45 Den. L.J. 347 (1968).

**37-42-102. Date of hearing - notice.** Upon the filing of such petition and the approval of the bond, the board of county commissioners shall communicate with the state engineer with reference thereto, and together they shall agree upon a date for hearing upon such petition, which shall in no case be later than ninety days from the date of filing thereof, and, in case no agreement is reached with reference to such date of hearing, it shall be had on the Tuesday next after the expiration of sixty days from the date of filing of such petition. During at least the four weeks immediately preceding such date for hearing, the board of county commissioners shall cause notice thereof to be published in some newspaper of general circulation published in each of the counties wherein any portion of the area of said proposed district lies, and, in case no such newspaper is published in any such county, the notice shall be given by posting the notice at the county courthouse in such county and in at least one conspicuous point within the area of such proposed district which lies in such county during the same time that publication is required, where a newspaper is available therefor.

**Source:** L. 21: p. 518, § 2. C.L. § 2058. CSA: C. 90, § 433. CRS 53: § 149-2-2. C.R.S. 1963: § 150-2-2.

**Cross references:** For publication of legal notices, see part 1 of article 70 of title 24.

**37-42-103. Preliminary report.** Prior to the date of such hearing, the state engineer shall file with the board of county commissioners, before which the hearing will be held, his preliminary report on the proposed irrigation system, showing his estimate of costs, as well as the availability of an adequate water supply, and the general feasibility of the system. In the preparation of such report, the state engineer may require such aid, assistance, maps, and data as he deems necessary, from the proposers of organization. Such report shall be considered a public document and open to general public inspection and examination.

**Source:** L. 21: p. 519, § 3. C.L. § 2059. CSA: C. 90, § 434. CRS 53: § 149-2-3. C.R.S. 1963: § 150-2-3.

**37-42-104. Hearing - adjournments.** In case the state engineer considers the proposed irrigation system feasible, and shall so state in his report, or shall report his inability to reach a definite conclusion with reference thereto, the board of county commissioners shall proceed to a hearing and determination of those matters subject to their consideration either immediately upon the date set for hearing, or may adjourn such hearing from time to time as they shall see fit, but not exceeding two weeks. During such time consumed by adjournment, the state engineer may file such additional or supplemental reports as he sees fit, and they shall also be considered in the determination.

**Source:** L. 21: p. 519, § 4. C.L. § 2060. CSA: C. 90, § 435. CRS 53: § 149-2-4. C.R.S. 1963: § 150-2-4.

**37-42-105. Adverse report - investigations.** (1) In case the report of the state engineer is adverse to the formation of such district because it is not considered feasible, he shall state his reasons for such conclusion in concise language and shall call attention thereto expressly in his letter transmitting such report to the board of county commissioners.



The board of county commissioners shall thereupon fix and determine, upon such investigations and hearings as they see fit, the following matters and things:

(a) Whether the statutory requirements preliminary to organization have been substantially complied with, which determination shall be reviewable only by an action in the nature of certiorari issuing out of the district court having jurisdiction and upon application therefor made within fifteen days of the date of determination by the board of county commissioners;

(b) Fix the territorial extent and boundaries of such district and, in so doing, consider the petition upon which hearing is had, together with such petitions for inclusion within or exclusion from said district as are presented.

(2) No lands shall be excluded from said district which are susceptible of irrigation from the source of water supply intended for the irrigation of the district and not more easily irrigable from another source, nor shall any lands be included within said district which are not susceptible of irrigation from the source of supply intended for the district, or which are already irrigated, or which can be more easily irrigated from another source.

(3) Objection to such exclusions or inclusions, or the order fixing the territorial extent and boundaries of the district, shall be made in writing by the interested landowners, on or before such date of hearing or adjournment thereof, and an appeal from such adverse determination prosecuted to the district court of the county wherein such hearing is had, as in the case of appeals from disallowance of claims, insofar as applicable, within fifteen days from such determination. No such appeal having been prosecuted, the determination of the board of county commissioners shall be deemed conclusive on such points.

**Source:** L. 21: p. 519, § 5. C.L. § 2061. CSA: C. 90, § 436. CRS 53: § 149-2-5. C.R.S. 1963: § 150-2-5.

**37-42-106. Notice of organization meeting and election.** (1) Immediately following the determination of the board of county commissioners, it shall call an organization meeting and election of such proposed irrigation district for the purpose of determining whether such irrigation district shall be organized, and if organized, for the election of officers. Notice of such meeting shall recite the name of the proposed irrigation district, shall describe the boundaries thereof as defined by the determination of the board of county commissioners, and shall state that the purposes of such meeting are to determine whether said district shall be organized and, if organized, to elect directors thereof until the first annual election. Said notice shall state the place of holding such meeting, which shall be at some convenient place in the county where the petition was filed, and the date and hour thereof. Said notice shall be published once each week for four weeks immediately preceding such meeting in a newspaper published within the county where the meeting will be held, or, if no such newspaper is published in such county, then notice shall be given by posting such notice at the courthouse in each county in which any portion of said district lies and also by posting such notice at three conspicuous places within said proposed district.

(2) At all elections held under the provisions of this article, every owner of agricultural land within said district who is eighteen years of age or older, is a citizen of the United States or has declared his or her intention to become a citizen of the United States, is a resident of the state of Colorado, and has paid real property taxes upon the property located within said district on an area in excess of one acre during the year preceding the date of said election if a resident of the district or on an area of forty acres or more if a resident of the state outside the district or who is an entryman upon public lands of the United States and is residing thereon, shall be entitled to vote at such election in the precinct where he or she resides or, if a nonresident of the precinct, in the precinct within which the greater portion of his or her land is located. Any person so qualified to vote, and who resides in any county into which said district extends, is eligible for election as a director in and for the division in such district in which he or she is entitled to vote. All lands platted or subdivided into residence or business lots shall not be considered agricultural land.

**Source:** L. 21: p. 521, § 6. C.L. § 2062. CSA: C. 90, § 437. CRS 53: § 149-2-6. C.R.S. 1963: § 150-2-6. L. 2002: (2) amended, p. 8, § 1, effective March 5.

**37-42-107. Organization - meeting - voting.** (1) The board of county commissioners shall attend at the time and place of such meeting and shall certify to the meeting a list of the landowners of said proposed district, taking no account of those who have prosecuted appeals from the order of the board of county commissioners fixing and determining boundaries, together with the number of acres within said proposed district, owned or represented by each, the total of which acreage, for the purposes of this meeting, shall be considered the total acres of the district. The board of county commissioners shall also act as a credentials committee of said meeting and shall decide who are eligible voters thereat making a certificate concerning the same, and the chairman of the board shall preside at said meeting until such time as temporary officers are elected from among those present. The unit of voting power shall be the acre within said district or proposed district, each landowner being entitled to cast as many votes as he has acres of land within the district or proposed district, and, in casting such votes, such landowner may vote in person or by proxy, and, in the election of directors, the practice known as cumulative voting shall be allowed. Any person desiring to act as proxy for another must file written authority therefor before being allowed to vote, which authority shall be retained as part of the proceedings of the meeting at which such vote is cast and shall be subject to use at no other meeting.

(2) The landowners shall organize such meeting by the selection from their own number of a chairman who shall preside at said meeting and a clerk who shall keep the minutes of the proceedings of such meeting and perform the duties generally performed by such officer.

(3) The meeting having been so organized, a vote shall be taken by ballot to determine organization. The ballots cast shall contain the words "Irrigation District - Yes ...." and "Irrigation District - No ....", and shall have a cross marked opposite the words expressing the desire of the voter, together with the name and, if the vote is by proxy, both the name of the landowner and the person voting, and the number of votes cast, being the number of acres of the landowner within said proposed district.

(4) The vote shall be publicly counted by tellers selected by the chairman, entered at length upon a tally sheet and checked with the list certified by the board of county commissioners, and shall be entered in detail in the minutes of the proceedings. If a majority of the total vote of the proposed district, as shown by the list certified by the board of county commissioners, is not found to have been cast in favor of organization, the meeting shall thereby stand adjourned and no further proceedings had upon the petition for organization or order of determination; but, if the majority of the total vote of the district as shown by said certified list is cast in favor of organization, the organization of the district shall be declared accomplished and record thereof entered in the minutes of the meeting, and the meeting shall proceed to the election of the directors of the district who shall hold office until the first annual election.

**Source:** L. 21: p. 522, § 7. C.L. § 2063. CSA: C. 90, § 438. CRS 53: § 149-2-7. C.R.S. 1963: § 150-2-7.

**37-42-108. Directors - election.** (1) The board of directors shall consist of three landowners of the district, who shall hold their respective offices for the period of three years and until their successors are elected and qualified. They shall be elected by ballot upon public nominations made at the meeting at which they are elected, and each ballot shall contain the name of the person for whom it is cast, the name of the voter or if, by proxy, the name of both landowner and proxy, and the number of votes cast. Each landowner may cast as many votes as he has acres of land within the district for each of three persons voted for and may vote cumulatively, if he so desires, indicating that fact upon his ballot.

(2) At the first election to choose the first board of directors, the person having the highest number of votes shall continue in office for the full term of three years; the next highest two years; the next highest one year; but, if two or more persons have the same number of votes, their terms shall be determined by lot, under the direction of the county judge of the county wherein the organization of said district has been effected; and the person receiving the highest number of votes for any office to be filled at any such election



is elected thereto. In case a vacancy occurs in the membership of the board of directors by death, resignation, or otherwise, the remaining members shall select a successor to serve out the unexpired term. If vacancies occur in the membership of all the places upon the board or if the board fails, neglects, or refuses at any regular meeting to fill a vacancy existing at such time, the board of county commissioners of the county wherein is situated the office of such district may fill such vacancies for the unexpired terms from the landowners of such district.

**Source:** L. 21: p. 524, § 8. C.L. § 2064. CSA: C. 90, § 439. CRS 53: § 149-2-8. L. 57: p. 876, § 1. C.R.S. 1963: § 150-2-8.

**37-42-109. Directors to file map.** It is the duty of the board of directors to file for record in the office of the county clerk and recorder of each county wherein any part of an irrigation district lies a map of such district showing the boundaries thereof, together with a complete list of all lands within such county included within the organized area, and to file supplements of such lists from time to time as lands are excluded from or included within such district.

**Source:** L. 21: p. 525, § 9. C.L. § 2065. CSA: C. 90, § 440. CRS 53: § 149-2-9. C.R.S. 1963: § 150-2-9.

**37-42-110. Directors to organize - powers.** (1) On the same day the board of directors is elected, and immediately following the meeting at which they were elected, the board shall meet for the purpose of organization of the board. It shall select one of its own members as president of the irrigation district and shall select a secretary who may or may not be a member of the board.

(2) (a) The board of directors shall be the governing body of the irrigation district for which it is elected and shall have the power to make and alter bylaws, rules, and regulations for the distribution of water and for the conduct of the district business not inconsistent with the laws of the state of Colorado and to make such contracts and employ such persons as are necessary for the conduct of the affairs of the district, in general exercising the usual and ordinary functions of management of the district, including, when specifically authorized by vote of the landowners so to do, to cooperate with the United States under the federal reclamation laws or any other federal laws enacted by the congress of the United States for the purpose of the construction of irrigation works, including drainage works necessary to maintain the irrigability of the land, or for the acquisition, purchase, extension, operation, or maintenance of constructed works, or for the assumption as principal or guarantor of indebtedness to the United States on account of district lands.

(b) It is also the duty of such board to make an annual report of such district showing the status of its affairs generally, including full lists of assets and liabilities, warrants and bonds outstanding, and such as have been paid or retired during the last fiscal year, and to present the same to the landowners at the annual election.

(3) As compensation for such service as directors, each person so acting shall receive ten dollars for each day necessarily spent in the discharge of district business and such expenses as are necessarily incurred in the conduct of its affairs; except that, after the first year, the landowners may fix other compensation by vote at any annual election.

(4) Each member of the board of directors shall execute an official bond in the sum of three thousand dollars, which shall be approved by the county judge of the county wherein such organization was effected, and the bond shall be recorded in the office of the county clerk and recorder thereof. Such official bond may be signed by a surety company authorized to do business in the state of Colorado, in which case the district shall be liable for and shall pay the premium on said bond.

(5) No director or any officer named in this article shall be interested directly or indirectly, in any manner, in any contract awarded or to be awarded by the board or in the profits to be derived therefrom, nor shall he receive any bonds, gratuity, or bribe.

(6) Any officer who violates this section commits a class 6 felony and shall be punished as provided in section 18-1.3-401, C.R.S. He or she shall also forfeit his or her office upon conviction.

(7) If it is found necessary by the board of directors to employ judges of election, each shall receive as compensation for his services the sum of ten dollars per day to be paid by the district.

**Source:** L. 21: p. 525, § 10. C.L. § 2066. CSA: C. 90, § 441. CRS 53: § 149-2-10. L. 59: p. 829, § 1. C.R.S. 1963: § 150-2-10. L. 65: p. 1270, § 3. L. 77: (6) amended, p. 885, § 68, effective July 1, 1979. L. 89: (6) amended, p. 851, § 137, effective July 1. L. 91: (2)(b) amended, p. 893, § 23, effective June 5. L. 2002: (6) amended, p. 1554, § 337, effective October 1.

**Editor's note:** The effective date for amendments made to this section by chapter 216, L. 77, was changed from July 1, 1978, to April 1, 1979, by chapter 1, First Extraordinary Session, L. 78, and was subsequently changed to July 1, 1979, by chapter 157, § 23, L. 79. See *People v. McKenna*, 199 Colo. 452, 611 P.2d 574 (1980).

**Cross references:** For the legislative declaration contained in the 2002 act amending subsection (6), see section 1 of chapter 318, Session Laws of Colorado 2002.

**37-42-111. Meetings of directors - notice.** The board of directors shall hold its regular meetings at least four times each year, which may be immediately following the general election and on the first Tuesday of April, July, and October of each year, or, in the alternative, at such other times as may be designated in the bylaws adopted by the board, and such special meetings as shall be called, on at least five days' notice, by a majority of the board. All special and regular meetings must be held where practicable within the district or, if not so practicable, within the boundaries of any county in which the district is located, in whole or in part, or in any county so long as the meeting location does not exceed twenty miles from the district boundaries. The provisions of this section governing the location of meetings may be waived only if the proposed change of location of a meeting of the board appears on the agenda of a regular or special meeting of the board and if a resolution is adopted by the board stating the reason for which a meeting of the board is to be held in a location other than under the provisions of this section and further stating the date, time, and place of such meeting. In calling special meetings, the call must state specifically the business to be transacted, and none other shall be considered, but, at regular meetings, any business which the board of directors may legally transact may be acted upon. A majority of all members of the board shall concur in order to bind the district or the board in any matter. All board meetings shall be public and the records thereof open to general public inspection during business hours.

**Source:** L. 21: p. 527, § 11. C.L. § 2067. CSA: C. 90, § 442. CRS 53: § 149-2-11. C.R.S. 1963: § 150-2-11. L. 65: p. 1269, § 1. L. 90: Entire section amended, p. 1503, § 17, effective July 1.

**37-42-112. District elections.** Elections are of two kinds, general and special. A general election shall be held once each year in the month of January, at a date, time, and place designated by the board. Any business requiring or permitting a vote of the landowners may be transacted at such election, including always the election of a board of directors for the ensuing year. A special election may be called at any time by the board of directors by resolution duly passed and entered of record in the minutes of the proceedings of the board. Notice of general elections shall call attention to the date and place of such election. In addition, notice of special elections shall state the nature of the business to be transacted at such election, and no business shall be transacted thereat other than that mentioned in the call. In either case, notice shall be mailed to each landowner of the district at his last address as shown by the records of the district at least thirty days prior to the date of such election



and also published once each week for four consecutive weeks immediately preceding such election, in a newspaper designated by the board and of general circulation within said district.

**Source:** L. 21: p. 528, § 12. C.L. § 2068. CSA: C. 90, § 443. CRS 53: § 149-2-12. C.R.S. 1963: § 150-2-12. L. 65: p. 1270, § 2.

**37-42-113. Powers of district.** (1) Irrigation districts organized under this article may sue and be sued in their district names, and courts shall take judicial notice of their organization and territorial extent. The board of directors may acquire, by use, appropriation, purchase, or condemnation, property or rights of any kind, including rights-of-way, canals, or reservoirs either projected, or partly constructed, or constructed, or the part or whole of any contemplated, projected, partly completed system of irrigation or waterworks, water rights, or any other property or right necessary or useful for carrying out the objects of said irrigation district. The title to any such property so acquired shall vest immediately in said irrigation district in its corporate name and shall be held by said district in trust for, and is hereby dedicated and set apart for, the uses and purposes provided for in this article. Any contract purporting to bind the district to the payment of any sum in excess of twenty thousand dollars shall first be ratified by a majority of all the votes cast at a general or special election called for that purpose before it shall become so binding, and all contracts entered into by the board of directors agreeing to a payment in excess of such amount shall be construed as made expressly subject to this provision, and shall not become binding upon the district until authorized and ratified at an election called and held for that purpose.

(2) Where the compensation to be paid by the district to the owners of any property which the board of directors of an irrigation district are authorized to take by proceedings in eminent domain has been finally determined to be in excess of twenty thousand dollars, sufficient time shall be given by the courts for the submission to and determination by the landowners of the district, at a regularly called general or special election, of the questions of whether the district shall pay said compensation or shall abandon such condemnation proceedings. If the landowners, by majority vote of all the votes cast at such election, shall vote for the payment of such compensation, the necessary additional times shall be given the district wherein to pay such compensation either by levy and collection of assessments against the lands of the district, or by the issuance and sale of bonds of the district, or by both such methods, as may be determined at a district election.

(3) The board may also enter into any obligation or contract with the United States for the construction or operation and maintenance of the necessary works for the delivery and distribution of water therefrom; or for drainage of district lands; or for the assumption, as principal or guarantor, of indebtedness to the United States on account of district lands; or for the temporary rental of water under the provision of the federal reclamation act and all acts amendatory thereof or supplementary thereto and the rules and regulations established thereunder; or the board may contract with the United States for a water supply under any act of congress providing for or permitting such contract and may convey to the United States as partial or full consideration therefor water rights or other property of the district. The district also has power to take over the assets and assume the liabilities of water users' associations organized for cooperation with the United States under the provisions of the act of congress approved June 17, 1902 (32 Stat. 388), and acts amendatory thereto, in case a majority of the lands of each association shall be within such district, subject to the provision that the shareholders of such association by vote, as provided by their articles of incorporation and bylaws, shall assent and agree that such assets and liabilities shall be so taken over.

**Source:** L. 21: p. 528, § 13. C.L. § 2069. CSA: C. 90, § 444. CRS 53: § 149-2-13. C.R.S. 1963: § 150-2-13.

## ANNOTATION

**Law reviews.** For article, "Eminent Domain in Colorado", see 29 Dicta 313 (1952). For note, "A Survey of Colorado Water Law", see 47 Den. L.J. 226 (1970).

**The general assembly cannot extend the provisions of § 3 of art. X, Colo. Const.,** which exempts from separate taxation ditches, canals, and flumes owned and used by individuals or corporations for irrigating their own lands exclusively. The enactments of such statutes are unauthorized exercises of legislative power, and the portion of this section, insofar as it attempts

to exempt the property of irrigation districts from taxation, is unconstitutional and void. *Logan Irrigation Dist. v. Holt*, 110 Colo. 253, 133 P.2d 530 (1943).

**The board is specifically given authority to acquire by use, purchase, or condemnation** property or rights of any kind, including canals, reservoirs, water rights or any other property or right necessary or useful for carrying out the objects for which the district was organized. *Trinchera Ranch Co. v. Trinchera Irrigation Dist.*, 89 Colo. 170, 300 P. 614 (1931).

**37-42-114. Landowners - evidence of ownership.** (1) "Landowners", as used in this article, shall include any persons, natural or artificial, resident or nonresident, who are citizens of the United States and owners in fee of lands within the boundaries of any irrigation district organized or proposed to be organized, or holders of incomplete title under contracts to purchase state or Carey act lands, or the state board of land commissioners in care of agricultural college or public school lands, including also entrymen or purchasers of public lands of the United States under any of the agricultural public land laws, or the secretary of the interior in care of unentered public lands subject to this article under the terms of an act of congress entitled "An Act to promote reclamation of arid lands.", approved August 11, 1916, and all acts amendatory thereof or supplemental thereto.

(2) Where such landowner is under disability, or infancy, insanity, or otherwise, or the lands are held under administration, guardianship, conservatorship, receivership, or other similar proceeding, the administrator, executor, guardian, conservator, receiver, or other like officer shall be considered the "landowner" for the purposes of this article and, when authorized by the court having jurisdiction to do so, may act in that capacity in the formation, organization, operation, management, or dissolution of any irrigation district as any other landowner thereof.

(3) For the purposes of this article, evidence of ownership shall be prima facie established, as to patented land, by the certificate of the county assessor of the county wherein the lands involved are situated; as to unperfected entries upon public lands, by the certificate of the register of the United States land office of the district wherein the lands involved are situated; or as to holders of incomplete title under contracts to purchase state or Carey act lands, by certificate of the register of the state board of land commissioners.

**Source:** L. 21: p. 531, § 14. C.L. § 2070. CSA: C. 90, § 445. CRS 53: § 149-2-14. C.R.S. 1963: § 150-2-14.

**37-42-115. Land board as landowner.** (1) The state board of land commissioners is hereby authorized to act in the capacity of landowner with reference to any lands under its management or control; except that no such lands under the control or management of the state board of land commissioners, or upon which less than two-thirds of the purchase price has been paid under contracts to purchase such lands, shall be included within any irrigation district organized under this article over the written objection of such state board of land commissioners, and upon opportunity given to offer such objection.

(2) Any such lands when included within any irrigation district shall be subject to all the terms and provisions of this article for all purposes, and the state treasurer is authorized to pay assessments for district purposes upon such lands out of the proper funds, upon order of the state board of land commissioners.

**Source:** L. 21: p. 532, § 15. C.L. § 2071. CSA: C. 90, § 446. CRS 53: § 149-2-15. C.R.S. 1963: § 150-2-15.



**37-42-116. Irrigation district commission created. (Repealed)**

**Source:** L. 21: p. 532, § 16. C.L. § 2072. CSA: C. 90, § 447. CRS 53: § 149-2-16. C.R.S. 1963: § 150-2-16. L. 68: p. 130, § 143. L. 88: (1) amended, p. 419, § 15, effective April 11. L. 91: Entire section repealed, p. 886, § 10, effective June 5.

**37-42-117. Directors to adopt plans.** (1) The board of directors of any irrigation district organized under this article, as soon as organized, shall adopt a definite and complete plan for carrying out the purposes of its organization, which plan shall include a definite means for the irrigation or reclamation of the lands included within such area, as well as the plans proposed for financing such undertaking. This plan shall be set out at length in the record of the proceedings of the board of directors.

(2) and (3) (Deleted by amendment, L. 91, p. 893, § 24, effective June 5, 1991.)

**Source:** L. 21: p. 533, § 17. C.L. § 2073. CSA: C. 90, § 448. CRS 53: § 149-2-17. C.R.S. 1963: § 150-2-17. L. 91: Entire section amended, p. 893, § 24, effective June 5.

**37-42-118. Bond election - ballots.** (1) After the plan specified in section 37-42-117 has been adopted, the board of directors may then call a district election for the purpose of voting upon the question of authorization and issuance of district bonds in an amount and in such series and dates of maturities, but none later than forty years from date of issue and bearing such interest not exceeding seven percent, as shall be first determined by resolution of said board. Notice of said election shall be given as in case of other special elections of irrigation districts, or such question may be submitted at a general election. At the time and place named in the call, the election shall be held and the question of the authorization of bonds, and any other matter named in the call, shall be submitted to vote of the landowners, who shall vote by ballot. On the ballots cast concerning the authorization and issuance of bonds shall appear a recital of the amount of bonds proposed, the series and dates of maturities, the rate of interest they shall bear, and, beneath such recital, the words "Bonds, Yes ...." and "Bonds, No ....", with a cross marked opposite the words expressing the voter's choice. Bonds shall not be construed to be authorized, and none shall be issued, except upon an affirmative vote of the majority of the total voting strength of the district.

(2) If bonds are authorized, the board of directors shall immediately cause the same to be issued. They shall be in denominations of not less than one hundred dollars and not more than one thousand dollars and shall be in the total amount and in such series and dates of maturities and bear interest as authorized by vote of the landowners. All bonds so issued shall be numbered consecutively beginning with the number one, shall become due in the order of their serial numbers, shall bear interest payable semiannually evidenced by coupons attached thereto bearing the same number as the bonds to which they are attached, and shall be registered with the county treasurer of the county wherein is situated the office of such irrigation district, and it is the duty of the county treasurer to keep a list of such bonds, serially, with the names and addresses of the owners thereof, as furnished him from time to time. Such bonds may contain a provision for redemption upon call, serially, as provided in this article, shall be in such form as prescribed by the board of directors, and shall be signed by the president of the district, attested by the secretary thereof, and countersigned by the district treasurer. Such bonds may be issued and the proceeds of their sale used for the payment of the first two years' interest thereon and for any of the several purposes of this article, except for maintenance, operation, or salaries.

(3) If a contract is proposed to be made with the United States, the question to be submitted to the voters at such special election is whether a contract shall be entered into with the United States. The notice of election shall state the maximum amount of money payable to the United States for construction purposes, exclusive of penalties and interest, and the water rights and other property, if any, to be conveyed to the United States. The ballots for such election shall contain the words "Contract with the United States, Yes" and "Contract with the United States, No", or words equivalent thereto.

**Source:** L. 21: p. 534, § 18. C.L. § 2074. L. 27: p. 455, § 1. CSA: C. 90, § 449. CRS 53: § 149-2-18. C.R.S. 1963: § 150-2-18. L. 91: (1) amended, p. 894, § 25, effective June 5.

#### ANNOTATION

**Applied** in *Lapham v. Phillips*, 81 Colo. 449, 255 P. 1100 (1927).

#### **37-42-119. Registered bonds. (Repealed)**

**Source:** L. 21: p. 536, § 19. C.L. § 2075. CSA: C. 90, § 450. CRS 53: § 149-2-19. C.R.S. 1963: § 150-2-19. L. 89: (1) amended, p. 1132, § 74, effective July 1. L. 91: Entire section repealed, p. 886, § 11, effective June 5.

**37-42-120. Additional bonds.** If, after the issuance and sale of a series of bonds under this article, it becomes necessary to authorize an additional issue or series of bonds, the same may be authorized and sold in like manner and in accordance with the provisions of this article as to a first issue of bonds but shall be subject to said first issue.

**Source:** L. 21: p. 537, § 20. C.L. § 2076. CSA: C. 90, § 451. CRS 53: § 149-2-20. C.R.S. 1963: § 150-2-20. L. 91: Entire section amended, p. 894, § 26, effective June 5.

**37-42-121. Sale of bonds - notice.** The board of directors may sell bonds so authorized and issued from time to time as may be necessary for district purposes, having first by resolution declared its intention to do so and having appointed a day and hour therefor. Notice of such sale shall be given by publishing the same for twenty days in a daily newspaper published in the city of Denver, Colorado, and in such other newspapers as the board may designate. The notice shall state the time and place at which sealed bids shall be received to purchase such bonds as shall be offered, and sale shall be made to the highest responsible bidder; except that the board may reject all offers and refuse to sell in case no responsible bid is received for ninety-five cents or more on the dollar.

**Source:** L. 21: p. 537, § 21. C.L. § 2077. CSA: C. 90, § 452. CRS 53: § 149-2-21. C.R.S. 1963: § 150-2-21.

**Cross references:** For publication of legal notices, see part 1 of article 70 of title 24.

**37-42-122. Bonds - assessments.** Such bonds and the interest thereon, and all payments due or to become due to the United States under any contract between the district and the United States, which bonds of the district have not been deposited with the United States, shall be paid solely by revenue derived from an annual assessment upon the lands lying within and forming a part of said district, and said lands within said district shall be and remain liable to be assessed for such payments as provided in section 37-42-126. Public lands of the United States within any district shall be subject to taxation for all purposes of this article to the extent provided by the act of congress approved August 11, 1916, upon full compliance therewith by the district.

**Source:** L. 21: p. 538, § 22. C.L. § 2078. CSA: C. 90, § 453. CRS 53: § 149-2-22. C.R.S. 1963: § 150-2-22.

**37-42-123. Rescission of action authorizing bonds.** If the landowners of an irrigation district desire to rescind their action authorizing an issue of bonds, they may do so as to any such entire issue remaining unsold in the hands of the board of directors in the same manner as such issue was authorized and upon an affirmative vote of the majority of the total voting



strength of the district, whereupon the board of directors shall cancel or destroy said bonds and shall enter that fact, reciting the numbers of such bonds so canceled or destroyed, in the minutes of their proceedings.

**Source:** L. 21: p. 538, § 23. C.L. § 2079. CSA: C. 90, § 454. CRS 53: § 149-2-23. C.R.S. 1963: § 150-2-23. L. 91: Entire section amended, p. 894, § 27, effective June 5.

**37-42-124. Construction of works - bids - notice - contract - bond.** (1) After a plan for construction of irrigation or other works has been adopted and approved as provided in section 37-42-117, and funds provided therefor, the board of directors shall call for bids for the construction of the whole or any part thereof. The notice shall be published for four weeks in such papers as the board shall designate as best suited to give widest publicity, and shall set forth that plans and specifications can be seen at the office of the district, that sealed bids for such construction will be received, and that the contract will be let to the lowest responsible bidder, stating the time and place for opening such bids, which, at such time and place, shall be opened in public. Within ten days from the opening of such bids, the board shall let said contract, in whole or in part, to the lowest responsible bidder, or may reject any or all of said bids and readvertise for other bids, or may proceed to construct such works under the superintendence of the officers and employees of the district. Any person to whom a contract is let under this article shall enter into a bond with good and sufficient sureties to be approved by the board, payable to such district for its use in not less than twenty-five percent of the amount stated in said contract, conditioned for the faithful performance of such contract.

(2) All preliminary engineering and construction work shall be done under the direction of a competent irrigation engineer, and shall be approved by the state engineer of Colorado; except that this section shall not apply in the case of any contract between the district and the United States.

**Source:** L. 21: p. 539, § 24. C.L. § 2080. CSA: C. 90, § 455. CRS 53: § 149-2-24. C.R.S. 1963: § 150-2-24.

**37-42-125. Fiscal year - appropriation resolution.** (1) The fiscal year of each irrigation district in this state shall commence on January 1 in each year. It is the duty of the board of directors, in accordance with the schedule prescribed by section 39-5-128, C.R.S., to determine the amount of money required to meet the maintenance, operating, and current expenses for the ensuing fiscal year and to certify said amount by resolution to the board of county commissioners of the county in which the office of the district is located, together with such additional amounts as may be necessary to meet any deficiency in the payment of said expenses theretofore incurred. The board of directors may fix the amount payable for any tract containing one acre or less and, if so, similarly shall certify this amount to the board of county commissioners. The board of directors shall also fix the amount payable by each tract within any district with which the United States has made a contract and shall certify the same to the board of county commissioners.

(2) The amount so fixed shall be in accordance with the federal reclamation laws and the public notices, orders, and regulations issued thereunder and shall be in compliance with any contracts made by the United States with any owners of said lands and in compliance further with the contracts between the district and the United States. The resolution shall be termed the annual appropriation resolution for the next fiscal year, and any debt or liability incurred or warrant issued in excess of the amount therein stated shall be absolutely void, except upon express authority conferred by the landowners at a general or special election.

**Source:** L. 21: p. 539, § 25. C.L. § 2081. CSA: C. 90, § 456. CRS 53: § 149-2-35. L. 63: p. 1003, § 4. C.R.S. 1963: § 150-2-25. L. 77: (1) amended, p. 1515, § 85, effective July 15.

**37-42-126. Assessment of lands - valuation.** (1) It is the duty of the county assessor of any county embracing the whole or a part of any irrigation district to assess and enter

upon his records as assessor in its appropriate columns the assessment of all lands, including public lands subject to assessment under the congressional act of August 11, 1916, exclusive of improvements, situate, lying, and being within any irrigation district in whole or in part of such county. Immediately after said assessment has been extended as provided by law, the assessor shall make returns of the total amount of such assessment to the board of county commissioners of the county in which the office of said district is located.

(2) All lands within the district for the purpose of taxation under this article shall be valued by the assessor at the same rate per acre; except that in no case shall any land be taxed, or subject to taxation, for irrigation district purposes under this article, or under any other or former law relative to irrigation districts, which by reason of location, or the broken uneven surface, or unsuitable character or quality of the soil is unsuitable for irrigation and cultivation, or which, from any natural cause is not capable of irrigation and cultivation, except at a financial loss, nor shall tracts of land of one acre or less be taxed for irrigation purposes if the board of directors of the irrigation district has fixed an amount payable for each of such tracts. If the amount of water available from the water system of the irrigation district is wholly insufficient for the successful growing and maturing of crops on the entire acreage of lands within the district and susceptible of irrigation therefrom, that fact may be alleged and, upon proof, shall entitle the owner of lands that have never been cultivated and irrigated from the water system of such irrigation district to the relief provided for in this article.

(3) Where a contract is entered into between the United States and an irrigation district organized under this article providing for the payment of charges at an unequal rate per acre, district land so affected shall not be valued by the county assessor under the foregoing provision of this section, but in such case the county assessor shall assess such district land in accordance with the certificate provided for in section 37-42-125 and in compliance with the terms of such contract between the United States and the district.

**Source:** L. 21: p. 540, § 26. C.L. § 2082. L. 25: p. 326, § 1. CSA: C. 90, § 457. CRS 53: § 149-2-26. L. 63: p. 1004, § 5. C.R.S. 1963: § 150-2-26.

#### ANNOTATION

**Law reviews.** For note, "A Survey of Colorado Water Law", see 47 Den. L.J. 226 (1970).

**37-42-127. Levy to pay interest and expenses.** (1) It is the duty of the board of county commissioners of the county in which the office of any irrigation district is located, immediately upon receipt of the returns of the total assessment of said district and upon the receipt of the certificates of the board of directors certifying the total amount of money required to be raised as provided in section 37-42-125, to fix the rate of levy necessary to provide the amount of money required to pay the interest and principal of the bonds of said district as the same becomes due; also, to fix the rate necessary to provide the amount of money required for any other purposes provided in this article which are to be raised by the levy of assessments upon the real property of said district; and to certify said respective rates to the board of county commissioners of each county embracing any portion of said district. The rate of levy necessary to raise the required amount of money on the valuation for assessment of the property of said district shall be increased fifteen percent to cover delinquencies.

(2) For the purposes of said district, it is the duty of the board of county commissioners of each county in which any irrigation district is located, in whole or in part, at the time of making levy for county purposes, to make a levy, at the rates above specified, upon all lands in said district within their respective counties and, in case of contract with the United States, in the amounts and on the tracts as fixed and certified by the board of directors. If the board of directors of an irrigation district has certified the amount payable for any tract of one acre or less, it is the duty of the board of county commissioners of each county in which the irrigation district is located, in whole or in part, also to levy such amount against each of such tracts. All taxes levied under this article are special taxes.



Source: L. 21: p. 541, § 27. C.L. § 2083. CSA: C. 90, § 458. CRS 53: § 149-2-27. L. 63: p. 1005, § 6. C.R.S. 1963: § 150-2-27.

**37-42-128. Collection of assessments.** (1) The county treasurer of the county wherein the office of an irrigation district is located shall be and is hereby constituted ex officio district treasurer of such irrigation district and shall be liable upon his official bond and to indictment and criminal prosecution for malfeasance, misfeasance, or failure to perform any duty prescribed in this article, either as county treasurer or as district treasurer, as is provided by law in like or other cases as county treasurer. Said treasurer shall collect, receive, and receipt for all moneys belonging to the district.

(2) It is the duty of the county treasurer of any county wherein is located the whole or any part of an irrigation district to collect and receipt for all irrigation district assessments levied. The revenue laws of this state for the assessment, levying, and collection of taxes on real estate for county purposes, except as modified in this article, shall be applicable for the purposes of this article, including the enforcement of penalties and forfeitures for delinquent assessments, and, in the collection and enforcement of irrigation district assessments, the county treasurer is authorized to issue such instruments and do such acts at such times, in the same manner and with like effect, as authorized by the general revenue laws concerning such taxes upon real estate for county purposes.

(3) In the case of irrigation district assessments, such county treasurer shall receive, in payment of the general fund assessment for the year in which taxes are payable, warrants drawn against said general fund the same as so much lawful money of the United States, if such warrant does not exceed the amount of the general fund assessment which the person tendering the same owes. Such county treasurer shall receive, in payment of the district bond fund assessment for the year in which said taxes are payable, interest coupons or bonds of said irrigation district maturing within the year said assessments are payable the same as so much lawful money of the United States, if such interest coupons or bonds do not exceed the amount of district bond fund assessment which the person tendering the same owes. Payment of irrigation district assessments shall be receipted for upon the same receipt required in the collection of general real estate taxes, but, in the case of payment of only general tax or irrigation district assessment and the nonpayment of the other, such nonpayment shall be clearly indicated upon such receipt so issued, and the payment of the one shall in no way affect the lien or obligation of the unpaid tax or assessment, but each shall exist and be enforceable separately.

(4) The county treasurer of each county comprising a portion only of an irrigation district, excepting the county treasurer of the county in which the office of said district is located, on the first Monday of each month, shall remit to the district treasurer all moneys, warrants, coupons, or bonds theretofore collected or received by him on account of said district. Every county treasurer shall keep a general fund account, a bond fund account, and, in the case of a contract with the United States, a United States contract fund account. In the bond fund account shall be placed all moneys received from taxation for the payment of bonds and the interest thereon. In the United States contract fund account shall be placed all moneys received for payments due or to become due the United States under any contract between the district and the United States.

(5) All other district moneys from whatever sources shall be placed in the general fund, and the three funds kept separate at all times. The district treasurer shall pay out of said bond and United States contract fund, when due, the interest and principal of the bonds of said district, at the time and place specified in said bonds, or all payments due to the United States under any contract between the district and the United States, at the time and in the manner provided in said contract, and shall pay out of the general fund only upon warrants signed by the person duly authorized by the board of directors of said district as provided in this section.

(6) The district treasurer, on the fifteenth day of each month, unless excused therefrom by order of the board of directors, shall report to the secretary of the district the amount of money in his hands to the credit of the respective funds, the amount of warrants paid during the previous month, and the amount of registered warrants, if any, together with an account of bonds retired or United States contract payments made, if any.

(7) All such district assessments collected and paid to the county treasurer shall be received by said treasurer in his official capacity, and he shall be responsible for the safekeeping, disbursement, and payment thereof the same as for other moneys collected by him as such treasurer. The county treasurer shall receive for the collection of such assessments such amount as the board of directors may allow, as provided in section 30-1-102, C.R.S. Any assessment collected and paid to the county treasurer for districts that are defunct or have not been in operation for five or more years shall be transferred by the county treasurer to the county general fund.

**Source:** L. 21: p. 542, § 28. C.L. § 2084. CSA: C. 90, § 459. CRS 53: § 149-2-28. C.R.S. 1963: § 150-2-28. L. 71: p. 330, § 14. L. 73: p. 1531, § 1.

**Cross references:** For collection of taxes, see article 10 of title 39.

**37-42-129. Warrants - interest - call.** Except with respect to claims coming within the provisions of article 10 of title 24, C.R.S., no warrants shall be issued except upon a verified claim first audited and allowed by the board, and each warrant shall be signed by the person duly authorized by the board of directors; and, if the district treasurer has insufficient money in the general fund to pay any warrant when presented for payment, he shall enter such warrant, with its number, amount, date, and the name and address of holder, in a register kept for that purpose and shall endorse upon said warrant "presented and not paid for want of funds", with the date of presentation. Such warrant shall draw interest at the rate of six percent per annum from such date of presentation until called for payment. When money sufficient to pay such warrant, or sufficient to allow a credit of not less than one hundred dollars thereon is in the general fund, such treasurer shall mail notice thereof to the holder of record at his address of record, and interest thereon shall thereupon cease. Warrants shall be paid in the order of their presentation for payment.

**Source:** L. 21: p. 545, § 29. C.L. § 2085. CSA: C. 90, § 460. CRS 53: § 149-2-29. C.R.S. 1963: § 150-2-29. L. 71: p. 1217, § 17. L. 73: p. 1531, § 2.

**37-42-130. Call of bonds - surplus fund.** If bonds are issued which are subject to redemption prior to maturity, and if, after the payment of all coupons and bonds due in any fiscal year, it is found that the bond fund of an irrigation district contains an amount of money sufficient therefor, it is the duty of the district treasurer to call such bonds as first become due and payable and to retire such indebtedness. Call shall be made by registered mail, addressed to the holder of such bonds so called at his address of record, giving the number of the bonds called, and notifying the holder thereof, that upon presentation of such bonds with all future due coupons attached, they shall be redeemed at their face value, with interest to date of call. When any bond has been so called, such fact shall be noted upon the bond register of the district treasurer, and money in the amount of its face, with interest to date of call, shall be set aside for its payment from the bond fund, and no coupons upon such bond maturing at a date later than the date of such call shall be paid. If money remains in or is paid into the bond fund after final liquidation of all bonded indebtedness, such money shall be transferred to the general fund by the treasurer of the district.

**Source:** L. 21: p. 546, § 30. C.L. § 2086. L. 27: p. 457, § 2. CSA: C. 90, § 461. CRS 53: § 149-2-30. C.R.S. 1963: § 150-2-30.

**37-42-131. Payment of general expenses.** (1) If any money in excess of one hundred dollars remains in the general fund in any year after the payment of all district warrants or other indebtedness properly chargeable against such fund and due and payable within such fiscal year, the board shall apply such surplus to the payment of the warrants of preceding years, if any, in the order of their registration and thereafter, in its discretion, by resolution, may authorize the transfer of such money from the general fund to the bond fund, and a



certified copy of such resolution, signed by the president and attested by the secretary of the district, shall be sufficient warrant to the treasurer for making such transfer.

(2) For the purposes of defraying the expenses of the organization of the district and the care, operation, management, repair, and improvement of all canals, ditches, reservoirs, and works, including salaries of officers and employees, the board may either fix rates of tolls and charges and collect the same of all persons using said canal and water for irrigation or other purposes and in addition thereto may provide, in whole or in part, for the payment of such expenditures by levy of assessments therefor, as provided in section 37-42-126, or by both tolls and assessments. In case the money raised by the sale of bonds issued is insufficient, and in case bonds are unavailable for the completion of the plans of works adopted, it is the duty of the board of directors to provide for the completion of said plans by levy of an assessment therefor in the same manner in which levies of assessments are made for the other purposes.

**Source:** L. 21: p. 547, § 31. C.L. § 2087. CSA: C. 90, § 462. CRS 53: § 149-2-31. C.R.S. 1963: § 150-2-31.

**37-42-132. Relief from bonded indebtedness.** (1) At any time after the expiration of two years from the date of the issuance of any bonds under this article, any landowner may relieve his lands from the burden of such bonded indebtedness in the following manner: He shall pay to the district treasurer an amount of money sufficient to retire district bonds in such ratio to the total bonded indebtedness of the district as the acreage of lands which he owns within such district bears to the total acreage thereof, subject to such bonded indebtedness, plus fifteen percent; except that, where such district may have outstanding more than one issue of bonds, the bonds of any one issue may be thus retired without reference to other issues; and where such payment is insufficient to furnish money to retire an entire bond, such landowner shall pay such further sum as shall be required to retire an entire bond, and the treasurer shall issue to him a lien bond in a denomination representing such excess payment, bearing the same serial number, of like terms, and with the same rate of interest as the bond of the last serial number so retired.

(2) The treasurer shall thereupon issue to such landowner his official receipt in duplicate, one of which receipts shall be filed with the secretary of such irrigation district and one filed for record in the office of the county clerk and recorder of the county wherein the lands involved are situated. From and after the filing, such lands shall be free and clear from any and all liens, levies, and assessments of such bonded indebtedness for which such payment was made; except that, in the case of a contract with the United States, the provisions of this section shall not apply, but, in such case, the real property of the district shall be and remain liable to be assessed for all payments provided for in such contract with the United States until the obligations under such contract have been paid.

**Source:** L. 21: p. 548, § 32. C.L. § 2088. CSA: C. 90, § 463. CRS 53: § 149-2-32. C.R.S. 1963: § 150-2-32. L. 91: (2) amended, p. 895, § 28, effective June 5.

**37-42-133. Exclusion of land from district.** (1) Any landowner desiring the exclusion of any of his lands from an irrigation district organized under this article shall present to the board of directors of such district his verified petition describing such lands and praying their exclusion by order of such board. He shall allege and show by certificate of the county clerk and recorder of the county wherein such lands are situate that such lands are not subject to any bonded indebtedness of such district and, by certificate of the county treasurer of such county, that all levies for the general fund of said district have been paid upon said lands. Whereupon, said board shall proceed to an examination of the matters alleged in said petition as it sees fit and shall consider the advisability of such exclusion. If it finds that such land is not burdened with any bonded indebtedness of such district, and that all levies made thereon have been paid, or proper security given for payment of such levies as are not yet payable, and that its exclusion from the district would in no way damage or injure other lands of said district, it may order such exclusion, and thereafter

such lands shall be dropped from the lists of district lands for all purposes; except that such exclusion shall in no way affect or impair any of the rights or obligations of such district.

(2) The board of directors of an irrigation district is authorized to exclude any lands situate in the district where the board believes that the exclusion of such lands from such district would be in the best interest of other landowners in such district. Such board may order such exclusion, and thereafter such lands shall be dropped from the lists of district lands for all purposes; except that notice shall be published first in a newspaper in said district or county thereof for a period of two successive weeks, and, in the event there is no such newspaper published in such district, such intended order shall be posted at the office of the district board and in at least two other public places within the boundaries of said district, and notice shall also be served upon the owners of the lands proposed to be excluded before the making of such order. Proof of such posting and publication and also of such notice having been served upon the landowner shall be duly made and recorded in the minutes of the board of directors.

(3) However, when the district makes such an order, anyone having a water privilege on such land so excluded shall be reimbursed for the value of such privilege, and the owners of said lands shall have the right to appeal to the district court of the judicial district in which such land is situate to have such order reviewed and set aside, if improperly made. In case a contract has been made between the district and the United States, no change shall be made in the boundaries of the district, and the board of directors shall make no order changing the boundaries of the district until the secretary of the interior assents thereto in writing and such assent is filed with the board of directors.

**Source:** L. 21: p. 549, § 33. C.L. § 2089. CSA: C. 90, § 464. CRS 53: § 149-2-33. C.R.S. 1963: § 150-2-33.

**37-42-134. Inclusion of land in district.** (1) Landowners representing a majority of the acreage of any tracts of land susceptible of irrigation from the system of any irrigation district already organized may present their petition to the board of directors of such irrigation district, praying that such lands be included within the district. Such petition shall describe each tract of land sought to be included within such district and give the name of the owner thereof. It shall be accompanied by a map prepared by a competent civil engineer, showing the proposed method of irrigation of the land involved and the susceptibility of its irrigation from the system of such district. Upon the filing of such petition, it is the duty of the secretary of such district to cause notice thereof to be published, at the expense of such petitioners, once each week for three successive weeks in a newspaper designated by the board and of general circulation within such district and to set said petition down for hearing before the board at its next regular meeting after the last of such publications.

(2) At the date set for hearing, such board shall proceed to hear said petition and any objections thereto that have been offered in writing by any landowner of the district or other interested person and may allow or reject said petition in whole or in part in its discretion. As a condition precedent to the granting of such petition, the board of directors shall require the payment into the bond fund of such amount, as nearly as the same can be estimated, as such land as is included by its order would have been assessed on account of such fund if it had been in such district from the date of its organization and, in addition, may require such further payments as it considers just and equitable to be paid into the general fund; but, in case any unentered public land is so included within any irrigation district, such payment shall be assessed against such lands on the records of the district and collected in the manner authorized by the act of congress of August 11, 1916.

(3) In case a contract has been made between the district and the United States, no change shall be made in the boundaries of the district unless the secretary of the interior assents thereto in writing and such assent is filed with the board of directors. Upon such assent any lands excluded from the district shall be discharged from all liens in favor of the United States under a contract with the United States.

**Source:** L. 21: p. 550, § 34. C.L. § 2090. CSA: C. 90, § 465. CRS 53: § 149-2-34. C.R.S. 1963: § 150-2-34. L. 91: (1) and (2) amended, p. 895, § 29, effective June 5.



**37-42-135. District to lease surplus water.** Whenever any irrigation district organized under the provisions of this article acquires water in excess of its own needs or becomes the owner of water or rights capable of use for other purposes than those for which it was organized, without impairing or injuring such use, it may lease such water or rights for use within or without the district for domestic, agricultural, power, or mechanical purposes, upon affirmative vote of the district authorizing such lease, and the rentals derived from such lease shall be paid into the general fund of the district. Such rentals shall become due and payable semiannually, in advance, on March 1 and August 1 of each year, and shall bear interest at the rate of one percent per month from due date until paid. At its option the board of directors may cancel any lease upon which any rental is past due and unpaid, and no lease shall extend beyond the term of twenty years from the date of its execution.

**Source:** L. 21: p. 552, § 35. C.L. § 2091. CSA: C. 90, § 466. CRS 53: § 149-2-35. C.R.S. 1963: § 150-2-35.

**37-42-136. Drainage of lands - surveys.** The board of directors of any irrigation district may cause surveys, maps, estimates of cost, and a report of feasibility to be made looking to the drainage of the whole or any part of an irrigation district which may have become, or threatens to become, seeped or too wet or which requires drainage for profitable cultivation. Such surveys, maps, estimates, and report shall be filed in the office of the district, and such matters shall be submitted to the landowners at a general or special election held not less than sixty days from the date of the filing of such documents. If the landowners express their approval of such drainage undertaking by affirmative vote of a majority of the votes cast at such election, the district may proceed to do such drainage work and shall have like powers with reference thereto, including the levying of an assessment or the issuing of bonds, to defray the expense thereof.

**Source:** L. 21: p. 552, § 36. C.L. § 2092. CSA: C. 90, § 467. CRS 53: § 149-2-36. C.R.S. 1963: § 150-2-36. L. 91: Entire section amended, p. 896, § 30, effective June 5.

**37-42-137. Sale of surplus water - proceeds.** The board of directors may sell property or assets of the district not needed for district use nor essential to its operation from time to time as it shall direct by resolution, at public auction, and upon such notice as it shall designate, and shall cause the proceeds thereof to be placed in the bond fund or United States contract fund of the district. If such district has no bonded or United States contract indebtedness then such proceeds shall be placed in the general fund.

**Source:** L. 21: p. 553, § 37. C.L. § 2093. CSA: C. 90, § 468. CRS 53: § 149-2-37. C.R.S. 1963: § 150-2-37.

**37-42-138. Confirmation of organization and bonds.** (1) The board of directors of any irrigation district organized under this article at any time may file a petition in the district court of the county wherein is situated the office of such district praying for a judicial examination and determination of the question of the validity of the organization of the district, or of any bonds issued, whether sold or not, or of any assessment levied, or of any order, act, proceeding, or contract of said district. Such petition shall set forth the facts whereon the validity of such organization or of such bonds, assessment, order, act, proceeding, or contract is founded and shall be verified by a member of the board.

(2) Thereupon a notice in the nature of a summons shall issue under the hand and seal of the clerk of said court, directed to all landowners, creditors, or other persons interested in said district, naming it, which designation shall be deemed sufficient to give the court jurisdiction of all matters and parties involved and interested. Service shall be obtained by publication of such notice as in the case of publication of summons in an action to quiet title to real property. Any landowner, creditor, or other interested person may move to dismiss or answer said petition within the time allowed therefor. All persons filing motions to

dismiss or answers shall be entered as defendants in said cause and their several defenses consolidated for hearing or trial.

(3) Upon hearing, the court shall examine into all matters and things affecting the validity of the matter in controversy, shall make a finding with reference thereto, and shall enter judgment and decree as the case warrants. In reaching its conclusions in such causes, the court shall follow a liberal interpretation of the law and shall disregard informalities or omissions not affecting the substantial rights of the parties, unless it is affirmatively shown that such informalities or omissions led to a different result than would have been otherwise obtained. The Colorado rules of civil procedure shall govern matters of pleading and practice as nearly as may be. Costs may be assessed or apportioned among contesting parties in the discretion of the trial court. Review of judgments of the district court by an appellate court may be had as in other civil causes.

**Source:** L. 21: p. 553, § 38. C.L. § 2094. CSA: C. 90, § 469. CRS 53: § 149-2-38. C.R.S. 1963: § 150-2-38.

**37-42-139. Dissolution of district - election.** (1) A plan for the dissolution of any irrigation district organized under this article may be submitted to the landowners at a special election held for that purpose. Such plan must provide for the payment of all district debts and liabilities and the disposition of district assets. If the landowners authorize such dissolution by an affirmative vote of a majority of the entire voting strength of the district, the directors shall proceed to carry out the plan so authorized and, upon the accomplishment thereof, shall file their certificate of such fact with the county clerk and recorder of each county wherein any part of said district is situated.

(2) Thereupon, the district shall be considered at an end; except that, within fifteen days from the date of the vote of the landowners authorizing such dissolution, any landowner or creditor may contest the validity of such proceeding or the legality of the proposed plan of dissolution by action in the district court of the county wherein the district office is situated, and, pending determination in such cause, no action shall be taken by the board of directors thereunder. If any funds remain in the hands of the district treasurer to the credit of such district after its dissolution, such funds shall be distributed among the landowners in proportion to the acreage of their lands within the district.

**Source:** L. 21: p. 555, § 39. C.L. § 2095. CSA: C. 90, § 470. CRS 53: § 149-2-39. C.R.S. 1963: § 150-2-39. L. 91: (1) amended, p. 896, § 31, effective June 5.

**37-42-140. Districts organized hereafter.** This article shall apply only to irrigation districts organized after April 7, 1921, and no existing laws in any manner relating to irrigation districts shall apply to or affect irrigation districts organized after said date, but said existing laws and all amendments thereto made after said date shall be and remain in and have full force and effect as to all irrigation districts organized prior to April 7, 1921. However, whenever resident freeholders, representing a majority of the number of acres of the irrigable land in any irrigation district organized prior to April 7, 1921, shall petition the board of directors to call a special election for the purpose of submitting to the qualified electors of said irrigation district, who for the purpose of this section are defined as the owners or entrymen of agricultural or horticultural land within said district exclusive of lands platted or subdivided into residence or business lots, a proposition to vote, at any regular or any special election called and notice given for such purpose, upon the question whether or not such irrigation district shall thereafter operate under the provisions of this article and if two-thirds of said qualified electors of such irrigation district voting upon such question shall vote in favor of coming under the provisions of this article, upon the filing of a statement of the results of such election in the manner provided by section 37-41-112, such irrigation district shall thereafter be governed by the provisions of this article, but the election of such district to come under the provisions of this article shall not invalidate any act or proceeding theretofore done under the laws governing such irrigation district prior to such election and shall not impair any obligation of such irrigation district or any right thereunder.



**Source:** L. 21: p. 555, § 40. C.L. § 2096. L. 31: p. 434, § 1. CSA: C. 90, § 471. CRS 53: § 149-2-40. C.R.S. 1963: § 150-2-40. L. 88: Entire section amended, p. 1230, § 2, effective April 6.

**37-42-141. Ratification of irrigation district.** If the qualified voters of an irrigation district have authorized the dissolution of such district in the manner provided by section 37-42-139 but the plan of dissolution so authorized has not been implemented and the district has continued to function as an irrigation district, such district may submit the question of ratification of the district to the qualified voters in a district election as specified in section 37-42-112. If a majority of the votes cast at such election are in favor of the ratification of the district, the prior authorization of dissolution shall be deemed null and void. The directors shall file their certificate of such fact with the county clerk and recorder of the county wherein such district is situated, and the district shall be deemed, for all purposes, to be a de jure irrigation district.

**Source:** L. 88: Entire section added, p. 1231, § 3, effective April 6.

ARTICLE 43

Irrigation Districts of 1905 and 1921  
and Irrigation District Salinity Control Act

**Editor's note:** The statutes in this article neither expressly amend nor repeal other statutes and purport to be applicable to all irrigation districts without regard to date.

**Cross references:** For publication of legal notices, see part 1 of article 70 of title 24; for single election precinct law, see § 37-41-160.

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## PART 2

IRRIGATION DISTRICT SALINITY  
CONTROL ACT

## PART 1

IRRIGATION DISTRICTS  
OF 1905 AND 1921

**37-43-101. Definition of landowner.** For the purposes of sections 37-43-101 to 37-43-103, a "landowner" shall be held to be any individual eighteen years of age or older, owning in fee within an irrigation district land in excess of one acre that is subject to irrigation district taxation or assessment, who is a citizen of the United States or has declared his or her intention to become a citizen of the United States and is a resident of the state of Colorado or who is an entryman upon public lands of the United States and is residing thereon. Any landowner shall be eligible to election as a director of the district in which the landowner is entitled to vote.



**Source:** L. 35: p. 664, § 3. **CSA:** C. 90, § 487. **CRS 53:** § 149-3-3. **C.R.S. 1963:** § 150-3-3. **L. 2002:** Entire section amended, p. 8, § 2, effective March 5.

**37-43-102. Landowners to vote for directors on acreage basis.** Landowners in irrigation districts in this state who do not have the right to vote for district directors on an acreage basis shall have such right if so authorized as provided in sections 37-43-101 and 37-43-103.

**Source:** L. 35: p. 663, § 1. **CSA:** C. 90, § 485. **CRS 53:** § 149-3-1. **C.R.S. 1963:** § 150-3-1.

#### ANNOTATION

**Law reviews.** For article, "Rights and Remedies of Irrigation District Bondholders", see 20 Dicta 137 (1943). For article, "Irrigation Confirmation Proceedings", see 21 Dicta 140

(1944). For article, "Legal Classification of Special District Corporate Forms in Colorado", see 45 Den. L.J. 347 (1968).

**37-43-103. Directors may submit question.** At any general or special election held in any irrigation district, the board of directors may submit to the electors of the district the question of voting for directors of the district on an acreage basis; except that no landowner has the right to vote more than eighty acres in the election of directors. If at such election a majority of the votes cast are in favor of the proposition, at all elections of directors held thereafter, each landowner of the district shall be permitted to vote for each office to be filled as many votes as he has acres of land within the district which are subject to district taxes or assessments. A landowner may vote in person or by proxy, and any person acting as proxy for another must file written authority therefor with the election judges, which authority must be retained with the other election proceedings. The candidate receiving the most votes shall be declared elected.

**Source:** L. 35: p. 663, § 2. **CSA:** C. 90, § 486. **CRS 53:** § 149-3-2. **C.R.S. 1963:** § 150-3-2.

#### **37-43-104. Qualifications of directors and electors. (Repealed)**

**Source:** L. 71: p. 1347, § 2. **C.R.S. 1963:** § 150-3-89. **L. 2002:** Entire section repealed, p. 9, § 3, effective March 5.

**37-43-105. Increasing number of directors.** The board of directors of any irrigation district in the state of Colorado may submit to the electors of any such district the question of whether or not the number of directors of such district shall be increased from three to five.

**Source:** L. 45: p. 419, § 1. **CSA:** C. 90, § 487(1). **CRS 53:** § 149-3-4. **C.R.S. 1963:** § 150-3-4.

**37-43-106. Calling election - ballot.** Such election may be called by any board of directors and shall be called if a petition therefor, signed by thirty percent of the qualified electors in said district, as defined in section 37-43-108, is presented to any such board, which election shall be a special election and the question to be voted upon shall be submitted upon printed ballots on which the said question shall be set forth as follows:

FOR an increase of the number of directors of the .....

Irrigation District from three to five ☐

AGAINST an increase in the number of directors of the .....

Irrigation District from three to five ☐

**Source: L. 45:** p. 419, § 2. **CSA:** C. 90, § 487(2). **CRS 53:** § 149-3-5. **C.R.S. 1963:** § 150-3-5.

**37-43-107. Voting.** The preference of voters shall be indicated by inserting a cross mark following either one or the other of the foregoing propositions, and said ballot shall have printed upon the face thereof instructions to the voters, worded as follows:

“To vote for or against an increase in the number of directors of the ..... Irrigation District, a voter shall place a cross mark in the space at the right of the words expressing his wish either ‘FOR’ or ‘AGAINST’ such increase.”

**Source: L. 45:** p. 419, § 3. **CSA:** C. 90, § 487(3). **CRS 53:** § 149-3-6. **C.R.S. 1963:** § 150-3-6.

**37-43-108. Who may vote.** Any qualified elector, as defined in the law under which such district is organized, owning agricultural lands of one acre or more in extent may vote at such election and is entitled to one vote and shall not vote upon an acreage basis regardless of whether or not the landowners in the particular district have the right to vote upon an acreage basis in the election of directors.

**Source: L. 45:** p. 420, § 4. **CSA:** C. 90, § 487(4). **CRS 53:** § 149-3-7. **C.R.S. 1963:** § 150-3-7.

**37-43-109. Canvassing vote - directors-at-large.** The vote shall be canvassed by the board of directors at its first regular meeting after such election, and, if a majority of landowners voting at such special election vote for an increase in the membership of directors of the said district from three to five, at their next regular meeting following such election, the board of directors shall appoint two electors within the said district to serve as directors-at-large to represent and act for the entire district and to serve until the next regular election for directors in the district.

**Source: L. 45:** p. 420, § 5. **CSA:** C. 90, § 487(5). **CRS 53:** § 149-3-8. **C.R.S. 1963:** § 150-3-8.

**37-43-110. When directors-at-large elected.** At the next general election following such special election, in the event the landowners vote in favor of an increase in the membership of the board of directors, there shall be elected two directors-at-large, one to serve for two years and one for three years, and, at each regular election thereafter held in said district immediately preceding the expiration of the term of office of any such director-at-large, a successor shall be elected to succeed him for a term of three years.

**Source: L. 45:** p. 420, § 6. **CSA:** C. 90, § 487(6). **CRS 53:** § 149-3-9. **C.R.S. 1963:** § 150-3-9.

**37-43-111. Eligibility of directors.** The law applicable to the qualification of directors shall be applicable to directors-at-large so appointed or elected.

**Source: L. 45:** p. 420, § 7. **CSA:** C. 90, § 487(7). **CRS 53:** § 149-3-10. **C.R.S. 1963:** § 150-3-10.

**37-43-112. Agricultural college and school lands included.** For the purpose of furnishing water and securing water rights for agricultural college and public school lands lying within or adjacent to the boundaries of any irrigation district organized, the state board of land commissioners is authorized to petition all such lands into such irrigation districts.



**Source:** L. 09: p. 429, § 1. C.L. § 2026. CSA: C. 90, § 488. CRS 53: § 149-3-11. C.R.S. 1963: § 150-3-11.

**37-43-113. Petition - form and execution.** All such petitions shall be in the form provided by law for the petition of other lands into such irrigation districts, and shall be signed, sealed, and acknowledged by the register of the state board of land commissioners on behalf of said board and shall in addition be countersigned by the governor of the state on behalf of the state and, when so signed, sealed, acknowledged, and filed with the board of directors of any irrigation district, shall be deemed to give the assent of said state board of land commissioners and the state of Colorado to the inclusion of all lands therein described in said irrigation district.

**Source:** L. 09: p. 429, § 2. C.L. § 2027. CSA: C. 90, § 489. CRS 53: § 149-3-12. C.R.S. 1963: § 150-3-12.

**37-43-114. Assessments.** All such lands so included in any irrigation district in this state shall be assessed for irrigation district purposes in the same manner and at the same rate as other lands in such irrigation districts.

**Source:** L. 09: p. 429, § 3. C.L. § 2028. CSA: C. 90, § 490. CRS 53: § 149-3-13. C.R.S. 1963: § 150-3-13.

**37-43-115. Mode of payment - receipts.** It is the duty of the county treasurer of each county in this state wherein any irrigation district is located and in which such lands have been so included to notify the register of the state board of land commissioners on or before February 1 of each year of the amount of district assessments due on such lands, giving therein the exact description of each tract of land so assessed and the amount of assessments due thereon. Immediately upon receiving such notice, it is the duty of the register of said state board of land commissioners to place the same before said board at its next regular meeting at which it shall examine said notice of assessments due, and, if the same is found correct, the board shall certify the same to the state treasurer who shall pay the same out of any moneys in his hands belonging to said respective land funds howsoever derived and charge the same to said respective funds. Such payment shall be by warrant from the state treasurer to the proper county treasurer, and, when so received by him, he shall issue his receipts therefor in the name of the state board of land commissioners, and shall in addition issue a duplicate receipt to said state treasurer.

**Source:** L. 09: p. 430, § 4. C.L. § 2029. CSA: C. 90, § 491. CRS 53: § 149-3-14. C.R.S. 1963: § 150-3-14.

**37-43-116. Purchaser to pay accrued assessments.** Upon the receipt of such receipts from said county treasurers, it is the duty of the register of the state board of land commissioners to enter and charge the same against each tract of land so paid on, in a book to be kept by him for that purpose, showing the amount paid, date of payment, and to whom paid. Whenever any of said tracts of land are sold, the purchaser thereof, in addition to the purchase price therefor, shall pay all of such accrued assessments so paid, together with interest thereon, from the date of payment at the rate of six percent per annum, such accrued assessments and interest thereon to be included in the total purchase price to be paid by said purchaser; except that this section shall not apply to such assessments which have been paid by the lessees of any such tracts of land theretofore leased from the state as provided in section 37-43-117.

**Source:** L. 09: p. 430, § 5. C.L. § 2030. CSA: C. 90, § 492. CRS 53: § 149-3-15. C.R.S. 1963: § 150-3-15.

**37-43-117. Lessee to pay assessments in addition to rent.** In the event that any such tracts of land so included within any irrigation district are leased from the state board of

land commissioners, then all such lessees, in addition to the rental paid to said state board of land commissioners, shall pay such an additional amount to said board as will equal the district assessments levied upon such lands for the year in which such rental shall be paid; and such moneys, when so received by the register of the state board of land commissioners, shall be turned in to the state treasurer and kept in a separate fund for the payment of such assessments.

**Source:** L. 09: p. 430, § 6. C.L. § 2031. CSA: C. 90, § 493. CRS 53: § 149-3-16. C.R.S. 1963: § 150-3-16.

**37-43-118. Purchasers to pay to register until patent.** All contracts for the sale of any such lands included within any irrigation district, in addition to the purchase price to be paid, shall provide that such purchaser, on or before March 1 in each year, until he has secured a patent for such lands, shall pay to the register of the state board of land commissioners an amount to equal the district assessments so levied upon such lands for the year in which such payment is to be made, and such moneys when so received by said register shall be turned in to the state treasurer and kept in a separate fund for the payment of such assessments.

**Source:** L. 09: p. 431, § 7. C.L. § 2032. CSA: C. 90, § 494. CRS 53: § 149-3-17. C.R.S. 1963: § 150-3-17.

**37-43-119. Board of directors may exclude land.** The board of directors of an irrigation district by resolution may exclude any lands from the district, if such district does not have any outstanding unpaid bonded indebtedness and if the permission of the owner of the fee title and of any equitable owner has first been had or secured for such exclusion.

**Source:** L. 35: p. 665, § 1. CSA: C. 90, § 495. CRS 53: § 149-3-18. C.R.S. 1963: § 150-3-18.

**37-43-120. Land may be excluded at time of refinancing.** At any time during the refinancing of the bonded indebtedness of an irrigation district, the board of directors thereof by resolution may exclude any land from such district, provided such exclusion is known to the purchaser of the district's refunding bonds.

**Source:** L. 35: p. 665, § 2. CSA: C. 90, § 496. CRS 53: § 149-3-19. C.R.S. 1963: § 150-3-19.

**37-43-121. Prior exclusion of lands.** All exclusions of lands made prior to February 16, 1935, by boards of directors of irrigation districts which would be lawful under the terms and provisions of sections 37-43-119 and 37-43-120 are declared to be lawful.

**Source:** L. 35: p. 665, § 3. CSA: C. 90, § 497. CRS 53: § 149-3-20. C.R.S. 1963: § 150-3-20.

**37-43-122. Irrigation districts to provide drainage.** Upon presentation of a petition to the board of directors of an irrigation district signed by not less than two-thirds of the legal voters of such district, each of whom is the owner of five acres or more of lands within the district and has paid the irrigation district taxes in full upon all his real property located within said district during the calendar year preceding the presentation of said petition, any irrigation district organized under the laws relating to such districts may provide for any drainage made necessary by the irrigation provided for by such laws. The officers, agents, and employees of such districts shall have the same powers, duties, and liabilities respecting such drainage, and the construction, repair, maintenance, management, and control thereof



as they have respecting such irrigation, and all laws respecting such irrigation or such irrigation districts shall be so construed, applied, and enforced as to apply to such drainage as well as such irrigation.

**Source:** L. 19: p. 481, § 1. C.L. § 2055. CSA: C. 90, § 498. CRS 53: § 149-3-21. C.R.S. 1963: § 150-3-21.

**Cross references:** For drainage of marsh lands, see article 33 of this title.

#### ANNOTATION

**This section authorizes irrigation districts to construct drainage projects and provides that in such case the rights of the district, the**

**powers of its officers, and the law applicable shall be the same.** San Luis Irrigation Dist. v. Noffsinger, 85 Colo. 202, 274 P. 827 (1929).

**37-43-123. Title in seepage or waste waters.** Whenever it appears necessary, proper, or beneficial to the lands affected thereby to drain such lands or any portion thereof on account of the irrigation which has been done, or which is intended to be done under such laws, whether for the purpose of more beneficially carrying on such irrigation, or increasing the available water supply of the district or for any other purpose, whether the irrigation works have already been constructed or not, it is the duty of the board of directors to provide for such drainage, and said board and its officers, agents, and employees shall do all necessary and proper acts for the construction, repair, maintenance, and management of drainage work for such purposes. Any irrigation district shall have a first and preferred right to the beneficial use of all seepage, waste, and percolating waters flowing within said district or collected and conveyed by drainage works constructed in any portion of the lands of the district. Any segregated lands drained under the provisions of this section and section 37-43-122 shall be immediately reinstated, placed upon the tax roll by the county assessor, and taxed for irrigation district and drainage purposes, and all of said lands shall bear their pro rata share of all bonded indebtedness of such irrigation district. Any lands not included in said irrigation district before, which are benefited by said drainage system, shall be assessed by the county assessor and taxed for irrigation district and drainage purposes and shall bear a full proportion of all of said irrigation district bonds and costs of drainage, in accordance with the terms of payment specified by said district.

**Source:** L. 19: p. 481, § 2. C.L. § 2056. CSA: C. 90, § 499. CRS 53: § 149-3-22. C.R.S. 1963: § 150-3-22.

**37-43-124. Sale of water rights and property.** The board of directors of any irrigation district may sell or dispose of any part or all of the irrigation works, franchises, water rights, or other property of the district when authorized so to do by the vote of a two-thirds majority of the legally qualified electors of the district, in the manner and upon the conditions provided in section 37-43-125, and the authority so vested in the board of directors shall be and remain effective until such sale is fully consummated, unless previously revoked by the vote of a majority of the qualified electors of the district or such sale fails by act of the purchaser.

**Source:** L. 17: p. 321, § 1. C.L. § 1974. CSA: C. 90, § 500. CRS 53: § 149-3-23. C.R.S. 1963: § 150-3-23.

#### ANNOTATION

**Law reviews.** For article, "One Year Review of Property Law", see 38 Dicta 192 (1961).

**For applicability of this section to sale of**

**assets and not to dissolution of districts, see** McKinley v. Dunn, 141 Colo. 487, 349 P.2d 139 (1960).

**37-43-125. Election - notice - canvass.** Whenever it is desired to sell property of the district, the board of directors, by resolution entered in the minutes of their proceedings, shall submit such questions to the qualified voters of said district at a special election of the district called for such purpose or at a general district election when noticed as provided in this section. The notice of said election shall be published and posted for the same length of time and in the same manner and the election shall be conducted the same as in case of an election for an original issue of bonds. The notice shall also contain a general description of the property, or interest therein, to be sold, the conditions of the terms of sale, the time and manner of payment, and such other information as may be necessary to fully advise the voters of the facts, together with the substance of any plan proposed to carry the same into execution and any settlement with the bondholders of the district, or any proposed contract may be published in full. The ballot shall contain such appropriate words as shall enable the electors to indicate their approval or disapproval of the propositions submitted. The returns shall be canvassed and the statements of the results of said election shall be entered and filed in the same manner as in case of an original issue of bonds. Two or more propositions may be submitted at the same election.

**Source: L. 17: p. 321, § 2. C.L. § 1975. CSA: C. 90, § 501. CRS 53: § 149-3-24. C.R.S. 1963: § 150-3-24.**

**37-43-126. Determination of validity of sale.** (1) In case, upon the canvass of a vote at such election, it is found and declared by said board of directors that a majority of the votes cast at such election have been cast in favor of selling all or part of the dams, reservoirs, canals, franchises, water rights, and other property of the district, then said board of directors may file a petition in the district court of the county wherein is located the office of such board to determine the validity of the proceedings had for the sale of the dams, reservoirs, canals, franchises, water rights, and other property of such district. The same petition shall set forth the same facts required to be given in the notice of election.

(2) Such actions shall be in the nature of a proceeding in rem and jurisdiction of all parties interested may be had by publication of a notice of the pendency of such action at least once a week for three weeks in some paper of general circulation published in the county and district where the action is pending; except that if the district is situated in more than one county, then the publication shall be made in one newspaper in each county where the district is situated, said newspapers to be designated by the judge of the court having jurisdiction of the proceedings; or the court may provide for notice by posting not less than thirty days before the date set for hearing such petition in any county where no newspaper is published. Jurisdiction shall be complete in thirty days after the posting or last publication of such notice.

(3) Such notice shall be directed as follows:

“To all holders of indebtedness of the ..... irrigation district (inserting the name of the district whose property is to be sold, etc.); to all landowners within said district, and to all others interested in the proposed sale of the dams, reservoirs, canals, franchises, water rights, and other property of said irrigation district”, and said notice shall state the filing of said petition by the board of directors, the date of filing said petition, and the court in which filed, and shall further state that the object of such petition is to obtain the sale of said dams, reservoirs, canals, franchises, water rights, and other property of the district briefly described in the same, and shall give the date set by the court for the hearing of said petition.

(4) At or before the time set for the hearing of said petition, anyone interested may appear and file written objections to such petition, and may at the time set for the hearing of said petition appear and contest the validity of the proceedings already had, and of the plan proposed for the sale of the dams, reservoirs, canals, franchises, water rights, and other property of the district or any portion thereof, including the validity of any portion of the indebtedness set out in said petition. At the one hearing the court shall determine the amount of indebtedness of said district, and may determine the validity of any portion thereof, and in said proceeding may adjust and determine the rights and liabilities of all parties, and decree an adoption and execution of the proposed plan. Such action shall be speedily tried and judgment rendered. At the hearing the court shall hear and determine the regularity,



legality, and correctness of all proceedings and in doing so shall disregard any error, irregularity, or omission which does not affect the substantial rights of the parties.

(5) The rules of pleading and practice in the Colorado rules of civil procedure and in the Colorado appellate rules not inconsistent with the provisions of sections 37-43-124 to 37-43-130 are made applicable to the proceedings provided in this section. Any party shall have the right to appellate review, as provided by law and the Colorado appellate rules, within ninety days after the entering of final decree by the district court and the case shall be advanced on the docket of the appellate court and disposed of with all convenient speed. Unless appellate review is so pursued, the decree entered in said case by the district court shall be final and binding upon all parties interested in said district, whether as officer, electors, landowners, creditors, or otherwise. The costs of any contest may be allowed and proportioned between the parties or taxed to the losing party, in the discretion of the court, and no contest of any matter or thing provided for in this section shall be made other than in the time and manner specified in this section.

**Source:** L. 17: p. 322, § 3. C.L. § 1976. CSA: C. 90, § 502. CRS 53: § 149-3-25. C.R.S. 1963: § 150-3-25.

**37-43-127. Proceedings by elector on failure of board.** If no such proceedings have been filed by the board of directors within thirty days after the canvass of said vote, then any qualified elector of the district may bring an action in the district court of the county wherein the office of the board of directors is located. The board of directors shall be made parties defendant and notice shall be served on the members of the board personally, if they can be found in the county; if not, then service by publication as provided in section 37-43-125 shall be sufficient. Proceedings shall be had in the same manner and with the same effect as if brought by the board of directors.

**Source:** L. 17: p. 324, § 4. C.L. § 1977. CSA: C. 90, § 503. CRS 53: § 149-3-26. C.R.S. 1963: § 150-3-26.

**37-43-128. Sale.** The sale may be made to any person or to a corporation organized under the laws of the state of Colorado, or may be made to the United States, but no sale of water rights shall in any manner impair or be deemed to relinquish any of the sovereign rights of the state of Colorado in the waters of the state or to control and regulate the diversion, use, and distribution thereof.

**Source:** L. 17: p. 324, § 5. C.L. § 1978. CSA: C. 90, § 504. CRS 53: § 149-3-27. C.R.S. 1963: § 150-3-27.

**37-43-129. Decree of sale.** The court in its decree has the power to make the orders necessary to carry out said proposition or plan for the sale of the dams, reservoirs, canals, franchises, water rights, or other property of the district; but no plan for the sale of the entire property of irrigation districts including the dams, reservoirs, canals, franchises, water rights, and other property of the district shall be approved by the court which does not provide for the ultimate payment or liquidation of all the indebtedness of the district and adequate security for the holders thereof, and as well protect the landowners of said district.

**Source:** L. 17: p. 325, § 6. C.L. § 1979. CSA: C. 90, § 505. CRS 53: § 149-3-28. C.R.S. 1963: § 150-3-28.

**37-43-130. Construction.** Sections 37-43-124 to 37-43-131 shall be liberally construed to carry out the intent and purpose, and nothing in this article shall be held to curtail or abridge the powers of the district officers, the boards of county commissioners, or the revenue officers of the state in the assessment, levy, or collection of irrigation district taxes, or in any other particular. All such powers are expressly retained and, in addition thereto, such officers have all powers necessary or proper to enable them to fully carry out the

provisions of sections 37-43-124 to 37-43-131. The procedure provided in this article shall not be deemed to affect any liens for unpaid taxes or assessments which have been duly levied and assessed, existing at the time of the filing of the petition in the district court; but nothing in sections 37-43-124 to 37-43-131 or in the procedure therein provided shall be construed in any manner to either impair, enlarge, or give additional rights or powers to the holders of bonds or other evidences of district indebtedness. The board of directors of the district has the right to sell or otherwise dispose of any of the personal property of the district in the ordinary course of business, and nothing in sections 37-43-124 to 37-43-131 shall be taken or held to interfere with such right.

**Source:** L. 17: p. 325, § 7. C.L. § 1980. CSA: C. 90, § 506. CRS 53: § 149-3-29. C.R.S. 1963: § 150-3-29.

**37-43-131. Distribution of proceeds.** Whenever all of the property of any irrigation district has been disposed of and all of the indebtedness and obligations thereof, if any, have been discharged, the balance of the money of said district shall be distributed to the landowners in said district upon the last assessment roll in the proportion in which each acre of land has contributed to the total amount of said assessments.

**Source:** L. 17: p. 326, § 8. C.L. § 1981. CSA: C. 90, § 507. CRS 53: § 149-3-30. C.R.S. 1963: § 150-3-30.

**37-43-132. Purposes for bond issues.** Whenever irrigation districts shall be organized or created under the laws of this state, they have power to construct, build, or acquire irrigation works and to purchase or acquire rights-of-way, reservoirs, water rights, and priorities of rights to the use of water, all of which are declared to be public purposes. Such districts shall be special taxing districts with power to levy ad valorem taxes on all taxable land therein and to collect the same and to issue negotiable coupon general obligation bonds for any of said purposes, the principal of and the interest on which shall be payable from such ad valorem taxes as provided in section 37-43-136. If it is proposed that any district to be organized shall issue bonds under this part 1, the petition for the organization thereof and the notice of the election on the question of organization shall so state.

**Source:** L. 33-34, 2nd Ex. Sess.: p. 57, § 1. CSA: C. 90, § 512. CRS 53: § 149-3-31. C.R.S. 1963: § 150-3-31. L. 88: Entire section amended, p. 1231, § 4, effective April 6.

**37-43-133. Meeting of landowners.** Whenever the board of directors of any irrigation district proposes to issue negotiable coupon general obligation bonds of the district for one or more of said purposes, it shall call a meeting of the owners of land in the district, at which meeting the question of issuing such bonds shall be submitted. Notice of such meeting shall be given by publication once a week in five consecutive weekly issues of an official newspaper published nearest the center of the district, and the secretary of the board, not later than five days after the first publication of said notice, shall mail a copy of said notice, postage prepaid, to each owner of land within the district. In determining who are owners of land in the district the secretary may rely upon the records on file in the office of the county clerk and recorder of the county in which the district is located. Such notice shall designate the time and place of meeting, not less than thirty days after the first publication of the notice, the purpose and the amount of bonds proposed to be issued, the maximum rate of interest thereon not exceeding six percent per annum payable semiannually, and the time during which the bonds shall mature not exceeding twenty-five years.

**Source:** L. 33-34, 2nd Ex. Sess.: p. 58, § 2. CSA: C. 90, § 513. CRS 53: § 149-3-32. C.R.S. 1963: § 150-3-32.

**37-43-134. Voting on bond issue.** The president of the board of directors, or in his absence one of the other members of the board of directors of the district, shall preside at



such meeting and the secretary of the board shall act as secretary of the meeting. The landowners present shall elect three of their own number to act as judges who shall determine all questions arising concerning ownership of land and the regularity and authenticity of proxies. The owners of land in the district or their duly authorized proxies shall vote by ballot containing the words "for the bonds" and "against the bonds", with spaces opposite wherein the voter may place a cross mark (X) to express his choice. Said ballot shall also have appropriate places for the signature of the voter and the number of acres of land in the district owned by the voter. Each landowner shall be entitled to cast as many votes as he has acres of land in the district. The owner of the fee title to land in the district or the owner of incomplete title to public land in the district on which a filing has been made and proceedings taken to perfect title in good faith and in full compliance with law shall be deemed to be a "landowner" for the purposes of sections 37-43-132 to 37-43-138, and all persons, corporations, partnerships, or entities owning land in the district shall be entitled to vote at said meeting in person or by their duly authorized proxy. All proxies shall be in writing and shall be acknowledged. The judges shall canvass the votes cast at any meeting held pursuant to said sections and shall certify the result thereof to the board of directors of the district.

**Source:** L. 33-34, 2nd Ex. Sess.: p. 58, § 3. CSA: C. 90, § 514. CRS 53: § 149-3-33. C.R.S. 1963: § 150-3-33.

**37-43-135. Resolution of board of directors.** If the result so certified shows that votes representing eighty percent of the acres of taxable land in the district have been cast in favor of the proposed bonds, the board of directors, by resolution, may authorize the issuance of negotiable coupon general obligation bonds of the district. Such resolution shall specify the purpose for which the bonds are to be issued, the date thereof, the rate of interest not exceeding six percent per annum payable semiannually, and the maturities thereof. Such bonds shall mature serially commencing not later than five years after the date thereof and extending to a time not exceeding twenty-five years after the date thereof. The amounts which shall mature in each of the years shall be determined by the board of directors of the district and specified in said resolution. The bonds shall be in the denomination of one hundred dollars or some multiple thereof. The said bonds and the coupons attached thereto shall be payable at such places, within or without the state of Colorado, as shall be designated in such resolution. The bonds shall be signed by the president of the board of directors, countersigned by the county treasurer, ex officio treasurer of the district, sealed with the seal of the district, and attested by the secretary of the board. The semiannual interest coupons attached to said bonds shall be executed with the facsimile signature of the president of the board of directors. The county treasurer, ex officio treasurer of the district, shall make a record of all bonds issued pursuant to sections 37-43-132 to 37-43-138 in a book to be kept in his office for that purpose. Bonds issued pursuant to said sections shall be sold at not less than the par value thereof.

**Source:** L. 33-34, 2nd Ex. Sess.: p. 59, § 4. CSA: C. 90, § 515. CRS 53: § 149-3-34. C.R.S. 1963: § 150-3-34.

**37-43-136. Levy of tax - collection.** For the purpose of paying such bonds and the interest thereon, the board of directors of any district issuing bonds under this article is authorized to levy ad valorem taxes on all taxable land within the district. Such taxes shall be certified, extended, and collected at the same time and in the same manner as other irrigation district taxes or assessments, and the revenue laws of the state of Colorado relating to the levy, collection, and enforcement of general taxes, the sale of property for the nonpayment of general taxes, and the rights of redemption shall apply, as nearly as may be, to such irrigation district taxes. The lien of irrigation district taxes levied pursuant to the provisions of sections 37-43-132 to 37-43-138 shall be on a parity with the lien of general taxes, and no sale of land for the nonpayment of general taxes shall extinguish the lien of irrigation district taxes levied to pay the principal of or the interest on any bonds issued

under this part 1. In the event that the amount of taxes collected in any year is not sufficient to pay the principal of or interest on bonds due and payable in such year, the deficit shall be made up in the next annual levy.

**Source:** L. 33-34, 2nd Ex. Sess.: p. 60, § 5. CSA: C. 90, § 516. CRS 53: § 149-3-35. C.R.S. 1963: § 150-3-35. L. 88: Entire section amended, p. 1231, § 5, effective April 6.

**Cross references:** For taxation generally, see title 39.

#### ANNOTATION

**Law reviews.** For article, "Legal Classification of Special District Corporate Forms in Colorado", see 45 Den. L.J. 347 (1968).

**37-43-137. Bonds receivable in payment of taxes.** Bonds of any maturity issued under this part 1 may be used at face value in paying taxes levied to pay the principal of such bonds; except that bonds maturing after the year in which the bonds are so used shall have all future due coupons attached thereto and no credit shall be allowed for such coupons. Interest coupons attached to such bonds and maturing in any year may be used at face value in paying taxes levied for such interest which becomes due and payable in that year.

**Source:** L. 33-34, 2nd Ex. Sess.: p. 61, § 6. CSA: C. 90, § 517. CRS 53: § 149-3-36. C.R.S. 1963: § 150-3-36. L. 88: Entire section amended, p. 1232, § 6, effective April 6.

**37-43-138. Construction.** The provisions of sections 37-43-132 to 37-43-138 shall not be construed to be exclusive of the provisions of any other laws authorizing the issuance of irrigation district bonds, but shall be construed to be supplemental thereto, and owners of land within any existing irrigation district, with or without the owners of additional lands, may organize a new irrigation district having all the powers conferred by sections 37-43-132 to 37-43-138, by taking such steps and proceedings as may be required by law for such organization.

**Source:** L. 33-34, 2nd Ex. Sess.: p. 61, § 7. CSA: C. 90, § 518. CRS 53: § 149-3-37. C.R.S. 1963: § 150-3-37.

**37-43-139. Bonds to retire warrants.** Whenever any irrigation district formed under the laws of this state has issued warrants for any purposes for which said irrigation district could lawfully have issued its bonds, it is lawful for said irrigation district to issue bonds for the purpose of retiring said warrants, submitting the question at a general or special election to the qualified voters of said district and otherwise complying with the provisions of the laws of this state in relation to the issuing of bonds by irrigation districts, and when so issued said bonds may be sold in the same manner as provided by law, at not less than ninety-five percent of the face value thereof, and the proceeds applied to the payment of said warrants and accrued interest, or said bonds may be exchanged for said warrants and accrued interest at not less than the face value of said bonds.

**Source:** L. 13: p. 385, § 1. C.L. § 1992. CSA: C. 90, § 519. CRS 53: § 149-3-38. C.R.S. 1963: § 150-3-38.



## ANNOTATION

**This section provides for the issuance and sale of refunding bonds for the purpose of refunding past due indebtedness. Michigan**

Trust Co. v. Otero Irrigation Dist., 76 Colo. 441, 232 P. 919 (1925).

**37-43-140. Subject to outstanding bonds.** All bonds issued by any irrigation district under the provisions of section 37-43-139 shall be subject to all bonds previously issued by such district.

**Source: L. 13:** p. 385, § 2. **C.L.** § 1993. **CSA:** C. 90, § 520. **CRS 53:** § 149-3-39. **C.R.S. 1963:** § 150-3-39.

**37-43-141. Levy of tolls or charges.** The board of directors of any irrigation district within the state may annually or otherwise levy and assess such tolls or charges as may be necessary to raise moneys for the maintenance and operation or payment of existing unfunded indebtedness of the district, said tolls or charges to be levied and assessed pro rata upon each acre of land within the district for the use of water for the irrigation thereof. By resolution, the board may refuse to deliver water to any land within such district when the owner thereof, within such time as may be fixed by such resolution, fails or refuses to pay in cash, to the secretary or treasurer of the district, such tolls or charges. Where a district takes over by deed or assignment or otherwise any irrigation system or works, or parts thereof, either upon reorganization or otherwise, the board of directors of any such district in like manner may collect any and all assessments theretofore levied for maintenance and operation by its predecessor in the ownership or operation of such system, whether such predecessor is a district or a mutual company, if such assessments are assigned to and become the property of the district seeking to collect the same.

**Source: L. 37:** p. 785, § 1. **CSA:** C. 90, § 479(1). **CRS 53:** § 149-3-40. **C.R.S. 1963:** § 150-3-40.

**37-43-142. Where payment of tolls made.** Payments of tolls or charges provided for in section 37-43-141 shall in each instance be made to the secretary or treasurer of such district as may be directed by the board of directors thereof.

**Source: L. 37:** p. 786, § 2. **CSA:** C. 90, § 479(2). **CRS 53:** § 149-3-41. **C.R.S. 1963:** § 150-3-41.

**37-43-143. Water may be refused - when.** The board of directors of any irrigation district within the state of Colorado, by resolution, may refuse to deliver water to any land within such district upon which land any tax or assessment has been levied for the payment of principal or interest due or to become due on the bonds or obligations of such district and which are then delinquent or past due under the general revenue laws of this state. Such board may continue to refuse delivery of water to such lands until all such past due or delinquent assessments have been paid in full with all interest and penalties as provided by law.

**Source: L. 37:** p. 786, § 3. **CSA:** C. 90, § 479(3). **CRS 53:** § 149-3-42. **C.R.S. 1963:** § 150-3-42.

**37-43-144. Issuance of refunding bonds.** The board of directors of any irrigation district, under the conditions provided in sections 37-43-144 to 37-43-151, may issue negotiable coupon bonds, denominated as refunding bonds for the purpose of taking up, paying off, and refunding any outstanding indebtedness of the district, whether due or not and whether such indebtedness is now existing or may be created, when there are not funds in the treasury in such district available for the payment of such indebtedness. Such

refunding bonds sought to be issued shall not exceed the amount lawfully owing and unpaid upon such indebtedness so to be taken up, paid, and refunded. Such refunding bonds shall not bear interest greater in rate or amount per annum than that borne by the indebtedness to be taken up, paid, and refunded. The authority vested in the board of directors by any election held pursuant to sections 37-43-144 to 37-43-151 shall be and remain effective until the indebtedness so authorized to be refunded has been paid, redeemed, or refunded. Such refunding bonds may be issued and used to pay off all or part of any indebtedness then outstanding.

**Source:** L. 35: p. 670, § 1. CSA: C. 90, § 521. CRS 53: § 149-3-43. C.R.S. 1963: § 150-3-43.

**37-43-145. Board of directors to issue bonds.** (1) Whenever it is desired to issue refunding bonds under sections 37-43-144 to 37-43-151, the board of directors of the district, by resolution entered in the minutes of their proceedings, shall call a special election of the qualified voters of said district for the purpose of voting upon the issuance of such refunding bonds, or such question may be submitted at a general election of the district if the notice complies with the requirements set forth in this section. At any election held under sections 37-43-144 to 37-43-151, the question of refunding all or any part of the then outstanding indebtedness of an irrigation district may be submitted for determination, whether such indebtedness is due or not.

(2) The notice of said election shall be published and posted for the same length of time and in the same manner, and the election shall be conducted the same as in the case of an election for an original issue of bonds. The notice shall specify the time and place of holding said election, the amount and date of the indebtedness sought to be taken up and paid, the amount and rate of interest of the refunding bonds proposed to be issued, and the dates when said refunding bonds will become due.

(3) At such election the ballots shall contain the words "Refunding Bonds - Yes" and "Refunding Bonds - No". The return shall be canvassed by the board of directors in the same manner as in the case of an original issue of bonds and a similar statement of the results of said election shall be entered in the records of said board and filed with the county clerk and recorder of the county in which the office of said district is located. If it is determined upon such canvass that a majority of the legally qualified electors of the district have voted "Refunding Bonds - Yes", the board of directors shall cause bonds in such amount to be issued. Such bonds may mature serially, with or without an option to redeem the same prior to maturity, or they may have one maturity date, not exceeding fifty years from date, and be redeemable on and after a designated date not later than ten years from the date of said bonds.

(4) If serial bonds are issued, the last series shall mature in not more than fifty years from the date of said bonds, and the first series shall become due not more than ten years from the date of said bonds, and the series shall be so arranged that some part of the principal of said bonds, never less than one percent, shall become due each year during the maturity period until the entire principal is paid. If optional bonds are issued, the board of directors of the district, when funds are available for redemption purposes at any time after the optional date, shall call for offerings for redemption, and, out of the redemption fund provided for the payment of said bonds, shall pay any bonds presented for payment pursuant to such call to any holders thereof who offer the same for payment and redemption for the lowest amount below par, including accrued interest, to the extent of the funds available.

(5) Available funds not used for the retirement of bonds shall be used in the redemption of outstanding bonds commencing with the lowest outstanding number. For the ultimate redemption of such refunding bonds, the board of county commissioners of each county embracing any portion of an irrigation district, at the time of making tax levies for county purposes commencing not more than ten years from the date of said refunding bonds, shall levy annually a separate tax upon the lands within a district subject to taxes for irrigation district purposes sufficient to discharge, at maturity, the principal of the refunding bonds issued, registered, and outstanding, pursuant to the provisions of sections 37-43-144 to 37-43-151; and except for the payment of an issue of refunding bonds payable serially, each



annual tax levy for the payment of principal shall be equal, as nearly as can be. Such bonds shall be as nearly as possible in the same general form as an original issue of bonds of said district, with interest represented by coupons payable semiannually upon June 1 and December 1 of each year, at the office of the county treasurer of the county in which the organization of the district was effected, and, at the option of the board of directors, at such other places within or outside the state of Colorado as the board may designate in said bonds.

**Source:** L. 35: p. 671, § 2. CSA: C. 90, § 522. CRS 53: § 149-3-44. C.R.S. 1963: § 150-3-44.

**37-43-146. Submission of question to electors.** The board of directors at the same election, or at any future general or special election, may submit to the qualified voters of the district the question of whether the coupons upon such refunding bonds shall bear interest at a rate not to exceed six percent per annum after their maturity, if said coupons are not paid upon presentation. In such case the ballots shall contain the words, "Interest on coupons - Yes", and "Interest on coupons - No", or words equivalent thereto. The vote upon said question shall be canvassed at the same time and in the same manner as the vote for the issue of refunding bonds and, if a majority of the qualified electors of the district have voted "Interest on coupons - Yes", the board of directors shall certify the result and cause the same to be entered of record and filed the same as in the case of an election for refunding bonds. Thereafter, when any of said coupons are presented for payment on or after their due dates and there are insufficient funds on hand to pay said coupons, the county treasurer shall stamp on the back of said coupons, "Not paid for want of funds", and all coupons so stamped shall bear interest from that date until paid at the same rate as the principal of the bond.

**Source:** L. 35: p. 673, § 3. CSA: C. 90, § 523. CRS 53: § 149-3-45. C.R.S. 1963: § 150-3-45.

#### ANNOTATION

**This section is a legislative recognition that our existing statutes upon the question of interest on district coupons forbid the same.**

In re Green City Irrigation Dist., 91 Colo. 202, 13 P.2d 1113 (1932) (decided prior to the earliest source of this section).

**37-43-147. Sale of bonds.** In case of the sale of said refunding bonds or any portion thereof for cash, the same procedure shall be followed as in case of the sale of an original issue of bonds; but, if no bid of par or better is received at public sale, said bonds may be sold at private sale. No bond shall be sold for less than ninety-five percent of the par value thereof. The money realized from said sale shall be used only for the purpose of paying the indebtedness for which said refunding bonds were issued. Any part or all of said issue of refunding bonds may be exchanged for the indebtedness to be refunded; but the par value of the refunding bonds exchanged shall not exceed the par value of the indebtedness refunded thereby. All indebtedness so discharged, either by payment or exchange, shall immediately be canceled by the county treasurer of the county in which the office of the district is located.

**Source:** L. 35: p. 674, § 4. CSA: C. 90, § 524. CRS 53: § 149-3-46. C.R.S. 1963: § 150-3-46.

**37-43-148. County treasurer to register bonds.** At the time of the issue by exchange or sale of refunding bonds authorized under the provisions of sections 37-43-144 to 37-43-151, each bond shall be registered by the county treasurer, who is ex officio district treasurer, in a book to be kept by him for such purpose. Coupons evidencing unearned interest shall be detached and canceled. Each bond so registered shall have endorsed thereon

the treasurer's certificates of such registration; and only such bonds so certified shall be valid; but such certificate shall be conclusive evidence that the bond so certified has been duly issued in full conformity with the provisions of sections 37-43-144 to 37-43-151. Immediately upon the registration of any refunding bond, the treasurer shall certify the fact to the board of county commissioners of the county in which the office of the district is located, in order that the requisite tax levies may be made in due course to meet the maturing interest upon and principal of such bond.

**Source:** L. 35: p. 674, § 5. CSA: C. 90, § 525. CRS 53: § 149-3-47. C.R.S. 1963: § 150-3-47.

**37-43-149. Collection of taxes.** Taxes for the payment of interest and principal of said refunding bonds shall be levied and thereafter collected in the same manner as provided by law for the levy and collection of taxes for the payment of interest and principal of an original issue of irrigation district bonds. Such bonds and coupons shall be receivable in payment of said taxes, as is provided in the irrigation district law concerning original bond issues. All taxes for interest shall be kept by the county treasurer as a special fund to be used in the payment of interest only, and all taxes for the redemption of such refunding bonds shall be kept by such county treasurer as a special fund to be used for the redemption of the principal only of such refunding bonds. The revenue laws of this state for the assessment, levying, and collection of taxes on real estate for county purposes and the disbursement of such taxes, except as modified by sections 37-43-144 to 37-43-151 or by the irrigation district laws of this state, shall be applicable for the purposes of sections 37-43-144 to 37-43-151, including the enforcement of penalties and forfeitures for delinquent taxes; but if in any year a sufficient amount is not collected for payment in full of principal or interest installments falling due in such year on any specific piece of property in said irrigation district, the delinquency on such property shall be included in the next assessment thereafter levied against said piece of property.

**Source:** L. 35: p. 675, § 6. CSA: C. 90, § 526. CRS 53: § 149-3-48. C.R.S. 1963: § 150-3-48.

**Cross references:** For collection of taxes, see article 10 of title 39.

**37-43-150. Validity of bonds examined.** The validity of refunding bonds issued pursuant to sections 37-43-144 to 37-43-151 may be judicially examined, approved, and confirmed in the same manner as an original issue of bonds of such district.

**Source:** L. 35: p. 676, § 7. CSA: C. 90, § 527. CRS 53: § 149-3-49. C.R.S. 1963: § 150-3-49.

**37-43-151. Relief of lands from burden of refunded indebtedness.** At any refunding bond election held under the provisions of sections 37-43-144 to 37-43-151, the board of directors may submit to the voters of the district the question of giving landowners the privilege of relieving their lands from the lien of taxes or assessments to be levied for the payment of said refunding bonds and the interest thereon. If authorized by a majority of those voting on the question, any owner of land within the district, who is not in default in the payment of irrigation district taxes or assessments, may relieve his lands from the burden of such refunded indebtedness by paying to the district treasurer an amount of money sufficient to retire district bonds in such ratio to the total bonded indebtedness of the district as the acreage of lands which he owns within such district bears to the total acreage thereof subject to such bonded indebtedness plus fifteen percent for the privilege of discharging his total indebtedness to the district at one time. The treasurer shall thereupon issue to such landowner his official receipt in duplicate, one of which receipts shall be filed with the secretary of such irrigation district and one filed for record in the office of the



county clerk and recorder of the county wherein the lands involved are situate, and from and after such filing, such lands shall be free and clear from all liens, levies, and assessments of such bonded indebtedness for which such payment was made.

**Source:** L. 35: p. 676, § 8. CSA: C. 90, § 528. CRS 53: § 149-3-50. C.R.S. 1963: § 150-3-50.

**37-43-152. Board may contract with United States.** The board of directors of any irrigation or drainage district, organized under the laws of the state of Colorado, in its discretion, whenever it is determined by such board to be for the best interests of any such district, may contract with the United States or any governmental agency thereof to fund or refund any or all of the outstanding indebtedness of such district together with the interest accrued and unpaid thereon.

**Source:** L. 35: p. 677, § 1. CSA: C. 90, § 529. CRS 53: § 149-3-51. C.R.S. 1963: § 150-3-51.

**37-43-153. Provisions of contract.** Such contract and the proceedings taken by any such district pursuant thereto and in connection with the authorization and issue of refunding bonds, in case the indebtedness of such district is reduced by the issuance of such refunding bonds, may include provisions whereby the board of directors of said district covenants and agrees on behalf of said district to levy and collect assessments in excess of the amounts which would meet the principal of and the interest on said bonds as the same fall due if all such assessments were paid in full, in order to create and maintain a reserve fund to insure the prompt payment of the principal of and interest on said bonds; but such covenants and agreements shall never provide for assessments in amounts greater than such assessment would have been had such indebtedness of such district not been so reduced. Said provisions and covenants, when included in the proceedings adopted by the board of directors of any such district, shall inure to the holders of said refunding bonds.

**Source:** L. 35: p. 668, § 2. CSA: C. 90, § 530. CRS 53: § 149-3-52. C.R.S. 1963: § 150-3-52.

**37-43-154. Prior contracts validated.** Contracts entered into prior to April 10, 1935, between irrigation and drainage districts and the United States or any agency thereof, for any of the purposes stated in section 37-43-152, and all proceedings taken pursuant thereto for the creation of reserve funds are hereby ratified, confirmed, and validated.

**Source:** L. 35: p. 668, § 3. CSA: C. 90, § 531. CRS 53: § 149-3-53. C.R.S. 1963: § 150-3-53.

**37-43-155. Powers cumulative.** The powers conferred in sections 37-43-152 to 37-43-154 upon the board of directors of any irrigation or drainage district organized as provided in section 37-43-152 are cumulative in character and are in addition to all powers possessed by any such board under the laws of the state of Colorado or which may be conferred upon such board by said laws.

**Source:** L. 35: p. 668, § 4. CSA: C. 90, § 532. CRS 53: § 149-3-54. C.R.S. 1963: § 150-3-54.

**37-43-156. Irrigation districts may dissolve.** Any irrigation district organized under the laws of the state of Colorado may be dissolved in the manner provided in sections 37-43-156 to 37-43-166.

**Source:** L. 15: p. 307, § 1. C.L. § 2035. CSA: C. 90, § 533. CRS 53: § 149-3-55. C.R.S. 1963: § 150-3-55.

## ANNOTATION

**Law reviews.** For article, "One Year Review of Property Law", see 38 Dicta 192 (1961).

**This act allows a dissolution of districts which are, as well as those which are not, in debt.** Michigan Trust Co. v. Otero Irrigation Dist., 76 Colo. 441, 232 P. 919 (1925).

**Debts must be paid.** The dissolution statute, if construed to authorize the dissolution of an irrigation district without payment of its just debts, would be unconstitutional as impairing the obligation of contracts and as depriving citizens of their property without due process of law. Michigan Trust Co. v. Otero Irrigation Dist., 76 Colo. 441, 232 P. 919 (1925).

**Bondholders may be afforded relief in equity.** Where the district and its officials have

voluntarily surrendered the property and their official positions so that they are no longer able to respond to any mandamus suit which might be instituted to carry the judgments and claims of plaintiffs into effect, nonresident bondholders may be afforded relief in a court of equity, for otherwise they are without any remedy to effect the collection of their claims. Beck v. Otero Irrigation Dist., 38 F.2d 275 (D. Colo. 1929).

**For this section and §§ 37-43-157 through 37-43-167 governing dissolution,** see McKinley v. Dunn, 141 Colo. 487, 349 P.2d 139 (1960).

**37-43-157. Petition - where filed - contents.** A majority of the legally qualified electors of any irrigation district, or the holders of the legal title to a majority of the whole acreage of said district, or seventy-five percent or more in amount of the holders of the bonds issued by said irrigation district may propose the dissolution of said district by a petition signed by the petitioners. In case of a petition by the bondholders, said petition may be signed by said bondholders or by any one or more persons or corporations representing said bondholders and filed with the board of directors of said district, which petition shall set forth the amount of the outstanding bonds, coupons, and other indebtedness, if any, insofar as known to the petitioners, together with a general description of the same and the amount overdue thereon, if any, and the holders, insofar as known, showing the amount of each description of indebtedness and the ownership, insofar as known, of the same and also the estimated cost of the dissolution of said district. The petition shall also state the assets of said district, including the irrigation system, if any, dams, reservoirs, canals, franchises, and water rights. If any proposition has been made by the holders of said indebtedness to settle the same, said proposition, together with any plan proposed to carry the same into execution, shall be included in said petition.

**Source:** L. 15: p. 307, § 2. C.L. § 2036. CSA: C. 90, § 534. CRS 53: § 149-3-56. C.R.S. 1963: § 150-3-56.

**37-43-158. Dissolution - special election.** (1) Upon the filing of said petition with the board of directors of said district, the board shall call a special election, at which shall be submitted to the qualified electors of such district the question whether or not said district shall be dissolved, its indebtedness liquidated, and its assets distributed in accordance with the plan so proposed or, in case no plan has been proposed, in accordance with a plan which shall be proposed by said board of directors in the notice of the election. No such election shall be called until either the assent of all holders of valid indebtedness against the district known to the directors is obtained, or else provision shall be made in said plan for the ultimate payment or liquidation of the claims of such nonassenting holders, either in money or, in the alternative, until all tax levies required by the laws of the state of Colorado for the payment of such indebtedness have been made; except that action shall not be taken upon said petition and said election called, in case contract has been made between the district and the United States, until the secretary of the interior has assented thereto in writing and such assent is filed with the board of directors.

(2) Notice of such election must be given in the same manner and for the same time as notice of election of directors of an irrigation district under the laws of the state of Colorado. Such notice must specify the time of holding the election, the fact that it is proposed to dissolve the district, and a brief summary of the plan proposed for liquidating all its indebtedness or for the making of all tax levies required by the laws of the state of Colorado



for the payment of such indebtedness and for disposing of its assets. Such election shall be held and the result thereof determined and declared in all respects as nearly as practicable in conformity with the provisions governing the election of directors in irrigation districts. At such election the ballot shall contain the words "Dissolution of the District - Yes" and "Dissolution of the District - No" or words equivalent thereto.

**Source:** L. 15: p. 308, § 3. L. 17: p. 314, § 21. C.L. § 2037. CSA: C. 90, § 535. L. 41: p. 522, § 1. CRS 53: § 149-3-57. C.R.S. 1963: § 150-3-57.

### ANNOTATION

**Statutory procedure part of bond contract.** If dissolution of an irrigation district is had in compliance with the statutes which were in effect when district bonds were issued, no holder thereof can successfully raise a jurisdictional question based upon any failure of due process, since he must be held to have agreed to the statutory procedure as a part of his bond contract. *Alpha Corp. v. Denver-Greeley Valley Irrigation Dist.*, 110 Colo. 179, 132 P.2d 448 (1942).

**Once directors offer to satisfy bondholder's claim, he cannot contest dissolution.** Where the holder of bonds of an irrigation district was tendered, and refused to accept, the full amount of money which, as such holder, he was entitled to receive, he had no further interest to subserve by complaining of a dissolution decree. A creditor cannot compel further action by district officials, if what they have done is sufficient to satisfy his legal demands. *In re Green City Irrigation Dist.*, 91 Colo. 202, 13 P.2d 1113 (1932).

**Directors' determination of who is a qualified voter is binding on court absent fraud or abuse of discretion.** Two requisites in the statute defining qualified electors are ownership on the date of the election plus payment of taxes in the preceding year. The undelivered and unrecorded deeds were properly held by the court to justify the directors in disqualifying the plaintiffs because of no title in them. The board of directors, having the duty to determine the qualifications of both the signers of the petition and the voters, made their determination as an administrative function, and in the absence of a showing that they acted illegally, fraudulently, or abused their discretion, their determination is binding on the trial court. *McKinley v. Dunn*, 141 Colo. 487, 349 P.2d 139 (1960).

**For composition under bankruptcy act,** see *Kiles v. Trinchera Irrigation Dist.*, 136 F.2d 894 (10th Cir. 1943).

**37-43-159. Determination of validity of dissolution.** (1) In case, upon the canvass of the vote at such election, it is found and declared by said board of directors that a majority of the votes cast at such election have been cast in favor of "Dissolution of the District - Yes", then the board of directors shall file a petition in the district court of the county wherein is located the office of such board to determine the validity of the proceedings had and of the proposed plan for the dissolution of such district. Such action shall be in the nature of a proceeding in rem, and jurisdiction of all parties interested may be had by publication of a notice of the pendency of the proceeding at least once a week for three weeks in some newspaper of general circulation published in the county where the action is pending; but if the district is situate in more than one county, then the publication shall be made in one newspaper in each county wherein the same is situate, such newspaper to be designated by the court having jurisdiction of the procedure. The court may provide for notice by posting the same not less than thirty days before the date set for the hearing of such petition in any county where no newspaper is published. Jurisdiction shall be complete in thirty days after the posting or last publication of such notice.

(2) The notice may be directed as follows:

"To all holders of indebtedness of the ..... irrigation district (insert the name of the district sought to be dissolved), to all landowners within said district, and to all others interested in the proposed dissolution of the said irrigation district", and said notice shall state the filing of the petition by the board of directors, the date of filing said petition and the court in which filed, and shall further state that the object of said petition is to obtain the dissolution of said irrigation district, and shall give the date set by the court for the hearing of said petition.

(3) At the time set for the hearing of said petition, anyone interested may appear and contest the validity of the proceedings already had, and of the plan proposed for the

dissolution of said district or any portion thereof, including the validity of any portion of the indebtedness set out in said petition. The court shall determine the amount of the indebtedness of said district, and may determine the validity of any portion thereof, and in said proceeding, may adjust and determine the rights and liabilities of all parties and decree an adoption and execution of the proposed plan. Such action shall be speedily tried and judgment rendered.

(4) Any party shall have the right of appellate review, as provided by law and the Colorado appellate rules, at any time within thirty days after the entering of final judgment, and the case shall be heard and determined by an appellate court of the state within three months after taking the appeal. Unless appeal is made within such thirty days, the decree entered in said cause shall be final and binding upon all parties interested in said district, whether as officers, electors, landowners, creditors, or otherwise.

**Source:** L. 15: p. 309, § 4. C.L. § 2038. CSA: C. 90, § 536. CRS 53: § 149-3-58. C.R.S. 1963: § 150-3-58.

#### ANNOTATION

**A creditor who appears and files his claim in dissolution proceedings tacitly admits their propriety,** and it may be that he is estopped thereafter to assert objections that he might have urged had he not by his conduct acquiesced in the proceedings. In re Green City Irrigation Dist., 91 Colo. 202, 13 P.2d 1113 (1932).

**A dissolution proceeding is not one in rem.** It would be presuming too much to hold that a dissolution proceeding was actually one in rem which would bind those holding securities upon the property without personal service upon them. Beck v. Otero Irrigation Dist., 38 F.2d 275 (D. Colo. 1929).

**Service on nonresident bondholders by publication only does not bar suit for equitable relief.** Dissolution proceedings do not bar suit for equitable relief where plaintiffs, as holders of the bonds of the district, being nonresidents of the state, were served with no process other than the advertisement in the local paper. Beck v. Otero Irrigation Dist., 38 F.2d 275 (D. Colo. 1929).

**Applied** in Michigan Trust Co. v. Otero Irrigation Dist., 76 Colo. 441, 232 P. 919 (1925).

**37-43-160. Contents of petition - procedure - costs.** Such petition to the district court shall set forth the facts required to be set forth in the petition to the board of directors and all the proceedings had thereunder, and at the hearing the court shall hear and determine the regularity, legality, and correctness of all proceedings, and in doing so shall disregard any error, irregularity, or omission which does not affect the substantial rights of the parties. The rules of pleading and practice in the Colorado rules of civil procedure and in the rules of the supreme court not inconsistent with the provisions of sections 37-43-156 to 37-43-168 are made applicable to the proceeding provided in this article. The costs of any contest may be allowed and proportioned between the parties or taxed to the losing party in the discretion of the court, and no contest of any matter or thing provided for in said sections shall be made other than in the time and manner specified in sections 37-43-151 to 37-43-168.

**Source:** L. 15: p. 310, § 5. C.L. § 2039. CSA: C. 90, § 537. CRS 53: § 149-3-59. C.R.S. 1963: § 150-3-59.

**37-43-161. Elector may bring action.** If no such proceeding has been filed by the board of directors within thirty days after the canvass of said vote, then any qualified elector of the district may bring an action in the district court of the county wherein the office of the board of directors is located. The board of directors shall be made parties defendant, and notice shall be served on the members of the board personally if they can be found in the county; if not, then service by publication as provided in section 37-43-159 shall be sufficient. Proceedings shall be had in the same manner and with the same effect as if brought by the board of directors.



**Source:** L. 15: p. 310, § 6. C.L. § 2040. CSA: C. 90, § 538. CRS 53: § 149-3-60. C.R.S. 1963: § 150-3-60.

**37-43-162. May organize corporation to acquire assets.** A corporation may be organized under general laws for the purpose of acquiring the assets of said district, including the irrigation system, if any, dams, reservoirs, canals, franchises, water rights, and all other property of any nature belonging to said district, which corporation shall have all the powers, rights, and franchises of corporate bodies organized under general laws and in addition shall have such further powers as may be necessary to possess and carry on said irrigation system and exercise such franchise and water rights.

**Source:** L. 15: p. 311, § 7. C.L. § 2041. CSA: C. 90, § 539. CRS 53: § 149-3-61. C.R.S. 1963: § 150-3-61.

**37-43-163. Decree of court.** (1) The court in its decree shall have power to make the orders necessary to carry out said proposition or plan for the liquidation of the indebtedness and distribution of the property of said district, including the right to apportion any indebtedness found due, and to declare said portions of any said indebtedness liens upon the various parcels and lots of land within the district, and may decree a sale or exchange of its assets in such manner as may effectuate said proposition, as the said court may judge best, and as, in the opinion of the court, provides an adequate security for the ultimate payment or complete liquidation of all the indebtedness of said district. Said sale or exchange of said assets may be made either in one lot or in such parcels as may be provided, and the decree may provide for conveyance of said irrigation system, including the dams, reservoirs, canals, franchises, and water rights, and also of all of the other assets of the district and for the exchange thereof for outstanding indebtedness and the cancellation of such indebtedness. Said court may also provide by decree for the ultimate payment of all or any part of the indebtedness of said district by directing a continuance of the levy and assessment of taxes upon the lands included in said district in the manner provided by the laws of this state in relation to irrigation districts.

(2) At any time prior to the actual execution of the proposed plan for dissolution, whether before or after entry of the decree, the proceeding for approval of such plan may be dismissed by the court and such dissolution may be abandoned when it is made to appear to the court that a majority of the qualified electors of the irrigation district have voted for the dismissal of such proceeding and abandonment of such proposed dissolution at an election regularly held for the purpose of voting on such question and that such dissolution plan and proceeding can feasibly and equitably be abandoned and dismissed at that time. Notice of such election shall be given in the same manner and for the same time as notice of election of directors of an irrigation district under the laws of the state of Colorado, and such notice shall specify the time of holding the election and the matter to be voted upon. Such election shall be held and the result thereof determined and declared in all respects as nearly as practicable in conformity with the provisions governing the election of directors in irrigation districts. The court in its decree dismissing any such proceeding under the provisions of this subsection (2) has the power to make all orders necessary to effectuate the abandonment of such dissolution plan and the continuation of such irrigation district.

**Source:** L. 15: p. 311, § 8. C.L. § 2042. CSA: C. 90, § 540. CRS 53: § 149-3-62. L. 63: p. 1007, § 1. C.R.S. 1963: § 150-3-62.

#### ANNOTATION

This section contemplates, in the event of a dissolution of the district, that the property and assets of the district may be sold and

outstanding indebtedness thereby be paid. Michigan Trust Co. v. Otero Irrigation Dist., 76 Colo. 441, 232 P. 919 (1925).

**37-43-164. Apportionment of indebtedness.** In any such proceeding for the dissolution of any irrigation district, the district court also has power, subject to such terms and conditions as it may deem just and equitable under the circumstances, to apportion the bonded indebtedness of the district among the various tracts of land within said district, each irrigable acre being liable for the same amount, and to provide for the release and extinguishment of the lien securing the bonds of said district or a part or portion thereof against all or any of said tracts of land upon the payment of all or a pro rata amount of said bonded indebtedness by the landowner either in cash or by the surrender by said landowner of an equivalent amount of said district bonds, coupons, or warrants. In the event the lien of said bonds, coupons, or warrants is so extinguished pursuant to said decree of said district court against any tract of land within said district, it is the duty of the county treasurer to issue a certificate to said landowner evidencing the extinguishment of said lien, and said certificate may be recorded and when recorded shall be conclusive evidence that the land described therein has been released and relieved from the lien securing the bonds of said district.

**Source:** L. 15: p. 311, § 9. C.L. § 2043. CSA: C. 90, § 541. L. 41: p. 523, § 2. CRS 53: § 149-3-63. C.R.S. 1963: § 150-3-63.

**37-43-165. Plan must provide for adequate levies.** No plan of liquidation shall be approved by the court which does not provide for the making of all levies required by the laws of the state of Colorado for the payment of all valid indebtedness of the district. In the petition mentioned in section 37-43-157, it shall not be necessary to include in the schedule of indebtedness any bond, coupon, warrant, or other indebtedness, claim, or demand which has been barred by the laws of this state, nor shall it be necessary to include in the schedule of indebtedness any bond, coupon, warrant, or other indebtedness for the payment of which all levies required by the laws of the state of Colorado have been made prior to the filing of said petition with the board of directors of said irrigation district, nor shall it be necessary in winding up the affairs of any district organized under the laws of this state to pay all or any portion of a debt or obligation of such district for the enforcement of which debt or obligation a suit is barred by the laws of this state, nor shall it be necessary to pay, except from the proceeds of tax levies therefor already made, all or any portion of a debt or obligation of such district for the payment of which all levies required by the laws of the state of Colorado have been made.

**Source:** L. 15: p. 312, § 10. C.L. § 2044. CSA: C. 90, § 542. L. 41: p. 524, § 3. CRS 53: § 149-3-64. C.R.S. 1963: § 150-3-64.

#### ANNOTATION

**Applied** in *Alpha Corp. v. Denver-Greeley Valley Irrigation Dist.*, 110 Colo. 179, 132 P.2d 448 (1942).

**37-43-166. Foreclosure subject to prior taxes.** In case the court decrees the establishment of a lien against any portion of the lands in said district, or against any of the property of said district, the decree shall provide for the foreclosure of such liens upon the failure to make any payments for which said liens are given at the time the same become due under the terms of the decree entered in such proceeding. All conditions of such foreclosure, including the existence or nonexistence of a right to redeem therefrom, shall be within the discretion of the court. Nothing in sections 37-43-156 to 37-43-168 and nothing in the procedure provided for in this article shall be deemed to affect any liens for unpaid taxes or assessments which have been duly levied and assessed and existing at the time of the filing of the petition in the district court.

**Source:** L. 15: p. 312, § 11. C.L. § 2045. CSA: C. 90, § 543. CRS 53: § 149-3-65. C.R.S. 1963: § 150-3-65.



**37-43-167. Disposition of surplus.** Whenever all the property of such irrigation district has been disposed of, and all indebtedness and obligations thereof, if any, have been discharged, the balance of the money of said district shall be distributed to the assessment payers in said district as named in the last assessment roll in the proportion in which each has contributed to the total amount of said assessments.

**Source:** L. 15: p. 312, § 12. C.L. § 2046. CSA: C. 90, § 544. CRS 53: § 149-3-66. C.R.S. 1963: § 150-3-66.

**37-43-168. Procedure where district is solvent.** Irrigation districts which are free from debt may be dissolved under sections 37-43-156 to 37-43-168. In such cases, it shall not be necessary that the proceedings for the dissolution of said district shall be passed upon by the district court, as prescribed in section 37-43-159, but, after the holding of the election in the district and the declaration of the result, a certificate, signed by the president and secretary of the district, shall be filed with the county clerk and recorder of each county in which the district is situated, which certificate shall state the number of signers to the petition for dissolution and shall recite the calling of an election, the holding of said election, and the result thereof. Said certificate shall bear the seal of the district. It is the duty of said respective clerk and recorders to record all such certificates in the records of the respective counties, and, upon filing of such certificate with the said county clerk and recorders the dissolution of said district shall be complete.

**Source:** L. 15: p. 313, § 13. C.L. § 2047. CSA: C. 90, § 545. CRS 53: § 149-3-67. C.R.S. 1963: § 150-3-67.

**37-43-169. Dissolution of inactive irrigation districts.** Whenever, for a period of five successive years, any irrigation district organized under the laws of the state of Colorado has failed to transact any business for which such district was organized, or its board of directors has failed to hold a meeting for the purpose of transacting any business for the benefit of such district, or the board of directors has failed to certify the annual appropriation resolutions to the board of county commissioners during such period or, during such period, there has been no election of directors or there is no duly elected, qualified, and acting board of directors due to death, resignation, or otherwise, or if, for a like period, the irrigation works of the district has been abandoned by such district, the indebtedness of said irrigation district shall be paid and such irrigation district may be dissolved, not only in the manner provided by law prior to April 7, 1921, but also in the manner provided in sections 37-43-169 to 37-43-178.

**Source:** L. 21: p. 507, § 1. C.L. § 2097. CSA: C. 90, § 546. CRS 53: § 149-3-68. C.R.S. 1963: § 150-3-68.

**37-43-170. Petition for payment of indebtedness.** The president, secretary, any officer or director, any legally qualified elector of such district, or any holder of outstanding bonds of said district may file, in the district court of the county wherein is located the principal office of such irrigation district or of the counties wherein the greater portion of the acreage of such irrigation district lies, a petition, duly verified, setting forth any one or more of the foregoing reasons for the payment of the indebtedness or dissolution of such irrigation district, or both, and setting forth any other reasons showing just cause therefor, and setting forth, as nearly as such petitioner shall be able to ascertain, a list of the outstanding indebtedness of the district and the names and addresses of the creditors of the district.

**Source:** L. 21: p. 508, § 2. C.L. § 2098. CSA: C. 90, § 547. CRS 53: § 149-3-69. C.R.S. 1963: § 150-3-69.

**37-43-171. Jurisdiction - order for hearing.** Upon the filing of such petition, the district court shall be vested with jurisdiction of the subject matter and shall forthwith

ascertain from testimony or other evidence, as nearly as may be, the names and addresses of all the creditors and bondholders, or their counsel or representative, of said district and shall make an order requiring each of the owners of the lands included within the boundaries of such irrigation district, and the legal holders of any indebtedness of such irrigation district, and all persons who may be affected in any manner by such proceedings to appear before such district court upon a certain day, to be designated in such order, not less than twenty days after service of notice of such order, as provided in section 37-43-172, there to show cause why the said petition should not be granted.

**Source:** L. 21: p. 508, § 3. C.L. § 2099. CSA: C. 90, § 548. CRS 53: § 149-3-70. C.R.S. 1963: § 150-3-70.

**37-43-172. Notice of hearing.** Immediately upon the making of such order by said district court, the clerk of such court shall issue a notice of such order, in the nature of a summons, under his hand and the seal of such court, notifying all persons included within such order of the contents thereof, which notice may be served either personally in the same manner as provided for the service of summons under the Colorado rules of civil procedure, or by publication once a week for three successive weeks in some newspaper, to be designated in such order, of general circulation published in the county where such court is held, or, in case there is no such newspaper, then by posting the same in at least three conspicuous places in such county, to be designated by such order, one of which places shall be within the boundaries of such irrigation district, and by mailing a copy of such published notice, by registered mail at least thirty days before the date of any such hearing, to each of the creditors and bondholders of the district and their representatives and attorneys, insofar as known to or ascertainable by the court.

**Source:** L. 21: p. 508, § 4. C.L. § 2100. CSA: C. 90, § 549. CRS 53: § 149-3-71. C.R.S. 1963: § 150-3-71.

**37-43-173. Notice - how addressed.** Neither such notice nor such order shall be addressed to any person by name, but it shall be sufficient if it is addressed to any and all owners of land in such irrigation district, to the legal holders of any claims of indebtedness against said district, and to all persons interested in said proceedings.

**Source:** L. 21: p. 509, § 5. C.L. § 2101. CSA: C. 90, § 550. CRS 53: § 149-3-72. C.R.S. 1963: § 150-3-72.

**37-43-174. Completion of service.** Service of such published or posted notice shall be deemed complete at the expiration of ten days after the last publication or posting and mailing thereof. At the expiration of the time required by such order to show cause, and not less than twenty days after the service of such notice, whether by personal service or by publication or posting, such district court shall be vested with complete jurisdiction over both the subject matter of such petition and of all parties in any manner concerned or affected by it, and thereafter its proceedings shall be governed by the Colorado rules of civil procedure except only as modified or controlled by sections 37-43-169 to 37-43-178.

**Source:** L. 21: p. 509, § 6. C.L. § 2102. CSA: C. 90, § 551. CRS 53: § 149-3-73. C.R.S. 1963: § 150-3-73.

**37-43-175. Answer or contest - default.** Within the time required by such order to show cause, any person interested in the subject matter of such petition, including any owner of lands in said irrigation district or the holder of any of its indebtedness whether bonded or otherwise, may appear and move to dismiss, plead, or answer to such petition, or contest the same, in the same manner as in civil actions under the Colorado rules of civil procedure wherein he might be defendant; and for all purposes the nonappearance of any landowner in said district, after due notice of such order, shall be taken as his consent to the granting of such petition and all proceedings had thereon.



**Source:** L. 21: p. 510, § 7. C.L. § 2103. CSA: C. 90, § 552. CRS 53: § 149-3-74. C.R.S. 1963: § 150-3-74.

**37-43-176. Proceedings in rem - accounting.** (1) All proceedings upon such petition shall be considered as in the nature of proceedings in rem, and the court has power to make any proper orders affecting the rights of all parties interested therein, and may order all of the corporate property of said irrigation district to be sold or otherwise disposed of for the benefit of its creditors and the good of the lands or landowners thereof, and shall take a full and complete accounting of all the assets and liabilities of such district, and provide for the payment of all its indebtedness of any sort, either by the sale of its corporate property or by the levy of assessments or taxes upon all the lands within the boundaries of such district, which lands shall be assessed for the same amount per acre, or by both such means and methods. The district court may enter such other and further orders from time to time for additional levies as may be necessary to pay and discharge all the indebtedness of said district, whether in the original amount of said indebtedness or any compromise amount which may be offered by the creditors and bondholders and approved by the court.

(2) All assessments or taxes shall be collected and their collection enforced by and according to the methods provided by law for the collection of taxes and assessments for irrigation district purposes, but it shall not be necessary for any board of directors of such district to take any part in such proceedings, but certified copies of the orders, findings, or judgments of the district court filed with the board of county commissioners shall be sufficient authority for the board of county commissioners of the proper county to make the levies of taxes or assessments against the district lands in said orders, findings, or judgments provided.

(3) If the court orders the sale of any district property, a commissioner shall be appointed for such sale and conveyance of the property, and to report to the court, and any funds obtained from any such sales shall be deposited with the district treasurer for the payment of district indebtedness. Sufficient additional amounts shall be added to the levies to pay the costs of any such proceedings in the district court, and, after collection, moneys derived from such levies for such purposes shall be paid by the district treasurer upon order of court and any surplus shall be used to pay district indebtedness. In case any outstanding warrants or bonds of the district are surrendered to the court for compromise or for the purpose of aiding in the closing up of the district affairs, or for other purposes, the court may enter judgment in behalf of each such creditor for the amount of the indebtedness ascertained to be due or which such creditor consents he will accept in satisfaction of such indebtedness and such judgment shall be sufficient warrant upon the district treasurer to pay the amount thereof out of the funds of the district obtained upon levies and collection of taxes and assessments or from other sources. When all the outstanding indebtedness of the district has been paid, the district court, if so petitioned, may enter findings and decree dissolving such irrigation district.

**Source:** L. 21: p. 510, § 8. C.L. § 2104. CSA: C. 90, § 553. CRS 53: § 149-3-75. C.R.S. 1963: § 150-3-75.

**37-43-177. Indebtedness of inactive districts.** (1) In addition to the methods provided in sections 37-43-169 to 37-43-178, the following method of providing for the naming of directors and ascertaining and providing for the payment and discharge of the indebtedness of inactive or abandoned irrigation districts may be followed:

(a) Whenever any irrigation district organized prior to April 7, 1921, in this state has no duly elected or appointed and acting board of directors, by reason of the death, resignation, expiration of the terms of office of its former directors, or from any other cause, and no action has been taken by the electors of said district to fill such vacancies in its directorate by election or appointment as provided by law, upon petition filed and presented by any landowner, creditor, or bondholder of the irrigation district and upon notice given as provided in this section, the district court in and for the county in which the office of said district is located, by order, shall appoint not less than two nor more than three persons to

act as directors of said district until their successors have been elected by the district and qualified as provided by law. Such directors so appointed by the district court shall be selected either from electors of said district or from owners of lands therein, although not otherwise qualified as electors of said district. If any person so appointed refuses to qualify as such, the court may appoint others in the place of those so refusing. The persons so appointed who qualify as directors shall file a certified copy of such order of court with the county clerk and recorder of said county in lieu of the statement of the results of election of directors required to be filed by the secretary of the district by section 37-41-112, and said directors so appointed shall have all the powers of, and shall otherwise qualify in the same manner provided by law for, directors elected by the district.

(b) If it appears to the court, upon the hearing, that there are not two or more electors or owners of land in said district who are ready and willing to accept such appointment and to qualify as such directors, the court, by order duly entered, shall direct the county assessor of the county in which the office of the district is located and it is thereupon his official duty to forthwith ascertain and certify to the court and thereafter certify to the board of county commissioners of said county, on or before October 15 of that year and succeeding years until directors of said district are elected or appointed, the amount and maturities of the outstanding bonds of said district, the amount of the unpaid interest thereon, the amounts and payees of the several outstanding warrants of said district, and the number of acres of land in said district which are burdened and obligated for the payment of bonded indebtedness and the number of acres subject to taxation for the payment of the general indebtedness of such district. Such certificate by the assessor shall have the same force and effect as the annual appropriation resolution required by law to be certified to the board of county commissioners by the directors of the irrigation district.

(c) The petitioners may submit to the court in any such proceeding any offer, proposition, or contract of compromise with holders of outstanding bonds and interest coupons of said district, wherein it is proposed to issue warrants of said district in exchange for said bonds and coupons and providing for the amounts to be levied from year to year to pay such warrants; and, if it appears to the court that said proposition or contract of compromise affords an equitable method of paying off said outstanding indebtedness, the court shall enter an order directing an election to be held at some convenient point at or near the location of the last office of the district for the purpose of submitting the question of the approval or rejection of such offer, proposition, or contract of compromise to a vote of the electors of the district. The election shall be conducted, and returns thereof made to the court, by the clerk of the court upon four weeks' published notice in the newspaper published nearest the place of holding said election. If a majority of the electors voting at said election vote in favor of said offer, proposition, or contract, or, in event no votes are cast, upon returns by the clerk, the court shall enter an order directing the carrying out of said offer, proposition, or the execution of said contract.

(d) If there are no directors of said district, the board of county commissioners of the county in which the office of the irrigation district is located, or should be located according to law, is hereby given the powers of directors of such district and shall act in the name of the district for the purpose of carrying out such offer or proposition or executing such contract and any warrants necessary to fulfill the terms of said offer, proposition, or contract, upon filing with the county clerk and recorder of said county a certified copy of said order of the court, and said board shall thereupon notify the county assessor of the amount of money to be collected from year to year as fixed and determined by said proposition or contract and the warrants so issued, which said certificate shall be followed by the county assessor in making certificate to the board of county commissioners. If the electors of the district reject such offer, proposition, or contract, the court may in like manner submit other or different propositions or contracts that may be proposed, and the proceedings shall be held open by the court for such purpose.

(e) All such proceedings before the district court shall be proceedings in rem and shall be entitled "In the matter of the ..... irrigation district, for appointment of directors and other purposes", and notice of the hearing upon such petition shall be given by publication in a newspaper of general circulation published nearest the office of the district for the time required for publication of summons as provided by the Colorado rules of civil procedure,



and copies of such printed notice shall be mailed by the clerk of the court to the last-known directors and secretary of said district, as shown by the records of the county clerk and recorder of the county in which the office of the district is or was last located, and to all creditors, bondholders, or owners of warrants of said irrigation district, as nearly as the court and county assessor may be able to ascertain, at least three weeks prior to the date of such hearing. Any landowner or creditor of said district may appear and plead to or answer said petition and may offer testimony at said hearing. The court shall liberally construe sections 37-43-169 to 37-43-178 in carrying out the provisions of this section and shall retain jurisdiction of such proceedings until final provision has been made to pay off the indebtedness of any such irrigation district.

**Source:** L. 21: p. 512, § 9. C.L. § 2105. CSA: C. 90, § 554. CRS 53: § 149-3-76. C.R.S. 1963: § 150-3-76.

**37-43-178. Appeals.** Appellate review as provided by law and the Colorado appellate rules shall lie to review the orders, judgments, or decrees of the district court entered in either of the proceedings provided in sections 37-43-169 to 37-43-178, and the supreme court shall advance such cases upon its docket. The supreme court may provide for further proceedings upon said petitions and may make further rules of procedure in such cases in the same manner and to the same extent as it may provide amendments or further rules of procedure under the Colorado rules of civil procedure.

**Source:** L. 21: p. 516, § 10. C.L. § 2106. CSA: C. 90, § 555. CRS 53: § 149-3-77. C.R.S. 1963: § 150-3-77.

**37-43-179. Dissolution - where bondholders are unknown.** Any irrigation district organized under the laws of the state of Colorado in which bonds have been issued and in which said bonds were not registered as required by law, and the whereabouts of the bondholders is unknown, and more than twenty years has elapsed since the maturity date of the last issue of said bonds in said district may be dissolved as provided in sections 37-43-179 to 37-43-182.

**Source:** L. 51: p. 519, § 1. CSA: C. 90, § 555(12). CRS 53: § 149-3-78. C.R.S. 1963: § 150-3-78.

**37-43-180. Petitions for dissolution.** Any person who is the owner of real property situated in said district sought to be dissolved may file a verified petition in the district court of the county wherein is located the principal office of such irrigation district or of the county wherein lies the greater portion of the acreage of such irrigation district, setting forth in said petition the facts upon which petitioner relies for dissolution of such irrigation district, including the fact that the bonds previously issued were not registered as required by law, that the whereabouts of said bondholders is unknown, and that more than twenty years has elapsed since the maturity date of the last issue of said bonds.

**Source:** L. 51: p. 519, § 2. CSA: C. 90, § 555(13). CRS 53: § 149-3-79. C.R.S. 1963: § 150-3-79.

**37-43-181. Notice of hearing.** (1) After the filing of said petition, the court shall thereupon enter an order fixing a day certain for the hearing of said petition, said date not to be less than forty-five days from the date on which said petition was filed. Immediately upon making such order by the district court, the clerk of said court shall issue a notice of such order, in the nature of a summons, under the hand and seal of the court, notifying all persons in interest of the contents of said order. Said notice shall be served in the same manner as provided for the service of summons under the Colorado rules of civil procedure or by publication thereof once a week for three successive weeks in a newspaper, to be designated by the court, of general circulation published in the county where such court is

held, or, if there is no such newspaper in said county, publication of said notice shall be in a newspaper designated by the court.

(2) Service of said published notice shall be deemed complete at the expiration of ten days after the last publication of said notice, at which time the court shall be vested with complete jurisdiction over the subject matter of such petition and all of the parties in any manner concerned or affected by it. Before the time of completion of service of notice, any person interested in the subject matter of said petition may appear in and contest the same in the same manner as in civil actions under the Colorado rules of civil procedure. The nonappearance of any bondholder concerned at the time of the hearing of said petition, or prior thereto, shall be considered as his consent to the granting of such petition and all proceedings had thereon. All proceedings upon such petition shall be considered as in the nature of proceedings in rem, and the court has power to make any proper orders affecting the rights of all parties concerned.

**Source:** L. 51: p. 520, § 3. **CSA:** C. 90, § 555(14). **CRS 53:** § 149-3-80. **C.R.S. 1963:** § 150-3-80.

**37-43-182. Disposition of unpaid funds.** If, at the time of the entry of the order of dissolution, there remains in the funds of any county treasurer any moneys for the redemption of said bonds, the court shall require, by its proper order, said county treasurer to disburse said funds to any persons who present bonds for redemption and in proportion to the total value of such bonds presented. Such county treasurer, before disbursing any of said money, shall cause the publication of a notice, in the manner set forth in section 37-43-181, that said funds will be disbursed on a day certain not sooner than ninety days from the date of the first publication of said notice.

**Source:** L. 51: p. 520, § 4. **CSA:** C. 90, § 555(15). **CRS 53:** § 149-3-81. **C.R.S. 1963:** § 150-3-81.

**37-43-183. Application.** The provisions of sections 37-43-183 to 37-43-189 shall apply only to irrigation districts having a bonded indebtedness of twenty dollars or more per acre and to lands in such described irrigation districts upon which the general property taxes have been delinquent and unpaid for more than five years.

**Source:** L. 33: p. 646, § 1. **CSA:** C. 90, § 556. **CRS 53:** § 149-3-82. **C.R.S. 1963:** § 150-3-82.

**37-43-184. Treasurer to strike off lands to county.** When lands situate in an irrigation district, having an outstanding bonded indebtedness or indebtedness evidenced by outstanding warrants for which there are no available funds for payment, are sold for delinquent taxes assessed for state, county, and school district purposes, or any one or more of said purposes, with or without levies for irrigation district taxes or assessments, and there are no bidders at said sale for said lands in the amount of taxes assessed against the same, the treasurer, as in other cases, shall strike said lands off to the county for the amount of the state, county, and school district taxes and issue a certificate the same as in other cases. The treasurer shall offer separately said lands for sale for irrigation district taxes or assessments, if any, and sell the same to the person who bids the amount of the assessments for irrigation purposes against said lands. Such bidder may pay in cash or by such other obligations of said district as are acceptable for such purpose. If there is no bidder when said lands are offered for sale for the irrigation district assessments, the same shall be struck off to the district. In either event a certificate of sale for irrigation district assessments shall be executed and delivered to the purchaser or said district with a notation thereon by the treasurer showing the outstanding certificate of sale held by the county and the amount thereof.

**Source:** L. 33: p. 646, § 1. **CSA:** C. 90, § 557. **CRS 53:** § 149-3-83. **C.R.S. 1963:** § 150-3-83.



**37-43-185. Redemption.** The person holding said certificate of purchase for irrigation district taxes, or the irrigation district, or any persons to whom said district assigns said certificate issued to it, upon payment of the amount due the county for state, county, and school district taxes, together with costs of sale and interest as provided by law, or for such amount as may be fixed by the board of county commissioners, may redeem from the sale to said county, and the amount so paid shall be endorsed upon and added to the certificate of sale issued for irrigation district assessments or taxes.

**Source:** L. 33: p. 647, § 2. CSA: C. 90, § 558. CRS 53: § 149-3-84. C.R.S. 1963: § 150-3-84.

**37-43-186. Lands offered for sale - when.** Lands covered by an outstanding certificate held by the county shall not again be offered for sale until said certificate is redeemed or assigned. Subsequent taxes assessed against said land shall be endorsed upon such certificate and shall become an additional amount due and payable thereon.

**Source:** L. 33: p. 647, § 3. CSA: C. 90, § 559. CRS 53: § 149-3-85. C.R.S. 1963: § 150-3-85.

**37-43-187. When county entitled to tax deed.** If any such certificate of sale issued to the county is not sold or assigned within three years from the date of the sale, thereupon the county may apply for a tax deed and shall be entitled to such tax deed the same as provided by law for other purchasers at tax sales. After the execution of said deed, the county shall be entitled to the rents, issues, and profits from any such land the same as any other owner. Such tax deed shall name the board of county commissioners as grantee and tax deeds may be executed and delivered, based upon certificates now held by counties, as well as certificates which may hereafter be issued covering lands in irrigation districts having an outstanding indebtedness, as provided in this article.

**Source:** L. 33: p. 648, § 4. CSA: C. 90, § 560. CRS 53: § 149-3-86. C.R.S. 1963: § 150-3-86.

**37-43-188. County may sell by quitclaim deed.** At any time the county may sell by quitclaim deed any such land so acquired for the best price obtainable in the opinion of the board, which price is to be fixed by the board of county commissioners; and the purchase price, as well as the net amount realized as rental on such lands, shall be applied upon and apportioned to the payment of taxes for state, county, and school district purposes in proportion to the amount due at the time said tax deed is executed and delivered.

**Source:** L. 33: p. 648, § 5. CSA: C. 90, § 561. CRS 53: § 149-3-87. C.R.S. 1963: § 150-3-87.

**37-43-189. Continuation of lien of bonded indebtedness.** No such sale shall relieve the land so sold from the lien of a bonded indebtedness, but the county, if it becomes the owner of any such land, shall not be obligated or liable for any such bonded indebtedness, interest, or other assessments or levies on account of irrigation district purposes, but the same shall be enforceable against the land, and not otherwise.

**Source:** L. 33: p. 648, § 6. CSA: C. 90, § 562. CRS 53: § 149-3-88. C.R.S. 1963: § 150-3-88.

## PART 2

### IRRIGATION DISTRICT SALINITY CONTROL ACT

**37-43-201. Short title.** This part 2 shall be known and may be cited as the "Irrigation District Salinity Control Act".

**Source: L. 88:** Entire part added, p. 1227, § 1, effective April 6.

**37-43-202. Definitions.** As used in this part 2, unless the context otherwise requires:

(1) "Contracting district" means an irrigation district which has entered into a salinity control contract.

(2) "Irrigation district" means an irrigation district formed pursuant to the provisions of article 41 or 42 of this title.

(3) "Salinity control contract" means a contract made between an irrigation district and the United States pursuant to the "Colorado River Basin Salinity Control Act", 43 U.S.C. sec. 1571, as amended, for the construction, improvement, operation, and maintenance of lateral ditches and pipelines or for any combination of such purposes.

(4) "Salinity control lateral" means a lateral ditch or pipeline constructed or improved pursuant to a salinity control contract.

**Source: L. 88:** Entire part added, p. 1227, § 1, effective April 6.

**37-43-203. Applicability - exercise of authority.** The provisions of this part 2 shall apply only to irrigation districts formed prior to January 1, 1988. The powers and authority conferred by this part 2 may be exercised only within the boundaries of such an irrigation district, as such boundaries existed on January 1, 1988.

**Source: L. 88:** Entire part added, p. 1228, § 1, effective April 6.

**37-43-204. Irrigation district - authority to contract.** Subject to authorization by a vote of the electors as provided in section 37-43-211, an irrigation district formed prior to January 1, 1988, shall have and may exercise all rights and powers necessary or incidental to enter into, implement, and perform a salinity control contract.

**Source: L. 88:** Entire part added, p. 1228, § 1, effective April 6.

**37-43-205. Special assessment.** (1) (a) To the extent that the expenses of the operation and the maintenance of salinity control laterals are in excess of annual reimbursements payable to a contracting district by the United States under a salinity control contract, the contracting district may levy special assessments upon real estate within the contracting district which is entitled to receive water through the salinity control laterals. The special assessments shall be made as provided in this article. The laws of this state relating to the review, correction, collection, and enforcement of other district taxes shall apply to the special assessment; except that revenue derived from each such special assessment shall be excluded in the year in which such assessment is first levied in computing the limitations specified in part 3 of article 1 of title 29, C.R.S.

(b) The board of directors of a contracting district shall provide and certify a description of the real estate within the contracting district and within the county which the board determines to be entitled to receive water through salinity control laterals. The assessor shall assess and enter upon his records the assessed valuation of all real estate, including public lands subject to assessment under the act of the United States congress of August 11, 1916, exclusive of improvements, which is within the contracting district and served by the salinity control laterals. Such assessment shall be based upon values at the same rate per acre. Tracts of land of one acre or less shall not be assessed if the board of directors of the contracting district has otherwise fixed the amount to be paid by each tract of one acre or less.

(c) Immediately after assessment has been made, the assessor shall make a return to the board of county commissioners of the county in which the contracting district's office is located of the total amount of assessed valuation of the real estate served by salinity control laterals within the contracting district and, if the board of directors of the contracting district has specified a fixed amount for tracts of one acre or less, the number of such tracts in the area served by such laterals within the contracting district. The board of directors of the



contracting district shall certify to the board of county commissioners of the county in which the contracting district's office is located the total amount of the special assessment and the amount, if any, payable by tracts of one acre or less. The board of directors of the contracting district may include in the special assessment an amount of up to fifteen percent of the expenses of operation and maintenance not reimbursed under a salinity control contract to cover delinquencies.

(d) Upon receipt of the returns of the total assessment of the contracting district and receipt of the certification from the board of directors of the contracting district, the board of county commissioners shall levy the special assessment upon all tracts of land of one acre or less in the amount established by the board of the contracting district, if any, and shall fix the rate of levy necessary to provide the balance of the special assessment certified by the board of directors of the contracting district. The board of county commissioners of the county in which the contracting district's office is located shall certify the rates thus established to the board of county commissioners of each county in which any portion of real estate served by the salinity control laterals is located, and such boards shall make the levy, at the rate specified, upon the lands in their respective counties.

(2) In lieu of the special assessment taxes specified in subsection (1) of this section, a contracting district may charge and collect toll charges for deliveries of water through salinity control laterals to obtain additional funds to defray operation and maintenance expenses of such laterals not reimbursed under a salinity control contract. The board of directors of a contracting district may, from time to time, establish schedules of such toll charges based upon a reasonable apportionment, as determined by the board, among the users deriving water through such salinity control laterals. Deliveries of water may be suspended or withheld from a water user who is delinquent in payment of toll charges.

**Source: L. 88:** Entire part added, p. 1228, § 1, effective April 6.

**37-43-206. Authority to obtain loans to defray expenses.** Upon authorization of its board of directors, a contracting district shall have the authority to obtain loans, upon such terms and granting such security for repayment thereof as the board deems proper, to defray the annual expenses of operation and maintenance required to perform a salinity control contract. Such loans shall not be subject to any other requirement or limitation in this article or in articles 41 to 43 of this title.

**Source: L. 88:** Entire part added, p. 1229, § 1, effective April 6.

**37-43-207. Power of eminent domain.** In order to carry out the purposes of this part 2, a contracting district shall have the power of eminent domain to acquire, within the boundaries of the district, existing lateral ditches, pipelines, and appurtenances thereto and interests therein, easements, rights-of-way, and such other rights and interests in property, including property devoted to a public purpose, as may be required in order to carry out the purposes of this part 2. The power of eminent domain granted to a contracting district pursuant to this section shall not extend to the acquisition of: Water rights; laterals which have been and as of April 6, 1988, are improved so as to achieve the purposes of the federal "Colorado River Basin Salinity Control Act" as determined by the United States bureau of reclamation; and ditch rights in a lateral with respect to which the owners of a majority of the acreage entitled to receive water therefrom have not agreed to have such lateral improved under the provisions of such federal act. If the compensation to be paid for the taking or acquisition of interests in property by a contracting district is to be paid or reimbursed by the United States, the question of whether such compensation shall be made need not be submitted to a vote of the qualified voters of such district.

**Source: L. 88:** Entire part added, p. 1229, § 1, effective April 6.

**37-43-208. Contracts - reimbursement by United States.** If payments required under contracts made by a contracting district for construction, improvement, operation, or

maintenance of facilities, or for supplying of materials or services, in implementation of a salinity control contract are to be paid for or reimbursed by the United States, to the extent that such payments exceed the expenses that would have been incurred by a contracting district in the thorough and timely operation and maintenance of its salinity control lateral absent their improvement pursuant to a salinity control contract, then such contracts need not be submitted to a vote of the qualified voters of the contracting district.

**Source: L. 88:** Entire part added, p. 1229, § 1, effective April 6.

**37-43-209. Submission of plans to state engineer - not required.** (1) Notwithstanding the provisions of section 37-41-104 (1), a contracting district shall not be required to submit to the state engineer:

- (a) Plans for the construction, operation, or maintenance of salinity control laterals; or
- (b) Information concerning such salinity control laterals.

(2) Notwithstanding the provisions of section 37-41-104 (1), a contracting district shall not be required to obtain a decision from the state engineer as to the feasibility of construction, operation, and maintenance of salinity control laterals.

**Source: L. 88:** Entire part added, p. 1230, § 1, effective April 6. **L. 91:** IP(1) and (2) amended, p. 896, § 32, effective June 5.

**37-43-210. Compensation of director of contracting district.** Amounts paid to a director of a contracting district for services rendered pursuant to a salinity control contract shall be excluded from and not considered to be a part of compensation subject to the limitations imposed by section 37-41-108 or 37-42-110 (3).

**Source: L. 88:** Entire part added, p. 1230, § 1, effective April 6.

**37-43-211. Creation of contracting district - election.** An irrigation district proposing to become a contracting district shall submit the question of whether to become a contracting district at a special election called for that purpose. Copies of the contract proposed to be entered into shall be maintained at the office of the district from the date of notice of such election until the election is held, and such copies shall be available for inspection by landowners of the district during business hours. Each landowner who owns property within the district which is assessed for district taxes shall be entitled to cast one vote for each acre, or fraction thereof, of land owned by such landowners in the district. If a majority of the votes cast at such election are in favor of the irrigation district becoming a contracting district, such district shall be deemed to be subject to the provisions of this part 2, and the board of directors thereof shall be authorized to enter into a salinity control contract and to execute such modifications, extensions, and supplements thereto from time to time as the board shall deem appropriate.

**Source: L. 88:** Entire part added, p. 1230, § 1, effective April 6.

ARTICLE 44

Internal Improvement Districts Law of 1923

**Cross references:** For publication of legal notices, see part 1 of article 70 of title 24; for foreclosure proceedings relating to public improvements, see part 11 of article 25 of title 31; for single election precinct law, see § 37-41-160.

37-44-101.	Liberal construction.	37-44-103.	Powers of district.
37-44-102.	Petition - establishment of an internal improvement district.	37-44-104.	Presentation and allowance of petitions.
		37-44-105.	Notice of election - voters -



	ballots.	37-44-127.	Notices of election of officers.
37-44-106.	Canvass of votes.	37-44-128.	Judges and clerk of election.
37-44-107.	Plans for improvements.	37-44-129.	Voters to appoint judges if necessary.
37-44-108.	Directors - powers and duties.		Administration of oath.
37-44-109.	Meetings of board - records.	37-44-130.	Hours polls open.
37-44-110.	Title - tax exemption.	37-44-131.	Count of ballots - certificate of returns.
37-44-111.	Conveyances - power to sue.	37-44-132.	Canvass of returns - result.
37-44-112.	Bonds.		Procedure in case of tie.
37-44-113.	Sale of bonds.	37-44-133.	Certificate of election.
37-44-114.	Classification of lands.	37-44-134.	Filling vacancy.
37-44-115.	Objections to classifications.	37-44-135.	Collection of assessments.
37-44-116.	Conduct of appeals.	37-44-136.	Construction contract - bond.
37-44-117.	Appeal not to delay.	37-44-137.	Claims - audit - payment.
37-44-118.	Modification of classification.	37-44-138.	Expenses of organization.
37-44-119.	Apportionment of levy.	37-44-139.	Works may cross other lands.
37-44-120.	Assessment.	37-44-140.	Officers' compensation.
37-44-121.	Assessment list - collection.	37-44-141.	Limit of indebtedness.
37-44-122.	Assessment book.	37-44-142.	Insufficient supply.
37-44-123.	Assessments affect land benefited.	37-44-143.	Judicial action on bonds.
37-44-124.	County treasurer ex officio district treasurer.	37-44-144.	Petition for confirmation.
37-44-125.	Where office of district kept.	37-44-145.	Notice of hearing.
37-44-126.	Election of officers - oath - bond.	37-44-146.	Answer or pleading.
		37-44-147.	Determination.
		37-44-148.	
		37-44-149.	

**37-44-101. Liberal construction.** This article, being necessary to secure and preserve the public health, safety, convenience, and welfare, and being necessary for the security of public and private property, shall be liberally construed to effect the purposes of this article.

**Source:** L. 23: p. 519, § 48. CSA: C. 138, § 64. CRS 53: § 149-5-48. C.R.S. 1963: § 154-4-48.

#### ANNOTATION

**Law reviews.** For article, "Legal Classification of Special District Corporate Forms in Colorado", see 45 Den. L.J. 347 (1968).

**37-44-102. Petition - establishment of an internal improvement district.** (1) For the purpose of the establishment of an internal improvement district, as provided for by this article, a petition shall be filed in the office of the clerk of the district court of the county which embraces the largest acreage of the proposed district, which district court is hereby vested with full jurisdiction to hear said petition and to establish such internal improvement district.

(2) Such petition shall state that it is the purpose of the petitioners to organize an internal improvement district; shall contain a general description of the boundaries of such proposed internal improvement district, the means proposed to supply storage water for the irrigation of lands embraced therein or of preventing floods, regulating streams and channels, regulating the flow of streams, and protecting public and private property from inundation or the means of supplying storage water and flood protection to the lands proposed to be included within said internal improvement district as necessary, and the name proposed for such internal improvement district; and shall name a committee of five of the petitioners to present such petition to the district court praying that the district court define and establish the boundaries of said proposed internal improvement district and submit the question of the final organization of the same to the vote of the qualified electors of said district.

(3) The petition shall be signed by a majority of the owners of the land within the limits of the territory proposed to be organized into such district, who shall have all the

qualifications of electors provided for under section 37-44-105. The petition shall also be accompanied by a good and sufficient bond to be approved by the clerk of said district court, in an amount to be fixed by the court, conditioned for the payment of all costs incurred in such proceeding in case such organization shall not be effected, but in case such district is effected, then such expenses incurred in the organization thereof shall be paid by said district.

(4) In the event the proposed district intends to acquire or maintain any such drainage system, the said petition shall also set forth:

- (a) In general terms, a description of the area proposed to be drained or benefited;
- (b) A general description of the means to be adopted to effect such drainage;
- (c) A statement of the proposed means of financing the construction of the necessary drainage works;
- (d) An estimate of the probable annual expense of maintaining such drainage system;
- (e) A general statement of the reasons why the construction and the maintenance of such drainage system would inure to the benefit of the irrigated lands included within the proposed district.

(5) Such petitions shall be published for at least four weeks before the time at which the same is to be presented in some newspaper of general circulation and published in each county into which any part of the proposed district extends, together with a notice signed by the committee of said petitioners selected by the petition for that purpose, giving the time and place of the presentation of the same to said district court.

**Source:** L. 23: p. 484, § 1. L. 35: p. 948, § 1. CSA: C. 138, § 17. CRS 53: § 149-5-1. C.R.S. 1963: § 150-4-1.

**37-44-103. Powers of district.** (1) Any district organized under this article has the power, whenever necessary or expedient to promote the object of the district:

- (a) To provide for the drainage of lands whether lying within or without the boundaries of such district;
- (b) To acquire by condemnation or otherwise such lands as are necessary for the construction, operation, and maintenance of such ditches, canals, drains, or other works as are required for the drainage of such lands;
- (c) To accept grants or loans of money from the federal government, or any department or agency thereof, for the construction of such drainage ditches, canals, drains, or other works, and to enter into such contracts for the maintenance of such drainage system as are necessary to be entered into in order to procure any such grant of money or other federal aid in the construction of such drainage system;
- (d) In general, to contract with the federal government, or any department or agency thereof, in such manner as shall be found necessary or advisable in order to procure federal aid in any form in the construction of any such drainage system;
- (e) To provide means for the maintenance of and to maintain and operate such drainage system when so constructed or acquired.

**Source:** L. 23: p. 484, § 1. L. 35: p. 948, § 1. CSA: C. 138, § 17. CRS 53: § 149-5-1. C.R.S. 1963: § 150-4-1.

**37-44-104. Presentation and allowance of petitions.** (1) (a) When such petition is presented and it appears that the notice of presentation of said petition has been given, as required by section 37-44-102, and that said petition has been signed by the requisite number of petitioners, the district court in which said petition is presented shall proceed to define the boundaries of such proposed district, from the petition and from such application for the exclusion of lands from and inclusions of lands therein as may be made in accordance with the provisions of this article.

(b) Any owner of land included in the proposed district who is not a signer of said petition may file with said court, on or before the day fixed by said notice for the presentation of said petition, a protest against the inclusion of lands so owned by him in the



proposed district and petition for its exclusion. Said protest and petition shall set out the facts and conditions by reason of which such owner seeks to have his lands excluded from said proposed district. As many different owners as desire to do so may join in the same petition.

(c) Owners of lands not included in said proposed district, in like manner, may petition for the inclusion of their lands therein.

(2) On the day fixed for such hearing, the court shall proceed to examine the petition for the formation of said district and shall determine whether the same is in proper form and signed by the requisite number of petitioners. Certificates from several county assessors as to the ownership of lands in said proposed district, if the same appear upon the last assessment rolls of their respective counties, shall be prima facie evidence of the ownership of the lands therein mentioned; but strict proof of such ownership may be required by the court in regard to any lands, the ownership of which is called in question by any interested parties.

(3) When it appears to the court that the required notice of such hearing has been given, and that such petition is in proper form and signed by the required number of landowners, the court shall proceed to hear the same and all applications for inclusion and exclusion of lands theretofore filed with the clerk of said court. In such hearing, the court may consider:

(a) The physical condition and location of any lands for the inclusion or exclusion of which a petition has been filed;

(b) Its adaptability for agricultural use; and the sufficiency of any water supply already available for its irrigation and the need for any additional supply;

(c) The location and condition of said land with reference to other lands to be included in the proposed district;

(d) The cost and practicability of applying the proposed water supply to the irrigation of said lands, and the necessity and practicability of flood protection for said lands, if the same is sought to be included for flood protection purposes;

(e) The necessity and practicability of draining lands, either within or without the boundaries of said district;

(f) In general, any other matters which will enable the court to determine the question of whether such land should be included or excluded from said district. Lands which will not be benefited by the works of any such proposed district or lands already provided with adequate water supply for irrigation, where it is proposed to irrigate such lands, in whole or in part, from the works of such proposed district, or lands already provided with drainage, where it is proposed to drain such lands, in whole or in part, by the works to be constructed by such proposed district, shall not be included in said district or assessed for district purposes, except upon the written consent of the owner thereof, including all encumbrances, duly acknowledged in the manner provided by law for the acknowledgment of deeds.

(4) If, in the judgment of the court, the matters to be heard in connection with said petition can best be determined by reference of such matters, or any thereof to a magistrate, reference thereof may be ordered by said court and such order of reference shall expressly state what question shall be heard by said magistrate, when and where such hearing will be held, and the date on which the magistrate's report and findings shall be received and considered by the court. Said court may adjourn such hearing from time to time. If the court finds and determines that the organization of the proposed district is not in the best interests of the lands proposed to be included therein, the petition shall be denied and the proceedings dismissed. If the court finds that the formation of the district is meritorious and in the best interests of the lands to be included therein, the court by final order duly entered, shall define and establish the boundaries of such proposed district. When the boundaries of any proposed district have been examined and defined, the district court shall forthwith make an order allowing the prayer of said petitions defining and establishing the boundaries and designating the name of such proposed district.

(5) Thereupon said district court by order duly entered in said court shall call an election of all qualified electors of said district to be held for the purpose of determining whether such district shall be organized under provisions of this article and by such order shall submit the names of two or more persons from each of the five divisions of said district, who may be voted for as directors therein. For the purposes of said election the

court shall divide said district into five divisions as nearly equal in size as may be practicable and shall provide that a qualified elector of each of said five divisions shall be elected as a member of the board of directors of said district by the qualified electors of the whole district. Each of said divisions shall constitute an election precinct and three qualified electors shall be appointed in each of said precincts, who shall act as judges to conduct the election in said precinct, one of whom shall act as clerk of said election.

**Source:** L. 23: p. 485, § 2. L. 35: p. 951, § 2. CSA: C. 138, § 18. CRS 53: § 149-5-2. C.R.S. 1963: § 150-4-2. L. 91: (4) amended, p. 365, § 41, effective April 9.

**37-44-105. Notice of election - voters - ballots.** (1) The clerk of the district court of the county where said petition was presented shall thereupon cause a notice embodying said orders in substance, signed by the clerk of the said district court, to be issued, given, and published, giving notice of said election and the time and place thereof. The notice shall be published once a week for at least three weeks prior to such election in a newspaper of general circulation in each county into which any portion of such proposed district extends. In addition to the notice by publication, the clerk of the district court shall mail, postage prepaid, a printed copy of said notice of election to each of the owners of the lands proposed to be included in said district. Such notices shall be addressed to the last-known post office address of each of said owners as the same may appear from the certificates of the several county assessors theretofore certified to the court as provided in section 37-44-104, or which are otherwise made known to the clerk of said court, and said notices shall be mailed not less than two weeks prior to the election. The clerk shall certify and file, in the records of the proceeding, a list of the persons, and their addresses, to whom notices have been mailed.

(2) At all elections held under the provisions of this article, all persons are entitled to vote who are resident freeholders of agricultural lands within the said district or who are the owners of land to the extent of forty acres or more within said district and reside in the state of Colorado, and who are qualified electors under the general laws of the state of Colorado, and who have paid property taxes upon property located within said district during the three hundred and sixty-five days immediately preceding any such election.

(3) Electors not residing within the district are entitled to vote only within the precinct of such district wherein the majority of their lands are located. Any person entitled to vote shall also be eligible to election as director in and for the precinct of such district in which the major portion of his lands are located.

(4) The ballot to be used and cast at such election for the formation of such district shall be substantially as follows: "Internal Improvement District - Yes" or "Internal Improvement District - No", or words equivalent thereto, and shall also contain the names of persons to be voted for as members of the board of directors of said district and shall contain a sufficient number of blank spaces to permit each elector to write in the names of any persons for whom he may wish to vote as members of the board of directors. Each elector may vote for five directors, one for each precinct, and shall indicate his choice by placing a marginal cross upon the ballot opposite any name voted upon or by writing in the name of the person for whom he desires to vote, and shall also indicate his vote upon any question submitted by placing a marginal cross upon the ballot either for or against such question.

**Source:** L. 23: p. 489, § 3. CSA: C. 138, § 19. CRS 53: § 149-5-3. C.R.S. 1963: § 150-4-3.

**37-44-106. Canvass of votes.** The district judge, within ten days after the returns of said election have been filed with the clerk of said district court by the judges of election in the various precincts of said district, shall proceed to canvass the returns of the votes cast thereat and if it is proven to said court that at least a majority of the legal electors in said district who are also the owners of more than one-half the total acreage included in said district have voted "Internal Improvement - Yes", the said judge, by an order duly entered in said court, shall declare such territory duly organized into an internal improvement



district under the name and style theretofore designated and in said order declare the persons receiving respectively the highest number of votes in each election precinct for such several offices to be duly elected to such office. Said board shall cause a copy of such order, including a plat of said district, duly certified by the clerk of said district court, to be filed for record in the office of the county clerk and recorder of each county into which any portion of the lands situated in said internal improvement district extends and, after the date of filing such order, no portion of such district shall be included in or form a part of any other internal improvement district. From and after the date of such filing, the organization of such district shall be complete, and the officers thereof shall immediately enter upon the duties of their respective offices, upon qualifying in accordance with law, and shall hold such offices respectively until their successors are elected and qualified.

**Source:** L. 23: p. 491, § 4. CSA: C. 138, § 20. CRS 53: § 149-5-4. C.R.S. 1963: § 150-4-4.

**37-44-107. Plans for improvements.** Upon qualification, the board of directors shall prepare, or cause to be prepared, a plan for the improvements for which the district was created. Such plan shall include such maps, profiles, plans, other data and descriptions as may be necessary to give the proper location and character of the work contemplated, and the specific property to be benefited thereby, that portion to be furnished with a supply of reservoir water for the irrigation thereof or to supplement inadequate water rights already appurtenant thereto, or used for the irrigation thereof, or any lands lying either within or without the boundaries of the district, the drainage of which may be deemed directly or indirectly beneficial to the lands within the district, and that portion of said district requiring flood protection; however, no system of drainage or irrigation already existing in said internal improvement district, or any drainage district, or irrigation district, or any water rights appertaining to or provided for any lands in said district after May 9, 1923, and not supplied by works constructed by such internal improvement district, shall be affected in any way by the passage of this article or the organization of said district.

**Source:** L. 23: p. 492, § 5. L. 35: p. 955, § 3. CSA: C. 138, § 21. CRS 53: § 149-5-5. C.R.S. 1963: § 150-4-5.

**37-44-108. Directors - powers and duties.** (1) The directors, having duly qualified, shall organize as a board, elect a president from their number, and appoint a secretary. The board has power, and it is its duty, to adopt a seal, manage and conduct the affairs and business of the district, make and execute all necessary contracts, employ such agents, attorneys, officers, and employees as may be required, and prescribe their duties, and generally perform all such acts as shall be necessary to fully carry out the purposes of this article. The board of directors has power to construct, acquire, purchase, or condemn any drainage canals, reservoir sites, and such inlet and outlet works as may be necessary, or to acquire, by condemnation or otherwise, the right to enlarge any reservoir already constructed or partly constructed and to enlarge the inlet and outlet works thereof, or to purchase or acquire, by proceedings in eminent domain or otherwise, any reservoir, drainage system, or irrigation system already constructed or partially constructed and to enlarge and complete the same adequate to the needs of the district.

(2) No contract or award or judgment in eminent domain involving a consideration exceeding twenty-five thousand dollars shall be binding until such contract, award, or judgment has been authorized, ratified, or the payment thereof approved at an election in the same manner as is provided for the issue of bonds, and the necessity of submitting such matters to the approval of the electors shall not be avoided by entering into more than one contract with considerations of less than twenty-five thousand dollars where the whole transaction actually involved more than that amount.

(3) The board also has power to promulgate rules regulating the use of the water owned and controlled by said district, and all water owned by said district shall be apportioned and distributed for irrigation to each landowner in proportion to the benefits to said land as

determined by the assessments levied against said land for irrigation purposes as provided in this article.

(4) The board of directors has the further power to lease or rent the use of water or to contract for the delivery thereof to settlers thereon or occupants of the public domain; except that, in such case, the board of directors has the further power to make a contract on behalf of the district with such settlers or occupants to the effect that any such settler or occupant, upon receiving full title to his land and upon the payment of his proportional share of the bond assessment and maintenance charges as fixed and determined by the board of directors of said district, shall include his land within said district, and such land upon such inclusion shall be entitled to all the rights and privileges of other lands of said district and subject to all of the provisions of this article. Before the execution of such contract, the board of directors shall cause a notice of such contract to be given for three successive weeks in a newspaper of general circulation in the county where the office of the district is required to be located, and a hearing upon said contract and all objections thereto shall be had as provided in this article.

(5) If upon said hearing the board of directors deems it for the best interest of the district not to execute said contract, the petition shall be rejected, but, if the board deems it for the best interest of the district that the contract be executed, the board shall execute said contract, and, in such case, the contract shall be valid and binding upon all parties thereto. When such settler or occupant has complied with said contract and obtained title to his land, upon proof of such compliance and obtaining of title and without any further notice or hearing of the matter, the board shall enter an order for the inclusion of said lands as provided in this article. If any settler or occupant fails or refuses to perform said contract, the board of directors, if it so elects, may rescind the contract and declare a forfeiture of any payments theretofore made, in which event said land shall no longer be entitled to any of the benefits to be obtained under said contract and shall not become a part of the district.

(6) The board of directors further has full power, in order to protect life and property within the district, to devise, prepare, execute, maintain, and operate any and all works and improvements provided for by the plan adopted and, to that end, may employ and secure men and equipment under the general supervision of the engineer of the district or, in its discretion, may let contracts for such work either in the whole or in parts. In order to protect life and property, and in order to drain, protect, or relieve land, which subject to overflow or washing or which is menaced or threatened by the normal flow, flood, surplus, or overflow of water of any natural watercourse, stream, canal, or wash, whether perennial, intermittent, or flood, and in order to effect the protection of the land and other property in the district, the board of directors is empowered to clean out, straighten, widen, alter, deepen, or change the course or terminus of any ditch, drain, sewer, reservoir, watercourse, pond, lake, creek, or natural stream, in or out of said district, necessary for the proper protection of the lands in said district from overflow, washing, or drainage by reason thereof.

**Source:** L. 23: p. 492, § 6. L. 35: p. 955, § 4. CSA: C. 138, § 22. CRS 53: § 149-5-6. C.R.S. 1963: § 150-4-6.

**Cross references:** For eminent domain proceedings, see articles 1 to 7 of title 38.

**37-44-109. Meetings of board - records.** The board of directors shall hold a regular quarterly meeting in its office on the first Tuesday after the first Monday in January, April, July, and October and such special meetings as may be required for the proper transaction of business. All special meetings shall be called by the president of the board or any two directors. All meetings of the board shall be public, and three members shall constitute a quorum for the transaction of business, and, on all occasions requiring a vote, there shall be a concurrence of at least two members of said board. All special meetings of the board shall be held at locations which are within the boundaries of the district or which are within the boundaries of any county in which the district is located, in whole or in part, or in any county so long as the meeting location does not exceed twenty miles from the district boundaries. The provisions of this section governing the location of meetings may be



waived only if the proposed change of location of a meeting of the board appears on the agenda of a regular or special meeting of the board and if a resolution is adopted by the board stating the reason for which a meeting of the board is to be held in a location other than under the provisions of this section and further stating the date, time, and place of such meeting. All records of the board must be kept open to any elector during business hours. The board and its agents and employees have the right to enter upon any land in the district, to make surveys, and to construct such works as may be necessary for the proper operation of the district. The board also has the right to acquire all lands, water rights, franchises, and other property necessary to the construction, use, maintenance, repairs, and improvements of its canals, ditches, reservoirs, and works and also has the right by purchase or condemnation to acquire rights-of-way for the construction or enlargement of any of its ditches, canals, or reservoirs or lands for reservoir sites.

**Source:** L. 23: p. 495, § 7. CSA: C. 138, § 23. CRS 53: § 149-5-7. C.R.S. 1963: § 150-4-7. L. 90: Entire section amended, p. 1504, § 18, effective July 1.

**37-44-110. Title - tax exemption.** The title to all property acquired under the provisions of this article, immediately and by operation of law, shall vest in such internal improvement district in its corporate name, and shall be held by such district in trust and is hereby dedicated and set apart for the uses and purposes set forth in this article, and shall be exempt from all taxation, and said board is hereby empowered to hold, use, acquire, manage, occupy, and possess said property.

**Source:** L. 23: p. 496, § 8. CSA: C. 138, § 24. CRS 53: § 149-5-8. C.R.S. 1963: § 150-4-8.

**37-44-111. Conveyances - power to sue.** The board is hereby empowered to take conveyances or assurances for all property acquired by it under the provisions of this article and, in the name of such internal improvement district to and for the purposes expressed in this article, to institute and maintain any action or proceeding necessary or proper in order to fully carry out the provisions of this article or to enforce, maintain, and protect all rights, privileges, and immunities created by this article or acquired in pursuance thereof. In all courts, actions, or proceedings, the board may sue, appear, and defend in person or by attorneys and in the name of such internal improvement district. Judicial notice shall be taken in all actions and judicial proceedings in any court of this state of the organization and existence of any internal improvement district of this state, from and after the filing for record in the office of the county clerk and recorder of the certified copy of the order of the district court creating the same, and a certified copy of said order shall be prima facie evidence in all actions and proceedings in any court of this state of the regularity and legal sufficiency of all acts, matters, and proceedings therein recited.

**Source:** L. 23: p. 496, § 9. CSA: C. 138, § 25. CRS 53: § 149-5-9. C.R.S. 1963: § 150-4-9.

**37-44-112. Bonds.** (1) For the purpose of constructing, purchasing, or acquiring necessary reservoir sites, reservoirs, canals, ditches, and works and acquiring the necessary property rights therefor, for the purpose of paying an amount not to exceed the first five years' interest on the bonds authorized in this article, and for the purpose of otherwise carrying out the provisions of this article, the board of directors of any such internal improvement district, as soon after such district has been organized as may be practicable, shall estimate and determine the amount of money necessary to be raised for such purposes and shall forthwith call a special election, at which election there shall be submitted to the electors of such district possessing the qualifications prescribed by this article the question of whether or not the bonds of said district shall be issued in the amount so determined. A notice of such election shall be given by posting notices in three public places in each election precinct in said district for at least twenty days and also by publication of such

notice in some newspaper published in the county where the office of the board of directors is required to be kept once a week for at least three successive weeks.

(2) Such notice shall specify the time of holding the election, the amount of bonds proposed to be issued and the amount and rate of interest on such bonds proposed to be issued, and the dates when the percentage of principal or series of said bonds will become due, if serial bonds are contemplated, or the maturity date of the entire issue, as the case may be. At such election the ballots shall contain the words, "Bonds - Yes" or "Bonds - No", or words equivalent thereto, and also such appropriate words as shall enable the electors to indicate whether such bonds shall be redeemable at the option of the district at any time after their date or payable in series, and said election must be held and the result determined and declared in all respects as nearly as possible in conformity with the provisions of this article governing the election of officers, but no informality in conducting such election shall invalidate the same if the election has been otherwise fairly conducted. If a majority of the legal electors who are freeholders and taxpayers who represent a majority of the land within said district have voted "Bonds - Yes", the board of directors shall immediately cause bonds in such amount to be issued.

(3) If bonds are to be payable in series, each series shall consist of a definite percentage of the whole amount and number of said bonds. The time of maturity of the series of bonds and the percentage represented by each series shall be submitted to and approved by the electors at said election; but the last series shall mature in not more than fifty years from the date of said bonds, and the first series or percentage of the principal of said bonds shall become due not more than ten years from the date of said bonds, and the series shall be so arranged that some percentage of the principal of said bonds, never less than one percent, shall become due each year thereafter until the entire principal has been paid. If such bonds are made redeemable at the option of the district, they shall mature at a specific date not more than fifty years from their date of issue. If the optional form of bond is issued, the board of directors of the district, when funds are available for redemption purposes at any time before maturity, shall call for offerings for redemption and, out of the redemption fund provided for the payment of said bonds, shall pay any bonds presented for payment pursuant to such call to any holder thereof who offers the same for payment and redemption for the lowest amount below par, including accrued interest, to the extent of the funds available; otherwise said bonds shall be retired in the order of their issue numerically.

(4) The interest on said bonds shall be made payable semiannually on June 1 and December 1 of each year. The principal and interest shall be payable at the office of the county treasurer of the county in which the organization of the district was effected and at such other place as the board of directors may designate in such bond.

(5) Such bonds shall each be of the denomination of not less than one hundred dollars and nor more than one thousand dollars and shall be negotiable in form, executed in the name of the internal improvement district, and signed by the president and secretary, and the seal of the district shall be affixed thereto.

(6) Such bonds shall be numbered consecutively as issued and bear the date of their issue. Coupons for the interest shall be attached to each bond bearing the lithographed signatures of the president and secretary. Said bonds shall express on their faces that they are issued by the authority of this article, stating its title and date of approval. At the time of the issue of said bonds, each bond shall be registered by the county treasurer, who is ex officio treasurer of the internal improvement district, in a book to be kept by him for such purpose, and the interest thereon shall begin to run only from the date of such registry. Coupons evidencing unearned interest shall be detached and canceled. Each bond so registered shall have endorsed thereon the treasurer's certificate of such registration, and only such bonds so certified shall be valid, but such certificate shall be conclusive evidence that the bond so certified has been duly issued in full conformity with the provisions of this article.

(7) When the money provided by any previous issue of bonds has been exhausted by expenditures provided for in this article and it becomes necessary to raise additional money for such purposes, additional bonds may be issued, submitting the question by special election to the qualified voters of said district and otherwise complying with the provisions



of this article in respect to an original issue of such bonds, but the lien for assessments for the payment of interest and principal of any bond issue shall be a prior lien to that of any subsequent bond issue.

**Source:** L. 23: p. 497, § 10. CSA: C. 138, § 26. CRS 53: § 149-5-10. C.R.S. 1963: § 150-4-10.

**37-44-113. Sale of bonds.** (1) The board may sell bonds so issued from time to time in such quantities as necessary and most advantageous to raise the money for the construction of reservoirs or canals, or the purchase of reservoir sites, reservoirs, water rights and works, and otherwise to carry out the objects and purposes of this article. Before making any sale, the board at a meeting shall declare by resolution its intent to sell a specified amount of bonds and the day and hour and place of such sale and shall cause such resolution to be entered in its minutes and a notice of the sale to be published at least twenty days in a daily newspaper published in the city of Denver and in any other newspaper at its discretion. The notice shall state that sealed proposals will be received by the board at its office for the purchase of the bonds until the day and hour named in the resolution. At the time appointed the board shall open the proposals and award the purchase of the bonds to the highest responsible bidder or may reject any and all bids; but said board shall, in no event, sell any of said bonds for less than ninety-five percent of the face value thereof.

(2) The bonds and the interest thereon shall be paid by revenue derived from an annual assessment upon the real property of the district, and the real property of the district shall be and remain liable to be assessed for such payments as provided in this article.

**Source:** L. 23: p. 501, § 11. CSA: C. 138, § 27. CRS 53: § 149-5-11. C.R.S. 1963: § 150-4-11.

**37-44-114. Classification of lands.** (1) As soon as the plans for the development of storage water and flood protection have been determined and before the actual work thereon is begun or bonds voted, the board of directors shall proceed to make special assessments for benefits by classifying the lands in the district in tracts of forty acres, more or less, according to the legal or recognized subdivisions, on a graduated scale to be numbered according to the benefits to be received by the contemplated supply of storage water or flood protection. The tracts of land which will receive more than about equal benefits shall be marked one hundred, and such as are adjudged to receive less benefits shall be marked with a lesser number denoting their percentage of benefit. This classification when established shall remain as a basis for the levy of such assessments as may be needed for the lawful and proper purposes of the internal improvement district, but, in any district where a classification has once been made and the board of directors believes from experience and results that such former classification was or is not fairly adjusted on the several tracts of land according to benefits, which classification may be adjusted by new or additional assessments, the board of directors shall disregard such former classification and make a new classification in accordance with justice and right. When the classification is completed, it shall be properly tabulated or shown by a map, or both, and filed in the office of the district for inspection.

(2) The board of directors shall cause to be personally served upon all parties owning land to be affected by the proposed supply of storage or reservoir waters or flood protection or other property liable to be assessed under this article and residing in the district a written or printed notice of the time and place where they will meet to hear and consider any objections that may be made to the classification of lands on the graduated scale, which notice shall be served in case of residence in the district at least ten days before the time set for the hearing by delivering a copy thereof to the party to be served. As to all persons not served personally, they shall be given notice by publishing the same in one public newspaper in each county into which such internal improvement district may extend, which notice shall be published in such newspaper once in each week until four successive weekly publications have been made, the last publication to be on a day previous to the day

appointed for said hearing, and proof of the proper publication of said notice in the newspaper shall consist of the sworn certificate of the publisher of such newspaper, showing the publication to have been made in accordance with the provisions of this section.

(3) Such hearing may be adjourned from day to day by public announcement of the board of directors made at the hearing until all objections are heard. All persons duly notified of the first day of the meeting as provided in this section shall take cognizance of all adjournments without further notice. The affidavit of any creditable person that he has posted or served such notice as required by this section and the affidavit of publication of the publisher of such newspapers as to the publication of said notice shall be sufficient evidence of such facts.

**Source:** L. 23: p. 501, § 12. CSA: C. 138, § 28. CRS 53: § 149-5-12. C.R.S. 1963: § 150-4-12.

#### ANNOTATION

**Law reviews.** For article, "Legal Classification of Special District Corporate Forms in Colorado", see 45 Den. L.J. 347 (1968).

**37-44-115. Objections to classifications.** At the time of said meeting, the board of directors shall hear any objections made by any interested person, and, if satisfied that any injustice has been done in the classification of the tracts of land, it shall correct the same in accordance with what is right, but, if not so satisfied, it shall leave the classification as first made and enter an order to that effect. Any person appearing and urging objections who is not satisfied with the decision of the board of directors may appeal its decision to the district court having original jurisdiction in the formation of said district within ten days after the decision of the board of directors was rendered by filing with the clerk of said court a statement in writing of his objections to the assessment made against him together with a bond with security conditioned to pay such taxes as may be finally levied upon the land in question and the costs occasioned by the appeal if the board of directors is sustained by said court.

**Source:** L. 23: p. 503, § 13. CSA: C. 138, § 29. CRS 53: § 149-5-13. C.R.S. 1963: § 150-4-13.

**37-44-116. Conduct of appeals.** Appeals taken to the district court under the provisions of section 37-44-115 may be heard at any term thereof at such time as may be fixed by the court, and the cost of such appeal at the discretion of the court may be divided between the internal improvement district and the owner of the land who appeals the classification of the board of directors or assessed against either party. Either party may demand a jury to which shall be submitted all questions of fact as in other civil cases, and said cause shall be heard and determined as other civil causes. The classification as determined and fixed by the court shall be entered in the records of the district in which the lands are situate and thereafter shall be the basis upon which assessments for benefits are made.

**Source:** L. 23: p. 504, § 14. CSA: C. 138, § 30. CRS 53: § 149-5-14. C.R.S. 1963: § 150-4-14.

**37-44-117. Appeal not to delay.** The taking of an appeal by any person as provided in section 37-44-115 shall not operate to delay the collection of any assessment from which no appeal has been taken or to delay the progress of the work or the issuing of any bonds.

**Source:** L. 23: p. 505, § 15. CSA: C. 138, § 31. CRS 53: § 149-5-15. C.R.S. 1963: § 150-4-15.



**37-44-118. Modification of classification.** The board of directors shall modify such classification so that the same conforms to the changes made therein in the hearings before said board, and the secretary of the district shall certify and file said classification of property of the district so modified, properly tabulated or shown by a map or both, with the county clerk and recorder of each county into which said district extends. If on appeal said classification is modified, the board shall then modify the classification, and the secretary of the district shall certify and file the same with the clerk of each county in which the district is located.

**Source:** L. 23: p. 505, § 16. CSA: C. 138, § 32. CRS 53: § 149-5-16. C.R.S. 1963: § 150-4-16.

**37-44-119. Apportionment of levy.** (1) On or before July 1 in each year, the board of directors shall determine the amount of money required to meet the current expenses of the district for the coming year, including the cost of construction, maintenance, including maintenance of drainage works, operating expenses, and any deficiencies in the payment of expenses already incurred, and bond interest unpaid, and also the amount of bonded indebtedness and the principal or interest which will fall due during the coming year and, by resolution, shall order such an amount of money to be raised by special assessment upon the lands of the district as may be necessary to raise the sum of money so determined, and such amount shall be apportioned among the several tracts in the name of the owner, when known, according to the acreage of each at its figure or classification on the graduated scale so that each tract may bear its equal burden proportionate to benefits.

(2) The secretary of the district shall make out a special assessment roll, hereinafter designated "assessment list", setting down in opposite columns the owners, names when known, and when unknown stating unknown, a description of the land, and the number denoting the classification of the assessment, which is current expenses and which is bonded indebtedness and interest thereon in separate columns.

**Source:** L. 35: p. 959, § 5. CSA: C. 138, § 33. CRS 53: § 149-5-17. C.R.S. 1963: § 154-4-17.

**37-44-120. Assessment.** The assessment list shall be completed on or before July 15, and, on the first Tuesday in August in each year and from day to day thereafter, Sundays excepted, the board of directors shall sit to hear complaints and to correct errors in such assessments until all complaints filed with the secretary are presented to the board of directors and have had an opportunity to be heard and have been determined. The classification of any lands on the graduated scale shall not be changed or determined at said hearings.

**Source:** L. 23: p. 506, § 18. CSA: C. 138, § 34. CRS 53: § 149-5-18. C.R.S. 1963: § 150-4-18.

**37-44-121. Assessment list - collection.** On or before September 1 in each year, the secretary shall transmit to the county assessor of each county in which said district is located, a certified copy of so much of said assessment book as relates to land within said county together with a certified copy of the order of the board of directors, and the county assessor shall attach his warrant for the collection of said amounts and deliver said certified copy of the warrant to the county treasurer of his county at the same time that the tax roll of the county is delivered, and the county treasurer shall collect said assessments as taxes are collected as a part of the tax roll of that year.

**Source:** L. 23: p. 506, § 19. CSA: C. 138, § 35. CRS 53: § 149-5-19. C.R.S. 1963: § 150-4-19.

**Cross references:** For collection of taxes, see article 10 of title 39.

**37-44-122. Assessment book.** The secretary of the board of directors shall deliver the assessment book duly certified together with a copy of the order of the board of directors, levying said assessment, to the district treasurer of said internal improvement district.

**Source:** L. 23: p. 507, § 20. CSA: C. 138, § 36. CRS 53: § 149-5-20. C.R.S. 1963: § 150-4-20.

**37-44-123. Assessments affect land benefited.** All districts organized under authority of this article shall be special or local improvement districts. The assessments levied by, for, or on behalf of any such district shall be local or special improvement assessments. Such assessments shall be determined and levied according to the benefits to accrue to each tract of land included in any such district and not otherwise. No tract of land so included shall be burdened by cumulative levies or otherwise for the payment of delinquencies or defaults in the payment of assessments levied against other lands in such district.

**Source:** L. 23: p. 507, § 21. CSA: C. 138, § 37. CRS 53: § 149-5-21. C.R.S. 1963: § 150-4-21.

**37-44-124. County treasurer ex officio district treasurer.** (1) The county treasurer of the county in which is located the office of any internal improvement district shall be and is hereby constituted ex officio district treasurer of said district, and said county treasurer shall be liable upon his official bond and to indictment and criminal prosecution for malfeasance, misfeasance, or failure to perform any duty prescribed in this article as county treasurer or district treasurer, as is provided by law in other cases as county treasurer. Said county treasurer shall collect, receive, and receipt for all moneys belonging to said district. It is the duty of the county treasurer of each county in which any internal improvement district is located, in whole or in part, to collect and receipt for all assessments levied in the same manner and at the same time and on the same receipt as is required in the collection of taxes upon real estate for county purposes. The county treasurer of each county comprising a portion only of such internal improvement district, excepting the county treasurer of the county in which the office of said district is located, on the first Monday of every month shall remit to the district treasurer all moneys theretofore collected or received by him on account of said district. Every county treasurer shall keep a bond fund account and a general fund account. The bond fund account shall consist of all moneys received on account of interest and principal of bonds issued by said district, and said accounts for interest and principal shall be kept separate. The general fund shall consist of all other moneys received by the collection of assessments or otherwise.

(2) The district treasurer shall pay out of said bond fund when due the interest and principal of the bonds of said district at the time and place specified in said bonds and shall pay out of the said general funds only upon the order of the board of directors, signed by the president and countersigned by the secretary of the district. The district treasurer on the fifteenth day of each month shall report to the secretary of the district the amount of money in his hands to the credit of the respective funds showing the amount of warrants and bonds paid during the previous month and the amount of warrants registered, if any. All such district assessments collected and paid to the county treasurers shall be receipted for by said treasurers in their official capacity, and they shall be responsible for the safekeeping and disbursement and payment thereof the same as for other moneys collected by them as treasurers. Each county shall receive for the collection of such taxes such amount as the board of directors may allow, to be not less than twenty-five dollars nor more than one hundred dollars per year, but the board of directors may allow such an additional amount to the county in which the office of the district is located, such additional compensation, as it may determine in any event, not to exceed the sum of five hundred dollars per year.

**Source:** L. 23: p. 507, § 22. CSA: C. 138, § 38. CRS 53: § 149-5-22. C.R.S. 1963: § 150-4-22.



**37-44-125. Where office of district kept.** The office of the district shall be kept at such place as the board of directors may designate in the county where the petition for the formation of said district was originally filed.

**Source:** L. 23: p. 509, § 23. CSA: C. 138, § 39. CRS 53: § 149-5-23. C.R.S. 1963: § 150-4-23.

**37-44-126. Election of officers - oath - bond.** (1) The regular election of the district for the purpose of electing a board of directors shall be held on the first Monday after the first Tuesday in December of each year, at which time one director shall be elected for a term of five years; except that, at the first election held to choose the first board of directors after the organization of any internal improvement district has been effected, the person having the highest number of votes shall continue in office for the full term of five years, the next highest four years, the next highest three years, the next highest two years, and the next highest one year. If two or more persons in the same precinct have the same number of votes, their term shall be determined by lot under the direction of the judge of the district court having original jurisdiction of the formation of the said district. The person receiving the highest number of votes for any office to be filled is elected thereto.

(2) Within ten days after receiving their certificates of election provided for in section 37-44-135, said officers shall take and subscribe the official oath and file the same in the office of the county clerk and recorder wherein the organization was effected and, January 1 following, shall assume the duties of their respective offices. Each member of the board of directors shall execute an official bond in the sum of five thousand dollars, which bond shall be approved by the judge of the district court of the county wherein such organization was effected and shall be filed in the office of the county clerk and recorder thereof. All official bonds shall be in the form prescribed by law for official bonds for county commissioners; except that the obligee named in said bonds shall be the internal improvement district and shall be filed with the county clerk and recorder at the same time as the filing of the oath.

**Source:** L. 23: p. 509, § 24. CSA: C. 138, § 40. CRS 53: § 149-5-24. C.R.S. 1963: § 150-4-24.

**37-44-127. Notices of election of officers.** Fifteen days prior to any election held under the provisions of this article and after the organization of an internal improvement district, the secretary shall cause notices specifying the polling place of each precinct to be posted in three public places in each precinct, giving the hour and place of holding the election, and at the same time shall post a general election notice of the election in the office of said internal improvement district.

**Source:** L. 23: p. 510, § 25. CSA: C. 138, § 41. CRS 53: § 149-5-25. C.R.S. 1963: § 150-4-25.

**37-44-128. Judges and clerk of election.** Prior to the time for posting said notices, the board of directors shall appoint three judges of election in each precinct, each of whom shall be a landowner within said precinct, and one of whom shall act as clerk of the election.

**Source:** L. 23: p. 511, § 26. CSA: C. 138, § 42. CRS 53: § 149-5-26. C.R.S. 1963: § 150-4-26.

**37-44-129. Voters to appoint judges if necessary.** If the board of directors fails to appoint judges or the appointees fail to attend at the hour designated for opening the polls on the morning of election, the voters of the precinct present at that hour may appoint one or more judges to supply the places of those absent.

**Source:** L. 23: p. 511, § 27. CSA: C. 138, § 43. CRS 53: § 149-5-27. C.R.S. 1963: § 150-4-27.

**37-44-130. Administration of oath.** Any judge or clerk of election may administer and certify oaths required to be administered during the progress of an election. Before opening the polls each judge and clerk shall take and subscribe an oath to faithfully perform the duties imposed upon him by law. Any qualified elector of the precinct may administer and certify said oath.

**Source:** L. 23: p. 511, § 28. CSA: C. 138, § 44. CRS 53: § 149-5-28. C.R.S. 1963: § 150-4-28.

**37-44-131. Hours polls open.** The polls shall be open at 8 a.m. and be kept open until 6 p.m. of the day of election.

**Source:** L. 23: p. 511, § 29. CSA: C. 138, § 45. CRS 53: § 149-5-29. C.R.S. 1963: § 150-4-29.

**37-44-132. Count of ballots - certificate of returns.** After closing the polls the judges of election shall forthwith proceed to count the ballots and make returns of the results of the election. It is the duty of the clerk forthwith to deliver the returns duly certified to the board of directors of the internal improvement district, together with the ballots cast.

**Source:** L. 23: p. 511, § 30. CSA: C. 138, § 46. CRS 53: § 149-5-30. C.R.S. 1963: § 150-4-30.

**37-44-133. Canvass of returns - result.** The board of directors shall meet at the office of the internal improvement district on the first Monday after an election and canvass the returns. If at the time of the meeting the returns have been received from all the precincts, the board of directors shall then proceed to canvass the returns. If returns have not been received from all precincts, the canvass shall be postponed from day to day until the returns have all been received or until six postponements have been had. The canvass shall be made in public by opening the returns and counting the votes of the district for each person voted for and for or against each question submitted at such election and declaring the results thereof. The board shall declare elected the person receiving the highest number of votes for each office and shall declare the result of the vote on any question submitted to the voters.

**Source:** L. 23: p. 511, § 31. CSA: C. 138, § 47. CRS 53: § 149-5-31. C.R.S. 1963: § 150-4-31.

**37-44-134. Procedure in case of tie.** In the event that at any regular or special election two or more persons receive the same number of votes and one is elected thereby, the election shall be determined by lot under direction of the county judge of the county in which the office of the internal improvement district is kept.

**Source:** L. 23: p. 512, § 32. CSA: C. 138, § 48. CRS 53: § 149-5-32. C.R.S. 1963: § 150-4-32.

**37-44-135. Certificate of election.** The secretary shall forthwith deliver to each person elected a certificate of election, signed by the secretary and authenticated with the seal of the internal improvement district.

**Source:** L. 23: p. 512, § 33. CSA: C. 138, § 49. CRS 53: § 149-5-33. C.R.S. 1963: § 150-4-33.

**37-44-136. Filling vacancy.** In case of vacancy in the board of directors, by death, removal, or inability from any cause to properly discharge the duties of a director, the board



of county commissioners of the county where the office of said district is located shall appoint a director who shall hold his office until the next regular election in said district and until his successor is elected and qualified.

**Source:** L. 23: p. 512, § 34. CSA: C. 138, § 50. CRS 53: § 149-5-34. C.R.S. 1963: § 150-4-34.

**37-44-137. Collection of assessments.** The revenue laws of this state for the assessment and collection of taxes on real estate for county purposes, except as modified by this article, shall be effective for the purposes of this article, including the enforcement of penalties and forfeitures for delinquent taxes.

**Source:** L. 23: p. 513, § 35. CSA: C. 138, § 51. CRS 53: § 149-5-35. C.R.S. 1963: § 150-4-35.

**Cross references:** For the assessment and collection of property taxes, see articles 1 to 14 of title 39.

**37-44-138. Construction contract - bond.** After adopting a plan for the construction of reservoirs and works for the protection of life and property and to furnish water for the irrigation of the territory embraced within the boundaries of the internal improvement district, or to drain lands within or without the boundaries of said district, the board of directors shall give notice, by publication thereof, not less than twenty days in a newspaper published in the county in which the office of the internal improvement district is located, provided a newspaper is published therein, and in such other newspapers as it may deem advisable, calling for bids for the construction of said works or any portion thereof. If less than the whole work is advertised, then the portion so advertised must be particularly described in such notice. The notice shall set forth that plans and specifications may be seen at the office of the board and that the board shall receive sealed proposals therefor and that the contract will be let to the lowest responsible bidder, stating the time and place for opening the proposals, which bids at said time and place shall be opened in public. As soon as convenient thereafter, the board shall let said work, either in portions or as a whole, to the lowest responsible bidder, or it may reject any or all bids and readvertise for proposals, or may proceed to construct the work under its own superintendence. Contracts for the purchase of materials shall be awarded to the lowest responsible bidder. The person to whom a contract may be awarded shall enter into a bond, with good and sufficient sureties, to be approved by the board, payable to said district for its use, for not less than ten percent of the amount of said contract, conditioned for the faithful performance of said contract. The work shall be done under the direction and to the satisfaction of the engineer in charge and shall be approved by the board.

**Source:** L. 35: p. 960, § 6. CSA: C. 138, § 52. CRS 53: § 149-5-36. C.R.S. 1963: § 150-4-36.

**37-44-139. Claims - audit - payment.** Except with respect to claims coming within the provisions of article 10 of title 24, C.R.S., no claim shall be paid by the district treasurer until the same is allowed by the board, and only upon warrants signed by the president and countersigned by the secretary, which warrants shall state the date authorized by the board and for what purposes. If the district treasurer has not sufficient money on hand to pay such warrant when it is presented for payment, he shall endorse thereon "not paid for want of funds, this warrant draws interest from date at six percent per annum" and endorse thereon the date when so presented over his signature, and from the time of such presentation such warrant shall draw interest at the rate of six percent per annum. All claims against the district shall be verified, and the secretary of the district is authorized to administer oaths to the parties verifying said claims, the same as a notary public might do. The district treasurer shall keep a register in which he shall enter said warrants presented for payment,

showing the date and amount of such warrants, to whom payable, the date of presentation for payment, the date of payment, and the amount paid in redemption thereof, and all warrants shall be paid in their order of presentation for payment to the district treasurer. All warrants shall be drawn payable to bearer the same as for county warrants.

**Source:** L. 23: p. 514, § 37. CSA: C. 138, § 53. CRS 53: § 149-5-37. C.R.S. 1963: § 150-4-37. L. 71: p. 1217, § 18. L. 75: Entire section amended, p. 223, § 80, effective July 16. L. 76: Entire section amended, p. 311, § 59, effective May 20.

**37-44-140. Expenses of organization.** For the purpose of defraying the expenses of the organization of the district, and the repair, operation, management, and improvement of all reservoirs, inlet works, outlet works, drainage works, canals, and works for the protection of life and property from floods, washing, and inundation, including salaries of officers and employees, the board may provide, in whole or in part, for the payment of such expenditures by levy of assessments therefor as provided in section 37-44-119, if the money raised by the sale of bonds issued is insufficient. In case bonds are unavailable for the completion of the plans of works adopted, the board of directors may provide for the completion of said plans by levy of an assessment therefor in the same manner in which levy of assessments is made for other purposes.

**Source:** L. 23: p. 515, § 38. L. 35: p. 961, § 7. CSA: C. 138, § 54. CRS 53: § 149-5-38. C.R.S. 1963: § 150-4-38.

**37-44-141. Works may cross other lands.** The board of directors has the dominant power to construct said works across any stream of water, watercourses, street, avenue, highway, railway, canal, ditch, or flume which intersects or crosses the area covered by such works or reservoir site, and, if said board and such railroad company or the owners and controllers of said property, thing, or franchise so to be crossed cannot agree upon the amount to be paid therefor, or the points or the manner of said crossing, the same shall be ascertained and determined in all respects as is provided in respect to the taking of land for public uses. The right-of-way is hereby given, dedicated, and set apart to locate, construct, and maintain said works or reservoirs over, through, or upon any of the lands which are the property of the state.

**Source:** L. 23: p. 515, § 39. CSA: C. 138, § 55. CRS 53: § 149-5-39. C.R.S. 1963: § 150-4-39.

**37-44-142. Officers' compensation.** The directors shall receive a salary at the rate of four dollars per day while attending meetings and for each day necessarily spent in attending to the business of the district and their actual and necessary expenses while engaged in official business. The salary of the secretary shall not exceed fifteen hundred dollars per annum. No director or any officer named in this article shall in any manner be interested, directly or indirectly, in any contract awarded or to be awarded by the board or in the profits to be derived therefrom, nor shall he or she receive any bonds, gratuity, or bribe; and for the violation of this provision such officer commits a class 6 felony and shall be punished as provided in section 18-1.3-401, C.R.S. He or she shall also forfeit his or her office upon conviction.

**Source:** L. 23: p. 516, § 40. CSA: C. 138, § 56. CRS 53: § 149-5-40. C.R.S. 1963: § 150-4-40. L. 77: Entire section amended, p. 885, § 69, effective July 1, 1979. L. 89: Entire section amended, p. 851, § 138, effective July 1. L. 2002: Entire section amended, p. 1554, § 338, effective October 1.

**Editor's note:** The effective date for amendments made to this section by chapter 216, L. 77, was changed from July 1, 1978, to April 1, 1979, by chapter 1, First Extraordinary Session, L. 78, and was subsequently changed to July 1, 1979, by chapter 157, § 23, L. 79. See *People v. McKenna*, 199 Colo. 452, 611 P.2d 574 (1980).



**Cross references:** For the legislative declaration contained in the 2002 act amending this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

**37-44-143. Limit of indebtedness.** The board of directors, or other officers of the district, shall have no power to incur any debt or liability, either by issuing bonds or otherwise, in excess of the express provisions of this article, and any debt or liability incurred in excess of such express provisions shall be and remain absolutely void.

**Source:** L. 23: p. 516, § 41. CSA: C. 138, § 57. CRS 53: § 149-5-41. C.R.S. 1963: § 150-4-41.

**37-44-144. Insufficient supply.** In case the volume of storage water from the reservoir or other works in any district shall not be sufficient to supply the continual wants of that portion of the district requiring reservoir water, then it is the duty of the board of directors to distribute all water available on certain or alternate days to different localities in proportion to the benefits for which the respective lands in said district have been assessed.

**Source:** L. 23: p. 516, § 42. CSA: C. 138, § 58. CRS 53: § 149-5-42. C.R.S. 1963: § 150-4-42.

**37-44-145. Judicial action on bonds.** The board of directors of an internal improvement district organized under the provisions of this article may commence special proceedings, by which the proceedings of said board and of said district providing for and authorizing the issue and sale of the bonds of the district, whether said bonds have or have not been sold or disposed of, may be judicially examined, approved, and confirmed.

**Source:** L. 23: p. 517, § 43. CSA: C. 138, § 59. CRS 53: § 149-5-43. C.R.S. 1963: § 150-4-43.

**37-44-146. Petition for confirmation.** The board of directors shall present to the district court in which the organization of the district was elected, a petition, praying, in effect, that the proceedings may be examined, approved, and confirmed by the court. The petition shall state the facts showing the proceedings had for the issue and sale of said bonds and shall state generally that the internal improvement district was duly organized and that the first board of directors was duly elected; but the petition need not state the facts showing such organization of the district or the election of said first board of directors.

**Source:** L. 23: p. 517, § 44. CSA: C. 138, § 60. CRS 53: § 149-5-44. C.R.S. 1963: § 150-4-44.

**37-44-147. Notice of hearing.** The court shall fix the time for the hearing of said petition and shall order the clerk of the court to give and publish a notice of the filing of said petition. The notice shall be given and published for three successive weeks in a newspaper published in each county into which the district may extend. The notice shall state the time and place fixed for the hearing of the petition and the prayer of the petitioners and that any person interested in the organization of said district, or sale of said bonds, on or before the day fixed for the hearing of said petition, may move to dismiss or answer said petition. The petition may be referred to and described in said notice as the petition of the board of directors of ..... internal improvement district (giving its name), praying that the proceedings for the issue of said bonds of said district may be examined, approved, and confirmed by the court.

**Source:** L. 23: p. 517, § 45. CSA: C. 138, § 61. CRS 53: § 149-5-45. C.R.S. 1963: § 150-4-45.

**37-44-148. Answer or pleading.** Any person interested in said district, or in the issue or sale of said bonds, may move to dismiss or to answer said petition. The Colorado rules of civil procedure respecting motions to dismiss and answer to a verified complaint shall be applicable to a motion to dismiss and answer said petition. The person so moving or answering said petition shall be the defendant to the special proceeding, and the board of directors shall be the plaintiff. Every material statement of the petition not specifically contradicted by the answer for the purpose of said special proceedings shall be taken as true, and each person failing to answer the petition shall be deemed to admit as true all the material statements of the petition. The rules of pleading and practice relating to appeals and appellate review as provided by law and the Colorado appellate rules which are not inconsistent with the provisions of this article are applicable to the special proceedings.

**Source:** L. 23: p. 518, § 46. CSA: C. 90, § 62. CRS 53: § 149-5-46. C.R.S. 1963: § 150-4-46.

**37-44-149. Determination.** Upon the hearing of such special proceedings, the court shall find and determine whether the notice of the filing of the petition has been duly given and published for the time and in the manner prescribed and shall have power and jurisdiction to examine and determine the legality and validity of, and approve and confirm, the proceedings for the organization of said district, from and including the petition for the organization of the internal improvement district, and all other proceedings which may affect the legality and validity of said bonds and the order of sale and the sale thereof. The court, inquiring into the regularity, legality, or correctness of said proceedings, must disregard any error, irregularity, or omission which does not affect the substantial rights of the parties to such special proceedings. The court by decree may approve and confirm such proceedings in part and disapprove and declare illegal or invalid other and subsequent parts of the proceedings. The cost of the special proceedings may be allowed and apportioned between the parties, in the discretion of the court. Appeals for review of judgments of the district court may issue as provided by law and the Colorado appellate rules as in other civil cases.

**Source:** L. 23: p. 519, § 47. CSA: C. 138, § 63. CRS 53: § 149-5-47. C.R.S. 1963: § 150-4-47.

ARTICLE 45

Water Conservancy Districts

**Editor’s note:** The “Water Conservancy Act”, enacted by House Bill No. 6 and House Bill No. 714, chapters 265 and 266, Session Laws of Colorado 1937, was originally numbered as chapter 173A in the 1938 supplement to the 1935 Colorado Statutes Annotated but was renumbered as chapter 173B in the 1941and 1942 cumulative supplements and in the 1949 replacement volume 4B to the 1935 Colorado Statutes Annotated. (See pages 48 and 49 of the disposition table for session laws 1937 located in the back of the 1953 cumulative supplement to the 1935 Colorado Statutes Annotated.)

**Cross references:** For publication of legal notices, see part 1 of article 70 of title 24.

**Law reviews:** For article, “Constitutional Law”, which discusses Tenth Circuit decisions dealing with U.S. supremacy clause and retroactive legislation under the due process clause, see 63 Den. U. L. Rev. 247 (1986).

37-45-101.	Short title.	37-45-107.	Repeal - saving clause.
37-45-102.	Legislative declaration.	37-45-108.	Jurisdiction of district courts.
37-45-103.	Definitions.	37-45-109.	Petition.
37-45-104.	Name of district - bonds.	37-45-110.	Bond of petitioners.
37-45-105.	Liberal construction.	37-45-111.	Notice of hearing on petition.
37-45-106.	Constitutional construction clause.	37-45-112.	Protests and hearings on petitions.



37-45-113.	Provisions for filing and recording decree of incorporation.	37-45-132.	Contracts - security - enforcement.
37-45-114.	Appointment of board of directors.	37-45-133.	Sinking fund.
37-45-115.	Organization of the board of directors.	37-45-134.	Additional powers.
37-45-116.	Meetings and records.	37-45-135.	Allotment of water to disabled landowner or administrator.
37-45-117.	Employment of agents.	37-45-136.	Inclusion of lands.
37-45-118.	General powers.	37-45-137.	Exclusion of lands.
37-45-119.	Power to acquire rights-of-way.	37-45-138.	Board to execute contracts - issue bonds.
37-45-120.	Subdistricts.	37-45-139.	Contracts - submission to electors.
37-45-121.	Classification of taxes and assessments - powers.	37-45-140.	Publication of call.
37-45-122.	Levy and collection under class A.	37-45-141.	Conduct of election.
37-45-123.	Levy and collection under class B.	37-45-142.	Bond elections - subsequent elections.
37-45-124.	Levy and collection under class C.	37-45-143.	Confirmation of contract proceedings.
37-45-125.	Levy and collection under class D.	37-45-144.	Correction of faulty notices.
37-45-126.	Levies cover defaults and deficiencies.	37-45-145.	Early hearings.
37-45-127.	Objections to assessments - appeal.	37-45-146.	Dissolution of districts.
37-45-128.	Officers levy and collect taxes and assessments.	37-45-147.	Election for dissolution - petition or resolution filed.
37-45-129.	Sale for delinquencies.	37-45-148.	Notice of election.
37-45-130.	Exemptions.	37-45-149.	Objections to resolution or petition.
37-45-131.	Sale of water by contract.	37-45-150.	Election procedure - ballot.
		37-45-151.	Majority vote determines question.
		37-45-152.	Winding up and dissolution - order entered.
		37-45-153.	Validation and recreation of water conservancy districts.

**37-45-101. Short title.** This article shall be known and may be cited as the "Water Conservancy Act".

**Source:** L. 37: p. 1311, § 2. CSA: C. 173B, § 16. CRS 53: § 149-6-2. L. 61: p. 843, § 1. C.R.S. 1963: § 150-5-2.

#### ANNOTATION

**Water conservancy act provides complete statutory scheme** for the creation of water conservancy districts and their operation, including the grant of authority to set rates to the board of directors. It requires no further procedures, such as seeking public utilities commission approval of these rates. *Matthews v. Tri-County Water Conservancy Dist.*, 42 Colo. App. 80, 594 P.2d 586 (1979), *aff'd*, 200 Colo. 202, 613 P.2d 889 (1980).

**Water conservancy districts are not under public utilities commission jurisdiction.** *Matthews v. Tri-County Water Conservancy Dist.*, 42 Colo. App. 80, 594 P.2d 586 (1979), *aff'd*, 200 Colo. 202, 613 P.2d 889 (1980).

**Applied** in *Purgatoire River Water Conservancy Dist. v. Kuiper*, 197 Colo. 200, 593 P.2d 333 (1979).

**37-45-102. Legislative declaration.** (1) It is hereby declared that to provide for the conservation of the water resources of the state of Colorado and for the greatest beneficial use of water within this state, the organization of water conservancy districts and the construction of works as defined in this article by such districts are a public use and will:

(a) Be essentially for the public benefit and advantage of the people of the state of Colorado;

(b) Indirectly benefit all industries of the state;

- (c) Indirectly benefit the state of Colorado in the increase of its taxable property valuation;
- (d) Directly benefit municipalities by providing adequate supplies of water for domestic use;
- (e) Directly benefit lands to be irrigated from works to be constructed;
- (f) Directly benefit lands now under irrigation by stabilizing the flow of water in streams and by increasing flow and return flow of water to such streams;
- (g) Promote the comfort, safety, and welfare of the people of the state of Colorado.
- (2) It is therefore declared to be the policy of the state of Colorado:
  - (a) To control, make use of, and apply to beneficial use all unappropriated waters originating in this state to a direct and supplemental use of such waters for domestic, manufacturing, irrigation, power, and other beneficial uses;
  - (b) To obtain from water originating in Colorado the highest duty for domestic uses and irrigation of lands in Colorado within the terms of interstate compacts;
  - (c) To cooperate with the United States under the federal reclamation laws and other agencies of the United States government for the construction and financing of works in the state of Colorado as defined in this article, and for the operation and maintenance thereof;
  - (d) To promote the greater prosperity and general welfare of the people of the state of Colorado by encouraging the organization of water conservancy districts as provided in this article.
- (3) It is further declared that:
  - (a) The development, use, and conservation of water within this state is inextricably tied to the development and construction of works as defined in this article;
  - (b) The development and construction of such works shall be deemed to be the development, use, and conservation of water; and
  - (c) Such works are deemed to be a public use essential for the public benefit of the people of this state.

**Source:** L. 37: p. 1309, § 1. CSA: C. 173B, § 15. CRS 53: § 149-6-1. C.R.S. 1963: § 150-5-1. L. 92: (3) added, p. 2291, § 1, effective April 2.

## ANNOTATION

- I. General Consideration.
- II. Constitutionality.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "When Corporate Stock Becomes Real Estate", see 21 Dicta 53 (1944). For article, "Water Conservancy Districts", see 22 Rocky Mt. L. Rev. 432 (1950). For article, "Irrigation Corporations", see 32 Rocky Mt. L. Rev. 527 (1960). For article, "Legal Classification of Special District Corporate Forms in Colorado", see 45 Den. L.J. 347 (1968).

**This section declares the public policy of the state to be that of encouraging the organization of water conservancy districts.** People ex rel. Dunbar v. South Platte Water Conservancy Dist., 139 Colo. 503, 343 P.2d 812 (1959).

**Not every proposed water district is worthy of public sanction.** People ex rel. Dunbar v. South Platte Water Conservancy Dist., 139 Colo. 503, 343 P.2d 812 (1959).

**The general assembly has not stated that district formation, per se, is desirable.** People

ex rel. Dunbar v. South Platte Water Conservancy Dist., 139 Colo. 503, 343 P.2d 812 (1959).

**Districts are state agencies and constitute a public purpose.** The objects of this and following sections are of sufficient public benefit and advantage to the people of Colorado as a whole to constitute a public purpose and the water conservancy districts authorized by the act are state agencies and public corporations, and in them are vested powers which have come to be associated with true municipal corporations, including the power of taxation to further its purpose. People ex rel. Rogers v. Letford, 102 Colo. 284, 79 P.2d 274 (1938); Kistler v. Northern Colo. Water Conservancy Dist., 126 Colo. 11, 246 P.2d 616 (1952).

**The general assembly, as a matter of public policy, believed that the formation of a conservancy district under the standards set forth in the act would further the public interest.** People ex rel. Dunbar v. South Platte Water Conservancy Dist., 139 Colo. 503, 343 P.2d 812 (1959).

**The functions of a water conservancy district are in no sense the functions of a state**



**subdivision** like counties, cities, and school districts. Northern Colo. Water Conservancy Dist. v. Witwer, 108 Colo. 307, 116 P.2d 200 (1938).

**Applied** in Southeastern Colo. Water Conservancy Dist. v. Huston, 197 Colo. 365, 593 P.2d 1347 (1979).

## II. CONSTITUTIONALITY.

**This section and following sections, constituting the water conservancy act, do not violate § 35 of art. V, Colo. Const.,** as the board of directors of a water conservancy district is not a "special commission" within the meaning of the appellation of that constitutional provision. People ex rel. Rogers v. Letford, 102 Colo. 284, 79 P.2d 274 (1938).

**Such sections do not violate § 1 of art. XI, Colo. Const.** The contention that this and following sections constituting the water conservancy act, constitute a pledge of the credit of cities and towns within a water conservancy district, contrary to the provisions of § 1 of art. XI, Colo. Const., is overruled. People ex rel. Rogers v. Letford, 102 Colo. 284, 79 P.2d 274 (1938).

**This section and following sections, constituting the water conservancy act, do not violate § 8 of art. XI, Colo. Const.,** since only debts contracted for the supply of water to a city or town are expressly excepted by the constitutional provision. People ex rel. Rogers v. Letford, 102 Colo. 284, 79 P.2d 274 (1938).

**Section § 8 of art. XI, Colo. Const., has no application.** This and following sections constituting the water conservancy act do not contravene § 8 of art. XI, Colo. Const., as the latter section has no application to independent enti-

ties such as water conservancy districts. People ex rel. Rogers v. Letford, 102 Colo. 284, 79 P.2d 274 (1938).

**Such sections do not violate § 14 of art. X, Colo. Const.** The provision of the water conservancy act that the board of directors of a water conservancy district shall have power to levy and collect assessments upon people within the district does not violate § 14 of art. X, Colo. Const., since that section means only that a creditor of a municipality may not levy upon and sell private property of individuals within the corporation to pay the debts of the municipality. People ex rel. Rogers v. Letford, 102 Colo. 284, 79 P.2d 274 (1938).

**Since § 13 of art. XIV, Colo. Const., provides only for the organization of cities and towns,** consequently water conservancy districts do not come within the purview of the constitutional provision. People ex rel. Rogers v. Letford, 102 Colo. 284, 79 P.2d 274 (1938).

**In addition, since § 14 of art. XIV, Colo. Const., provides that cities and towns created under special local laws may elect** to become governed by the general laws of the state relating to such corporations, the constitutional provision is not applicable to water conservancy districts created under this and following sections. People ex rel. Rogers v. Letford, 102 Colo. 284, 79 P.2d 274 (1938).

**This article does not violate art. III, Colo. Const.** In an action involving the validity of this and following sections, constituting the water conservancy law, the contention that the act delegates nonjudicial functions to the district court in violation of art. III, Colo. Const., is overruled. People ex rel. Rogers v. Letford, 102 Colo. 284, 79 P.2d 274 (1938).

**37-45-103. Definitions.** As used in this article, unless the context otherwise requires:

(1) "Acre-foot" or "acre-feet" may be substituted by any other commonly used unit for the measurement of water when appropriate.

(2) "Board" means the board of directors of the district.

(3) "Court" means the district court of that judicial district of the state of Colorado wherein the petition for the organization of a water conservancy district shall be filed.

(4) (a) "Elector" means a person who, at the designated time or event, is qualified to vote in general elections in this state, and:

(I) Who has been a resident of the district or the area to be included in the district for not less than thirty-two days; or

(II) Who or whose spouse owns taxable real or personal property within the district or the area to be included in the district.

(b) A person who is obligated to pay general taxes under a contract to purchase real property within the district shall be considered an owner within the meaning of this subsection (4). The payment of a specific ownership tax pursuant to law shall not qualify a person as an elector. Taxable property means real or personal property subject to general ad valorem taxes.

(c) For all elections and petitions that require ownership of real property or land, a mobile home or manufactured home as defined in section 38-12-201.5 (2), 5-1-301 (29), or 42-1-102 (106) (b), C.R.S., shall be deemed sufficient to qualify as ownership of real property or land for the purpose of voting rights and petitions.

(5) "Land" or "property" is used in this article with reference to benefits, appraisals, assessments, or taxes, as political entities, according to benefits received, and public corporations shall be considered as included in such reference in the same manner as "land" or "property".

(6) "Land" or "real estate" means real estate, as "real estate" is defined by the laws of the state of Colorado, and embraces all railroads, tramroads, electrical roads, street and interurban railroads, highways, roads, streets and street improvements, telephone, telegraph, and transmission lines, gas, sewer and water systems, water rights, pipelines, and rights-of-way of public service corporations, and all other real property whether held for public or private use.

(7) "Person" means a person, firm, partnership, association, or corporation, other than a county, town, city, city and county, or other political subdivision. Similarly, "public corporation" means counties, city and counties, towns, cities, school districts, irrigation districts, water districts, park districts, subdistricts, and all governmental agencies, clothed with the power of levying or providing for the levy of general or special taxes or special assessments.

(8) "Property" means real estate and personal property.

(9) "Publication" means once a week for three consecutive weeks in at least one newspaper of general circulation in each county wherein such publication is to be made. It shall not be necessary that publication be made on the same day of the week in each of the three weeks, but not less than fourteen days, excluding the day of the first publication, shall intervene between the first publication and the last publication, and publication shall be complete on the date of the last publication.

(10) "Works" means dams, storage reservoirs, compensatory and replacement reservoirs, canals, conduits, pipelines, tunnels, power plants, and any and all works, facilities, improvements, and property necessary or convenient for the supplying of water for domestic, irrigation, power, milling, manufacturing, mining, metallurgical, and all other beneficial uses.

**Source:** L. 37: p. 1311, § 2. CSA: C. 173B, § 16. CRS 53: § 149-6-2. L. 61: p. 843, § 1. C.R.S. 1963: § 150-5-2. L. 70: p. 436, § 1. L. 71: p. 1347, § 1. L. 82: (4)(d) added, p. 546, § 8, effective April 15. L. 90: (4) amended, p. 1849, § 49, effective May 31. L. 94: (4)(c) amended, p. 706, § 12, effective April 19; (4)(c) amended, p. 2567, § 83, effective January 1, 1995. L. 2001: (4)(c) amended, p. 1277, § 47, effective June 5.

**Editor's note:** Amendments to subsection (4)(c) by Senate Bill 94-092 and Senate Bill 94-001 were harmonized.

#### ANNOTATION

**Law reviews.** For article, "Irrigation Confirmation Proceedings", see 21 Dicta 140 (1944).

**37-45-104. Name of district - bonds.** The districts created under this article may be termed "water conservancy districts", and the bonds which may be issued under this article may be called "water conservancy bonds", and such designation may be engraved or printed on their face.

**Source:** L. 37: p. 1311, § 2. CSA: C. 173B, § 16. CRS 53: § 149-6-2. L. 61: p. 843, §. C.R.S. 1963: § 150-5-2.

**37-45-105. Liberal construction.** This article, being necessary to secure and preserve the public health, safety, convenience, and welfare and for the security of public and private property, shall be liberally construed to effect the purposes of this article.

**Source:** L. 37: p. 1358, § 39. CSA: C. 173B, § 53. CRS 53: § 149-6-41. C.R.S. 1963: § 150-5-41.



## ANNOTATION

**Law reviews.** For article, "One Year Review of Property", see 37 Dicta 89 (1960).

**This section provides for liberal construction of the act to effect its purposes.** People ex rel. Dunbar v. South Platte Water Conservancy Dist., 139 Colo. 503, 343 P.2d 812 (1959).

**The obligation of liberal construction imposed by this section runs to each section in the entire act** in order that all its purposes may be accomplished. People ex rel. Dunbar v. South

Platte Water Conservancy Dist., 139 Colo. 503, 343 P.2d 812 (1959).

**A provision as to liberal construction of an act is not a grant of power to a trial court to exercise its authority by committing the manifest error of failing to protect rights accorded by the act.** People ex rel. Dunbar v. South Platte Water Conservancy Dist., 139 Colo. 503, 343 P.2d 812 (1959).

**37-45-106. Constitutional construction clause.** If the courts of the state or of the United States declare any section, provision, paragraph, clause, sentence, or phrase, or part thereof, of this article invalid or unconstitutional, or in conflict with any other section, provision, paragraph, clause, sentence, or phrase, or part thereof, of this article, then such decision shall affect only the section, provision, paragraph, clause, sentence, phrase, or part thereof declared to be unconstitutional or unauthorized and shall not affect any other part whatsoever of this article. The general assembly of the state of Colorado declares that it would have passed this article and each section, provision, paragraph, clause, sentence, or phrase hereof irrespective of the fact that any one or more of the other sections, provisions, paragraphs, clauses, sentences, or phrases, or parts thereof, are declared invalid or unconstitutional.

**Source:** L. 37: p. 1358, § 40. CSA: C. 173B, § 54. CRS 53: § 149-6-42. C.R.S. 1963: § 150-5-42.

**37-45-107. Repeal - saving clause.** All acts or parts of acts conflicting in any way with any of the provisions of this article in regard to the improvements or improvement districts, or regulating or limiting the power of taxation or assessments, or otherwise interfering with the accomplishment of the purposes of this article according to its terms are declared nonoperative and noneffective as to this article as completely as if they did not exist. But all such acts and parts of acts shall not in any other way be affected by this article.

**Source:** L. 37: p. 1358, § 41. CSA: C. 173B, § 55. CRS 53: § 149-6-43. C.R.S. 1963: § 150-5-43.

**37-45-108. Jurisdiction of district courts.** The district court sitting in and for any county in this state is hereby vested with jurisdiction when the conditions stated in section 37-45-109 are found to exist to establish water conservancy districts which may be entirely within or partly within and partly without the judicial district in which said court is located for conserving, developing, and stabilizing supplies of water for domestic, irrigation, power, manufacturing, and other beneficial uses as provided in this article; but the terms of this article shall not be construed to confer upon such district court jurisdiction to hear, adjudicate, and settle questions concerning the priority of appropriation of water between districts organized under this article and ditch companies and other owners of ditches drawing water for irrigation purposes from the same stream or its tributaries, and jurisdiction to hear and determine such questions of law and questions of right growing out of or in any way involved or connected therewith are expressly excluded from this article and shall be determined in the proper county as otherwise provided by the laws of the state of Colorado.

**Source:** L. 37: p. 1313, § 3. CSA: C. 173B, § 17. CRS 53: § 149-6-3. C.R.S. 1963: § 150-5-3.

## ANNOTATION

This section gives a district court authority to form such districts only when the conditions stated in § 37-45-109 are found to exist. *People ex rel. Dunbar v. South Platte Water Conservancy Dist.*, 139 Colo. 503, 343 P.2d 812 (1959).

**Petitions for district formation must set forth a general description of the territory** to be included in the proposed district, and where the territory actually included in a district is substantially different from the territory to be included the conditions stated in this section do not exist. In such a situation, the conditions which would give a lower court authority to form a district do not exist. *People ex rel. Dunbar v. South Platte Water Conservancy Dist.*, 139 Colo. 503, 343 P.2d 812 (1959).

Any authority exercised by the district court following the organization and incorporation is limited to clear statutory provisions such as the filling of vacancies in the board of directors and is nongeneral in nature. *Peaker v. Southeastern Colo. Water Conservancy Dist.*, 174 Colo. 210, 483 P.2d 232 (1971).

**The general powers over the affairs of the district after incorporation are granted to the members of the board of directors** by § 37-45-118, with the jurisdiction of the district court limited by this section. *Peaker v. Southeastern Colo. Water Conservancy Dist.*, 174 Colo. 210, 483 P.2d 232 (1971).

**37-45-109. Petition.** (1) (a) Except as provided in subsection (2.5) of this section, before any water conservancy district is established under this article having a valuation for assessment of irrigated land, together with improvements thereon within the proposed district, of twenty million dollars or more, a petition shall be filed in the office of the clerk of the court vested with jurisdiction in a county in which all or part of the lands embraced in such proposed water conservancy district are situated, signed by not fewer than fifteen hundred owners of irrigated land situated within the limits of the territory proposed to be organized into a district but not embraced within the incorporated limits of a city or town; and each tract of land shall be listed opposite the name of the signer, each such tract, together with improvements thereon, to have a valuation for assessment of not less than two thousand dollars. Such petition shall be also signed by not fewer than five hundred owners of nonirrigated land or lands embraced in the incorporated limits of a city or town, all situated in the proposed district; and each tract of land shall be listed opposite the name of the signer, each such tract, together with improvements thereon, to have a valuation for assessment of not less than one thousand dollars.

(b) In the event a petitioner signs the petition both as owner of irrigated and nonirrigated land situated within a municipality, his name shall be counted only as an owner of irrigated lands. A signing petitioner shall not be permitted, after the filing of the petition, to withdraw his name therefrom.

(c) No district shall be formed under this subsection (1) unless the valuation for assessment of irrigated land, together with improvements thereon, within the proposed district, is twenty million dollars or more, and no city, or city and county, having a population of more than twenty-five thousand as determined by the last United States census shall be included within such district unless by and with the written consent of the chief executive officer of such city, or city and county, and with the approval of the legislative body of such municipality, and such consent may specify that the rate of taxation on the valuation for assessment of property within said city, or city and county, under section 37-45-122, shall not exceed a maximum rate which may be less than the rates set out in section 37-45-122, and, in such case, the district shall not have power to levy an assessment on the property in said city, or city and county, at a greater rate than that specified in said consent.

(2) (a) Except as provided in subsection (2.5) of this section, before any water conservancy district shall be established under this article having a valuation for assessment of irrigated land, together with improvements thereon, within the proposed district of less than twenty million dollars, a petition shall be filed in the office of the clerk of the court vested with jurisdiction in a county in which all or part of the lands embraced in such proposed water conservancy district are situated, signed by not fewer than twenty-five percent of the owners of irrigated lands to be included in the district but not embraced



within the incorporated limits of a city or town; and each tract of land shall be listed opposite the name of the signer, each such tract, together with improvements thereon, to have a valuation for assessment of not less than one thousand dollars. Such petition shall be also signed by not fewer than five percent of the owners of nonirrigated land or lands embraced in the incorporated limits of a city or town, all situated in the proposed district; and each tract of land shall be listed opposite the name of the signer, each such tract, together with improvements thereon, to have a valuation for assessment of not less than one thousand dollars.

(b) In the event a petitioner signs such a petition both as owner of irrigated and nonirrigated land situated within a municipality, his name shall be counted only as an owner of irrigated land. A signing petitioner shall not be permitted, after the filing of the petition, to withdraw his name therefrom.

(c) No district shall be formed under this subsection (2) unless the valuation for assessment of irrigated land, together with improvements thereon, within the proposed district, is less than twenty million dollars, and no city, or city and county, having a population of more than twenty-five thousand as determined by the last United States census shall be included within such district unless by and with the written consent of the chief executive officer of such city, or city and county, with the approval of the legislative body of such municipality, and such consent may specify that the rate of taxation on the valuation for assessment of property within said city, or city and county, under section 37-45-122, shall not exceed a maximum rate which may be less than the rates set out in section 37-45-122, and, in such case, the district shall not have power to levy an assessment on the property in said city, or city and county, at a greater rate than that specified in said consent.

(2.5) (a) As an alternative to the procedures set forth in subsections (1) and (2) of this section, a petition for an election on the organization of a water conservancy district may be filed with the clerk of the court vested with jurisdiction in a county in which all or part of the lands embraced in such proposed district is situated. The petition shall be signed by not less than ten percent or two hundred electors of the proposed special district, whichever number is smaller. The proposed boundary of the special district may include any part or all of any city or city and county of any size. Such petition and the hearing thereon shall otherwise comply with the provisions of this article which are not inconsistent with the provisions of this subsection (2.5).

(b) On the day fixed for the hearing, or at a continuance thereof, the court shall first ascertain, from such evidence which may be adduced, that the required number of electors of the proposed district have signed the petition. Upon said hearing, if it appears that the petition for the organization of the district has been signed and presented in conformity with this subsection (2.5) and that the allegations of the petition are true, the court, by order duly entered of record, shall direct that the question of the organization of the water conservancy district shall be submitted at an election to be held for that purpose in accordance with the procedures set forth in sections 37-45-139 to 37-45-141. The court shall exercise all functions which are the responsibility of the board of directors of a water conservancy district as set forth in said sections.

(c) At such election, the voter shall vote for or against the organization of the water conservancy district. If a majority of the votes cast at said election are in favor of the organization, the court shall declare the district organized and give it the corporate name designated in the petition, by which it shall thereafter be known in all proceedings. However, if the proposed district includes any territory within a municipality and a majority of the votes cast by voters residing within that incorporated area are against formation of the district, the governing body of said municipality may, within thirty days after certification of the election results, petition the court organizing the district for exclusion from the district of all such incorporated territory, and the court shall exclude such territory from the district. Thereupon, the district shall be a political subdivision of the state of Colorado and a body corporate with all the powers of a public or municipal corporation.

(3) The petition shall set forth:

(a) The proposed name of said district;

(b) In cases where an election will not be held on the organization of the district, that property within the proposed district will be benefited by the accomplishment of the purposes enumerated in section 37-45-108;

(c) A general description of the purpose of the contemplated improvement and of the territory to be included in the proposed district. The description need not be given by metes and bounds or by legal subdivision, but it shall be sufficient to enable a property owner to ascertain whether his property is within the territory proposed to be organized as a district. The territory need not be contiguous if it is so situated that the organization of a single district of the territory described is calculated to promote one or more of the purposes enumerated in section 37-45-108.

(d) Whether or not any part of the proposed district is included within the boundaries of a district already in existence under the provisions of this article and, if so, the general description, as defined in paragraph (c) of this subsection (3), of the overlapping area;

(e) The valuation for assessment of all irrigated land within the boundaries of the proposed district if the district is to be organized without holding an election on the question of organization;

(f) A general designation of divisions of the district and the number of directors of the district proposed for each subdivision;

(g) A prayer for the organization of the district by the name proposed and, in the case of a petition for an election under subsection (2.5) of this section, a request for the holding of an election on the question of the organization of the district.

(4) No petition with the requisite signatures shall be declared void on account of alleged defects, but the court may permit the petition to be amended at any time to conform to the facts by correcting any errors in the description of the territory or in any other particular. However, similar petitions or duplicate copies of the same petition for the organization of the same district may be filed and together shall be regarded as one petition. All such petitions filed prior to the hearing on the first petition filed shall be considered by the court the same as though filed with the first petition placed on file.

(5) In determining whether the requisite number of landowners have signed the petition, the court shall be governed by the names as they appear upon the tax roll which shall be prima facie evidence of such ownership.

**Source:** L. 37: p. 1313, § 4. CSA: C. 173B, § 18. L. 39: p. 592, § 1. L. 49: p. 737, § 1. CRS 53: § 149-6-4. L. 61: p. 845, § 2. C.R.S. 1963: § 150-5-4. L. 67: p. 698, § 1. L. 81: (1)(a), (2)(a), (3)(b), (3)(e), and (3)(g) amended and (2.5) added, p. 1752, § 1, effective June 19.

#### ANNOTATION

**Law reviews.** For article, "When Corporate Stock Becomes Real Estate", see 21 Dicta 53 (1944).

**Section 37-45-108 gives a district court authority to form such districts only when the conditions stated in this section are found to exist.** People ex rel. Dunbar v. South Platte Water Conservancy Dist., 139 Colo. 503, 343 P.2d 812 (1959).

**This statute requires as a prerequisite to the exercise of authority that a petition be first filed designating the boundaries of a district, so that it may be easily distinguished.** This is for the benefit of the property owners. A property owner might be willing to sign for an improvement district as designated in the first petition, and might be unwilling to sign if a part of the property included within the boundaries of the district should be omitted; for this might have the effect of imposing upon the property

owners additional and enlarged burdens which they did not contemplate when they signed the petition. People ex rel. Dunbar v. South Platte Water Conservancy Dist., 139 Colo. 503, 343 P.2d 812 (1959).

**The sufficiency of the petition giving the court jurisdiction is to be determined on the record at the time of the hearing fixed in the order of publication and not otherwise.** Hill v. District Court, 134 Colo. 369, 304 P.2d 888 (1956).

**The function of requiring a petition to describe territory to be included and the purpose of the contemplated improvement is that a citizen may know what he is petitioning for.** He is furnished a basis for estimating the quantities of water needed, the size of the tax base and population involved, and the benefit which might be anticipated in terms of the cost per acre foot of water supplied. Furnishing a "basis for



estimating" various matters is a far cry from stating that a district's project must be completely planned in every detail prior to the time the petition is filed. People ex rel. Dunbar v. South Platte Water Conservancy Dist., 139 Colo. 503, 343 P.2d 812 (1959).

**This section requires a petition to pray for the organization of a district by the name proposed, not some other name.** People ex rel. Dunbar v. South Platte Water Conservancy Dist., 139 Colo. 503, 343 P.2d 812 (1959).

**This section permits a petition to be amended at any time to conform to the facts by correcting errors in description of territories or in any other particular.** People ex rel. Dunbar v. South Platte Water Conservancy Dist., 139 Colo. 503, 343 P.2d 812 (1959).

**A desire to foreclose opposition by excluding lands or individuals is not a correction of an error in description nor a correction of an error in any other particular in originating petitions.** People ex rel. Dunbar v. South Platte Water Conservancy Dist., 139 Colo. 503, 343 P.2d 812 (1959).

**Subsection (4) may not be used to exclude originally included land.** Subsection (4), permitting amendment of a petition to form a conservancy district to conform to the facts by correcting any errors in the description of the territory or in other particulars, does not authorize such amendment for the purpose of excluding territory originally included in the district. People ex rel. Dunbar v. South Platte Water Conservancy Dist., 139 Colo. 503, 343 P.2d 812 (1959).

**Changes of scope and magnitude emasculate the notice and information requirements of the act.** People ex rel. Dunbar v. South Platte Water Conservancy Dist., 139 Colo. 503, 343 P.2d 812 (1959).

**It cannot be assumed that petitioners affixing their signatures to an originating petition would have done so had they known that the district to be created would be substantially different from that described in the original petition.** People ex rel. Dunbar v. South Platte Water Conservancy Dist., 139 Colo. 503, 343 P.2d 812 (1959).

**37-45-110. Bond of petitioners.** At the time of filing the petition or at any time subsequent thereto and prior to the time of hearing on said petition, a bond shall be filed, with security approved by the court, sufficient to pay all expenses, including any expenses of an election, connected with the proceedings in case the organization of the district is not effected. If at any time during the proceeding the court is satisfied that the bond first executed is insufficient in amount, it may require the execution of an additional bond within a time to be fixed to be not less than ten days distant, and, upon failure of the petitioner to execute the same, the petition shall be dismissed.

**Source:** L. 37: p. 1316, § 5. CSA: C. 173B, § 19. CRS 53: § 149-6-5. C.R.S. 1963: § 150-5-5. L. 81: Entire section amended, p. 1754, § 2, effective June 19.

**37-45-111. Notice of hearing on petition.** (1) Immediately after the filing of such petition, the court wherein such petition is filed, by order, shall fix a place and time, not less than sixty days nor more than ninety days after the petition is filed, for hearing thereon, and thereupon the clerk of said court shall cause notice by publication to be made of the pendency of the petition and of the time and place of hearing thereon; the clerk of said court shall also forthwith cause a copy of said notice to be mailed by United States registered mail to the board of county commissioners of each of the several counties having territory within the proposed district.

(2) The district court in and for the county in which the petition for the organization of a water conservancy district has been filed shall thereafter for all purposes of this article, except as otherwise provided in this article, maintain and have original and exclusive jurisdiction coextensive with the boundaries of said water conservancy district and of land and other property proposed to be included in said district or affected by said district, without regard to the usual limits of its jurisdiction.

(3) No judge of such court wherein such petition is filed shall be disqualified to perform any duty imposed by this article by reason of ownership of property within any water conservancy district or proposed water conservancy district or by reason of ownership of any property that may be benefited, taxed, or assessed therein.

**Source:** L. 37: p. 1316, § 6. CSA: C. 173B, § 20. CRS 53: § 149-6-6. C.R.S. 1963: § 150-5-6.

## ANNOTATION

- I. General Consideration.
- II. Hearing Date.
- III. Judicial Supervision.

**I. GENERAL CONSIDERATION.**

**The sufficiency of the petition giving the court jurisdiction is to be determined on the record** at the time of the hearing fixed in the order of publication and not otherwise. *Hill v. District Court*, 134 Colo. 369, 304 P.2d 888 (1956).

**II. HEARING DATE.**

**Date of hearing is the date when pleadings are placed at issue.** The wording of this section, requiring the setting of a hearing "not less than 60 days nor more than 90 days after the petition is filed" is a date which puts the respective petitions and pleadings at issue, the final determination of which lies in the sound discretion of the trial court in accordance with the evidence introduced. *Hill v. District Court*, 134 Colo. 369, 304 P.2d 888 (1956).

**In the act there is a clear mandate that the courts act with all convenient speed to determine a matter of great public importance.** However, this speed is for the benefit of the petitioners of a proposed district. As long as the matter is inactive objectors have lost nothing. *Hill v. District Court*, 134 Colo. 369, 304 P.2d 888 (1956).

**The objectors to a petition for formation of a water conservancy district are not prejudiced by the continuation of the hearing**

**thereon.** *Hill v. District Court*, 134 Colo. 369, 304 P.2d 888 (1956).

**A continuation does not divest the court of jurisdiction.** Since the general assembly has provided that certain objections may be filed up to and including the date set for hearing, a petition for formation of a water conservancy district cannot stand fully at issue until the date of the hearing itself, and continuation of the hearing date beyond that set forth in the published notice does not divest the court of jurisdiction. *Hill v. District Court*, 134 Colo. 369, 304 P.2d 888 (1956).

**III. JUDICIAL SUPERVISION.**

**This article, particularly subsection (2), grants the district court authority to supervise only the organization and incorporation of water conservancy districts.** *Peaker v. Southeastern Colo. Water Conservancy Dist.*, 174 Colo. 210, 483 P.2d 232 (1971).

**Any authority exercised by the district court following the organization and incorporation is limited to clear statutory provisions** such as the filling of vacancies in the board of directors and is nongeneral in nature. *Peaker v. Southeastern Colo. Water Conservancy Dist.*, 174 Colo. 210, 483 P.2d 232 (1971).

**It is improper for a district judge to maintain, in an official capacity, a close personal and financial relationship with a district.** Such association is violative of the judicial impartiality requisite for the proper functioning of an adversary system of justice. *Peaker v. Southeastern Colo. Water Conservancy Dist.*, 174 Colo. 210, 483 P.2d 232 (1971).

**37-45-112. Protests and hearings on petitions.** (1) (a) At any time after the filing of a petition for the organization of a conservancy district having a valuation for assessment of irrigated land within the proposed district, together with improvements thereon, of twenty million dollars or more, a petition protesting the creation of said district may be filed in the office of the clerk of the court wherein the proceeding for the creation of said district is pending. Such protesting petition shall be filed at least thirty days prior to the time fixed by order of court for the hearing upon the petition to create such district, and not thereafter.

(b) Any such protesting petition shall be signed by either: Not fewer than fifteen hundred owners of the irrigated lands in said proposed district, but not embraced within the incorporated limits of a city or town, the aggregate valuation for assessment of which, together with improvements, is not less than two million dollars and also signed by not fewer than five hundred owners of nonirrigated land or lands embraced in the incorporated limits of a city or town, all such situated within the proposed district, the aggregate valuation for assessment of which, together with improvements, is not less than one million dollars; or owners of property subject to ad valorem taxes within the proposed district, regardless of number, the aggregate valuation for assessment of which property is more than fifty percent of the total valuation for assessment of all property subject to ad valorem taxes within the proposed district.

(c) The signers of any such protesting petition shall state therein a description of the taxable property owned by each, the value thereof as shown by the last preceding assessment, and that they did not sign the petition for creating the proposed district.



(2) (a) At any time after the filing of a petition for the organization of a conservancy district having a valuation for assessment of irrigated land within the proposed district, together with improvements thereon, of less than twenty million dollars, a petition protesting the creation of said district may be filed in the office of the clerk of the court wherein the proceeding for the creation of said district is pending. Such protesting petition shall be filed at least thirty days prior to the time fixed by order of court for the hearing upon the petition to create said district, and not thereafter.

(b) Any such protesting petition shall be signed by either: Not fewer than twenty-five percent of the owners of the irrigated lands within said proposed district not embraced within the incorporated limits of a city or town and also signed by not fewer than five percent of owners of nonirrigated lands or lands embraced in the incorporated limits of a city or town, all situated within the proposed district; or owners of property subject to ad valorem taxes within the proposed district, regardless of number, the aggregate valuation for assessment of which property is more than fifty percent of the total valuation for assessment of all properties subject to ad valorem taxes within the proposed district.

(c) The signers of any such protesting petition shall state therein a description of the taxable property owned by each, the value thereof as shown by the last preceding assessment, and that they did not sign the petition for creating the proposed district.

(3) In the event a petitioner signs such petition both as owner of irrigated and nonirrigated land situated within a municipality, his name shall be counted only as an owner of irrigated lands.

(4) (a) Upon the filing of any petition either for or against creation of a district, it is the duty of the clerk of the court to make as many certified copies thereof, including the signatures thereto, as there are counties in which any part of said district extends.

(b) The court shall thereupon order the mailing of such copies to the appropriate county treasurers, which order shall include directions to the county treasurers to certify by a day certain such information contained in their official files as the court may deem necessary to resolve the issues of property ownership and valuation for assessment raised in or incidental to the petitions as filed.

(5) (a) Upon the day set for the hearing upon the original petition, if it appears to the court from the information furnished by the county treasurers, and from such other evidence as may be adduced by any party in interest, that a protesting petition is not signed by the requisite number of owners of lands and of the requisite values, as applicable, the court shall thereupon dismiss said protesting petition and shall proceed with the original hearing as provided in this section.

(b) If the court finds from the evidence that a protesting petition is signed by the requisite number of owners of lands and of the requisite values, as applicable, the court shall order an election on the question of the formation of the district in accordance with the procedure set forth in sections 37-45-139 to 37-45-141. The court shall exercise all functions which are the responsibility of the board of directors of a water conservancy district as set forth in said sections.

(c) The finding of the court upon the question of total valuation, the genuineness of the signatures, and all other matters of law and fact incident to such determination shall be final and conclusive on all parties and interests whether appearing or not.

(6) (a) Any owner of real property in said proposed district not having individually signed a petition for the organization of a conservancy district may file objection to the organization and incorporation of the district. Such objection shall be limited to a denial of the statements in the petition.

(b) The owner of any real property, or interest therein subject to ad valorem taxation, within the proposed district may file a petition with the court stating reasons why said property should not be included therein and praying that said property be excluded therefrom. Such reasons may include, but shall not be limited to, the absence of benefit to the said property derived from the proposed district and the fact that the exclusion will not interfere with the purposes of the proposed district. Such petition shall be duly verified and shall describe the property sought to be excluded. The court shall hear said petition and all objections thereto at the time of the hearing on the petition for organization as an advanced matter and shall determine whether said property should be excluded or included in said

district. A final order of the court shall be entered on a petition for exclusion prior to and separately from any final order granting or dismissing the petition for the organization of the district.

(c) Any petitions or objections filed under paragraph (a) or (b) of this subsection (6) shall be filed at least thirty days prior to the time fixed by order of court for hearing upon the petition to create said district and not thereafter.

(6.5) (a) The only objections or protesting petitions allowed in the case of a petition for an election under section 37-45-109 (2.5) shall be those filed under paragraph (b) of subsection (6) of this section and those which protest that such petition for an election has not been signed and presented in compliance with said section.

(b) In the event that a petition is amended to request an election, any protesting petitions not allowed under paragraph (a) of this subsection (6.5) shall be dismissed by the court and the proceedings continued as provided in section 37-45-109 (2.5).

(6.6) Any petition originally filed under section 37-45-109 (1) or (2) may, at any time, be amended to request an election on the question of the organization of the district as provided in section 37-45-109 (2.5) if the original petition stated that it may be used in the alternative to request an election on the question of the organization of the district. Any such amended petition shall then conform with the petition requirements of section 37-45-109 (2.5), and any signers to the petition originally filed shall be considered valid signers on the amended petition so long as such signers meet the requirements of section 37-45-109 (2.5).

(7) Upon said hearing on a petition filed under section 37-45-109 (1) or (2), if it appears that the petition for the organization of a water conservancy district has been signed and presented in conformity with this article, and that the allegations of the petition are true, and that no protesting petition has been filed, or if filed has been dismissed, by order duly entered of record, the court shall adjudicate all questions of jurisdiction, declare the district organized, and give it a corporate name, by which in all proceedings it shall thereafter be known, and thereupon the district shall be a political subdivision of the state of Colorado and a body corporate with all the powers of a public or municipal corporation.

(8) In such decree the court shall designate the place where the office or principal place of business of the district shall be located, which shall be within the corporate limits of the district and which may be changed by order of court from time to time. The regular meetings of the board shall be held at such office or place of business but for cause may be adjourned to any other convenient place. The official records and files of the district shall be kept at the office so established.

(9) If the court determines that a petition for organization of a water conservancy district has not been signed and presented in conformity with this article or that the material facts are not as set forth in the petition, the court shall allow the petitioner thirty days within which to cure any defects as provided in section 37-45-109 (4) or to amend the petition as provided in subsection (6.6) of this section to request an election on the question of organizing the district. Any such amendment of a petition shall be valid if amended within said thirty days. If after said thirty days any defects are not cured or the petition is not so amended, the court shall dismiss the proceedings and adjudge the costs against the signers of the petition in such proportion as it deems just and equitable. No appeal or other remedy shall lie from an order dismissing said proceeding; but nothing in this section shall be construed to prevent the filing of a subsequent petition for similar improvements or for a similar water conservancy district, and the right to renew such proceeding is expressly granted and authorized.

(10) If an order is entered establishing the district, such order shall be deemed final and no appeal or other remedy shall lie therefrom, and the entry of such order shall finally and conclusively establish the regular organization of the district against all persons except the state of Colorado, in an action in the nature of quo warranto, commenced by the attorney general within three months after said decree, declaring such district organized as provided in this article, and not otherwise. The organization of such district shall not be directly nor collaterally questioned in any action or proceeding except as expressly authorized in this article.

(11) Nothing in this article shall be construed to affect districts organized prior to May 10, 1939, under the provisions of this article.



**Source:** L. 37: p. 1317, § 7. CSA: C. 173B, § 21. L. 39: p. 594, § 2. L. 49: pp. 740, 743, §§ 2, 3. CRS 53: § 149-6-7. C.R.S. 1963: § 150-5-7. L. 67: p. 699, § 2. L. 81: (7) amended, (6.5) and (6.6) added, and (9) R&RE, pp. 1754, 1755, §§ 3, 4, effective June 19.

### ANNOTATION

**Law reviews.** For article, "Irrigation Confirmation Proceedings", see 21 Dicta 140 (1944).

**The general assembly has provided that certain objections may be filed up to and including the date set for hearing.** Hill v. District Court, 134 Colo. 369, 304 P.2d 888 (1956).

**A petition for formation of a water conservancy district cannot stand fully at issue until the date of the hearing itself, and continuation of the hearing date beyond that set forth in the published notice does not divest the court of jurisdiction.** Hill v. District Court, 134 Colo. 369, 304 P.2d 888 (1956).

**If the applicable statutory requirements are complied with, the district court is directed to formalize the organization.** Peaker v. Southeastern Colo. Water Conservancy Dist., 174 Colo. 210, 483 P.2d 232 (1971).

**A water conservancy district is a legal entity upon the entry of a decree by the district court having jurisdiction.** People ex rel. Dunbar v. South Platte Water Conservancy Dist., 146 Colo. 318, 364 P.2d 215 (1961).

**A decree of the district court creating a water conservancy district may be attacked only by the attorney general of Colorado.** People ex rel. Dunbar v. South Platte Water Conservancy Dist., 146 Colo. 318, 364 P.2d 215 (1961).

**A quo warranto proceeding, being in the nature of a common-law writ, searches the entire record, including the testimony and all matters considered by the trial court.** People ex rel. Dunbar v. South Platte Water Conservancy Dist., 139 Colo. 503, 343 P.2d 812 (1959).

**Each taxpayer shares proportionately in the funds of a voided district.** The district

existed only as a de facto district, and its existence was ousted when the order of this court became final upon the denial of the petition for rehearing. The taxpayers as claimants shall share proportionately with the claimants in the funds in the registry of the court in that proportion in which the claim of each including the taxpayers bears to the total amount of the claims finally allowed. Each claimant including each taxpayer shall bear his proportion of the cost of these proceedings and each item shall bear its cost of refund. People ex rel. Dunbar v. South Platte Water Conservancy Dist., 146 Colo. 318, 364 P.2d 215 (1961).

**Water conservancy districts are not public utilities** subject to the regulation of the public utilities commission. Matthews v. Tri-County Water Conservancy Dist., 200 Colo. 202, 613 P.2d 889 (1980).

The power of a conservancy district to engage in rate fixing for the sale, leasing, or disposition of its waters does not by this authority alone give it public utility status or subject it to the rules, regulations, and supervision of the public utilities commission. Matthews v. Tri-County Water conservancy Dist., 200 Colo. 202, 613 P.2d 889 (1980).

A water conservancy district, a political subdivision of the state, having the powers of a public or municipal corporation and having no obligation to sell, and being prohibited by statute from selling water for use outside the district boundaries, does not rationally fall within the definition of a public utility or within the regulatory control of the public utilities commission. Matthews v. Tri-County Water Conservancy Dist., 200 Colo. 202, 613 P.2d 889 (1980).

**37-45-113. Provisions for filing and recording decree of incorporation.** Within thirty days after the district has been declared a corporation by the court, the clerk of the court shall transmit to the division of local government in the department of local affairs and to the county clerk and recorder in each of the counties having lands in said district copies of the findings and the decree of the court incorporating said district. The same shall be filed with said division, and copies shall also be recorded in the office of the county clerk and recorder of each county in which a part of the district may be, where they shall become permanent records.

**Source:** L. 37: p. 1321, § 8. CSA: C. 173B, § 22. CRS 53: § 149-6-8. C.R.S. 1963: § 150-5-8. L. 76: Entire section amended, p. 606, § 30, effective July 1. L. 83: Entire section amended, p. 1228, § 12, effective July 1.

**Cross references:** For filing of articles of incorporation, see § 7-102-103.

**37-45-114. Appointment of board of directors.** (1) (a) Within thirty days after entering the decree incorporating said district, the court shall appoint a board of directors

of the district with backgrounds reflecting the agricultural, municipal, industrial, and other interests in the beneficial use of water within the district. Such board shall consist of not more than fifteen persons who are residents of the counties in which the water conservancy district is situated, all of whom shall be the owners of real property in said district and knowledgeable in water matters. Directors shall be appointed so as to generally achieve geographical representation. No specific number of directors shall be required to represent any specific interest in the beneficial use of water. In order to achieve geographical representation, the court shall appoint a director from each county within the district which contains more than one percent of the total land area of the district, which person shall be the owner of real property within the district and within said county. Based on the most recent federal census, the court shall appoint the remaining directors, so far as practicable, in the same proportion that the population of each county or portion thereof within the district bears to the total population of the district. Said directors shall reside and own real property within each county, or portion thereof within the district, which is entitled to such proportional representation. The district shall maintain, for public inspection at its offices during normal working hours, a current list showing the names, counties of residence, and expiration dates of the terms of each member of the district's board of directors. Not more than sixty days and not less than forty-five days prior to expiration of a director's term, the conservancy district shall publish notice, once in a newspaper of general circulation within the district, that applications for appointment as director will be accepted by the court until thirty days prior to the expiration of the director's term. The notice shall specify the address of the court to which resumes may be sent, shall specify that the applicant must have resided within the district for a period of one year and be the owner of real property within the district, and, when applicable by decree or revised decree, shall specify that the applicant must be the owner of real property within the particular county whose director's term is expiring. If the organizational decree of the district provides criteria for the appointment of board members, the provisions of this paragraph (a), regarding geographical and population criteria for appointment, shall not apply to districts which were created pursuant to this article prior to July 1, 1985, unless the court enters an order pursuant to paragraph (d) of this subsection (1).

(b) At the expiration of their respective terms of office as fixed by the court, appointments of one-third of the board, to the nearest whole number, shall be made by said court for terms of one year; a like number shall be appointed for terms of two years; and the remainder shall be appointed for terms of four years. Thereafter all appointments of directors shall be for terms of four years. The court shall fill, for the duration of the unexpired term, any vacancy which may occur on the board. Each director shall hold office during the term for which he is appointed and until his successor is duly appointed and has qualified and shall furnish a corporate surety bond at the expense of the district, in the amount and form fixed and approved by the court, conditioned for the faithful performance of his duties as such director.

(c) In the event that any water conservancy district extends into two or more judicial districts, or any parts thereof, the directors of such water conservancy district shall be appointed by the presiding district judges of all such judicial districts, who, sitting en banc, shall constitute "the court" for purposes of this paragraph (c) and paragraph (a) of this subsection (1). In the event of a disagreement regarding appointees, the presiding judge of each judicial district shall appoint the directors from each eligible county within his judicial district.

(d) The court which entered the organizational decree of a district created before July 1, 1985, may reopen the organizational decree in accordance with this subsection (1). If a petition to reopen any such organizational decree is filed with the court in which the decree was originally entered, such petition shall be signed by the board of directors in its discretion or by the owners of ten percent of the allocation of a district's water supply or by ten percent of the registered electors who have resided within the district for a period of one year and who are owners of real property within the district. The court shall promptly conduct a hearing for the limited purpose of reviewing and revising the organizational decree, if necessary to meet the criteria of paragraph (a) of this subsection (1), to specify the number of directors from each county according to the criteria of paragraph (a) of this



subsection (1). After the initial reopening and revision of a decree under the provisions of this subsection (1), such decree may be reopened and revised only once every ten years if necessary to reflect the criteria of paragraph (a) of this subsection (1). Any revision to the decree shall take effect upon entry, but no provision of the revised decree shall remove a director then serving prior to the expiration of his term. A director whose term expires after a proper petition has been filed pursuant to this paragraph (d) shall continue to serve, and the court shall make no appointment of a successor director until such time as a revised organizational decree is entered pursuant to this paragraph (d) or until the court makes a determination that no revision is necessary. The revised decree shall stagger the terms of the directors so that no more than one-third of the terms of the directors shall expire in any given year.

(e) Upon petition or upon its own motion, the court may remove any director of a district board for malfeasance, misfeasance, willful neglect of duty, or any other cause which renders such director incapable or unfit to perform the duties of his office. Such action for removal of a director shall occur after notice and a public hearing, unless such notice and hearing is expressly waived in writing by the challenged director.

(2) In the event that a petition, signed by not fewer than ten percent of the registered electors residing in a county, or portion of a county entitled to a director, of a water conservancy district, which electors, for the purpose of this subsection (2), are those persons entitled to vote in general elections, praying for the election of a director from that county to fill the term of office of the specified director from that county then about to expire, in lieu of the appointment thereof by the court, shall be filed with the clerk of the court at any time prior to ninety days preceding the expiration date of the term of office of such director appointed by the court, the court shall order the holding of an election in the county, or portion of a county entitled to a director, in the district for the purpose of filling the vacancy to be caused by the expiration of the term of office of the director so about to expire in lieu of the appointment of a successor by the court as provided in subsection (1) of this section.

(3) Upon the entry of such order by the court, the clerk of the court shall prepare a certified copy of such order and file the same with the board of directors which shall thereafter provide for the holding of such election for the election of such member of the board of directors in accordance with the provisions of section 37-45-139.

(4) Any director so elected shall have the qualifications required for members of the board of directors appointed by the court and shall furnish like bond as required of directors appointed by the court under subsection (1) of this section.

(5) The call of such election shall be published as required by the provisions of section 37-45-140, and such election and the canvass of returns thereof shall be held in pursuance of the provisions of section 37-45-141.

(6) Repealed.

**Source:** L. 37: p. 1322, § 9. CSA: C. 173B, § 23. L. 45: p. 721, § 1. L. 49: pp. 735, 736, §§ 1, 2. CRS 53: § 149-6-9. C.R.S. 1963: § 150-5-9. L. 64: p. 835, § 1. L. 75: (1)(b) amended, p. 1366, § 1, effective July 1. L. 85: (1)(a), (1)(c), and (2) amended, (1)(d) and (1)(e) added, and (6) repealed, pp. 1147, 1150, §§ 1, 3, effective June 6. L. 96: (2) amended, p. 1036, § 1, effective May 23.

#### ANNOTATION

**Board of directors of water conservation district is subject to the elective process,** if steps are taken by the electors of the district as provided for in this section. Thus, if the electorate is dissatisfied with the operation of the dis-

trict, they may demonstrate their discontent by exercising their right to initiate the elective process. *Matthews v. Tri-County Water Conservancy Dist.*, 200 Colo. 202, 613 P.2d 889 (1980).

**37-45-115. Organization of the board of directors.** (1) Before entering upon his official duties each director shall take and subscribe to an oath before an officer authorized to administer oaths that he will support the constitutions of the United States and of the state of Colorado and will honestly, faithfully, and impartially perform the duties of his office and

that he will not be interested directly or indirectly in any contract let by said district, which oath shall be filed in the office of the clerk of said court in the original case.

(2) Upon taking the oath, the board shall choose one of its number chairman of the board and president of the district and shall elect some suitable person secretary of the board and of the district who may or may not be a member of the board. Such board shall adopt a seal and shall keep in a visual text format that may be transmitted electronically a record of all of its proceedings, minutes of all meetings, certificates, contracts, bonds given by employees, and all corporate acts, which shall be open to inspection of all owners of property in the district as well as to all other interested parties.

(3) Each member of the board shall receive as compensation for the member's service such sum as shall be ordered by the court, not in excess of two thousand four hundred dollars per annum, payable monthly, and necessary traveling expenses actually expended while engaged in the performance of the member's duties.

(4) All special and regular meetings of the board shall be held at locations which are within the boundaries of the district or which are within the boundaries of any county in which the district is located, in whole or in part, or in any county so long as the meeting location does not exceed twenty miles from the district boundaries. The provisions of this subsection (4) may be waived only if the following criteria are met:

(a) The proposed change of location of a meeting of the board appears on the agenda of a regular or special meeting of the board; and

(b) A resolution is adopted by the board stating the reason for which a meeting of the board is to be held in a location other than under the provisions of this subsection (4) and further stating the date, time, and place of such meeting.

**Source:** L. 37: p. 1322, § 10. CSA: C. 173B, § 24. CRS 53: § 149-6-10. C.R.S. 1963: § 150-5-10. L. 75: (3) amended, p. 1366, § 2, effective July 1. L. 90: (4) added, p. 1504, § 19, effective July 1. L. 2007: (3) amended, p. 357, § 1, effective April 2. L. 2009: (2) amended, (HB 09-1118), ch. 130, p. 563, § 11, effective August 5.

**37-45-116. Meetings and records.** (1) The meetings of the board of directors of a water conservancy district shall be subject to the requirements of part 4 of article 6 of title 24, C.R.S.

(2) A majority of the directors shall constitute a quorum, and a concurrence of a majority of those in attendance, in any matter within their duties, shall be sufficient for its determination, except as otherwise provided in this article.

(3) The board shall keep written minutes of its proceedings. The minutes of the board, as approved by the board, shall constitute prima facie evidence of the acts of the board recorded therein, and, when duly certified by the board's president or the board's secretary, copies of such minutes shall be received as evidence of the acts of the board in all courts equally and with like effect as the originals. The records of a water conservancy district shall be public records as defined by section 24-72-202 (6), C.R.S.

**Source:** L. 37: p. 1323, § 11. CSA: C. 173B, § 25. CRS 53: § 149-6-11. C.R.S. 1963: § 150-5-11. L. 85: Entire section amended, p. 1150, § 2, effective June 6. L. 91: (1) amended, p. 822, § 10, effective June 1.

**37-45-117. Employment of agents.** The secretary shall be custodian of the records of the district and of its corporate seal, and shall assist the board in such particulars as it may direct in the performance of its duties. The secretary shall attest, under the corporate seal of the district, all certified copies of the official records and files of the district that may be required of him by this article, or by any person ordering the same and paying the reasonable cost of transcription, and any portion of the record so certified and attested shall prima facie import verity. The secretary shall serve as treasurer of the district, unless a treasurer is otherwise provided for by the board. The board may also employ a chief engineer who may be an individual, partnership, or corporation; an attorney, and such other engineers, attorneys, and other agents and assistants as may be necessary; and may provide



for their compensation which, with all other necessary expenditures, shall be taken as a part of the cost or maintenance of the improvement. The chief engineer shall be superintendent of all the works and improvements, and shall make a full report to the board each year, or oftener if required by the board, and may make such suggestions and recommendations to the board as he may deem proper. The secretary and treasurer and such other agents or employees of the district as the court may direct, shall furnish corporate surety bonds, at the expense of the district, in amount and form fixed and approved by the court, conditioned upon the faithful performance of their respective duties.

**Source:** L. 37: p. 1323, § 12. **CSA:** C. 173B, § 26. **CRS 53:** § 149-6-12. **C.R.S. 1963:** § 150-5-12.

**37-45-118. General powers.** (1) The board has power on behalf of said district:

(a) To have perpetual succession;

(b) (I) (A) To take by appropriation, grant, purchase, bequest, devise, or lease, and to hold and enjoy water, waterworks, water rights, and sources of water supply, and any and all real and personal property of any kind within or without the district necessary or convenient to the full exercise of its powers;

(B) To sell, lease, encumber, alien, or otherwise dispose of water, waterworks, water rights, and sources of supply of water for use within the district;

(C) To acquire, construct, or operate, control, and use any and all works, facilities, and means necessary or convenient to the exercise of its power, both within and without the district for the purpose of providing for the use of such water within the district and to do and perform any and all things necessary or convenient to the full exercise of the powers granted in this paragraph (b).

(II) Any works or facilities planned and designed for the exportation of water from the natural basin of the Colorado river and its tributaries in Colorado, by any district created under this article, shall be subject to the provisions of the Colorado river compact and the "Boulder Canyon Project Act." Any such works or facilities shall be designed, constructed, and operated in such manner that the present appropriations of water and, in addition thereto, prospective uses of water for irrigation and other beneficial consumptive use purposes, including consumptive uses for domestic, mining, and industrial purposes, within the natural basin of the Colorado river in the state of Colorado from which water is exported will not be impaired nor increased in cost at the expense of the water users within the natural basin. The facilities and other means for the accomplishment of said purpose shall be incorporated in and made a part of any project plans for the exportation of water from said natural basin in Colorado.

(c) To have and to exercise the power of eminent domain and dominant eminent domain and in the manner provided by law for the condemnation of private property for public use to take any property necessary to the exercise of the powers granted in this article; except that such district shall not have or exercise the power of eminent domain over or by means thereof to acquire the title to or beneficial use of vested water rights for transmountain diversion, and in connection therewith such district shall not have the power to carry or transport water in transmountain diversion, the title to which has been acquired by any municipality by virtue of eminent domain proceedings against any such vested rights;

(d) (I) To construct and maintain works and establish and maintain facilities across or along any public street or highway and in, upon, or over any vacant public lands which public lands are now, or may become, the property of the state of Colorado and to construct works and establish and maintain facilities across any stream of water or watercourse; except that the district shall promptly restore any such street or highway to its former state of usefulness as nearly as may be and shall not use the same in such manner as to completely or unnecessarily impair the usefulness thereof. The grant of the right to use such vacant state lands shall be effective upon the filing by such district with the state board of land commissioners of an application showing the boundaries, extent, and locations of the lands, rights-of-way, or easements desired for such purposes.

(II) If the land, rights-of-way, or easements for which application is made is for the construction of any aqueduct, ditch, pipeline, conduit, tunnel, or other works for the conveyance of water, or for roads, or for poles or towers and wires for the conveyance of electrical energy, or for telephonic or telegraphic communication, no compensation shall be charged the district therefor, unless in the opinion of the state board of land commissioners the construction of such works will render the remainder of the legal subdivision through which such works are to be constructed valueless or unsalable, in which event the district shall pay for the lands to be taken and for such portion of any legal subdivision which in the opinion of the board is rendered valueless or unsalable, at the rate of two dollars and fifty cents per acre. If the lands for which application is made are for purposes other than the construction of roads or works for the conveyance of water or electricity or telephonic or telegraphic communication, such district shall pay to the state for such lands at the rate of two dollars and fifty cents per acre.

(III) Upon filing such application, accompanied by map or plat showing the location or proposed location of such works or facilities, the fee title to so much of such state lands as shall be necessary or convenient to enable such district efficiently and without interference to construct, maintain, and operate its works and to establish, maintain, and operate its facilities shall be conveyed to said district by patent. If an easement or right-of-way only over such lands is sought by the district, such easement or right-of-way shall be evidenced by permit or grant executed by or on behalf of the state board of land commissioners. The state board of land commissioners may reserve easements or rights-of-way, in the public, across any lands in such patents, grants, or permits described for streets, roads, and highways theretofore established according to law. Before any such patent, grant, or permit is executed, any compensation due to the state under the provisions hereof must be paid. No fee shall be exacted from the district for any patent, permit, or grant so issued or for any service rendered hereunder.

(IV) In the use of streets, the district shall be subject to the reasonable rules and regulations of the county, city, or town where such streets lie, concerning excavation and the refilling of excavation, the relaying of pavements, and the protection of the public during periods of construction; except that the district shall not be required to pay any license or permit fees or file any bonds. The district may be required to pay reasonable inspection fees.

(e) To contract with the government of the United States or any agency thereof for the construction, preservation, operation, and maintenance of tunnels, reservoirs, regulating basins, diversion canals, and works, dams, power plants, and all necessary works incident thereto and to acquire perpetual rights to the use of water from such works and to sell and dispose of perpetual rights to the use of water from such works to persons and corporations, public and private;

(f) To list in separate ownership the lands within the district which are susceptible of irrigation from district sources and to make an allotment of water to all such lands, which allotment of water shall not exceed the maximum amount of water that the board determines could be beneficially used on such lands; to levy assessments as provided in sections 37-45-121 to 37-45-126 against the lands within the district to which water is allotted on the basis of the value per acre-foot of water allotted to said lands within the district; except that the board may divide the district into units and fix a different value per acre-foot of water in the respective units and, in such case, shall assess the lands within each unit upon the same basis of value per acre-foot of water allotted to lands within such unit;

(g) To fix rates at which water not allotted to lands, as provided in paragraph (f) of this subsection (1), shall be sold, leased, or otherwise disposed of; but rates shall be equitable although not necessarily equal or uniform, for like classes of service throughout the district;

(h) To enter into contracts, employ and retain personal services, and employ laborers; to create, establish, and maintain such offices and positions as shall be necessary and convenient for the transaction of the business of the district; and to elect, appoint, and employ such officers, attorneys, agents, and employees therefor as found by the board to be necessary and convenient;

(i) To adopt plans and specifications for the works for which the district was organized, which plans and specifications may at any time be changed or modified by the board. Such plans shall include maps, profiles, and such other data and descriptions as may be necessary



to set forth the location and character of the works, and a copy thereof shall be kept in the office of the district and open to public inspection.

(j) To appropriate and otherwise acquire water and water rights within or without the state; to develop, store, and transport water; to subscribe for, purchase, and acquire stock in canal companies, water companies, and water users' associations; to provide, sell, lease, and deliver water for municipal and domestic purposes, irrigation, power, milling, manufacturing, mining, metallurgical, and any and all other beneficial uses and to derive revenue and benefits therefrom; to fix the terms and rates therefor; and to make and adopt plans for and to acquire, construct, operate, and maintain dams, reservoirs, canals, conduits, pipelines, tunnels, power plants, and any and all works, facilities, improvements, and property necessary or convenient therefor and, in the doing of all of said things, to obligate itself and execute and perform such obligations according to the tenor thereof; but the sale, leasing, and delivery of water for irrigation, domestic, and other beneficial purposes as provided in this section, whether the water is developed by the principal district or a subdistrict thereof, shall only be made for use within the boundaries of either the principal district or the subdistrict, or both;

(k) Repealed.

(l) To invest or deposit any surplus money in the district treasury, including such money as may be in any sinking or escrow fund established for the purpose of providing for the payment of the principal of or interest on any contract or bonded or other indebtedness, or for any other purpose, not required for the immediate necessities of the district in any legal investment or depository authorized by the provisions of part 6 of article 75 of title 24, C.R.S., and such investment may be made by direct purchase of any issue of such legal investment, or part thereof, at the original sale of the same or by the subsequent purchase of such legal investment. Any legal investment thus made and held may be sold from time to time and the proceeds reinvested in any such legal investment. Sales of any such legal investment thus purchased and held shall be made in season so that the proceeds may be applied to the purposes for which the money with which the legal investments were originally purchased was placed in the treasury of the district. The functions and duties authorized by this paragraph (l) shall be performed under such rules and regulations as shall be prescribed by the board. The board may appoint, by written resolution, one or more persons to act as custodians of the money of the district. Such persons shall give surety bonds in such amounts and form and for such purposes as the board requires.

(m) To refund bonded indebtedness incurred by the district under and pursuant to such rules and regulations as shall be prescribed by the board;

(n) To borrow money and incur indebtedness and to issue bonds or other evidence of such indebtedness;

(o) To adopt bylaws not in conflict with the constitution and laws of the state for carrying on the business, objects, and affairs of the board and of the district;

(p) To participate in the formulation and implementation of nonpoint source water pollution control programs related to agricultural practices in order to implement programs required or authorized under federal law and section 25-8-205 (5), C.R.S., enter into contracts and agreements, accept funds from any federal, state, or private sources, receive grants or loans, participate in education and demonstration programs, construct, operate, maintain, or replace facilities, and perform such other activities and adopt such rules and policies as the board deems necessary or desirable in connection with nonpoint source water pollution control programs related to agricultural practices;

(q) (I) To provide park and recreation improvements and services in connection with a reservoir owned by the district and adjacent land if such improvements and services are not already being provided by another entity with respect to the reservoir and adjacent land.

(II) Once the board adopts a resolution to provide improvements and services pursuant to this paragraph (q), no other entity may provide park and recreation improvements and services with respect to the reservoir and adjacent land without the consent of the board.

(III) The district may exercise any powers that a park and recreation district has in connection with the provision of park and recreation improvements and services, including imposing rates, fees, and charges in connection with the improvements and services. The district may use any district revenues to provide the improvements and services.

(2) Nothing provided in this article shall be construed to grant to the district or board the power to generate, distribute, sell, or contract to sell electric energy except for the operation of the works and facilities of the district and except for wholesale sales of electric energy which may be made both within and without the boundaries of the district or subdistrict.

**Source:** L. 37: p. 1324, § 13. CSA: C. 173B, § 27. L. 43: pp. 633, 635, §§ 1, 1. CRS 53: § 149-6-13. C.R.S. 1963: § 150-5-13. L. 71: p. 1348, § 1. L. 77: (1)(j) amended, p. 1636, § 1, effective June 9. L. 81: (1)(l) amended, p. 620, § 4, effective April 30; (1)(k) amended, p. 1756, § 1, effective May 18. L. 87: (1)(k) repealed and (2) added, p. 1582, §§ 42, 43, effective July 10. L. 88: (1)(p) added, p. 1023, § 3, effective April 6. L. 89: (1)(l) amended, p. 1135, § 84, effective July 1. L. 2005: (1)(q) added, p. 152, § 2, effective April 5.

**Cross references:** For the "Boulder Canyon Project Act", see 43 U.S.C. secs. 617 to 617t.

### ANNOTATION

**Law reviews.** For article, "Factors Affecting Water Utilization in Colorado", see 19 Rocky Mt. L. Rev. 341 (1947). For article, "Compensatory Storage", see 22 Rocky Mt. L. Rev. 453 (1950). For note, "Constitutionality of Colorado Statutes Providing for Transmountain Water Diversions", see 25 Rocky Mt. L. Rev. 363 (1953). For article, "Reclamation Water Rights", see 32 Rocky Mt. L. Rev. 464 (1960). For note, "A Survey of Colorado Water Law", see 47 Den. L.J. 226 (1970). For article, "Colorado Water Law Problems", see 50 Den. L.J. 293 (1973). For article, "Area-of-Origin Protection in Transbasin Water Diversions: An Evaluation of Alternative Approaches", see 57 U. Colo. L. Rev. 527 (1986). For article, "Law and the American West: The Search for an Ethic of Place", see 59 U. Colo. L. Rev. 401 (1988). For article, "The Constitution, Property Rights and the Future of Water Law", see 61 U. Colo. L. Rev. 257 (1990).

**Constitutional and statutory provisions not applicable.** The language of § 8 of art. XVI, Colo. Const., and of article 85 of title 37, is not applicable to a political subdivision of the state of Colorado. *Matthews v. Tri-County Water Conservancy Dist.*, 200 Colo. 202, 613 P.2d 889 (1980).

**Such provisions are only applicable to private parties.** The framers intended, and the general assembly understood, that § 8 of art. XVI, Colo. Const., was applicable only to private persons or corporations engaged in the business of storage, carriage, and sale of water for irrigation, mining, milling, manufacturing, or domestic purposes. *Matthews v. Tri-County Water Conservancy Dist.*, 200 Colo. 202, 613 P.2d 889 (1980).

**District compelled to obey section in formation and function.** A legislatively created water conservancy district is compelled to obey the mandate of this section, not only in how the district is formed but also in how the district

through its directors continues to function. *Central Colo. Water Conservancy Dist. v. Colo. River Water Conservation Dist.*, 186 Colo. 193, 526 P.2d 302 (1974).

**District must obey subsection (1)(b)(II) prior to diverting water.** A legislatively created water conservancy district is compelled to obey the mandate of subsection (1)(b)(II) prior to diverting water from a natural basin to the district. *Central Colo. Water Conservancy Dist. v. Colo. River Water Conservation Dist.*, 186 Colo. 193, 526 P.2d 302 (1974).

**The general powers over the affairs of the district after incorporation are granted to the members of the board of directors** by this section, with the jurisdiction of the district court limited by § 37-45-108. *Peaker v. Southeastern Colo. Water Conservancy Dist.*, 174 Colo. 210, 483 P.2d 232 (1971).

**This section gives a district board the authority to adopt plans and specifications for the works for which the district was organized**, which plans and specifications may at any time be changed or modified by the board. *People ex rel. Dunbar v. South Platte Water Conservancy Dist.*, 139 Colo. 503, 343 P.2d 812 (1959).

**Board has duty to determine extent of property necessary to be taken.** In the exercise of the broad power vested in the district board, there is a duty to determine, among other things, the extent of the property necessary to be taken to accomplish the public purpose, and its determination of the question, in the absence of fraud or bad faith, is final; accordingly the failure of the court to appoint a commission to determine the necessity of taking land above the high-water line of the lake involved, or to be involved, was not error. *Kistler v. Northern Colo. Water Conservancy Dist.*, 126 Colo. 11, 246 P.2d 616 (1952).

**Board is not subject to county commissioners' authority when setting rates for water it**



sells. *Matthews v. Tri-County Water Conservancy Dist.*, 42 Colo. App. 80, 594 P.2d 586 (1979), *aff'd*, 200 Colo. 202, 613 P.2d 889 (1980).

Water conservancy districts, when fixing rates for sale of water, are not subject to the jurisdiction of the boards of county commissioners. *Matthews v. Tri-County Water Conservancy Dist.*, 200 Colo. 202, 613 P.2d 889 (1980).

**Water conservancy district was a municipality** for purposes of the Federal Power Act notice requirements. *Northern Colo. Water Conservancy Dist. v. F.E.R.C.*, 730 F.2d 1509 (10th Cir. 1984).

**Water conservancy districts are not public utilities** subject to the regulation of the public utilities commission. *Matthews v. Tri-County Water Conservancy Dist.*, 200 Colo. 202, 613 P.2d 889 (1980).

The power of a conservancy district to engage in rate fixing for the sale, leasing or disposition of its waters does not by this authority alone give it public utility status or subject it to the rules, regulations, and supervision of the public utilities commission. *Matthews v. Tri-County Water Conservancy Dist.*, 200 Colo. 202, 613 P.2d 889 (1980).

A water conservancy district, a political subdivision of the state, having the powers of a public or municipal corporation and having no obligation to sell, and being prohibited by statute from selling water for use outside the district boundaries, does not rationally fall within the definition of a public utility or within the regulatory control of the public utilities commission. *Matthews v. Tri-County Water Conservancy Dist.*, 200 Colo. 202, 613 P.2d 889 (1980).

**37-45-119. Power to acquire rights-of-way.** Whenever, pursuant to this article, the electors of a water conservancy district have authorized a contract with the United States for construction and acquisition of works and water rights, which contract has obligated the district to acquire rights-of-way therefor to be conveyed by the district to the United States upon reimbursement by the United States, then the district, without further election and through its board of directors, has power to do all acts for acquiring such rights-of-way, including borrowing of and paying interest upon such sums of money as shall be required to make deposits fixed by the court for possession and to pay awards on condemnation of said rights-of-way as well as amounts up to the appraised values of the particular rights-of-way as have been fixed by the appraisers for the United States in each instance of negotiated purchases, notwithstanding the sum borrowed shall be greater than the ordinary annual incomes and revenues of the district; and all debts incurred, and interest payments made prior to February 5, 1943, for the aforesaid purposes, are expressly authorized, ratified, and approved.

**Source:** L. 43: p. 641, § 1. **CSA:** C. 173B, § 27(1). **CRS 53:** § 149-6-14. **C.R.S. 1963:** § 150-5-14.

**Cross references:** For the "Colorado River Compact", see article 61 of this title; for the "Boulder Canyon Project Act", see 43 U.S.C. secs. 617 to 617t; for eminent domain proceedings, see articles 1 to 7 of title 38.

**37-45-120. Subdistricts.** (1) Subdistricts may be organized upon the petition of the owners of real property, within or partly within and partly without the district, which

**For guides accompanying jurors inspecting lands during condemnation proceeding,** see *Kistler v. Northern Colo. Water Conservancy Dist.*, 126 Colo. 11, 246 P.2d 616 (1952).

**This section evinces an intent that a conservancy district use the benefits of any water developed by the district within the boundaries of the district, however, extra-district use is not per se impermissible.** *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

**The northern Colorado water conservancy district (NCWCD)** enacted rules and regulations to implement the limitations placed on the distribution of Colorado-Big Thompson (CBT) water by the Water Conservancy Act and the 1938 repayment contract between the United States and the NCWCD for the construction of the CBT project. The Water Conservancy Act, the repayment contract, and the rules enacted by the NCWCD all prohibited use of CBT water outside the boundaries of the NCWCD boundaries. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

Thornton could not use, outside the NCWCD boundaries, the CBT water it obtained by virtue of its shares in the water supply and storage company (WSSC) and the WSSC allotment contract with NCWCD. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

**Applied** in *Southeastern Colo. Water Conservancy Dist. v. Huston*, 197 Colo. 365, 593 P.2d 1347 (1979); *Colo. River Water Conservation Dist. v. Municipal Subdistrict*, 198 Colo. 352, 610 P.2d 81 (1979).

petition shall fulfill the same requirements concerning the subdistricts as the petition outlined in section 37-45-109 is required to fulfill, concerning the organization of the main district, and shall be filed with the clerk of the court, and shall be accompanied by a bond as provided for in section 37-45-110. All proceedings relating to the organization of such subdistricts shall conform in all things to the provision of this article relating to the organization of districts; except that not more than a majority of the owners of lands, having one-half or more of the aggregate valuation for assessment of the lands in the proposed subdistrict, shall be required to sign the petition for the creation of a subdistrict and not more than twenty-five percent of the owners of lands in the proposed subdistrict shall be required to sign the protesting petition against the creation of such subdistrict.

(2) Whenever the court declares and decrees by its order duly entered of record such subdistricts to be organized, the clerk of said court shall thereupon give notice of such order to the directors of the district who shall thereupon act also as directors of the subdistrict. Thereafter, the proceedings in reference to the subdistrict in all matters shall conform to the provisions of this article; except that, in the appraisal of benefits for the purpose of such subdistricts, in the issuance of bonds, in levying of assessments, and in all other matters affecting only the subdistrict, the provisions of this article shall apply to the subdistrict as though it were an independent district, and it shall not in these things be amalgamated with the main district.

(3) The petition for organization of a subdistrict shall also contain a statement of the amount or quantity of water for which said subdistrict desires to acquire the perpetual use and the amount of money that said subdistrict is willing to pay therefor, and, prior to the entry of its decree organizing any territory into a subdistrict, the court shall obtain the verified consent of the board to furnish such perpetual use of water for the purposes therein specified to such subdistrict at a price and upon the terms mentioned in the petition. The court shall then be authorized to enter its decree of organization of such subdistrict.

**Source:** L. 37: p. 1331, § 14. CSA: C. 173B, § 28. CRS 53: § 149-6-15. C.R.S. 1963: § 150-5-15.

#### ANNOTATION

**Applied** in Colo. River Water Conservation Dist. v. Municipal Subdistrict, 198 Colo. 352, 610 P.2d 81 (1979).

**37-45-121. Classification of taxes and assessments - powers.** (1) In addition to the other means of providing revenue for such districts, the board has the power to levy and collect taxes and special assessments for maintaining and operating such works and paying the obligations and indebtedness of the district by any one or more of the methods or combinations thereof, classified as follows:

(a) Class A: To levy and collect taxes upon all property within the district as provided in section 37-45-122;

(b) Class B: To levy and collect assessments for special benefits accruing to property within municipalities for which use of water or capacity of works is allotted as provided in section 37-45-123;

(c) Class C: To levy and collect assessments for special benefits accruing to property within public corporations for which use of water or capacity of works is allotted as provided in section 37-45-124;

(d) Class D: To levy and collect assessments for special benefits accruing to lands for which use of water or capacity of works is allotted as provided in section 37-45-125.

**Source:** L. 37: p. 1332, § 15. CSA: C. 173B, § 29. CRS 53: § 149-6-16. L. 60: p. 221, § 1. C.R.S. 1963: § 150-5-16. L. 92: (1)(b) to (1)(d) amended, p. 2291, § 2, effective April 2.



## ANNOTATION

**Law reviews.** For article, "Legal Classification of Special District Corporate Forms in Colorado", see 45 Den. L.J. 347 (1968). For article, "Colorado's Law of 'Underground Water': A Look at the South Platte Basin and Beyond", see 59 U. Colo. L. Rev. 579 (1988).

**The so-called assessments for special benefits provided for in classes B, C, and D of this section are unique in character and are not directly analogous to special assessments** as they generally are known in ordinary local improvement districts, since the liability for these assessments can arise only by the voluntary act of the individuals and corporations affected, and such assessments cannot be held violative of § 25 of art. II, Colo. Const., as each individual landowner and designated corporation agrees to process before he or it becomes subject to any special assessment. *People ex rel. Rogers v. Letford*, 102 Colo. 284, 79 P.2d 274 (1938).

**Taxes are levied under class A for paying expenses of organization, for surveys and plans, paying costs of construction, and operating and maintaining the works of the district**, provided that the rate shall not exceed those specified. *People ex rel. Dunbar v. South Platte Water Conservancy Dist.*, 139 Colo. 503, 343 P.2d 812 (1959).

**The express authorization for power to levy taxes conferred by the general assem-**

**bly upon the district here involved is found in § 7 of art. X; Colo. Const., and in this grant of power lies the distinction between a water conservancy district under this act and the irrigation districts authorized by the Colorado irrigation district act of 1935.** The public character of the water conservancy district is the occasion for this difference. *People ex rel. Rogers v. Letford*, 102 Colo. 284, 79 P.2d 274 (1938).

**A water conservancy district is not required to employ all methods authorized by this section for the levy and collection of taxes**, but rather may limit its means of providing revenues for the district to the levy and collection of taxes upon all property within the district, thereby collecting taxes from those who did not receive project water. *Pueblo West Metro v. S.E. Colo. Water Cons.*, 721 P.2d 1220 (Colo. App. 1986), cert. denied, 748 P.2d 349 (Colo. 1988).

**The specific ownership tax on motor vehicles, trailers, and semi-trailers, authorized by § 42-3-102, is not to be allotted in part to water conservation districts** unless it is clear that such was the intention of the general assembly. But a water conservation district is not a "political subdivision" within the meaning of § 6 of art. X, Colo. Const., directing the general assembly to impose such specific ownership tax. *Northern Colo. Water Conservancy Dist. v. Witwer*, 108 Colo. 307, 116 P.2d 200 (1941).

**37-45-122. Levy and collection under class A.** (1) As to any district formed prior to April 22, 1957, to levy and collect taxes under class A, in each year, the board shall determine the amount of money necessary to be raised by taxation, taking into consideration other sources of revenue of the district, and shall fix a rate of levy which when levied upon every dollar of valuation for assessment of property within the district and with other revenues will raise the amount required by the district to supply funds for paying expenses of organization, for surveys and plans, and for paying the costs of construction of, operating, and maintaining the works of the district. The rate shall not exceed one-half mill on the dollar, prior to the delivery of water from the works, and thereafter shall not exceed one mill on the dollar of valuation for assessment of the property within the district, except in the event of accruing defaults or deficiencies when an additional levy may be made as provided in section 37-45-126.

(2) (a) As to any district formed subsequent to April 22, 1957, to levy and collect taxes under class A, in each year, the board shall determine the amount of money necessary to be raised by taxation, taking into consideration other sources of revenue of the district, and shall fix a rate of levy which, when levied on every dollar of valuation for assessment of property within the district and with other revenues, will raise the amount required by the district to supply funds for paying expenses of organization, for surveys and plans, and for paying the costs of construction of and operating and maintaining the works of the district; except that said rate shall not exceed:

(I) In the case of a district having a valuation for assessment when formed of not more than twenty million dollars, one and one-half mill on each dollar of valuation for assessment of property within the district prior to the delivery of water from the works and thereafter not to exceed three mills on each dollar of valuation for assessment;

(II) In the case of a district having a valuation for assessment when formed of more than twenty million dollars but not more than fifty million dollars, one mill on each dollar

of valuation for assessment of property within the district prior to the delivery of water from the works and thereafter not to exceed two mills on each dollar of valuation for assessment;

(III) In the case of a district having a valuation for assessment when formed of more than fifty million dollars, not to exceed one-half mill on each dollar of valuation for assessment of property within the district prior to the delivery of water from the works and thereafter not to exceed one mill on each dollar of valuation for assessment of the property within the district.

(b) In the event of accruing defaults or deficiencies, a levy in addition to those prescribed in paragraph (a) of this subsection (2) may be made as provided in section 37-45-126.

(3) In accordance with the schedule prescribed by section 39-5-128, C.R.S., the board shall certify to the board of county commissioners of each county within the district, or having a portion of its territory within the district, the rate so fixed with directions that, at the time and in the manner required by law for levying of taxes for county purposes, such board of county commissioners shall levy such tax upon the valuation for assessment of all property within the district, in addition to such other taxes as may be levied by such board of county commissioners at the rate so fixed and determined.

(4) (a) Any district may increase the maximum mill levy to no more than nine mills for districts described in subparagraph (I) of paragraph (a) of subsection (2) of this section, to no more than six mills for districts described in subparagraph (II) of paragraph (a) of subsection (2) of this section, and to no more than three mills for districts described in subparagraph (III) of paragraph (a) of subsection (2) of this section, but any such increase in a mill levy shall be made in accordance with the election procedure provided in this subsection (4).

(b) Whenever the board of directors of the district, by resolution adopted by a majority of all of the members of the board, determines that the interests of said district and the public interest or necessity demand an increase in the mill levy for such district not greater than the maximum mill levy prescribed in paragraph (a) of this subsection (4) for the purposes therein stated, said board shall order the submission of the proposition to the electors of the district at an election held for that purpose. Any election held for the purpose of submitting any such proposition may be held separately or may be consolidated or held concurrently with any other election authorized by law at which such electors of the district shall be entitled to vote.

(c) The declaration of such election may be included within the same resolution, which resolution, in addition to such declaration of public interest or necessity, shall recite the maximum mill levy proposed which shall be no greater than that authorized by paragraph (a) of this subsection (4) for a district of like size. Such resolution shall also fix the date upon which such election shall be held and the manner of holding the same and the method of voting for or against the increase in mill levy. Such resolution shall also fix the compensation to be paid the officers of the election and shall designate the precincts and polling places and shall appoint for each polling place, from each precinct from the electors thereof, the officers of such election, which officers shall consist of three judges, one of whom shall act as a clerk, who shall constitute a board of election for each polling place. The description of precincts may be made by reference to any order of the board of county commissioners of the county in which the district or any part thereof is situated or by reference to any previous order or resolution of the board or by detailed description of such precincts. Precincts established by boards of the various counties may be consolidated for special elections held under this article.

(d) In the event any such election is called to be held concurrently with any other election or is consolidated therewith, the resolution calling the election under this article need not designate precincts or polling places or names of officers of the election but shall contain reference to the act or order calling such other election and fixing the precincts and polling places and appointing the election officers therefrom. The resolution shall be published once a week for two consecutive weeks, the last publication of which shall be at least ten days prior to the date set for said election, in a newspaper of general circulation, printed and published within the district, and no other or further notice of such election or



publication of the names of election officers or of the precincts or polling places need be given or made.

(e) The election shall be conducted in accordance with the provisions of section 37-45-141 and in the same manner as elections held in accordance with the provisions of section 37-45-142. In the event that the increase in the mill levy of the district is approved, the board of directors shall be authorized to levy taxes at the rate authorized in the election. If the proposition of increasing such mill levy is defeated, the board of directors may continue to levy taxes at rates not exceeding those authorized prior to such election.

**Source:** L. 37: p. 1333, § 16. CSA: C. 173B, § 30. CRS 53: § 149-6-17. L. 57: p. 878, § 1. L. 63: p. 1010, § 1. C.R.S. 1963: § 150-5-17. L. 70: p. 437, § 2. L. 74: (1) and (3) amended, p. 421, § 73, effective April 11. L. 75: (1) amended, p. 224, § 81, effective July 16. L. 79: (4)(a) to (4)(c) amended, p. 1353, § 1, effective July 1. L. 80: (4)(e) amended, p. 796, § 61, effective June 5. L. 87: (3) amended, p. 1409, § 9, effective April 22. L. 2001: (4)(b) amended, p. 1277, § 48, effective June 5.

#### ANNOTATION

**Taxes are levied under class A for paying expenses of organization, for surveys and plans, paying costs of construction, and operating and maintaining the works of the dis-**

**trict, provided that the rate shall not exceed those specified. People ex rel. Dunbar v. South Platte Water Conservancy Dist., 139 Colo. 503, 343 P.2d 812 (1959).**

**37-45-123. Levy and collection under class B.** (1) (a) To levy and collect special assessments under class B, the board shall make an allotment of water or of capacity of specified works to each petitioning municipality in the district in the manner provided in this article and in such quantity as will in the judgment of the board, when added to the then present supply of water of such municipality in the case of an allotment of water, or when added to the then present supply of capacity of all other works of such municipality in the case of an allotment of capacity of specified works, make an adequate supply for such municipality and shall fix and determine the rate and the terms upon which such water or capacity of such works shall be sold, leased, contracted for, or otherwise disposed of for use by such municipalities; except that such rates shall be equitable although not necessarily equal or uniform for like classes of services throughout the district and no municipality shall be required to make payments to secure or cover the default or failure of performance pertaining to capital debt of any other participating municipality which participates in a project in which the capacity of the specified works has been allotted to two or more participants.

(b) The board shall examine all rates charged for like classes of service throughout the district and shall by rule and regulation adjust such rates periodically as needed to make such rates within any such class of service equitable.

(2) In the event any city, city and county, or town desires to purchase, lease, contract for, or otherwise obtain the beneficial use of waters or capacity of works of the district for domestic, irrigation, or other beneficial purposes, the legislative body of such municipality shall by ordinance authorize and direct its mayor and clerk to petition the board for an allotment of water or capacity of specified works, upon terms prescribed by the board, which petition shall contain, inter alia, the following:

- (a) Name of municipality;
- (b) Quantity of water or capacity of works for which an allotment is sought;
- (c) Rate to be paid;
- (d) Whether payments are to be in cash or annual installments;

(e) Agreement by the municipality to make payments for the beneficial use of such water or capacity of works together with annual maintenance and operating charges and to be bound by the provisions of this article and the rules and regulations of the board.

(3) The secretary of the board shall cause notice of the filing of such petition to be given and published once each week for two successive weeks, in a newspaper published in the county in which said municipality is situated, which notice shall state the filing of such

petition and give notice to all persons interested to appear at the office of the board, at a time named in said notice and show cause, in writing, if any they have, why the petition should not be granted.

(4) The board at the time and place mentioned in said notice or at such time to which the hearing of said petition may adjourn, shall proceed to hear the petition and objections thereto, presented in writing, by any person showing cause why said petition should not be granted. The failure of any person interested to show cause shall be deemed an assent on such person's part to the granting of said petition. At its discretion, the board may accept or reject said petition; but, if it deems it for the best interest of the district that said petition be granted, the board shall enter an order granting said petition, and, from and after such order, the said municipality shall be deemed to have purchased, leased, contracted for, or otherwise acquired the beneficial use of water or capacity of works as set forth in said order.

(5) If said petition is granted, the board shall determine the amount of money necessary to be raised by taxation in each year from property within such municipality to pay the annual installments and a fair proportionate amount of estimated operating and maintenance charges for the next succeeding year, as provided in the order granting said petition, and shall prepare a statement showing the tax rate to be applied to all property in such municipality, which rate shall be the rate fixed by resolution of the board, modified to the extent necessary to produce from each such municipality only the amount of money apportioned thereto in said resolution, less any amount paid or undertaken to be paid by such municipality in cash or as credited thereto by payments from the general funds of such municipality. Upon receipt by the board of county commissioners of each county, wherein such municipality is located, of a certified copy of such resolution showing the tax rate to be applied to all property in each municipality and showing the municipalities and the property which is exempt therefrom, if any, it is the duty of the county officers to levy and collect such tax in addition to such other tax as may be levied by such board of county commissioners at the rate so fixed and determined.

**Source:** L. 37: p. 1334, § 17. CSA: C. 173B, § 31. CRS 53: § 149-6-18. C.R.S. 1963: § 150-5-18. L. 92: (1), (2), and (4) amended, p. 2292, § 3, effective April 2.

#### ANNOTATION

**Class B allottee agrees to pay a specific price per square foot.** For a class B water allotment to municipalities, as to class C allotments to irrigation districts and as to individual allotments under class D, the allottee in a petition for allotment agrees to pay a specific price per acre-foot for water and must in the applica-

tion agree to pay the tax rate above the general tax that is fixed each year by the district board. The board first accepts the petition — then annually fixes the rate of tax after the allottee is bound to the purchase. *People ex rel. Dunbar v. South Platte Water Conservancy Dist.*, 139 Colo. 503, 343 P.2d 812 (1959).

**37-45-124. Levy and collection under class C.** (1) (a) To levy and collect special assessments upon lands under class C, the board shall make an allotment of water or of capacity of specified works to each of the petitioning public corporations, other than municipalities, within the district in the manner as provided in this section, in such quantity as will in the judgment of the board, when added to the present supply of water of such public corporation in the case of an allotment of water, or when added to the then present supply of capacity of all other works of such public corporation in the case of an allotment of capacity of specified works, make an adequate supply for such public corporation and shall fix and determine the rate and terms at which such water or capacity of works shall be sold, leased, contracted for, or otherwise disposed of to such public corporation; except that such rates shall be equitable although not necessarily equal or uniform for like classes of services throughout the district.

(b) The board shall examine all rates charged for like classes of service throughout the district and shall by rule and regulation adjust such rates periodically as needed to make such rates within any such class of service equitable.



(2) In the event any such public corporation desires to purchase, lease, contract for, or otherwise obtain the beneficial use of waters or capacity of works of the district, the board of such public corporation by resolution shall authorize and direct its president and secretary to petition the board for an allotment of water or of capacity of specified works, upon terms prescribed by the board, which petition shall contain, inter alia, the following:

- (a) Name of public corporation;
- (b) Quantity of water or capacity of works for which allotment is sought;
- (c) Rate to be paid;
- (d) Whether payments are to be made in cash or annual installments;
- (e) Agreement by such public corporation to make payments for the beneficial use of such water or capacity of works, together with annual maintenance and operating charges, and to be bound by the provisions of this article and the rules and regulations of the board.

(3) The secretary of the board shall cause notice of the filing of such petition to be given and published, which notice shall state the filing of such petition and give notice to all persons interested to appear at the office of the board at a time named in said notice and show cause in writing why the petition should not be granted. The board at the time and place mentioned in said notice, or at such time to which the hearing of said petition may be adjourned, shall proceed to hear the petition and objections thereto, presented in writing, by any person showing cause why said petition should not be granted. The failure of any person interested to show cause shall be deemed an assent on such person's part to the granting of said petition. At its discretion, the board may accept or reject said petition; but, if it deems it for the best interest of the district that said petition be granted, the board shall enter an order to that effect granting said petition and, from and after such order, the public corporation or persons therein shall be deemed to have purchased, leased, contracted for, or otherwise acquired the beneficial use of water or capacity of works as set forth in said order.

(4) If said petition is granted, the board shall determine the amount of money necessary to be raised by assessment in each year on lands within such public corporation, less any amount paid or undertaken to be paid by such public corporation in cash or as credited thereto by payments from the general fund of such public corporation, and shall certify to the county assessor of the county in which the lands of such public corporation are located the amount of the assessment, plus a fair proportionate amount of the estimated operating and maintenance charges for the next succeeding year on each tract of land on or before October 1 of each year, and such county assessor shall extend the amount of such assessment, plus said operating and maintenance charges, on the tax roll as an assessment against the lands upon which said assessment is made.

**Source:** L. 37: p. 1336, § 18. CSA: C. 173B, § 32. CRS 53: § 149-6-19. L. 60: p. 222, § 2. C.R.S. 1963: § 150-5-19. L. 92: (1) to (3) amended, p. 2293, § 4, effective April 2.

#### ANNOTATION

**Class C allottee agrees to pay a specific price per square foot.** For a class B water allotment to municipalities, as to class C allotments to irrigation districts and as to individual allotments under class D, the allottee in a petition for allotment agrees to pay a specific price per acre-foot for water and must in the applica-

tion agree to pay the tax rate above the general tax that is fixed each year by the district board. The board first accepts the petition — then annually fixes the rate of tax after the allottee is bound to the purchase. *People ex rel. Dunbar v. South Platte Water Conservancy Dist.*, 139 Colo. 503, 343 P.2d 812 (1959).

**37-45-125. Levy and collection under class D.** (1) To levy and collect special assessments upon lands under class D, the board shall make an allotment of water or of capacity of specified works to petitioning owners of lands in the district, upon which water may be beneficially used in the manner as provided in this article, in such amount as will in the judgment of the board, together with the present supply of water for such lands in the case of an allotment of water, or when added to the then present supply of capacity of all other works in the case of an allotment of capacity of specified works, make an adequate

water supply for such lands and shall fix and determine the rate and the terms at which water or capacity of works shall be sold, leased, contracted for, or otherwise disposed of, for use on said lands.

(2) In the event that any person or private corporation elects to purchase, lease, contract for, or otherwise obtain the beneficial use of waters or capacity of works of the district, such person or corporation shall petition the board for an allotment of water or of capacity of specified works, upon terms prescribed by the board, which petition shall contain, inter alia, the following:

- (a) Name of applicant;
- (b) Quantity of water or capacity of works for which allotment is sought;
- (c) Descriptions of lands upon which the water or capacity of works will be used and attached;
- (d) Rate to be paid;
- (e) Whether payment will be made in cash or annual installments;
- (f) Agreement that the annual installments and the charges for maintenance and operating shall become a tax lien upon the lands for which such water or capacity of works is petitioned and allotted and to be bound by the provision of this article and the rules and regulations of the board.

(3) (a) In its discretion the board may accept or reject said petition, but, if it deems it for the best interest of the district that said petition be granted, the board shall enter an order granting said petition, and from and after such order, said petitioner shall be deemed to have agreed to the purchase, lease, contract, or other means of acquiring the beneficial use of water or capacity of works under the terms set forth in said petition and order. Such order shall provide for payment on the basis of rate per unit of measure of water allotted in the case of an allotment of water, or on the basis of rate per unit of capacity allotted in the case of an allotment of works to said lands within the district; except that the board may divide the district into units and fix a different rate in the respective units; and further except that such rates shall be equitable although not necessarily equal or uniform for like classes of services throughout the district.

(b) The board shall examine all rates charged for like classes of service throughout the district and shall by rule and regulation adjust such rates periodically as needed to make such rates within any such class of service equitable.

(4) The secretary of the board shall cause notice of the filing of such petition to be given and published, which notice shall state the filing of such petition and give notice to all persons interested to appear at the office of the board at a time named in said notice and show cause in writing why the petition should not be granted. The board at the time and place mentioned in said notice, or at such time to which the hearing on said petition may be adjourned, shall proceed to hear the petition and objections thereto, presented in writing, by any person showing cause why said petition should not be granted. The failure of any person interested to show cause shall be deemed an assent on such person's part to the granting of said petition. At its discretion, the board may accept or reject said petition; but, if it deems it for the best interest of the district that said petition be granted, the board shall enter an order to that effect granting said petition, and, from and after such order, the petitioner or persons interested therein shall be deemed to have purchased, leased, contracted for, or otherwise acquired the beneficial use of water or capacity of works as set forth in said order.

(5) If such petition is granted, the board shall cause a certified copy of the order granting said petition to be recorded in the county in which said lands are located, and, thereafter, the annual installments and annual operating and maintenance charges shall be a perpetual tax lien upon such lands. On or before October 1 of each year, the board shall certify to the county assessor of the county within the district in which such lands are located the amount of the annual installments, plus a fair proportionate amount of the estimated operating and maintenance charges apportioned to said lands for the next succeeding year, and such county assessor shall extend the amount so certified on the tax roll as a flat special assessment against the lands for which such water is petitioned and allotted.



**Source:** L. 37: p. 1338, § 19. **CSA:** C. 173B, § 33. **CRS 53:** § 149-6-20. **C.R.S. 1963:** § 150-5-20. **L. 92:** (1) to (4) amended, p. 2294, § 5, effective April 2.

#### ANNOTATION

**Class D allottee agrees to pay a specific price per square foot.** For a class B water allotment to municipalities, as to class C allotments to irrigation districts and as to individual allotments under class D, the allottee in a petition for allotment agrees to pay specific price per acre-foot for water and must in the applica-

tion agree to pay the tax rate above the general tax that is fixed each year by the district board. The board first accepts the petition — then annually fixes the rate of tax after the allottee is bound to the purchase. *People ex rel. Dunbar v. South Platte Water Conservancy Dist.*, 139 Colo. 503, 343 P.2d 812 (1959).

**37-45-126. Levies cover defaults and deficiencies.** The board, in making the annual assessments and levies, shall take into account the maturing indebtedness for the ensuing year as provided in its contracts or the maturing of bonds and interest on all bonds and deficiencies and defaults of prior years and shall make ample provision for the payment thereof. In case the proceeds of such levies and assessments made under the provisions of this article, together with other revenues of the district, are not sufficient to punctually pay the annual installments on its contracts or bonds and interest thereon and to pay defaults and deficiencies, then the board shall make such additional levies of taxes or assessments as may be necessary for such purposes; and, notwithstanding any limitations by contract, order, tax lien, or otherwise, such taxes and assessments shall be made and shall continue until the indebtedness of the district is fully paid; except that the additional levies authorized by this section may not be made to cover defaults and deficiencies with respect to evidences of indebtedness authorized and issued by a district pursuant to any law if such evidences of indebtedness declare on their faces that they are payable solely from revenues derived from payments made with respect to contracts which are entered into pursuant to this article and further except that the amount of such additional levies of taxes under class A shall not in any one year exceed an amount that would be raised by a levy of one-half mill against the valuation for assessment of such property as fixed for general tax purposes and further except that such levies for defaults and deficiencies shall not, at any time, be made to impose upon class A payments in excess of twenty-five percent of the anticipated revenue from all sources to be raised for the specific purpose of payment of existing defaults and deficiencies and further except that, in making such additional levies or assessments, the board shall take into account all sources of revenue and equitably distribute the burden of such defaults and deficiencies according to the uses and benefits as provided in this article.

**Source:** L. 37: p. 1341, § 20. **CSA:** C. 173B, § 34. **CRS 53:** § 149-6-21. **C.R.S. 1963:** § 150-5-21. **L. 75:** Entire section amended, p. 1367, § 3, effective July 1. **L. 81:** Entire section amended, p. 1757, § 1, effective May 27.

**37-45-127. Objections to assessments - appeal.** (1) Prior to October 1 of each year in which assessments are made, the board shall appoint a time and place where it will meet within the district for the purpose of hearing objections to assessments, and prior notice of such hearing shall be given by publication in two issues, a week apart, in some newspaper of general circulation published in each county; except that, if there is any county in the district in which there is no newspaper published, such notice shall be published in an adjoining county. Said notice shall notify the owners of property in the district that in the secretary's office may be found and examined a description of the property so assessed, the amount of the assessment thereon fixed by the board, and the time and place fixed by the board for the hearing of objections to such assessments. It shall not be necessary for said notice to contain separate descriptions of the lots or tracts of real estate, but it is sufficient if the notice contains such descriptions as will inform the owner whether or not his real estate is covered by such descriptions, and to inform the owner where can be found of record the amount of assessments.

(2) If, in the opinion of any person whose property is assessed, his property has been assessed too high, or has been erroneously or illegally assessed, at any time before the date

of such hearing, he may file written objections to such assessments, stating the grounds of such objections, which statement shall be verified by the affidavit of said person or his agent. In such hearing the board shall hear such evidence and arguments as may be offered concerning the correctness or legality of such assessment and may modify or amend the same.

(3) Any owner of property desiring to appeal from the findings of the board as to assessment, within thirty days from the finding of the board, shall file with the clerk of the court a written notice making demand for trial by the court. The appellant at the same time shall file a bond with good and sufficient security to be approved by the clerk of said court in a sum not exceeding two hundred dollars to the effect that, if the finding of the court is not more favorable to the appellant than the finding of the board, the appellant shall pay the cost of the appeal. The appellant shall state definitely from what part of the order the appeal is taken. In case more than one appeal is taken, upon its showing that the same may be consolidated without injury to the interests of anyone, the court may consolidate and try the same together.

(4) The court shall not disturb the findings of the board unless the findings of the board in any case are manifestly disproportionate to the assessments imposed upon other property in the district created under this article. The trial shall be to the court, and the matter shall take precedence before the court and shall be taken up as promptly as may be after the appeal is filed. If no appeal is taken from the findings of the board within the time prescribed in this section, or after the findings of the court in case an appeal is taken from the findings of the board, then the assessment shall be final and conclusive evidence that said assessments have been made in proportion to the benefits conferred upon the property in said district by reason of the improvements to be constructed under the provisions of this article, and such assessments shall constitute a perpetual lien upon such property so assessed until paid.

**Source:** L. 37: p. 1342, § 21. CSA: C. 173B, § 35. CRS 53: § 149-6-22. C.R.S. 1963: § 150-5-22.

**37-45-128. Officers levy and collect taxes and assessments.** It is the duty of the officer or body having authority to levy taxes within each county, city and county, or town to levy the taxes and special assessments as provided in this article, and it is the duty of all county or city and county officials charged with the duty of collecting taxes to collect such taxes and special assessments in the time, form, and manner and with like interest and penalties as county or city and county taxes are collected and, when collected, to pay the same to the district ordering its levy or collection, and the payment of such collections shall be made through the secretary of the district and paid into the depository thereof to the credit of the district. All taxes and assessments made under this article together with all interest thereon and penalties for default in payment thereof, and all costs in collecting the same, until paid, shall constitute a perpetual lien on a parity with the tax lien of general, state, county, city, town, or school taxes, and no sale of such property to enforce any general, state, county, city, town, or school tax or other liens shall extinguish the perpetual lien of such taxes and assessments.

**Source:** L. 37: p. 1344, § 22. CSA: C. 173B, § 36. CRS 53: § 149-6-23. C.R.S. 1963: § 150-5-23.

#### ANNOTATION

**Perpetual lien status of unpaid assessments and taxes is not subject to challenge.** The provision of this section that all taxes and assessments are, until paid, a perpetual lien on a

party with other tax liens, as they pertain to the general ad valorem tax, is not subject to challenge. *People ex rel. Rogers v. Letford*, 102 Colo. 284, 79 P.2d 274 (1938).



**37-45-129. Sale for delinquencies.** If the taxes or assessments levied are not paid, then the real property shall be sold at the regular tax sale for the payment of said taxes and assessments, interest, and penalties in the manner provided by the statutes of the state of Colorado for selling property for payment of general taxes. If there are no bids at said tax sale for the property so offered under class A and class B, said property shall be struck off to the county, and the county shall account to the district in the same manner as provided by law for accounting for school, town, and city taxes. If there are no bids for the property so offered under class C and class D, said property shall be struck off to the district, and the tax certificate shall be issued in the name of the district, and the board shall have the same power with reference to sale of said tax certificate as vested in county commissioners and county treasurers when property is struck off to the counties.

**Source:** L. 37: p. 1345, § 23. CSA: C. 173B, § 37. CRS 53: § 149-6-24. C.R.S. 1963: § 150-5-24.

**Cross references:** For tax sales, see article 11 of title 39.

**37-45-130. Exemptions.** All property of whatever kind and nature owned by the state and by towns, cities, school districts, drainage districts, irrigation districts, park districts, water districts, or any other governmental agency within said district shall be exempt from assessment and levy by the board as provided by this article for the purposes of this article.

**Source:** L. 37: p. 1346, § 24. CSA: C. 173B, § 38. CRS 53: § 149-6-25. C.R.S. 1963: § 150-5-25.

**37-45-131. Sale of water by contract.** The board may sell, lease, or otherwise dispose of the use of water by term contracts or by contracts for the perpetual use of such water to public corporations, persons, mutual ditch companies, water users' associations, and other private corporations for irrigation, domestic, or commercial use as shall be provided by contracts, in writing, authorized and entered into by the board; and the board shall require that security be given to secure the payments to be made under such contracts.

**Source:** L. 37: p. 1346, § 25. CSA: C. 173B, § 39. CRS 53: § 149-6-26. L. 60: p. 223, § 3. C.R.S. 1963: § 150-5-26.

**37-45-132. Contracts - security - enforcement.** (1) To meet the annual installments as provided in contracts for the use of water:

(a) A water users' association may bind itself to levy an annual assessment on the use of water and to secure same by liens on land and water rights or in such manner as may be provided by law;

(b) A mutual ditch or irrigation company may bind itself by mortgage upon its irrigation works and system or to levy annual assessments upon its stockholders;

(c) Any person or corporation landowner may create a mortgage lien upon lands or give other security satisfactory to the board; and all such contracts shall provide for forfeiture of the use of water for nonpayment of assessments or installments in the same manner and procedure as provided by statute for forfeiture of stock in a mutual ditch company;

(d) A public corporation shall meet the annual installments as provided in sections 37-45-123 and 37-45-124.

**Source:** L. 37: p. 1346, § 26. CSA: C. 173B, § 40. CRS 53: § 149-6-27. L. 60: p. 223, § 4. C.R.S. 1963: § 150-5-27.

**Cross references:** For forfeiture of stock in a ditch company, see § 7-42-104 (4).

**37-45-133. Sinking fund.** Whenever a contract of indebtedness has been created by the district, it shall be lawful for the board to make the annual levy of taxes and special

assessments in such amount as will create a surplus of funds to meet the annual installments of indebtedness or the payment of bonds and interest and the necessary maintenance and operating charges, and the board shall cause such surplus funds to be placed in a sinking fund which may be used for the payments of contingencies, defaults, and delinquencies and to pay the future annual installments of indebtedness on contract or bonds and interest.

**Source:** L. 37: p. 1347, § 27. CSA: C. 173B, § 41. CRS 53: § 149-6-28. C.R.S. 1963: § 150-5-28.

**37-45-134. Additional powers.** (1) The board has the following powers concerning the management, control, delivery, use, and distribution of water by the district:

(a) To make and enforce all reasonable rules and regulations for the management, control, delivery, use, and distribution of water;

(b) To withhold the delivery of water upon which there are any defaults or delinquencies of payment;

(c) To provide for and declare forfeitures of rights to the use of water upon default or failure to comply with any order, contract, or agreement for the purchase, lease, or use of water and to resell, lease, or otherwise dispose of water upon which forfeiture has been declared;

(d) To allocate and reallocate the use of water to lands within the district;

(e) To provide for and grant the right, upon terms, to transfer water from lands to which water has been allocated to other lands within the district and to discharge liens from lands to which the same was theretofore attached and to create liens, as provided in this article, upon lands to which the use of such water is transferred.

**Source:** L. 37: p. 1347, § 28. CSA: C. 173B, § 42. CRS 53: § 149-6-29. C.R.S. 1963: § 150-5-29.

#### ANNOTATION

This section granted the northern Colorado water conservancy district (NCWCD) the authority to enact rules and regulations that implement the limitations placed on the distribution of Colorado-Big Thompson (CBT) water by the Water Conservancy Act and the 1938 repayment contract between the United States and the NCWCD for the construction of the CBT project. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

The NCWCD had statutory authority to make those rules, the rules did not impermissibly in-

fringe on the jurisdiction of the water court to regulate the exercise of water rights, and the court has jurisdiction to resolve disputes concerning the interpretation and application of the rules. As the rules were reasonable limitations on the use of CBT water, they superseded the general replacement and exchange statutes. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

**37-45-135. Allotment of water to disabled landowner or administrator.** Where the landowner in a water conservancy district, organized under this article, is under disability by reason of infancy, insanity, or otherwise, or lands are held under administration, executorship, guardianship, conservatorship, trusteeship, receivership, or other similar proceeding, the administrator, executor, guardian, conservator, trustee, receiver, or other like officer shall be considered the "landowner" for all purposes within this article; and, when authorized by the court having jurisdiction of the estate or lands, such administrator, executor, guardian, conservator, trustee, receiver, or other like officer may petition for an allotment of water in such quantity as determined by such court as will, together with the present supply of water for irrigation purposes, make an adequate supply for the irrigation of such lands; or, in the event such administrator, executor, guardian, conservator, trustee, receiver, or other like officer has, prior to February 28, 1939, petitioned for a supply of water for irrigation of lands so held, the court having jurisdiction of the estate or lands may ratify or confirm the petition for such quantity of water as it may determine will make an adequate supply for the irrigation of such lands, and such petition so made and authorized



or ratified and confirmed shall have the same effect and be binding upon all parties interested in such lands to the same extent as though made by a landowner while not under disability.

**Source:** L. 39: p. 590, § 21 CSA: C. 173B, § 42(1). CRS 53: § 149-6-30. C.R.S. 1963: § 150-5-30.

**37-45-136. Inclusion of lands.** (1) The boundaries of any district organized under the provisions of this article may be changed in the manner prescribed in this article, but the change of boundaries of the district shall not impair or affect its organization or its rights in or to property or any of its rights or privileges whatsoever, nor shall it affect or impair or discharge any contract, obligation, lien, or charge for or upon which it might be liable or chargeable had such change of boundaries not been made.

(2) The owners of lands may file a petition with the board, in writing, praying that such lands be included in the district. The petition shall describe the tracts or body of land owned by the petitioners, and such petition shall be deemed to give the assent of the petitioners to the inclusion in said district of the lands described in the petition, and such petition must be acknowledged in the same manner that conveyances of land are required to be acknowledged. The secretary of the board shall cause notice of filing of such petition to be given and published in the county in which the lands are situated, which notice shall state the filing of such petition, names of petitioners, descriptions of lands mentioned, and the prayer of said petitioners, giving notice to all persons interested to appear at the office of the board at any time named in said notice and show cause in writing why the petition should not be granted. At the time and place mentioned or at such time to which the hearing may be adjourned, the board shall proceed to hear the petition and all objections thereto, presented in writing by any person showing cause why said petition should not be granted. The failure of any person interested to show cause shall be deemed an assent on his part to the inclusion of such lands in the district as prayed for in the petition. If the petition is granted, the board shall make an order to that effect and file the same with the clerk of the court, and, upon order of the court, said lands shall be included in the district.

(3) (a) In addition to the method provided in subsections (1) and (2) of this section, additional areas, either contiguous or noncontiguous to the district, and including irrigated lands, nonirrigated lands, towns and cities, and other lands and any one or more of the same, may be included in the district by petition, which petition shall be filed in the district court of the county in which the petition for organization of the original district was filed, signed by not fewer than twenty-five percent of the owners of irrigated lands in said area but not embraced within the corporate limits of a city or town; and each tract of land shall be listed opposite the name of the signer. Each such tract together with the improvements thereon shall have a valuation for assessment of not less than one thousand dollars. The petition shall also be signed by not fewer than five percent of the owners of nonirrigated lands or lands embraced within the incorporated limits of a city or town, all situated in the area embraced in said petition; and each tract of land shall be listed opposite the name of the signer. Each such tract together with improvements thereon shall have a valuation for assessment of not less than one thousand dollars. Said petition shall set forth a general description of the territory in the area sought to be included in the district, the name of the district in which it is sought to be included, and a statement that the property sought to be included will be benefited by the accomplishment of the purposes for which the original district was formed and shall pray for the inclusion of the area in the district.

(b) No petition with the requisite signatures shall be declared null and void on account of alleged defects, but the court may permit the petition to be amended at any time to conform to the facts by correcting any errors in the description of the territory or in any other particular. However, similar petitions or duplicate copies of the same petition for the inclusion of the same area may be filed and shall together be regarded as one petition. All such petitions filed prior to the hearing on the first petition filed shall be considered by the court the same as though filed with the first petition placed on file.

(c) In determining whether the requisite number of landowners has signed the petition, the names as they appear upon the tax roll shall be prima facie evidence of such ownership.

(d) At the time of filing the petition or at any time subsequent thereto, and prior to the time of hearing on said petition, a bond shall be filed, with security approved by the court, sufficient to pay all expenses connected with the proceedings in case the inclusion of the area is not effected. If at any time during the proceeding the court is satisfied that the bond first executed is insufficient in amount, it may require the execution of an additional bond within a time to be fixed to be not less than ten days distant, and, upon failure of the petitioner to execute the same, the petition shall be dismissed.

(e) Immediately after the filing of such petition, the court wherein such petition is filed, by order, shall fix a place and time, not less than sixty days nor more than ninety days after the petition is filed, for hearing thereon, and thereupon the clerk of said court shall cause notice by publication to be made of the pendency of the petition and of the time and place of hearing thereon. The clerk of said court shall also forthwith cause a copy of said notice to be mailed by registered mail to the board of county commissioners of each of the several counties having territory within the area proposed to be included within the district.

(f) No city, or city and county, having a population of more than twenty-five thousand as determined by the last United States census shall be included within such area proposed to be included within the district unless by and with the written consent of the chief executive officer of such city, or city and county, with the approval of the legislative body of such municipality, and such consent may specify that the rate of taxation on the valuation for assessment of property within said city, or city and county, under section 37-45-122, shall not exceed a maximum rate which may be less than the rates set out in said section 37-45-122, and in such case the district shall not have power to levy an assessment on the property in said city, or city and county, at a greater rate than that specified in said consent.

(g) Not less than thirty days prior to the time fixed by order of court for the hearing on said petition, and not thereafter, a petition may be filed in the office of the clerk of the court wherein the proceeding for inclusion is pending, signed by not fewer than twenty percent of the owners of irrigated lands in said area but not embraced within the incorporated limits of a city or town, who have not signed the petition for inclusion, and also signed by not fewer than five percent of the owners of nonirrigated lands or lands embraced in the incorporated limits of a city or town, all situated in said area proposed to be included within the district, who have not signed the petition for inclusion, protesting the inclusion of said area. The signers of said protesting petition shall state therein the land owned by each and also shall state the value thereof as shown by the last preceding assessment.

(h) In the event a petitioner signs such petition both as owner of irrigated and nonirrigated land situated within a municipality, his name shall be counted only as an owner of irrigated lands.

(i) Upon the day set for the hearing upon the original petition, if it appears to the court that said protesting petition is not signed by the requisite number of owners of lands and of the requisite value, the court shall thereupon dismiss said protesting petition and shall proceed with the original hearing as provided in this section.

(j) If the court finds from the evidence that said protesting petition is signed by the requisite number of owners of lands, and of the requisite values, the court shall forthwith dismiss the original petition for inclusion. The finding of the court upon the question of such valuation, the genuineness of the signatures, and all matters of law and fact incident to such determination shall be final and conclusive on all parties in interest whether appearing or not.

(k) Any owner of real property in said proposed area not having individually signed a petition for the inclusion, and desiring to object to the inclusion, on or before ten days prior to the date set for the cause to be heard, may file objection to the inclusion.

(l) Such objection shall be limited to a denial of the statements in the petition and shall be heard by the court as an advanced case without unnecessary delay.

(m) Any owner of irrigated land in said proposed area who has not individually signed a petition for the inclusion of the area within the district and who desires to have his irrigated lands excluded from said district, on or before ten days prior to the date set for the cause to be heard, may file a petition in said district court asking to have his irrigated lands excluded therefrom. Any petition so filed shall be heard by the district court on the date set



for the hearing of the petition for inclusion of the area, and the district court shall exclude such irrigated lands from the area proposed for inclusion within the district.

(n) Upon said hearing, if it appears that a petition for the inclusion has been signed and presented, as provided in this subsection (3), in conformity with this article, and that the allegations of the petition are true, and that no protesting petition has been filed, or if filed has been dismissed by order duly entered of record, the court shall adjudicate all questions of jurisdiction and declare the area included in the district to the same extent and as fully as if said area had been included in the original petition for the organization of the district; except that, prior to the entry of its decree including such area within the district, the court shall obtain the verified consent of the board of directors of the district to the inclusion of such area, which consent shall set forth the terms and conditions upon which said area shall be included, which terms may include the price and value per acre-foot of water to be allotted and contracted for use within said included area and which said terms and conditions shall be embodied in the decree of said court.

(o) If the court finds that no petition has been signed and presented in conformity with this section, or that the material facts are not as set forth in the petition filed, it shall dismiss said proceedings and adjudge the costs against the signers of the petition in such proportion as it deems just and equitable. No appeal or other remedy lies from an order dismissing said proceeding; but nothing in this article shall be construed to prevent the filing of a subsequent petition for similar purposes, and the right so to renew such proceeding is expressly granted and authorized.

(3.5) (a) As an alternative to the procedures set forth in subsections (2) and (3) of this section, a petition for inclusion and for an election on inclusion of lands within a water conservancy district may be filed in the district court of the county in which the petition for organization of the original district was filed. The petition shall be signed by not less than twenty-five percent of the owners of agricultural lands of the area embraced by the proposed lands to be included and by not less than ten percent of the electors of said area embraced by the proposed lands to be included. The petition shall show that the board of directors of the district has given its verified approval to the inclusion of such area in the district and shall recite the terms and conditions upon which said area shall be included, if any, which the board of directors of the district may have required, in its discretion, as a prerequisite to the inclusion. The board of directors of the district may require, as one of the conditions of its approval of the proposed inclusion, that the petitioners post a sufficient bond to cover the costs of the election. If no bond is so required, the district shall be deemed to have agreed to pay the costs of the election. The proposed boundary of the lands to be included within the district may include any part or all of any county, city, or city and county of any size. Such petition and the hearing thereon shall otherwise comply with the provisions of this section which are not inconsistent with the provisions of this subsection (3.5).

(b) On the day fixed for hearing, or at a continuance thereof, the court shall first ascertain, from such evidence which may be adduced, that the required number of electors of the area to be included in the district have signed the petition and that the board of directors has approved the inclusion of lands in the district. Upon said hearing, if it appears that the petition for inclusion has been signed and presented in conformity with this subsection (3.5) and that the allegations of the petition are true, the court, by order duly entered of record, shall direct that the question of the inclusion of lands in the water conservancy district be submitted at an election, to be held for that purpose, of electors of the area embraced within the inclusion petition. Such election shall be conducted by the board of directors of the district in the same manner set forth in sections 37-45-139 to 37-45-141.

(c) At such election the voter shall vote for or against the inclusion of lands in the water conservancy district. If the terms and conditions on inclusion have been set by the board of directors of the district, said terms and conditions shall be identified to the electors. If a majority of votes cast at said election are in favor of inclusion, the court, on the motion of the board of directors of the district, shall declare the area included in the district to the same extent and as fully as if said area had been included in the original petition for the organization of the district; except that, if the proposed inclusion in a district includes any territory within a municipality and a majority of the votes cast by the voters residing within

that incorporated area are against inclusion in the district, the governing body of said municipality may, within thirty days after certification of the election results, petition the court for exclusion from the district of such incorporated area, and the court shall exclude such territory from the district. Any order of the court so including lands in a district shall incorporate the terms and conditions, if any, for inclusion which the board of directors of the district has required as a prerequisite to inclusion.

(3.6) Whenever a municipality has annexed land into its boundaries and that municipality at the time of annexation previously had lands within its boundaries included within the district, upon consent of the governing body of the municipality, and upon consent by the board of directors of the district, the annexed lands shall be deemed to have been included within the district, subject to terms and conditions as determined by the board of directors of the district that shall not be inconsistent with the terms and conditions of previous applicable inclusion orders relating to that municipality. The municipality shall promptly transmit to the district a certified copy of the municipality's annexation ordinance. Upon receipt of the municipality's annexation ordinance, the board of directors of the district shall promptly act to grant or deny consent to the inclusion of the newly annexed lands into the district. If the board of directors of the district consents to such inclusion, and the municipality agrees to any terms and conditions to the inclusion adopted by the board of directors of the district, the district shall file with the court a certified copy of the municipality's annexation ordinance and a petition of the district for inclusion of the annexed lands that states the terms and conditions of inclusion as determined by the board of directors of the district. Upon the district's filing of a certified copy of the municipality's annexation ordinance and a petition of the district for inclusion of the annexed lands, the court shall enter an order including such lands within the boundaries of the district, upon the terms and conditions set forth in the petition.

(4) As a part of any order entered establishing the inclusion of lands or areas into the district, the court shall designate the division of the district to which such included lands or areas shall be attached or shall, in combination with or in lieu of the foregoing, create a new division from such included lands or areas and appoint the directors therefor; but the total number of directors of the district shall not exceed fifteen.

(5) (a) If an order is entered establishing the inclusion of lands or areas into the district, such order shall be deemed final and no appeal or other remedy lies therefrom, and the entry of such order shall finally and conclusively establish the inclusion of the lands or areas against all persons except the state of Colorado, in an action in the nature of quo warranto commenced by the attorney general within three months after said decree declaring such lands or areas included as provided, and not otherwise. The inclusion of said lands or areas shall not be directly or collaterally questioned in any suit, action, or proceeding except as expressly authorized in this section.

(b) Upon the entry of such decree, the clerk of the court shall transmit, to the division of local government in the department of local affairs and to the county clerk and recorder in each of the counties in which said lands or areas are located, copies of the findings and decree of the court including such lands or areas in the district. The same shall be recorded with said division, and copies shall also be filed in the office of the county clerk and recorder in each county in which a part of the district may be, where they shall become permanent records.

**Source:** L. 37: p. 1348, § 29. CSA: C. 173B, § 43. L. 51: p. 827, § 1. CRS 53: § 149-6-31. L. 61: p. 846, § 3. C.R.S. 1963: § 150-5-31. L. 76: (5)(b) amended, p. 606, § 31, effective July 1. L. 83: (3.5) and (3.6) added, p. 1390, § 1, effective May 16; (5)(b) amended, p. 1228, § 13, effective July 1. L. 99: (3.6) amended, p. 50, § 1, effective August 4.

#### ANNOTATION

**The water conservancy act provides a complete and exclusive procedure for organization of water conservancy districts, as well as**

**the exclusion and inclusion of property therefrom or thereto. People ex rel. Dunbar v. San Luis Water Conservancy Dist., 128 Colo. 193,**



261 P.2d 704 (1953).

**It is the duty of the supreme court to construe the water conservancy district act** so as to give force and effect to all of its provisions. *People ex rel. Dunbar v. San Luis Water Conservancy Dist.*, 128 Colo. 193, 261 P.2d 704 (1953).

**Jurisdiction is dependent upon the legal sufficiency of the inclusion petition.** *People ex rel. Dunbar v. San Luis Water Conservancy Dist.*, 128 Colo. 193, 261 P.2d 704 (1953).

**Any area contiguous or noncontiguous to the district may, by petition, be made a part of the district**, and it is not the area but the territory in the area which subsection (2) requires the petition to set forth a general description of the territory in the area sought to be included in the district, the name of the district in which it is sought to be included, a statement that the property sought to be included will be benefited by the accomplishment of the purposes for which the original district was formed, and shall pray for the inclusion of the area in the district. *People ex rel. Dunbar v. San Luis Water Conservancy Dist.*, 128 Colo. 193, 261 P.2d 704 (1953).

**It is apparent that contiguity is not required in the additional areas to be included in the district**, and it is equally apparent that the inclusion petition is not to include the area but rather territory in the area. This is made apparent by the provision that the petition shall set forth a general description of the territory in the area. If the area in its entirety was to become a part of the district by the inclusion petition, all the territory therein would necessarily be part of the district. *People ex rel. Dunbar v. San Luis Water*

*Conservancy Dist.*, 128 Colo. 193, 261 P.2d 704 (1953).

**An area is a particular extent of surface.** It is rather an elastic term not easily definable; it means a surface or a region or a territory, and, of course, contiguity is not a prerequisite. In subsection (2), area is used in connection with and subordinate to "district" and any surface or region or territory on petition of the designated owners and verified consent of the board may properly be included in the district in the absence of the statutory protest provided in the act. *People ex rel. Dunbar v. San Luis Water Conservancy Dist.*, 128 Colo. 193, 261 P.2d 704 (1953).

**There is no necessity for a determination of the sufficiency of the petition prior to the publication of notice.** *People ex rel. Dunbar v. San Luis Water Conservancy Dist.*, 128 Colo. 193, 261 P.2d 704 (1953).

**A petition must be dismissed when it takes signatures of owners.** Where the protesting petition did not contain the signatures of any owners of irrigated lands in the area described in the inclusion petition, this made it obligatory upon the trial court on the day for the hearing to dismiss the protesting petitions and then left for the court's determination the legal sufficiency of the inclusion petition only. *People ex rel. Dunbar v. San Luis Water Conservancy Dist.*, 128 Colo. 193, 261 P.2d 704 (1953).

**There is provided in the water conservancy act one hearing only on the sufficiency of the petition for inclusion and protests thereto.** *People ex rel. Dunbar v. San Luis Water Conservancy Dist.*, 128 Colo. 193, 261 P.2d 704 (1953).

**37-45-137. Exclusion of lands.** (1) (a) The owner in fee of any lands constituting a portion of any district, regardless of the valuation for assessment of such district, or, if the valuation for assessment of an existing district is less than three hundred million dollars, not less than fifteen owners of land in an overlapping area as described in section 37-45-109 (3) (d) who are petitioners for the formation of a new district proposed to be organized under the provisions of this article which includes lands within such existing district, may file with the board a petition praying that such lands be excluded and taken from said district. Petitions shall describe the lands which the petitioners desire to have excluded. Such petition must be acknowledged in the same manner and form as required in case of a conveyance of land and be accompanied by a deposit of money sufficient to pay all costs of the exclusion proceedings.

(b) The secretary of the board shall cause a notice of filing of such petition to be published in a newspaper of general circulation in the county in which said lands, or the major portion thereof, are located, the final publication to be made not less than ten days prior to the date set for the hearing thereon. If such petition has been filed by the proponents of a new district, individual notice shall also be given to those landowners of the existing district whose lands are included in the request for exclusion, by mailing a copy of such notice by registered or certified mail not less than ten days prior to the date set for the hearing thereon to each such landowner at his last-known address, as shown by the records of the treasurer of the county in which the lands are located. The notice shall state the filing of such petition, the names of petitioners, and, if applicable, the name of the proposed new district, descriptions of lands mentioned in said petition, and the prayer of said petitioners,

and it shall notify all persons interested to appear at the office of said board at the time named in said notice, showing cause in writing why said petition should not be granted.

(c) The board at the time and place mentioned in the notice, or at the time to which the hearing of said petition may be adjourned, shall proceed to hear the petition and all objections thereto, presented in writing, by any person showing cause why the prayer of the petition should not be granted. The filing of such petition shall be deemed an assent by each such petitioner to the exclusion from the district of his lands mentioned in the petition or any part thereof.

(d) If the board deems it not for the best interest of the district that the lands mentioned in the petition or some portion thereof are excluded from the district, the board shall order that said petition be denied; but, if the board deems it for the best interest of the district that the lands mentioned in the petition, or some portion thereof, be excluded from the district and, if there are no outstanding bonds of the district, the board may order the lands mentioned in the petition, or some portion thereof, to be excluded from the district. If such exclusion is granted at the request of a proposed new district, it shall be conditioned to take effect only upon the legal creation of the proposed new district.

(e) In case contract has been made between the district and the United States or any agency thereof, no change shall be made in the boundaries of the district unless the secretary of the interior assents thereto in writing and such assent is filed with the board. Upon such assent, any lands excluded from the district upon order of the court shall be discharged from all liens in favor of the United States under the contract with the United States or under bonds deposited with its agents.

(f) Upon allowance of such petition, the board shall file a certified copy of the order of the board making such change with the clerk of the court, and, upon order of the court, said lands shall be excluded from the district.

(2) Following organization of a district under this article at any time prior to authorization for the incurring of bonded or other indebtedness under the election procedures set forth in sections 37-45-139 to 37-45-142 and prior to the execution of a contract with the United States or any of its agencies, the governing body of any city, city and county, or town, regardless of its population, originally included in the district without consent given in the manner provided in section 37-45-109, and over an express objection made in writing to the court in which the petition for organization has been filed at any time prior to the date upon which the court declares the district organized, may pass an ordinance declaring all property, real and personal, within the limits of said public corporation, to be lands and property excluded from the district. Upon service by registered or certified mail of a certified copy of said ordinance upon the division of local government in the department of local affairs, the board of directors of the district, the court organizing said district, the assessor or treasurer, and the county clerk and recorder of the county in which that public corporation is located, said city, city and county, or town, and all lands and property within its limits, shall forthwith be automatically excluded from the district, and said property and lands within the limits of said public corporation shall thereafter be free of any tax levied by the district; except that, if such exclusion occurs after March 15 of any year, said lands and property, and the owners thereof, shall be liable for any existing levy made under section 37-45-122, only for the taxable year of the exclusion, said liability in no event to exceed one-half mill on the dollar of valuation of the property, real and personal, within the limits of said public corporation.

(3) Nothing in this section shall be construed to interfere or conflict with or amend any proceeding now pending in any district court in the state of Colorado.

**Source:** L. 37: p. 1349, § 30. CSA: C. 173B, § 44. CRS 53: § 149-6-32. L. 57: pp. 882, 884, §§ 1, 2. L. 61: p. 851, § 4. C.R.S. 1963: § 150-5-32. L. 76: (2) amended, p. 606, § 32, effective July 1.

**Cross references:** For acknowledgments in the conveyance of land, see article 35 of title 38.

**37-45-138. Board to execute contracts - issue bonds.** To pay for construction, operation, and maintenance of said works, and expenses preliminary and incidental thereto,



the board is authorized to enter into a contract with the United States or any agency thereof, providing for payment in installments or to issue negotiable bonds of the district. If bonds are authorized, the board shall set a maximum net effective interest rate, and such bonds shall bear interest at a rate such that the net effective interest rate of the issue of bonds does not exceed the maximum net effective interest rate authorized. Interest shall be payable annually or semiannually and shall be due and payable not more than fifty years from their dates. The form, terms, and provisions of said bonds, provisions for their payment, and conditions for their retirement and calling, not inconsistent with law, shall be determined by the board, and they shall be issued in payment of the works, equipment, expenses, and interest during the period of construction. When any bonded indebtedness has been authorized pursuant to section 37-45-139, and when the board has entered into a contract with the United States or any agency thereof whereby the United States or any agency thereof has agreed to purchase such bonds, at an interest rate established in such contract, the board may issue interim notes bearing interest at a net effective interest rate not exceeding the maximum net effective interest rate authorized for the bonds, the interim notes to be payable at the termination of such contract, or at such time not exceeding three years after the date of their issuance and on such terms and conditions as the board may determine. No interim note may be extended or funded except by the issuance of bonds. Bonds also may be issued to pay interim notes as they become due or may be exchanged for the interim notes as the board may determine. Said bonds or interim notes shall be executed in the name of and on behalf of the district and signed by the president of the board with the seal of the district affixed thereto and attested by the secretary of the board. Said bonds or interim notes shall be in such denominations as the board shall determine and shall be payable to bearer and may be registered in the office of the county treasurer of the county wherein the organization of the district has been effected, with the interest coupons payable to bearer, which coupons shall bear the facsimile signature of the president of the board. Such bonds and interim notes shall be exempt from all state, county, municipal, school, and other taxes imposed by any taxing authority of the state of Colorado. Such bonds or interim notes may be sold at par, above par, or below par, but the net effective interest rate to the district, including any discount, but exclusive of any discount payable for costs of the issue, shall not exceed the maximum net effective interest rate authorized for such issue of bonds. Such bonds or interim notes may be used as security for any depository bond or obligation where any kind of bonds or other securities must or may, by law, be deposited as security. Any resolution authorizing, or other instrument appertaining to, any bonds or interim notes under this article may provide that each bond or interim note therein authorized shall recite that it is issued under authority of this article. Such recital shall be conclusive evidence of full compliance with all of the provisions of this article, and all bonds and interim notes issued containing such recital shall be incontestable for any cause whatsoever after their delivery for value.

**Source:** L. 37: p. 1351, § 31. CSA: C. 173B, § 45. CRS 53: § 149-6-33. C.R.S. 1963: § 150-5-3. L. 69: p. 1233, § 1. L. 70: p. 437, § 3.

**37-45-139. Contracts - submission to electors.** (1) Whenever the board incorporated under this article, by resolution adopted by a majority of the said board, determines that the interests of said district and the public interest or necessity demand the acquisition, construction, or completion of any source of water supply, waterworks, or other improvements or facilities or the making of any contract with the United States or other persons or corporations to carry out the objects or purposes of said district, wherein the annual obligation created will require a greater annual expenditure than the annual income and revenue that the district is estimated to permit, said board shall order the submission of the proposition of incurring such obligation or bonded or other indebtedness for the purposes set forth in said resolution to the electors of the district at an election held for that purpose pursuant to the provisions of this section and section 37-45-142; except that no such election shall be required when the evidence of indebtedness evidencing the obligation created expressly states that it is payable solely from revenues derived from payments made with respect to contracts which are entered into pursuant to this article.

(2) Any election held for the purpose of submitting any proposition of incurring such obligation or indebtedness may be held separately or may be consolidated or held concurrently with any other election authorized by law at which such qualified electors of the district are entitled to vote.

(3) The declaration of public interest or necessity required in this section and the provisions for the holding of such election may be included within one and the same resolution, which resolution, in addition to such declaration of public interest or necessity, shall recite the objects and purposes for which the indebtedness is proposed to be incurred, the estimated cost of the works or improvements, as the case may be, the amount of principal of the indebtedness to be incurred therefor, and the maximum net effective rate of interest to be paid on such indebtedness. Such resolution shall also fix the date upon which such election shall be held and the manner of holding the same and the method of voting for or against the incurring of the proposed indebtedness. Such resolution shall also fix the compensation to be paid the officers of the election and shall designate the precincts and polling places and shall appoint for each polling place, from each precinct from the electors thereof, the officers of such election, which officers shall consist of three judges, one of whom shall act as clerk, who shall constitute a board of election for each polling place.

(4) The description of precincts may be made by reference to any order of the board of county commissioners of the county in which the district or any part thereof is situated or by reference to any previous order or resolution of the board or by detailed description of such precincts. Precincts established by the boards of the various counties may be consolidated for special elections held under this article. In the event any such election is called to be held concurrently with any other election or is consolidated therewith, the resolution calling the election under this article need not designate precincts or polling places or the names of officers of election but shall contain reference to the act or order calling such other election and fixing the precincts and polling places and appointing election officers therefrom.

**Source:** L. 37: p. 1352, § 32. CSA: C. 173B, § 46. CRS 53: § 149-6-34. C.R.S. 1963: § 150-5-34. L. 70: p. 438, § 4. L. 81: (1) amended, p. 1759, § 1, effective May 22.

**37-45-140. Publication of call.** The resolution provided in section 37-45-139 shall be published once a week for two consecutive weeks, the last publication of which shall be at least ten days prior to the date set for said election, in a newspaper of general circulation within the district, and no other or further notice of such election or publication of the names of election officers or of the precincts or polling places need be made.

**Source:** L. 37: p. 1354, § 33. CSA: C. 173B, § 47. CRS 53: § 149-6-35. L. 61: p. 853, § 5. C.R.S. 1963: § 150-5-35.

**37-45-141. Conduct of election.** (1) The respective election boards shall conduct the election in their respective precincts in the manner prescribed by law for the holding of general elections and shall make their returns to the court or secretary of the district, as applicable. At any regular or special meeting of the board held not later than five days following the date of such election, the returns thereof shall be canvassed and the results declared.

(2) In the event that any election held under this article is consolidated with any primary or general election, the returns thereof shall be made and canvassed at the time and in the manner provided by law for the canvass of the returns of such primary or general election. It is the duty of such canvassing body to promptly certify and transmit to the board or court, as applicable, a statement of the result of the vote upon the proposition submitted under this article. Upon receipt of such certificate, it is the duty of the board or court to tabulate and declare the results of the election held under this article.



**Source:** L. 37: p. 1354, § 34. **CSA:** C. 173B, § 48. **CRS 53:** § 149-6-36. **C.R.S. 1963:** § 150-5-36. **L. 81:** Entire section amended, p. 1755, § 5, effective June 19.

**Cross references:** For elections generally, see title 1.

**37-45-142. Bond elections - subsequent elections.** (1) No debt required by section 37-45-139 to be submitted to the electors of the district shall be incurred unless the proposition to create such debt is first submitted to and approved by the electors of the district.

(2) In the event it appears from the returns that the proposition submitted has been approved by a majority of those voting at the election as required under subsection (1) of this section, the district is authorized to incur such indebtedness or obligations, enter into such contract, or issue and sell such bonds of the district, all for the purpose and object provided for in the proposition submitted under this section and in the resolution therefor and in the amount so provided and at a net effective interest rate not exceeding the maximum net effective interest rate recited in such resolution. Submission of the proposition of incurring such obligation or bonded or other indebtedness at such an election shall not prevent or prohibit submission of the same or other propositions at subsequent elections called for such purpose.

(3) (a) The board, having received approval at an election to issue bonds and having determined that the limitations of the original election question are too restrictive to permit the advantageous sale of the bonds so authorized, may submit at another election held for such purpose:

(I) The question of issuing the bonds, or any portion thereof, at a higher maximum net effective interest rate than the maximum interest rate or maximum net effective interest rate approved at the original election; or

(II) The question of issuing the bonds, or any portion thereof, to mature over a longer period of time than the maximum period of maturity approved at the original election.

(b) An election held pursuant to this subsection (3) shall be held in substantially the same manner as an election to authorize bonds initially, except as may be required for the submission of the limited question or questions permitted under this subsection (3).

(c) If a majority of those voting at an election held pursuant to this subsection (3) fails to approve the changes submitted, such result shall not impair the authority of the board at a later time to issue the bonds originally approved within the limitations established at the first election.

**Source:** L. 37: p. 1355, § 35. **CSA:** C. 173B, § 49. **CRS 53:** § 149-6-37. **C.R.S. 1963:** § 150-5-37. **L. 70:** p. 439, § 5. **L. 71:** p. 1347, § 3.

**37-45-143. Confirmation of contract proceedings.** (1) In its discretion, the board may file a petition in the court at any time, praying for a judicial examination and determination of any power conferred or of any tax or assessment levied or of any act, proceeding, or contract of the district, whether or not said contract has been executed, including proposed contracts for the acquisition, construction, maintenance, or operation of works for the district. Such petition shall set forth the facts whereon the validity of such power, assessment, act, proceeding, or contract is founded and shall be verified by the president of the board. Notice of the filing of said petition shall be given by the clerk of the court, under the seal thereof, stating in brief outline the contents of the petition and showing where a full copy of any contract therein mentioned may be examined. The notice shall be served by publication in at least five consecutive issues of a weekly newspaper of general circulation published in the county in which the principal office of the district is located and by posting the same in the office of the district at least thirty days prior to the date fixed in said notice for the hearing on said petition.

(2) Any owner of property in the district or person interested in the contract or proposed contract may appear and move to dismiss or answer said petition at any time prior to the

date fixed for said hearing or within such further time as may be allowed by the court; and the petition shall be taken as confessed by all persons who fail to appear.

(3) The petition and notice shall be sufficient to give the court jurisdiction, and, upon hearing, the court shall examine into and determine all matters and things affecting the question submitted, shall make such findings with reference thereto, and shall render such judgment and decree thereon as the case warrants. Costs may be divided or apportioned among the contesting parties in the discretion of the trial court. Review of the judgment of the court may be had as in other similar cases; except that such review must be applied for within thirty days after the time of the rendition of such judgment or within such additional time as may be allowed by the court within the thirty days. The Colorado rules of civil procedure shall govern in matters of pleading and practice where not otherwise specified in this article. The court shall disregard any error, irregularity, or omission which does not affect the substantial rights of the parties.

**Source:** L. 37: p. 1355, § 36. CSA: C. 173B, § 50. CRS 53: § 149-6-38. C.R.S. 1963: § 150-5-38.

**37-45-144. Correction of faulty notices.** In every case where a notice is provided for in this article, if the court finds for any reason that due notice was not given, the court shall not thereby lose jurisdiction, and the proceeding in question shall not thereby be void or be abated, but in that case the court shall order due notice to be given, and shall continue the hearing until such time as notice shall be properly given, and thereupon shall proceed as though notice had been properly given in the first instance.

**Source:** L. 37: p. 1357, § 37. CSA: C. 173B, § 51. CRS 53: § 149-6-39. C.R.S. 1963: § 150-5-39.

**37-45-145. Early hearings.** All cases in which there arises a question of the validity of the organization of a water conservancy district, or a question of the validity of any proceeding under this article, shall be advanced as a matter of immediate public interest and concern and heard at the earliest practicable moment. The courts shall be open at all times for the purposes of this article.

**Source:** L. 37: p. 1357, § 38. CSA: C. 173B, § 52. CRS 53: § 149-6-40. C.R.S. 1963: § 150-5-40.

**37-45-146. Dissolution of districts.** Any water conservancy district organized may be dissolved in the manner specified in sections 37-45-146 to 37-45-152 if such district has not been authorized to incur bonded or other indebtedness under the election procedures set forth in sections 37-45-139 to 37-45-142 and such district has not incurred bonded or other indebtedness pursuant to the provisions of any other law; except that, if such district has entered into a contract with the United States or any other agency thereof, no dissolution shall take place unless the secretary of the interior of the United States has first consented thereto.

**Source:** L. 57: p. 885, § 1. CRS 53: § 149-6-44. C.R.S. 1963: § 150-5-44. L. 75: Entire section amended, p. 1367, § 4, effective July 1.

**37-45-147. Election for dissolution - petition or resolution filed.** (1) An election submitting the proposition of dissolution of the district may be initiated by the filing of a copy of a resolution adopted by three-fourths of all the members of the board of directors of such district requesting such an election or by the filing of a petition requesting such election. Such resolution or petition shall be filed in the district court which formed said district.

(2) Any such petition so filed shall be accompanied by a good and sufficient bond for five hundred dollars with not less than two sureties approved by the court, and, if a majority



of the qualified electors do not vote for dissolution in the election specified in this article, the amount of such bond shall be forfeited to the district, otherwise the same shall be discharged.

(3) If the valuation for assessment of irrigated land together with improvements thereon within said district when formed is in excess of twenty million dollars, such petition shall bear signatures of any owners of irrigated land equal in number to two-thirds or more of the number of such type of owners required by section 37-45-109, upon a petition for the formation of such a district. Such irrigated land shall be situated within the limits of the district and shall not be embraced within the incorporated limits of any city or town. Said petition shall also bear the signatures of any owners of nonirrigated land or land embraced within the incorporated limits of a city or town equal in number to two-thirds or more of the number of such type of owners required by said section upon a petition for the formation of such a district, said land to be situated within the limits of the district.

(4) If the valuation for assessment of irrigated land and improvements thereon within such district when formed is less than twenty million dollars, said petition shall contain the same number and type of signatures required by section 37-45-109 upon petitions for the formation of such a district. In either case the petition shall set forth opposite each signature the description of the land and the valuation for assessment thereof together with any improvements. Similar petitions or duplicate copies of the same petition may be filed together and shall be regarded as one petition. No petition with the requisite signatures shall be declared void on account of alleged defects, but the court may permit the petition to be amended from time to time to conform to the facts by correcting errors in descriptions, valuation, or any other particular.

**Source:** L. 57: p. 885, § 1. CRS 53: § 149-6-45. C.R.S. 1963: § 150-5-45.

**37-45-148. Notice of election.** Upon presentation of such petition or resolution, the court shall cause a notice to be published forthwith at least once each week for four consecutive weeks in a newspaper of general circulation in each county where the district or parts thereof lie. Such notice shall recite that a petition or resolution for dissolution of the district has been filed, shall describe generally the territory of the district, and shall further specify the time and places of election, which time shall not be less than sixty days nor more than ninety days after the date of the last publication of the notice. If an objection to the petition or resolution is filed in such court by an owner of land situated within said district within twenty days from the date of the last publication of the notice, the court may, if necessary, continue the election from time to time until all objections are disposed of. Due notice of the time and places of any continued election shall be given in the manner and form prescribed above.

**Source:** L. 57: p. 886, § 1. CRS 53: § 149-6-46. C.R.S. 1963: § 150-5-46.

**37-45-149. Objections to resolution or petition.** Objections to a resolution for an election shall be confined to the question of whether sufficient directors voted in favor of the same. Objections to a petition for such election shall be confined to the question of whether sufficient qualified owners of land situate within the district have signed the petition for such election. Such petition shall be accepted as prima facie evidence of all facts stated therein, and all signatures affixed to such petition shall be presumed to be those of qualified owners residing within the boundaries of the district until the contrary is proven. No signer of a petition shall be permitted to withdraw his name from such petition after it is filed, except for fraud. All objections shall be heard as an advanced case on the docket of the court. Nothing in this section shall be construed to prevent the filing of subsequent resolutions or petitions for the same purpose, but elections on the proposition of dissolution shall not be held more frequently than once every three years.

**Source:** L. 57: p. 887, § 1. CRS 53: § 149-6-47. C.R.S. 1963: § 150-5-47.

**37-45-150. Election procedure - ballot.** (1) Any election held for the purpose of submitting the proposition of dissolution of a district may be held separately or may be consolidated or held concurrently with any other election authorized by law. The election shall be conducted by the secretary of the board of directors of such district under the supervision of the court, and the court shall fix the manner of holding the same and shall also fix the compensation to be paid the officers of the election and shall designate the precincts and polling places. The court shall also appoint for each polling place and for each precinct from the electors thereof the officers of such election, which officers shall consist of three judges, one of whom shall act as clerk, who shall constitute a board of election for each polling place.

(2) The description of precincts may be made by reference to any order of the board of county commissioners of the county in which the district or any part thereof is situated or by reference to any previous order or resolution of the board or by detailed description of such precincts. Precincts established by the boards of the various counties may be consolidated for special elections held under this article. In the event any such election is called to be held concurrently with any other election or is consolidated therewith, the court order need not designate precincts or polling places or the names of officers of election but shall contain a reference to the act or order calling such other election and fixing the precincts and polling places and appointing election officers therefrom. The election shall be conducted in accordance with the provisions of section 37-45-141.

(3) The results of such election shall be certified promptly by the secretary of the board of directors to the court. It is the duty of the secretary of the board of directors of the district to prepare ballots to be used at the election on which shall be inscribed the words "For Dissolution" and "Against Dissolution". The costs of the election and ballots shall be paid by the district under the supervision of the court, and the district shall be authorized, under the supervision of the court, to borrow funds for this purpose. Irrespective of any other provision of this article, the district shall not be required or authorized to hold any election on the proposition of such borrowing.

**Source:** L. 57: p. 887, § 1. CRS 53: § 149-6-48. C.R.S. 1963: § 150-5-48.

**37-45-151. Majority vote determines question.** The electors of the district shall be qualified to vote on the question of dissolving the district. If a majority of votes are for dissolution of the district, the district shall be dissolved as provided in section 37-45-152. Any objections to the election, or proceedings to invalidate the election, must be filed in the court within thirty days from the date of the election. Errors, omissions, and irregularities not affecting substantial rights shall be disregarded.

**Source:** L. 57: p. 888, § 1. CRS 53: § 149-6-49. C.R.S. 1963: § 150-5-49. L. 70: p. 440, § 6.

**37-45-152. Winding up and dissolution - order entered.** (1) In the event the vote is for dissolution, any qualified signer of the petition for the election, or the board of directors of such district may, within such time as may be fixed by the court, present a written plan for the winding up of the affairs of the district. Such plan may specify that the affairs of the district be wound up by the board of directors of the district or by a receiver appointed by the court for that purpose. On a day fixed by the court, the court shall consider such plan and shall enter an order establishing therefrom a plan for the winding up of such affairs. The court shall retain continuing jurisdiction to modify such plan from time to time and shall supervise such winding up.

(2) If no such plan is presented on or before the day set by the court, the court shall appoint a receiver to wind up the affairs of the district under the court's supervision. Upon the appointment of any receiver all authority of the board of directors of the district shall terminate; except that its authority to levy taxes for the payment of the obligations of the district and the costs of winding up shall continue until the district is dissolved. Such board shall levy taxes within the limits imposed by this article sufficient to pay expeditiously such



obligations and costs, and, if a receiver has been appointed, all tax collections shall be delivered to such receiver.

(3) When it appears to the satisfaction of the court that all obligations of the district have been discharged, and the costs of winding up the districts paid, such court shall enter an order dissolving the district, and a certified copy of such order shall be recorded by the clerk of the court in all counties in which the district may be situate. All funds remaining in the hands of such receiver or board of directors after such dissolution shall be divided among the counties comprising any part of such district in proportion to the total valuation of taxable property in such county within the boundaries of such district, as determined by the tax roll of such counties in the treasurer's hands, for the calendar year preceding the year in which such dissolution occurs, and said receiver or members of the board of directors shall thereupon be discharged by the court.

**Source: L. 57: p. 888, § 1. CRS 53: § 149-6-50. C.R.S. 1963: § 150-5-50.**

**37-45-153. Validation and recreation of water conservancy districts.** (1) The following water conservancy districts, originally organized under the provisions of this article, are hereby validated and recreated: Alamosa-La Jara Water Conservancy District; Animas-La Plata Water Conservancy District; Badger-Beaver Water Conservancy District; Basalt Water Conservancy District; Battlement Mesa Water Conservancy District; Bluestone Water Conservancy District; Bostwick Park Water Conservancy District; Central Colorado Water Conservancy District; Collbran Water Conservancy District; Conejos Water Conservancy District; Costilla County Water Conservancy District; Crawford Water Conservancy District; Dolores Water Conservancy District; Florida Water Conservancy District; Fruitland Mesa Water Conservancy District; Grand Mesa Water Conservancy District; Great Northern Water Conservancy District; Groundwater Management Subdistrict, Central Colorado Water Conservancy District; Huerfano County Water Conservancy District; Jackson County Water Conservancy District; Juniper Water Conservancy District; La Plata Water Conservancy District; Lower South Platte Water Conservancy District; Mancos Water Conservancy District; Michigan River Water Conservancy District; Middle Park Water Conservancy District; Municipal Subdistrict, Northern Colorado Water Conservancy District; North Fork Water Conservancy District; North La Junta Water Conservancy District; Northern Colorado Water Conservancy District; Pot Hook Water Conservancy District; Purgatoire River Water Conservancy District; Saint Vrain and Left Hand Water Conservancy District; San Luis Valley Water Conservancy District; San Miguel Water Conservancy District; Silt Water Conservancy District; Southeastern Colorado Water Conservancy District; Tri-County Water Conservancy District; Trinchera Water Conservancy District; Upper Arkansas Water Conservancy District; Upper Gunnison River Water Conservancy District; Upper South Platte Water Conservancy District; Upper Yampa Water Conservancy District; Ute Water Conservancy District; West Divide Water Conservancy District; and Yellow Jacket Water Conservancy District.

(2) The territory of such water conservancy districts shall be the same as set forth or established for each such district by Colorado court orders entered pursuant to this article as of February 23, 1983.

(3) The provisions of this article, including changes in territory, shall continue to govern such districts, and the districts shall continue to function in all respects as they did prior to February 23, 1983; except that such districts shall be deemed to have been created by statute, irrespective of any organizational process set forth in this article or the district's method of original organization.

(4) All actions undertaken by such districts under or pursuant to the authority or apparent authority of this article prior to February 23, 1983, shall be considered as those of de facto officers and directors and as valid and effective should the original organization of such districts be ruled invalid in any respect.

(5) The purpose of this section is to validate and recreate such districts and to continue them in existence as constituted prior to February 23, 1983, without interruption in order to provide financial security and stability in water development in this state and to ensure that

obligations and projects undertaken, or to be undertaken, by such existing districts under or pursuant to this article are honored and carried out should the original organization of such existing districts be ruled invalid in any respect.

**Source: L. 83:** Entire section added, p. 1392, § 1, effective February 23.

#### ANNOTATION

**Law reviews.** For article, "Constitutional Law", which discusses Tenth Circuit decisions dealing with retroactive legislation under due process clause, see 63 Den. U.L. Rev. 247 (1986).

**Constitutionality upheld.** This section does not violate art. 2, § 11, Colo. Const., prohibiting laws retrospective in operation nor the due process clause of the fourteenth amendment of the

U.S. constitution. Taxpayers for Animas-La Plata Referendum v. Animas-La Plata, 739 F.2d 1472 (10th Cir. 1984).

**Enactment of this section effectively mooted claims for injunctive and declaratory relief** but not claims for damages. Taxpayers for Animas-La Plata Referendum v. Animas-La Plata, 739 F.2d 1472 (10th Cir. 1984).

#### ARTICLE 45.1

#### Water Activities - Enterprise Status

**Law reviews:** For article, "Water Activity Enterprises", see 22 Colo. Law. 2555 (1993).

37-45.1-101.	Legislative declaration.		authority.
37-45.1-102.	Definitions.	37-45.1-105.	Article X, section 20 matters.
37-45.1-103.	Establishment of enterprises.	37-45.1-106.	Contracts.
37-45.1-104.	Enterprise revenue bonding	37-45.1-107.	Construction.

**37-45.1-101. Legislative declaration.** (1) The general assembly hereby finds, determines, and declares that in order to provide for the continued beneficial use of all waters originating in Colorado, the establishment of water activity enterprises within or by water conservancy districts, water conservation districts, and other entities of state and local government is critical to the health and welfare of the people of the state of Colorado. The general assembly further finds that water activities are necessary to:

- (a) Provide a secure water supply for domestic use;
- (b) Continue to provide water for agricultural use;
- (c) Supply water for power, milling, manufacturing, mining, metallurgical, fish, wild-life, recreational, and all other beneficial uses;
- (d) Secure water to which the state is entitled under its interstate water compacts and equitable apportionment decrees;
- (e) Treat, reclaim, conserve, recharge, augment, exchange, or reuse water supplies within the state; and
- (f) Provide wholesale and retail water supply and wastewater services.

**Source: L. 93:** Entire article added, p. 102, § 1, effective March 30.

**37-45.1-102. Definitions.** As used in this article, unless the context otherwise requires:

(1) "District" means any state or local governmental entity that has authority to conduct water activities, including a water conservancy district created pursuant to article 45 of this title, a water conservation district created by article 46, 47, 48, or 50 of this title, a water and sanitation district or other entity created pursuant to title 32, C.R.S., an entity created pursuant to title 29, C.R.S., or this title, a county, or a municipality.

(2) "Grant" means a cash payment of public funds made directly to a water activity enterprise by the state or a local governmental entity or a district, which cash payment is not required to be repaid. "Grant" does not include public funds paid or advanced to a water activity enterprise by the state or a local governmental entity or district in exchange for an



agreement by a water activity enterprise to provide services including the provision of water, the capacity of project works, materials, or other water activities, nor does “grant” include refunds made in the current or next fiscal year, gifts, any payments directly or indirectly from federal funds or earnings on federal funds, collections for another government, pension contributions by employees and pension fund earnings, reserve transfers or expenditures, damage awards, or property sales.

(3) “Water activity” includes but is not limited to the diversion, storage, carriage, delivery, distribution, collection, treatment, use, reuse, augmentation, exchange, or discharge of water and includes the provision of wholesale or retail water or wastewater or storm water services and the acquisition of water or water rights.

(4) “Water activity enterprise” includes any government water activity business owned by a district, which enterprise receives under ten percent of its annual revenues in grants from all Colorado state and local governments combined and which is authorized to issue its own revenue bonds pursuant to this article or any other applicable law.

(5) “Water project or facility” includes a dam, storage reservoir, compensatory or replacement reservoir, canal, conduit, pipeline, tunnel, power plant, water or wastewater treatment facility, and any and all works, facilities, improvements, and property necessary or convenient for the purpose of conducting a water activity.

**Source:** L. 93: Entire article added, p. 103, § 1, effective March 30. L. 2004: (1) amended, p. 1930, § 2, effective August 4. L. 2010: (5) amended, (HB 10-1422), ch. 419, p. 2120, § 171, effective August 11.

**37-45.1-103. Establishment of enterprises.** (1) Any district which under applicable provisions of law has its own bonding authority may establish or may continue to maintain water activity enterprises for the purpose of pursuing or continuing water activities, including water acquisition or water project or facility activities, including the construction, operation, repair, and replacement of water or wastewater facilities. Any water activity enterprise established or maintained pursuant to this article is excluded from the provisions of section 20 of article X of the state constitution.

(2) (a) Each water activity enterprise shall be wholly owned by a single district and shall not be combined with any water activity enterprise owned by another district; however, each district may establish more than one water activity enterprise and each water activity enterprise may conduct or continue to conduct one or more water activities as may be determined by the governing body of the water activity enterprise.

(b) This subsection (2) shall not limit the authority of a water activity enterprise to contract with any other person or entity, including other districts or water activity enterprises.

(3) The governing body of the water activity enterprise shall be the governing body of the district which owns the enterprise or such governing body as may be prescribed by applicable laws, city and county, county, or municipal charters, county resolutions, municipal ordinances, or intergovernmental agreements which designate a different governing body for the water activity enterprise.

(4) The governing body of each water activity enterprise may exercise the district’s legal authority relating to water activities, but no enterprise may levy a tax which is subject to section 20 (4) of article X of the state constitution.

**Source:** L. 93: Entire article added, p. 103, § 1, effective March 30.

**37-45.1-104. Enterprise revenue bonding authority.** (1) Each water activity enterprise, through its governing body, may issue or reissue revenue bonds in accordance with and through the provisions of subsection (2) of this section.

(2) The water activity enterprise is authorized to issue or reissue bonds, notes, or other obligations payable from the revenues derived or to be derived from the function, service, benefits, or facility or the combined functions, services, benefits, or facilities of the enterprise or from any other available funds of the enterprise. The terms, conditions, and

details of said bonds, notes, and other obligations, the procedures related thereto, and the refunding thereof shall be set forth in the resolution authorizing said bonds, notes, or other obligations and shall, as nearly as may be practicable, be substantially the same as those provided in part 4 of article 35 of title 31, C.R.S., relating to water and sewer revenue bonds; except that the purposes for which the same may be issued shall not be so limited and except that said bonds, notes, and other obligations may be sold at public or private sale. Each bond, note, or other obligation issued under this subsection (2) shall recite in substance that said bond, note, or other obligation, including the interest thereon, is payable from the revenues and other available funds of the water activity enterprise pledged for the payment thereof. Notwithstanding any other provision of law to the contrary, such bonds, notes, and other obligations may be issued to mature at such times not beyond forty years from their respective issue dates, shall bear interest at such rates, and shall be sold at, above, or below the principal amount thereof, all as shall be determined by the governing body of the water activity enterprise. Notwithstanding anything in this section to the contrary, in the case of short-term notes or other obligations maturing not later than one year after the date of issuance thereof, the governing body of the water activity enterprise may authorize officials of the enterprise to fix principal amounts, maturity dates, interest rates, and purchase prices of any particular issue of such short-term notes or obligations, subject to such limitations as to maximum term, maximum principal amount outstanding, and maximum net effective interest rates as the governing body shall prescribe by resolution. Such action may be taken only at a public meeting preceded by adequate notice, and the action of the governing body of the water activity enterprise shall be properly recorded on the permanent records of the governing body of the enterprise. The powers provided in this section for water activity enterprises shall not modify, limit, or affect the powers conferred by any other law either directly or indirectly.

**Source: L. 93:** Entire article added, p. 104, § 1, effective March 30.

**37-45.1-105. Article X, section 20 matters.** (1) Contracts pertaining to a water project, facility, or activity entered into prior to November 4, 1992, and bonded indebtedness incurred prior to November 4, 1992, or refunding of such bonded indebtedness, which involve a levy or assessment or a pledge of a levy or assessment under any provision of law governing the district to provide revenues to the district or cover default or deficiencies in bonded indebtedness payments are not affected or impaired by the passage of section 20 of article X of the state constitution.

(2) Lands which are included in a district with authority to conduct a water activity shall be subject to the same mill levies and other taxes levied or to be levied on other similarly situated lands at the time such additional lands are included. Such newly included lands are additions to taxable real property, and application of such levies and other taxes to such newly included lands is not subject to the limitations of section 20 (4) of article X of the state constitution. This subsection (2) is intended to place newly included lands and similarly situated existing lands within a district on an equal basis.

(3) Water project loan agreements subject to repayment or contracts for services including the provision of water, capacity of project works, materials, or other water activities, which involve the payment of funds for such services to a district or its water activity enterprise by a state or local governmental entity or by another district or water activity enterprise, shall not be considered "grants" within the meaning of section 20 (2) (d) of article X of the state constitution. Notwithstanding the provisions of section 6 (3) of article XI of the state constitution, where such agreement or contract shall in whole or in part constitute a general obligation of such local governmental entity or district, and where such agreement or contract provides that such local governmental entity or district shall be required to accept and pay for water, capacity, materials, or other water activities agreed or contracted for by a defaulting local governmental entity or district, such agreement or contract shall not be entered into unless the question of incurring such general obligation has been submitted to and approved at an election conducted by such local governmental entity or district in accordance with applicable election laws.

**Source: L. 93:** Entire article added, p. 105, § 1, effective March 30.



**37-45.1-106. Contracts.** (1) A district or its water activity enterprise may contract with the Colorado water conservation board or any other governmental source of funding for loans and grants related to water activity enterprise functions, and a district or its water activity enterprise may contract with the Colorado water resources and power development authority for loans or other available financial assistance related to water activity enterprise functions.

(2) Revenues collected by a district for services rendered by a water activity enterprise which it owns, including but not limited to the revenues raised by rates on each class of service under article 45, 46, 47, or 48 of this title, are not subject to the limitations of subsections (4) and (7) of section 20 of article X of the state constitution.

(3) The rates or a change in the rates charged by a district for its water activity enterprise services, including the provision of water, capacity of project works, materials, or other water activities provided by or through the water activity enterprise, shall not be deemed a tax subject to the limitations of section 20 (4) and (7) of article X of the state constitution.

**Source: L. 93:** Entire article added, p. 106, § 1, effective March 30.

**37-45.1-107. Construction.** The authority of this article is in addition to all other authority provided by law. Nothing contained in this article shall be construed to require the establishment, operation, or continuation of a water activity enterprise or to limit the authority of any state or local government to utilize other policies and procedures for establishing, operating, or continuing water activity enterprises or to establish and operate other types of enterprises for any other lawful purpose.

**Source: L. 93:** Entire article added, p. 106, § 1, effective March 30.

## ARTICLE 46

### Colorado River Water Conservation District

37-46-101.	Legislative declaration.	37-46-120.	Improvement district bonds.
37-46-102.	Definitions.	37-46-121.	Assessments perpetual lien.
37-46-103.	District body corporate - area.	37-46-122.	Invalid assessments - board remedy.
37-46-104.	Board of directors.	37-46-123.	Assessment record as evidence.
37-46-105.	Compensation of directors.	37-46-124.	Remedies in case of faulty notice.
37-46-106.	Vacancies - secretary and treasurer.	37-46-125.	Lawful contracts.
37-46-107.	General powers.	37-46-126.	Issuance of general obligation bonds and revenue bonds.
37-46-108.	Principal office - meetings.	37-46-126.2.	Subdistrict's levy of taxes.
37-46-109.	Authority of board to levy taxes.	37-46-126.3.	Levy and collection of subdistrict's taxes.
37-46-109.3.	Taxes - determination and collection.	37-46-126.4.	Levies to cover subdistrict deficiencies.
37-46-109.4.	Levies to cover district's deficiencies.	37-46-126.5.	County to levy and collect.
37-46-110.	Organization.	37-46-126.6.	Delinquent taxes.
37-46-111.	Rules and regulations.	37-46-127.	Maintenance assessment.
37-46-112.	Petition.	37-46-128.	Annual levy limit.
37-46-113.	Notice of hearing on petition.	37-46-129.	Investment of surplus funds.
37-46-114.	Protesting of petitions.	37-46-130.	Sinking fund.
37-46-115.	Board of directors to prepare plans.	37-46-131.	Court confirmation.
37-46-116.	Appointment of appraisers.	37-46-132.	Allocation of water or service.
37-46-117.	Compensation of appraisers.	37-46-133.	Election to authorize debt.
37-46-118.	Board bound by financing plan.	37-46-134.	Definition of elector.
37-46-119.	Directors may make assessments.	37-46-135.	Elections.

37-46-136.	Election resolution.	37-46-145.	Rights - powers of holders of bonds - trustees.
37-46-137.	Conduct of election.		
37-46-138.	Notice of election.	37-46-146.	Investments and securities.
37-46-139.	Polling places.	37-46-147.	Rents and charges.
37-46-140.	Election supplies.	37-46-148.	Miscellaneous powers.
37-46-141.	Election returns.	37-46-149.	Cooperative powers.
37-46-142.	Debt election contests.	37-46-150.	Joint action entity.
37-46-143.	Covenants and other provisions in bonds.	37-46-151.	Correlative powers of political subdivisions.
37-46-144.	Liens on pledged revenues.		

**37-46-101. Legislative declaration.** In the opinion of the general assembly of the state of Colorado, the conservation of the water of the Colorado river in Colorado for storage, irrigation, mining, and manufacturing purposes and the construction of reservoirs, ditches, and works for the purpose of irrigation and reclamation of additional lands not yet irrigated, as well as to furnish a supplemental supply of water for lands now under irrigation, are of vital importance to the growth and development of the entire district and the welfare of all its inhabitants and that, to promote the health and general welfare of the state of Colorado, an appropriate agency for the conservation, use, and development of the water resources of the Colorado river and its principal tributaries should be established and given such powers as may be necessary to safeguard for Colorado, all waters to which the state of Colorado is equitably entitled under the Colorado river compact.

**Source:** L. 37: p. 997, § 1. CSA: C. 138, § 199(1). CRS 53: § 149-8-1. C.R.S. 1963: § 150-7-1.

#### ANNOTATION

**Law reviews.** For article, "Water Conservancy Districts", see 22 Rocky Mt. L. Rev. 432 (1950). For article, "Legal Classification of

Special District Corporate Forms in Colorado", see 45 Den. L.J. 347 (1968).

**37-46-102. Definitions.** As used in this article, unless the context otherwise requires:

(1) "Colorado river" is construed to embrace and include any tributaries or streams which flow into the Colorado river which may be found in any part of the territory embraced in said district.

(2) "District" means the "Colorado River Water Conservation District". The district is a body corporate and politic and a political subdivision of the state of Colorado.

(3) "Person" means a person, firm, partnership, association, or corporation.

(4) "Property", as used in sections 37-46-109 (1), 37-46-109.3, 37-46-126 (1), and 37-46-126.2 to 37-46-126.6, includes both real and personal property. In other parts of said article relating to special assessments, unless otherwise specified, it means real estate as the words "real estate" are defined by the law of the state of Colorado and embraces all railroads, tram roads, electric railroads, state and interurban railroads, highways, telephone, telegraph, and transmission lines, water systems, water rights, pipelines, and rights-of-way of public service corporations, and all other real property, whether held for public or private use.

(5) "Subdistrict" or "subdivision" embraces and includes the kind or character of special improvement districts created under the provisions of this article, including subdistricts organized under the name and style of "Water Users' Association No. .... of the Colorado River Water Conservation District" and "Special Improvement District No. .... of the Colorado River Water Conservation District". A subdistrict or subdivision is a body corporate and politic and a political subdivision of the state of Colorado.

**Source:** L. 37: p. 1025, § 25. CSA: C. 138, § 199(25). CRS 53: § 149-8-25. C.R.S. 1963: § 150-7-25. L. 77: (2) and (5) amended, p. 1638, § 1, effective June 9. L. 79: (4) amended, p. 1355, § 1, effective May 31.



**37-46-103. District body corporate - area.** There is hereby created a water conservation district to be known and designated as the "Colorado River Water Conservation District". Such district is hereby declared to be a body corporate under the laws of Colorado. Said district shall comprise the following area and territory of the state of Colorado: Grand county, Routt county, Moffat county, Rio Blanco county, Ouray county, Mesa county, Garfield county, Pitkin county, Eagle county, Delta county, Gunnison county, Summit county, those parts of Hinsdale and Saguache counties lying west and north of the continental divide and within the drainage basin of the Gunnison river, and that part of Montrose county not included in the Southwestern water conservation district as set forth and described in section 37-47-103.

**Source:** L. 37: p. 998, § 2. CSA: C. 138, § 199(2). L. 51: p. 691, § 1. CRS 53: § 149-8-2. L. 55: p. 937, § 1. L. 61: p. 854, § 1. C.R.S. 1963: § 150-7-2.

#### ANNOTATION

**Law reviews.** For article, "Highlights of the 1955 Colorado Legislative Session — Water", see 28 Rocky Mt. L. Rev. 58 (1955).

**37-46-104. Board of directors.** (1) The Colorado river water conservation district shall be managed and controlled by a board of fifteen directors. One of said directors shall be from each of the respective counties in said district. He shall be selected by the board of county commissioners of the county in which he resides. He may be a member of the board of county commissioners of such county. He shall have been a resident of such county, or if only a part of a county is included within the boundaries of the said district, a resident of such included part for a period of at least two years prior to the date of his appointment and shall be a freeholder who has paid taxes in the county of his residence during the calendar year next preceding his appointment. The members of said board shall hold office for a term of three years and until their successors are appointed and qualified, except as otherwise provided in this article. The regular term of office of each director shall commence on the third Tuesday of January following his appointment. The board of county commissioners of the county in which a director, whose term of office is about to expire, resides shall, at its first meeting in January, appoint a successor who shall take office on the third Tuesday in January following his appointment.

(2) The members of the board of directors of said district who are now in office shall hold their respective office for the period of time for which they were selected to serve, and their tenure of office shall not be affected by this amendatory section. Within sixty days after April 7, 1961, each of the boards of county commissioners of the counties of Hinsdale and Saguache shall appoint a director from such county with the qualifications above prescribed to serve as a member of the board of directors of the Colorado river water conservation district. The director from Hinsdale county shall hold office until the third Tuesday of January, 1962, and the director from Saguache county shall hold office until the third Tuesday of January, 1963. Upon expiration of the several terms of office of the directors appointed under the terms of this section, successors shall be appointed as provided in this section to serve for the regular term of three years.

**Source:** L. 37: p. 998, § 3. CSA: C. 138, § 199(3). L. 51: p. 692, §§ 2, 3. CRS 53: § 149-8-3. L. 55: p. 937, § 2. L. 61: p. 854, § 2. C.R.S. 1963: § 150-7-3.

**37-46-105. Compensation of directors.** The board of directors of the district shall receive as compensation a sum not to exceed one hundred dollars per day while actually engaged in the business of said district, and, in addition, said directors shall be entitled to their actual traveling and transportation expenses when away from their respective places of residence on district business.

**Source:** L. 37: p. 1026, § 26. CSA: C. 138, § 199(26). CRS 53: § 149-8-26. L. 61: p. 856, § 3. C.R.S. 1963: § 150-7-26. L. 83: Entire section amended, p. 1394, § 1, effective May 26. L. 2007: Entire section amended, p. 357, § 2, effective April 2.

**37-46-106. Vacancies - secretary and treasurer.** The office of director shall become vacant when any member ceases to reside in the county from which he was appointed. In the event a vacancy occurs in said office by reason of death, resignation, removal, or otherwise, it shall be filled by the board of county commissioners of the county from which said member originally came. Before entering upon the discharge of his duties, each director shall take an oath to support and defend the constitutions of the United States and of the state of Colorado and to impartially, without fear or favor, discharge the duties of a director of said district. The board of directors of said district shall appoint a secretary and a treasurer. The same individual may at the election of the board hold both of said offices. The board shall likewise hire such other employees, including engineers and attorneys, as may be required to properly transact the business of the district, and said board is authorized to provide for the compensation of the secretary and treasurer and other appointees. The treasurer shall be required by the board to give bond with corporate surety in such amount as the board may fix and which it deems sufficient to protect the funds in the hands of the treasurer or under his control. Such bond is subject to the approval of the board.

**Source:** L. 37: p. 999, § 4. CSA: C. 138, § 199(4). CRS 53: § 149-8-4. C.R.S. 1963: § 150-7-4.

**37-46-107. General powers.** (1) In its corporate capacity, the district shall have the power:

(a) To sue and be sued in the name of the Colorado river water conservation district;

(b) To acquire, operate, and hold in the name of the district such real and personal property as may be necessary to carry out the provisions of this article and to sell and convey such property or its products, as provided in this article, or when said property is no longer needed for the purposes of said district;

(c) To make surveys and conduct investigations to determine the best manner of utilizing stream flows within the district and the amount of such stream flow or other water supply, and to locate ditches, irrigation works, and reservoirs to store or utilize water for irrigation, mining, manufacturing, or other purposes, and to make filings upon said water and initiate appropriations for the use and benefit of the ultimate appropriators, and to perform all acts and things necessary or advisable to secure and insure an adequate supply of water, present and future, for irrigation, mining, manufacturing, and domestic purposes within said districts;

(d) To make contracts with respect to the relative rights of said district under its claims and filings and the rights of any other person, association, or organization seeking to divert water from any of the streams within said district;

(e) To contract with any agencies, officers, bureaus, and departments of the state of Colorado or the United States, including the department of corrections, to obtain services or labor for the initiation, the construction, or any other acquisition of irrigation works, ditches and ditch rights, canals, reservoirs, power plants, or retaining ponds within the district or to acquire, by purchase, rental, lease, or exchange, water, water rights, or electricity (or any combination thereof) from the state or the United States, acting by and through any such agency, officer, bureau, or department, but not to acquire any electricity for sale by the district as a public utility either to the public or to any other user (other than any sale to any subdistrict or to any water conservancy district located wholly or in part within the Colorado river water conservation district and other than any sale of electricity at wholesale to any person or governmental entity);

(f) To enter upon any privately owned land or other real property for the purpose of making surveys or obtaining other information, without obtaining any order so to do, but without causing any more damage than is necessary to crops or vegetation upon such land;



(g) To organize special assessment districts at different times for the purpose of establishing effective agencies to secure funds to construct reservoirs or other irrigation works under various types and plans of financing, including, among others, by issuance of revenue warrants only, by the issuance of bonds or revenue obligations constituting a lien up to a specified amount against the lands in said special improvement district, and payable out of special assessments or by general obligations of such special improvement districts;

(h) To contract with the United States government, the bureau of reclamation, or other agencies of the United States government for the construction of any such works and the issuance of such obligations as the special improvement districts may have the power to issue in payment of costs of construction and maintenance of said works;

(i) To have and exercise the power of eminent domain and, in general, to have and exercise rights and powers of eminent domain conferred upon other agencies as provided in articles 1 to 7 of title 38, C.R.S.; but the district, any subdivision thereof, or the special improvement districts therein shall neither have nor exercise the power of eminent domain against the state or state agencies nor acquire thereby any electric generation facilities, electric distribution lines, or any conditional or absolute decrees for the use of water;

(j) To file upon and hold for the use of the public sufficient water of any natural stream to maintain a constant stream flow in the amount necessary to preserve fish and to use such water in connection with retaining ponds for the propagation of fish for the benefit of the public;

(k) To exercise such implied powers and perform such other acts as may be necessary to carry out and effect any of the express powers hereby conferred upon such district;

(1) To participate in the formulation and implementation of nonpoint source water pollution control programs related to agricultural practices in order to implement programs required or authorized under federal law and section 25-8-205 (5), C.R.S., enter into contracts and agreements, accept funds from any federal, state, or private sources, receive grants or loans, participate in education and demonstration programs, construct, operate, maintain, or replace facilities, and perform such other activities and adopt such rules and policies as the board deems necessary or desirable in connection with nonpoint source water pollution control programs related to agricultural practices.

(2) The board of directors of the district acting as the governing body, in the name and on the behalf of the district, may issue revenue bonds to finance, in whole or in part, the construction or other acquisition of works, reservoirs, or other improvements for the beneficial use of water for the purposes for which it has been or may be appropriated, including, without limitation, the hydrogeneration of electricity, or the acquisition by purchase, rental, lease, or exchange of water, or the purchase or exchange of water rights or electricity and appurtenances (or any combination thereof), and to finance incidental expenses pertaining thereto, whether or not the interest on such bonds may be subject to taxation. Such revenue bonds shall be issued in such denominations and with such maximum net effective interest rate as may be fixed by the board of directors of the district and shall bear interest such that the net effective interest rate of the bonds does not exceed the maximum net effective interest rate authorized. The board shall pledge only bond proceeds, sale proceeds, rental or lease proceeds, service charges, and other income from such works or other improvements or from the sale, rental, or lease of water or the sale of electricity (or any combination thereof), and the district shall not be otherwise obligated for the payment thereof. At the time such revenue bonds are issued, the board of directors of the district shall make and enter in the minutes of the proceeding a resolution in which the due dates of such revenue bonds, the rates of interest thereon, the general provisions of the bonds, and a recital that the same are payable only out of bond proceeds, sale proceeds, rental and lease proceeds, service charges, and other income from such works or other improvements and from the sale, rental, lease, or exchange of water or the sale or exchange of electricity (or any combination thereof) are set forth. In addition, the board of directors shall require the payment of rental or lease charges, service charges, or other charges by the political subdivisions or persons who are to use or derive benefits from the water or other services furnished by such works or improvements or otherwise. Such charges shall be sufficient to pay operation and maintenance expenses thereof, to meet said bond payments, to accumulate and maintain reserve and replacement accounts pertaining thereto as set forth

in such resolution, and to provide funds sufficient for the further development of water resources for all of the foregoing beneficial purposes. Such resolution shall be irrevocable during the time that any of the revenue bonds are outstanding and unpaid. Except as provided in sections 11-55-101 to 11-55-106, C.R.S., the revenue bonds shall be signed "Colorado River Water Conservation District, By ....., President. Attest ....., Secretary", and they shall be countersigned by the treasurer.

**Source:** L. 37: p. 1000, § 5. **CSA:** C. 138, § 199(5). **CRS 53:** § 149-8-5. **C.R.S. 1963:** § 150-7-5. **L. 77:** (2) added, p. 1639, § 2, effective June 9; (1)(e) amended, p. 954, § 29, effective August 1. **L. 81:** IP(1), (1)(e), and (2) amended and (1)(i) R&RE, pp. 1761, 1762, §§ 1, 2, effective June 19. **L. 88:** (1)(l) added, p. 1023, § 4, effective April 6.

#### ANNOTATION

**Law reviews.** For article, "Water for Recreation: A Plea for Recognition", see 44 Den. L.J. 288 (1967).

**District must make same developmental efforts as other appropriators.** Subsection (1)(c) does not relieve a water district of the requirement to make the same developmental efforts as required of other appropriators in order to support a finding of reasonable diligence in the development of appropriations under conditional water rights. *Colo. River Water Conservation Dist. v. City & County of Denver*, 640 P.2d 1139 (Colo. 1982).

**There is no support in the law of Colorado for the proposition that a minimum flow of water may be "appropriated" in a natural stream for piscatorial purposes** without diversion of any portion of the water "appropriated"

from the natural course of the stream. By the enactment of this section the general assembly did not intend to bring about such an extreme departure from well established doctrine, and the supreme court holds that no such departure was brought about by said section. *Colo. River Water Conservation Dist. v. Rocky Mt. Power Co.*, 158 Colo. 331, 406 P.2d 798 (1965).

**Appropriations for piscatorial purposes without diversion intended.** The general assembly in the enactment of the second sentence in subsection (4) of § 37-92-103 and subsection (1)(j) of this section intended to have appropriations for piscatorial purposes without diversion. *Colo. River Water Conservation Dist. v. Colo. Water Conservation Bd.*, 197 Colo. 469, 594 P.2d 570 (1979).

**37-46-108. Principal office - meetings.** The board of directors of said district shall designate a place within the district where the principal office is to be maintained and may change such place from time to time. Regular quarterly meetings of said board shall be held at said office on the third Tuesday in the months of January, April, July, and October. The board is also empowered to hold such special meetings as may be required for the proper transaction of business. All special meetings of the board shall be held at locations which are within the boundaries of the district or which are within the boundaries of any county in which the district is located, in whole or in part, or in any county so long as the meeting location does not exceed twenty miles from the district boundaries. The provisions of this section governing the location of meetings may be waived only if the proposed change of location of a meeting of the board appears on the agenda of a regular or special meeting of the board and if a resolution is adopted by the board stating the reason for which a meeting of the board is to be held in a location other than under the provisions of this section and further stating the date, time, and place of such meeting. Special meetings may be called by the president of the board or by any three directors. Meetings of the board shall be public, and proper minutes of the proceedings of said board shall be preserved and shall be open to the inspection of any elector of the district during business hours.

**Source:** L. 37: p. 1002, § 6. **CSA:** C. 138, § 199(6). **CRS 53:** § 149-8-6. **C.R.S. 1963:** § 150-7-6. **L. 90:** Entire section amended, p. 1505, § 20, effective July 1.

**37-46-109. Authority of board to levy taxes.** (1) (a) In addition to other means of providing revenue for the district, the board of directors has the power to fix the amount of an assessment upon the property within the district, not to exceed two and one-half mills for



every dollar of valuation for assessment therein as a level or general levy to be used for the purpose of paying the expenses of organization, for surveys and plans, to pay the salaries of officers and the per diem allowed to directors and their expenses, for the costs and expenses of construction or partial construction of any project designed or intended to accomplish the utilization of water, by storage or otherwise, for any beneficial uses or purposes, and for other incidental expenses which may be incurred in the administration of the affairs of the district.

(b) and (c) Repealed.

(d) Upon the receipt of any proceeds of a tax levy made under paragraph (a) of this subsection (1), if any items of expense have already been paid in whole or in part from any other sources by the district, they may be repaid from receipts of such levy. Such levy may be made, although the work proposed or any part thereof may have been found impractical or for other reasons abandoned. The collection of data and the payment of expenses therefor, including the compensation of engineers and attorneys and clerical assistants, to conserve the water of the district and to enable the district to adopt plans and projects for the orderly development of the district are hereby declared to be a matter of general benefit to the public welfare and such that taxes for said purposes may be properly imposed in the opinion of the general assembly.

(e) If this subsection (1) or any clause, phrase, or part thereof is held unconstitutional or invalid by any court of competent jurisdiction, such decision shall not affect the validity or force of any other part of this section or any other part of this law, and the general assembly hereby declares it would have enacted the remainder of this article without this subsection (1).

(2) The board of said district may, in lieu of the level or general tax authorized by subsection (1) of this section, levy special assessments upon all real estate within the district, except such real estate as is exempted in this article, to raise funds to pay expenses of organization, salaries, expenses, and per diem allowances of officers and directors and to prepare a general plan for the maintenance of constant stream flow and adequate water supplies in all the principal tributaries and the main stream of the Colorado river in said district and provide for future development of the district and insure water therefor. Such assessments shall be made in proportion to the benefits to each piece of real estate accruing by reason of the adoption of a comprehensive plan of development of the natural resources of the district as a whole. The board of directors, if it deems it advisable at any time before levying special assessments, shall appraise the benefits to the several parcels of real estate within the district which shall result from the organization of said district and the general plans and development aforesaid. The board may adopt rules for such purpose and provide *inter alia* for notice and hearing to all persons affected thereby. A permanent record, arranged by counties, of the benefits which will accrue to each tract of land shall be kept, and such benefits shall be apportioned over a series of years, the amount to be collected each year to be in the discretion of the board; but the amount of such assessment to be levied and assessed against the real property in said district in any one year shall not exceed a total of seventy-five hundred dollars, and it is hereby declared that the amount of special benefits accruing annually to the real estate in said district is in excess of such amount. All property owned by the state, counties, cities, towns, school districts, or other governmental agencies shall be exempt from taxation or special levies under this article.

(3) Prior to October 15 of each year in which an assessment is made, the board of directors shall appoint a time and place where it will meet within the district for the purpose of hearing objections to assessments at least thirty days prior to the dates so appointed. Notice of such hearing shall be given by posting a notice thereof at or near the door of the treasurer's office in each county in said district and by publishing said notice in a legal newspaper not less than three consecutive times within a period of thirty days, immediately prior to the hearing. The notice posted in each county shall be sufficient if it pertains to the property subject to assessment in said county only and need not contain the description of, or any reference to, property situated in other counties also affected by such assessment. The notice shall contain a description of the real estate so assessed in the county in which said notice is posted and published, the amount of the assessment fixed by the board, and the time and place fixed by the board for the hearing of objections to such assessments. It

shall not be necessary for the notice to contain a separate description of the lots or tracts of real estate, but it shall be sufficient if the said notice contains such descriptions as will inform the owner whether or not his real estate is covered by such descriptions, and to inform the owner of the amount of special assessments thereon.

(4) If, in the opinion of any person whose real estate is assessed, his property has been assessed too high or has been erroneously or illegally assessed, at any time before the date of such hearing, he may file written objections to such assessments, stating the ground of such objections, which statement shall be verified by the affidavit of said person or some other person familiar with the facts. At such hearing the board shall hear such evidence and argument as may be offered concerning the correctness or legality of such assessment and may modify or amend the same. Any owner of property desiring to appeal from the finding of the board as to assessments, within thirty days from the finding of the board, shall file with the clerk of the district court of the county in which the property is situated, a written notice making demand for a trial by the court. At the same time, the appellant shall file a bond with good and sufficient security, to be approved by the clerk of said court, in a sum not exceeding two hundred dollars, to the effect that, if the finding of the court is not more favorable to the appellant than the finding of the board, the appellant will pay the costs of the appeal. The appellant shall state definitely from what part of the order the appeal is taken. In case more than one appeal is taken, upon a showing that the same may be consolidated without injury to the interests of anyone, the court may consolidate and try the appeals together.

(5) The court shall not disturb the findings of the board unless the finding of the board in any case is manifestly disproportionate to the assessments imposed upon other property in the district created under this article. The trial shall be to the court, and the matter shall take precedence before the court and shall be taken up as promptly as may be after the appeal is filed. If no appeal is taken from the finding of the board within the time prescribed in this section, or after the finding of the district court in case an appeal is taken from the finding of the board, then said assessments shall be final and conclusive evidence that said assessments have been made in proportion to the benefits conferred upon each tract of real estate of said district by reason of the general plans of survey, comprehensive plan of development, and the completion of improvements to be constructed under the provisions of this article, and such assessments shall constitute a perpetual lien as provided in section 37-46-121 upon the real estate so assessed until paid.

**Source:** L. 37: p. 1003, § 7. CSA: C. 138, § 199(7). CRS 53: § 149-8-7. L. 58: p. 323, § 1. C.R.S. 1963: § 150-7-7. L. 69: p. 1235, § 1. L. 79: (1)(c) repealed and (1)(d) amended, pp. 1360, 1355, §§ 8, 2, effective May 31. L. 83: (1)(a) and (1)(d) amended and (1)(b) repealed, pp. 1394, 1396, §§ 2, 5, effective May 26.

**Cross references:** For publication of legal notices, see part 1 of article 70 of title 24.

**37-46-109.3. Taxes - determination and collection.** (1) In addition to other means of providing revenue for the district, the board of directors, in the name of the district, has the power to levy and collect general ad valorem taxes on or against all taxable property within the district, subject to the limitations provided in section 37-46-109 (1).

(2) To levy and collect general ad valorem taxes, the board shall determine in each year the amount of money to be raised by taxation, including, without limitation, tax levies to retire and pay indebtedness incurred by the district by contract other than the issuance of bonds pursuant to section 37-46-133 and other provisions in this article supplemental thereto, taking into consideration other sources of revenue of the district, and shall fix a rate of levy, without limitation as to rate or amount, but subject to the limitations provided in section 37-46-109 (1), which, when levied upon every dollar of valuation for assessment of taxable property within the district and together with any other moneys of the district, will raise the amount required by the district annually to supply funds for the payment of costs and expenses specified in section 37-46-109 (1) and this subsection (2).

(3) In accordance with the schedule prescribed by section 39-5-128, C.R.S., the board of directors shall certify to the board of county commissioners of each county within the



district or having a portion of its territory within the district the rate so fixed in order that, at the time and in the manner required by law for the levying of taxes, such board of county commissioners shall levy such tax upon the valuation for assessment of all taxable property within the district.

(4) The body having authority to levy taxes within each such county shall levy the taxes certified to it, and all officials charged with the duty of collecting taxes shall collect such taxes levied by the district in accordance with sections 37-46-126.5 and 37-46-126.6.

**Source:** L. 79: Entire section added, p. 1356, § 3, effective May 31. L. 83: (2) amended, p. 1395, § 3, effective May 26.

**37-46-109.4. Levies to cover district's deficiencies.** The board of directors, in certifying annual levies for the district, shall take into account the maturing indebtedness incurred by the district by contract other than the issuance of bonds for the ensuing year as provided in its contracts and deficiencies and defaults of prior years and shall make ample provision for the payment thereof. In case the moneys produced from such levies, together with other revenues of the district, are not sufficient to pay punctually the annual installments of such contracts and interest thereon and to pay defaults and deficiencies, the board shall make such additional levies of taxes as may be necessary for such purposes, and such taxes shall be made and shall continue to be levied until the indebtedness of the district is fully paid.

**Source:** L. 79: Entire section added, p. 1356, § 3, effective May 31.

**37-46-110. Organization.** (1) Notwithstanding the organization of the district provided for in this section, public irrigation districts organized under and pursuant to article 4 of chapter 149, CRS 53, and irrigation districts organized under and pursuant to articles 41 and 42 of this title, and any other form or organization designed or intended to acquire, construct, or maintain reservoirs, ditches, and similar works for irrigation or other beneficial purposes under any law of the state of Colorado or of the United States may be organized to cover and include areas within the Colorado river water conservation district and may likewise embrace territory within that district and partly out of the district. The board of directors, whenever in their opinion such form of organization will help promote the local interests or accomplish improvements for any part of said district, may recommend the organization of any such type of organization.

(2) In addition to such forms of organization, whenever in the opinion of the board of directors of said district it is feasible and necessary that ditches, canals, reservoirs, or other works which benefit only a part of the district should be constructed, a local improvement district or subdivision, or as many of such local improvement districts as may be necessary, may be created as provided in this article. Said local improvement district, when organized under the provisions of this law, shall be designated as "Water Users' Association No. .... in the Colorado River Water Conservation District", or as "Special Improvement District No. .... in the Colorado River Water Conservation District". Each subdistrict shall be numbered consecutively as created or organized. The board of directors, the engineers, attorneys, secretary, and other officers, agents, and employees of the district, so far as it may be necessary, shall serve in the same capacity for such subdivisions or subdistricts. A contract and agreement between the main district and the subdistrict may be made in the same manner as contracts and agreements between two districts.

**Source:** L. 37: p. 1008, § 8. CSA: C. 138, § 199(8). CRS 53: § 149-8-8. C.R.S. 1963: § 150-7-8.

**Editor's note:** The public irrigation law, article 4 of chapter 149, CRS 53, referred to in subsection (1), was repealed, but the provisions of said article 4 were preserved as to all districts formed under that article prior to 1963. (See L. 63, p. 1009.)

**37-46-111. Rules and regulations.** The district has the power to make general rules and regulations for the conduct of its business, as well as the conduct of the business of any subdistrict therein, and by such rules and regulations may provide for the rental of water or other services which are to be furnished by said subdistrict, to any municipality, public irrigation district, or irrigation district, or other quasi-municipal corporation in this state, and to make contracts for the payment of the rental to be charged for any such water or services.

**Source:** L. 37: p. 1028, § 30. CSA: C. 138, § 199(30). CRS 53: § 149-8-30. C.R.S. 1963: § 150-7-30.

**37-46-112. Petition.** (1) Before any subdistrict is established under this article, a petition shall be filed in the office of the clerk of the district court of the county in which the territory to be embraced in said subdistrict, or the greater part thereof is situate, signed by the board of directors of the district or by a majority of the owners of land situate within the limits of the territory proposed to be organized into a subdistrict.

(2) The petition shall set forth:

(a) The proposed name of said subdistrict, whether it shall be designated "Water Users' Association No. .... in the Colorado River Water Conservation District", or "Special Improvement District No. .... in the Colorado River Water Conservation District";

(b) That property within the proposed subdistrict will be benefited by the proposed reservoirs, ditches, canals, works, or other improvements and shall set forth in a general way the nature and estimated cost thereof, together with a general statement of the nature of the anticipated benefits to be derived therefrom;

(c) A full description of the territory to be included in the proposed subdistrict. The description need not be given by metes and bounds or by legal subdivision, but it shall be sufficient to enable a property owner to ascertain whether his property is within the territory proposed to be organized in a subdistrict. Such territory need not be contiguous, if it is so situated that the organization as a single subdistrict of the territory described is such as to promote one or more of the objectives of this article as to all parts of the area proposed to be included.

(d) A general description of the methods proposed to finance the proposed works or other improvements, whether by revenue warrants pledging the income from the proposed works, special improvement bonds to be paid by special assessments on the property benefited in an amount on each tract of land not in excess of the appraised benefits, contracts of water users or water users' associations creating liens or mortgages on lands within the subdistrict, or general obligation bonds constituting a lien against the real property embraced in such subdistrict, and which indebtedness shall never be an obligation of the district itself. If general obligations are proposed, the petition shall allege and show that all lands in the subdistrict will be benefited in an amount not less than the total amount of general obligation bonds to be issued exclusive of interest.

(e) If such a petition is filed by the board of directors of the district, it shall contain a statement to the effect that a majority of the landowners of the territory in the proposed subdistrict petitioned the board of directors to organize said subdistrict, and a copy of the petition of said landowners shall be attached as an exhibit to the petition for organization of the subdistrict.

(f) The petition shall pray for the organization of a subdistrict by the name proposed.

(3) To determine whether a majority of landowners in said district have signed the petition, in the event the petition is signed by landowners, or have petitioned the board of directors of the district, in the event the petition is filed by the board of directors, the court may require the county treasurer of each county in which territory proposed to be included in said subdistrict is situated to furnish a certified list of names of landowners within said area, and the court shall be governed by the names as they appear upon said copy of the tax roll, and the same shall be prima facie evidence of ownership, and, if said tax roll shows a majority of the landowners have signed the main petition or petitioned the district for said organization, the same shall be considered as prima facie evidence that a majority of said landowners are in favor of the organization of said proposed subdistrict.



**Source:** L. 37: p. 1009, § 9. **CSA:** C. 138, § 199(9). **CRS 53:** § 149-8-9. **C.R.S. 1963:** § 150-7-9.

**37-46-113. Notice of hearing on petition.** (1) Immediately after the filing of such petition, the court wherein such petition is filed, by order, shall fix a place and time, not less than sixty days nor more than ninety days after the petition is filed, for hearing thereon, and thereupon the clerk of said court shall cause notice by publication, which may be substantially the same as provided in section 37-8-101, to be made of the pendency of the petition and of the time and place of the hearing thereon. The clerk of said court shall also forthwith cause a copy of said notice to be mailed by United States registered mail to the board of county commissioners of each of the several counties having territory within the proposed subdistrict and to the board of directors of said district in the event that said petition is filed by the landowners.

(2) The district court in and for the county in which the petition for the organization of a subdistrict has been filed, for all purposes of this article, except as otherwise provided in this article, thereafter shall maintain and have original and exclusive jurisdiction coextensive with the boundaries of said subdistrict of lands and other property proposed to be included in said subdistrict or affected by said district, without regard to the usual limits of its jurisdiction.

(3) No judge of such court wherein such petition is filed shall be disqualified to perform any duty imposed by this article by reason of ownership of property within any subdistrict or proposed subdistrict or by reason of ownership of any property that may be benefited, taxed, or assessed therein.

**Source:** L. 37: p. 1011, § 10. **CSA:** C. 138, § 199(10). **CRS 53:** § 149-8-10. **C.R.S. 1963:** § 150-7-10.

**37-46-114. Protesting of petitions.** (1) At any time after the filing of a petition for the organization of a subdistrict, and not less than thirty days prior to the time fixed by the order of the court for the hearing upon said petition, and not thereafter, a protest may be filed in the office of the clerk of the court wherein the proceedings for the organization of such subdistrict is pending, signed by a majority of the owners of the land in said proposed subdistrict protesting the organization or creation of said subdistrict. It is the duty of the clerk of the court forthwith, upon filing of said protest, to make as many certified copies thereof, including the signatures thereto, as there are counties into any part of which said proposed subdistrict extends and forthwith to place in the hands of the county treasurer of each of such counties one of said certified copies.

(2) It is the duty of each of such county treasurers to determine from the last tax rolls of his county, and to certify to said district court under his official seal, prior to the day fixed for the hearing, the total number of owners of land situate in such proposed subdistrict within his county and the total number of owners of land situate in such proposed subdistrict within his county who have signed such protest. Such certificate shall constitute prima facie evidence of the facts so stated therein and shall be so received and considered by the court.

(3) Upon the day set for the hearing upon the original petition, if it appears to the court from such certificate and from such other evidence as may be adduced by any party in interest that the said protest is not signed by a majority of the owners of land within the proposed subdistrict, the court shall thereupon dismiss said protest and shall proceed with the hearing on the petition. If it appears to the court at said hearing that the protest is signed by any person or corporation who signed the original petition for the organization of said subdistrict, either to the court or to the district, then the signature of any such landowner upon the protest shall be disregarded and not counted. The board of county commissioners of any county in which any part of said proposed subdistrict is situate, or any owner of real property in said proposed subdistrict who has not signed the petition for the organization of said subdistrict, on or before the date set for the cause to be heard, may file objections to the organization and incorporation of the district. Such objections shall be limited to a denial of the statements in the petition and shall be heard by the court as an advanced case without unnecessary delay.

(4) Upon said hearing, if it appears that said petition has been signed and presented in accordance with the requirements of this article and that the allegations of the petition are true, the court shall enter a decree and therein adjudicate all questions of jurisdiction and declare the subdistrict organized and designate the name of said subdistrict, by which in all subsequent proceedings it shall thereafter be designated and known, and thereafter said subdistrict shall be deemed a special improvement district.

(5) Such order shall be binding upon the real property within the subdistrict, and no appeal or other remedy shall lie therefrom, and entry of such order shall finally and conclusively establish the regular organization of said subdistrict against all persons except the state of Colorado in an action in the nature of quo warranto to be commenced by the attorney general within three months after said decree is entered and not otherwise. Within ten days after such subdistrict has been declared duly organized by the court, the clerk of said court shall transmit to the county clerk and recorder in each of the counties having lands in said subdistrict copies of the findings and decree of the court establishing said subdistrict. The same shall be recorded in the office of the county clerk and recorder, where they shall become permanent records.

**Source:** L. 37: p. 1012, § 11. CSA: C. 138, § 199(11). CRS 53: § 149-8-11. C.R.S. 1963: § 150-7-11. L. 83: (5) amended, p. 1228, § 14, effective July 1.

**37-46-115. Board of directors to prepare plans.** Upon organization of such subdistrict, the board of directors of said district, acting as the board of directors of said subdistrict, are authorized and required to prepare and adopt as the official plans for said subdistrict a comprehensive detailed plan showing the nature of the improvements or works, including all canals, reservoirs, and ditches, whether within or without the district, and the estimated cost of each principal part of said system or works.

**Source:** L. 37: p. 1015, § 12. CSA: C. 138, § 199(12). CRS 53: § 149-8-12. C.R.S. 1963: § 150-7-12.

**37-46-116. Appointment of appraisers.** As soon as such official plan has been prepared and adopted and is on file in the office of said district, upon petition of the district, the court shall appoint a board of appraisers consisting of three members. The qualifications of said appraisers and all proceedings before them shall be in accordance with the provisions of the law pertaining to the duties and qualifications of appraisers under the conservancy law of Colorado as set forth in article 4 of this title; except that, where reference is made in said law to districts, it shall apply to subdistricts organized under this article.

**Source:** L. 37: p. 1015, § 13. CSA: C. 138, § 199(13). CRS 53: § 149-8-13. C.R.S. 1963: § 150-7-13.

**37-46-117. Compensation of appraisers.** Appraisers when appointed under the provisions of this article shall receive a compensation of ten dollars per day during the time that they are engaged in the performance of their duties.

**Source:** L. 37: p. 1017, § 15. CSA: C. 138, § 199(15). CRS 53: § 149-8-15. C.R.S. 1963: § 150-7-15.

**37-46-118. Board bound by financing plan.** (1) The board of directors of the district shall be bound by the plan of financing set forth in the petition for the organization of the subdistrict and approved by decree of the district court. The appointment of appraisers shall not be necessary in the event that the plan adopted provides that general obligations of the subdistrict are to be issued or provides for the issuance of revenue warrants which are a lien and charge upon the rental and income from the irrigation works or reservoirs or other



improvements to be constructed under the plan adopted and the rental derived from any such works.

(2) The warrants shall be payable in such denominations, with a maximum net effective interest rate which may be fixed by the board of directors of said district pursuant to the order and decree of the court. Such warrants shall bear interest such that the net effective interest rate of the warrants does not exceed the maximum net effective interest rate authorized. The board shall pledge the income and rentals from said irrigation works or water supplied therethrough, and the subdistrict shall not be otherwise obligated for the payment thereof.

(3) At the time said revenue warrants are issued, the board of directors of the district shall make and enter in the minutes of the proceeding a resolution in which the due dates of said revenue warrants, the rate of interest thereon, the general provisions of said bonds, and a recital that the same are payable out of rental and income only are set forth and shall require the payment of an assessment or annual rental charge by the persons who are to use or derive benefit from the water or other service furnished through said improvements or works, sufficient to meet said payments, and the resolution shall be irrevocable during the time that any of said revenue warrants are outstanding and unpaid. The revenue warrants shall be signed "Water Users' Association No. .... in the Colorado River Water Conservation District, By ....., President. Attest ....., Secretary" or "Special Improvement District No. .... in the Colorado River Water Conservation District, By ....., President. Attest ....., Secretary". They shall be countersigned by the treasurer.

(4) General obligation bonds of said subdistrict shall be signed in the same manner as provided in this section for revenue warrants and shall recite that the same are issued pursuant to the provisions of this article and are to be payable at the time and in the manner and with the rate of interest therein specified and that the same were issued under and pursuant to a decree of court and a resolution of the board of directors authorizing the issue of said obligations and referring to the date of said resolution. Said bonds shall further recite that they are payable from funds to be derived by assessments and tax levies against the property in said subdistrict and not otherwise, and that the same are not to be deemed as an obligation of the Colorado river water conservation district but only as an obligation of said subdistrict, and that the district itself is not obligated in any manner for the payment of said bonds.

**Source:** L. 37: p. 1015, § 14. CSA: C. 138, § 199(14). CRS 53: § 149-8-14. C.R.S. 1963: § 150-7-14. L. 70: p. 440, § 7.

**37-46-119. Directors may make assessments.** (1) In the event that the plans for the organization of said district, including the petition and the decree entered thereon, provide for a plan of financing the construction or acquisition of the works, or other improvements proposed, by special assessments to be levied against the appraised benefits to property within said subdistrict, then the board of directors may make assessments from time to time as required, and said board in making said assessments shall be guided by the procedure for the levy of similar assessments under the conservancy law of the state of Colorado and particularly the provisions of said law appearing in sections 37-5-104 to 37-5-106, and the same shall apply to subdistricts created under this article. The board of directors from time to time, as the affairs of the subdistrict may demand, may levy on all property upon which benefits have been appraised an assessment of such portion of said benefits as may be found necessary by said board to pay the cost of the appraisal, the preparation and execution of the official plan for said subdistrict, superintendence of construction, and administration during the period of construction, plus ten percent of said total to be added for contingencies, but not to exceed in the total of principal the appraised benefits so adjudicated.

(2) The assessments, to be known as the "construction fund assessment", shall be apportioned to and levied on each tract of land or other property in said district in proportion to the benefits appraised and not in excess thereof, and in case bonds are issued, as provided in section 37-46-120, then the amount of interest which will accrue on such bonds as estimated by said board of directors shall be included in and added to said assessment, but the interest to accrue on account of the issuance of said bonds shall not be construed as a

part of the cost of construction in determining whether or not the expenses and cost of making said improvement are or are not equal to or in excess of the benefits appraised.

(3) As soon as said assessment is levied, the secretary of the subdistrict, at the expense thereof, shall prepare in duplicate an assessment of the subdistrict. It shall be in the form of a well-bound book endorsed and named "Construction Fund Assessment Record of Water Users' Association No. .... (or Special Improvement District No. ...., as the case may be) of the Colorado River Water Conservation District". Said record shall be in the form of similar records for conservancy districts under the laws of this state, particularly as provided by section 37-5-104. Said assessments may be paid in the manner provided by section 37-5-105, relating to conservancy districts under the laws of this state. All proceedings provided in said sections with respect to conservancy districts shall apply to the assessments, the records thereof, and the manner of payment of assessments of subdistricts organized under this article.

**Source:** L. 37: p. 1017, § 16. CSA: C. 138, § 199(16). CRS 53: § 149-8-16. C.R.S. 1963: § 150-7-16.

**37-46-120. Improvement district bonds.** (1) The board of directors of said district may issue as obligations of the subdistrict, not as an obligation of the Colorado river water conservation district, improvement district bonds to be paid out of special assessments made by said board of directors against all lands in the subdistrict, not exceeding in the aggregate principal amount of ninety percent of the amount of benefits assessed against said lands and unpaid at the time of issue of said bonds. The bonds shall contain a recital to the effect that they are issued under and in accordance with the provisions of this article as special improvement district bonds and are payable out of special assessments to be levied against the property in said subdistrict as provided in this article, and not otherwise. Such improvement district bonds shall be signed, "Water Users' Association No. .... (or Special Improvement District No. ...., as the case may be) of the Colorado River Water Conservation District, By ....., President", and countersigned "....., Treasurer".

(2) Otherwise said bonds shall be in such denominations and become due at such dates, with interest payable either annually or semiannually at such rate subject to a maximum net effective interest rate, and contain such other provisions as may be fixed by the board of directors, if said provisions are not inconsistent with the terms of this article. Except as otherwise expressly modified in this article, the law relating to the form and issuance of bonds of conservancy districts under the laws of this state, particularly section 37-5-106, shall apply and govern officers of the district in the issuance and sale of said bonds, and other provisions of said law with respect to the levy of assessments or the payment of said bonds with interest, and particularly section 37-5-110, shall likewise be applicable to the bonds of a subdistrict organized under this article.

**Source:** L. 37: p. 1019, § 17. CSA: C. 138, § (199)17. CRS 53: § 149-8-17. C.R.S. 1963: § 150-7-17. L. 70: p. 441, § 8.

**37-46-121. Assessments perpetual lien.** All assessments on account of special improvements against appraised benefits and interest thereon and penalties for default of payment thereof, together with costs of collecting the same, from the date of the filing of the "construction fund assessment" record and the "maintenance fund assessment" record in the office of the county treasurer of the county wherein the lands and property are situate, shall constitute a perpetual lien in an amount not in excess of the benefits severally appraised upon the land and other property against which said assessments have been levied and such benefits appraised to which only the lien of the general, state, county, city, town, or school district taxes shall be paramount, and any sale of such property and the issuance of a tax deed conveying title thereto, to enforce any general, state, county, city, town, or school district tax, or any other lien, shall extinguish the perpetual lien of said assessment. Any landowner at any time may pay the full amount of said assessment, and thereafter the



property of any such landowner shall be clear and free from said lien and shall not be subject to assessment for and on account of benefits appraised against any other land or default in the payment of assessments made against any other land.

**Source:** L. 37: p. 1020, § 18. CSA: C. 138, § 199(18). CRS 53: § 149-8-18. C.R.S. 1963: § 150-7-18. L. 79: Entire section amended, p. 1357, § 4, effective May 31. L. 83: Entire section amended, p. 1395, § 4, effective May 26.

**37-46-122. Invalid assessments - board remedy.** If any assessment made under the provisions of this article proves invalid, the board of directors by subsequent or amended acts or proceedings, promptly and without delay, shall remedy all defects or irregularities, as the case may require, by making and providing for the collection of new assessments, or otherwise.

**Source:** L. 37: p. 1021, § 19. CSA: C. 138, § 199(19). CRS 53: § 149-8-19. C.R.S. 1963: § 150-7-19.

**37-46-123. Assessment record as evidence.** The record of assessments contained in the respective assessment records of the district shall be prima facie evidence in all courts of all matters therein contained.

**Source:** L. 37: p. 1021, § 20. CSA: C. 138, § 199(20). CRS 53: § 149-8-20. C.R.S. 1963: § 150-7-20.

**37-46-124. Remedies in case of faulty notice.** Whenever in this article notice is provided for, if the court finds that due notice was not given, jurisdiction shall not thereby be lost or the proceedings abated or held void, but the court shall continue the hearing until such time as proper notice may be given and thereupon shall proceed as though proper notice had been given in the first instance. If any appraisal, assessment, levy, or other proceeding relating to said district is held defective, then the board of directors may file a motion in the cause in which said district was organized to perfect any such defect, and the court shall set a time for hearing thereon. If the original notice as a whole is held to be sufficient but faulty only with reference to publication as to certain particular lands or as to service as to certain persons, publication of the defective notice may be ordered as to the particular lands, or service may be made on the persons not properly served, and said notice is thereby corrected without invalidating the original notice as to other lands or persons.

**Source:** L. 37: p. 1021, § 21. CSA: C. 138, § 199(21). CRS 53: § 149-8-21. C.R.S. 1963: § 150-7-21.

**37-46-125. Lawful contracts.** (1) When the petition for the organization of a sub-district and the decree for such organization so provide, it is lawful for any said subdistrict to make contracts as follows:

(a) A water users' association may bind itself to levy an annual assessment for the use of water and to secure same by liens on land and water rights or in such manner as may be provided by law.

(b) Any person or corporation landowner may create a mortgage lien upon lands or give other security satisfactory to the board or any other contracting agency, and all such contracts shall provide for forfeiture of the use of water for nonpayment of assessments or installments in the same manner and procedure as provided by statute for forfeiture of stock in a mutual ditch company.

**Source:** L. 37: p. 1023, § 23. CSA: C. 138, § 199(23). CRS 53: § 149-8-213. C.R.S. 1963: § 150-7-23.

**Cross references:** For forfeiture of stock in a ditch company, see § 7-42-104 (4).

**37-46-126. Issuance of general obligation bonds and revenue bonds.** (1) The board of directors of the district acting as the governing body, in the name and on the behalf of the subdistrict as provided in section 37-46-110 and not otherwise, when authorized by the plan of organization and decree of court organizing said subdistrict to do so, may issue general obligation bonds or otherwise incur a general obligation indebtedness to finance, in whole or in part, the construction or other acquisition of works, reservoirs, or other improvements for the beneficial use of water for the purposes for which it has been or may be appropriated, including, without limitation, the hydrogeneration of electricity, or the acquisition by purchase, rental, lease, or exchange of water, or the purchase or exchange of water rights or electricity and appurtenances (or any combination thereof), and to finance incidental expenses pertaining thereto, whether or not the interest on such bonds may be subject to taxation. Said obligations shall bear interest at a rate such that the net effective interest rate of the issue does not exceed the maximum net effective interest rate authorized. Interest shall be payable semiannually, but the first installment of interest may evidence interest for not exceeding two years from the date of issue, and said obligations may be issued and made payable in series becoming due over a term of not less than five years and not more than fifty years after the date of issue. Such bonds or other indebtedness is to be paid from general ad valorem taxes levied from time to time, as the bonds or other indebtedness and interest thereon become due, against the taxable property in said subdistrict and not otherwise; but such taxes may be diminished to the extent other revenues are made available to pay such debt service as the same becomes due. The board of directors of the district shall certify to the boards of county commissioners of the several counties in which said subdistrict or any part thereof is located the amount of the levy necessary to pay said bonds or installments of principal of other indebtedness as they mature and also to pay the interest becoming due on all outstanding bonds or other indebtedness, and the procedure for the assessment and collection of revenue or taxes of the county and state are, except as may be otherwise provided in this article, made applicable and are to be followed in the levy of assessments for payment of taxes and collection of principal and interest on such general obligations.

(2) The board of directors of the district acting as the governing body, in the name and on the behalf of the subdistrict, may issue revenue bonds to finance, in whole or in part, the construction or other acquisition of works, reservoirs, or other improvements for the beneficial use of water for the purposes for which it has been or may be appropriated, including, without limitation, the hydrogeneration of electricity, or the acquisition by purchase, rental, lease, or exchange of water, or the purchase or exchange of water rights or electricity and appurtenances (or any combination thereof), and to finance incidental expenses pertaining thereto, whether or not the interest on such bonds may be subject to taxation. Such revenue bonds shall be issued in such denominations and with such maximum net effective interest rate as may be fixed by the board of directors of the subdistrict and shall bear interest such that the net effective interest rate of the bonds does not exceed the maximum net effective interest rate authorized. The board shall pledge only bond proceeds, sale proceeds, rental or lease proceeds, service charges, and other income from such works or other improvements or from the sale, rental, lease, or exchange of water or the sale or exchange of electricity (or any combination thereof), and the subdistrict shall not be otherwise obligated for the payment thereof. At the time said revenue bonds are issued, the board of directors of the subdistrict shall make and enter in the minutes of the proceeding a resolution in which the due dates of such revenue bonds, the rates of interest thereon, the general provisions of the bonds, and a recital that the same are payable only out of bond proceeds, sale proceeds, rental and lease proceeds, service charges, and other income from such works or other improvements and from the sale, rental, lease, or exchange of water or the sale or exchange of electricity (or any combination thereof) are set forth. In addition, the board of directors shall require the payment of rental or lease charges, service charges, or other charges by the political subdivisions or persons who are to use or derive benefits from the water or other services furnished by such works or improvements or otherwise. Such charges shall be sufficient to pay operation and maintenance expenses



thereof, to meet said bond payments, to accumulate and maintain reserve and replacement accounts pertaining thereto as set forth in such resolution, and to provide funds sufficient for the further development of water resources for all of the foregoing beneficial purposes. Such resolution shall be irrevocable during the time that any of the revenue bonds are outstanding and unpaid. Except as provided in sections 11-55-101 to 11-55-106, C.R.S., the revenue bonds shall be signed "Water Users' Association No. .... in the Colorado River Water Conservation District, By ....., President. Attest ....., Secretary" or "Special Improvement District No. .... in the Colorado River Water Conservation District, By ....., President. Attest ....., Secretary", and they shall be countersigned by the treasurer.

**Source:** L. 37: p. 1022, § 22. CSA: C. 138, § 199(22). CRS 53: § 149-8-22. C.R.S. 1963: § 150-7-22. L. 70: p. 441, § 9. L. 77: Entire section amended, p. 1639, § 3, effective June 9. L. 79: (1) amended, p. 1357, § 5, effective May 31. L. 81: Entire section amended, p. 1763, § 3, effective June 19.

**37-46-126.2. Subdistrict's levy of taxes.** In addition to other means of providing revenue for a subdistrict, the board of directors, in the name of the subdistrict, has the power to levy and collect general ad valorem taxes on or against all taxable property within the subdistrict, subject to the limitations provided in section 37-46-126.3 (1), in part 3 of article 1 of title 29, C.R.S., and in any other law which by its terms is applicable to the subdistrict and which imposes tax limitations or expenditure limitations thereon.

**Source:** L. 79: Entire section added, p. 1358, § 6, effective May 31.

**37-46-126.3. Levy and collection of subdistrict's taxes.** (1) The board of directors, in the name of the subdistrict, after it has been organized, shall determine the amount of money necessary to be raised by a levy on the taxable property in the subdistrict and shall fix a rate of levy, not to exceed five mills, which when levied upon every dollar of valuation for assessment of taxable property within the subdistrict will raise the amount required by the subdistrict during the ensuing fiscal year to supply funds for paying expenses of organization, costs of surveys and plans, salaries of any employees of the subdistrict, per diem allowed to directors and their expenses pertaining to the subdistrict, and other incidental expenses which may be incurred in the administration of the affairs of the subdistrict, paying the costs and expenses of construction of any project designed or intended to accomplish the utilization of water, by storage or otherwise, for any beneficial uses or purposes, and promptly paying in full, when due, all interest on and principal of general obligation bonds and other general obligation indebtedness of the subdistrict, but the limitation of five mills imposed in this section on the amount of levy shall not apply to levies made for the purpose of paying the principal of and interest on the general obligation bonds and other general obligation indebtedness of the subdistrict. Except for levies to pay such indebtedness, a two-thirds vote of the membership of the board shall be required to fix the amount of each of such levies.

(2) To levy and collect general ad valorem taxes, the board shall determine in each year the amount of money necessary to be raised by taxation, taking into consideration other sources of revenue of the subdistrict, and shall fix a rate of levy, without limitation of rate or amount, but subject to the provisions of subsection (1) of this section, which, when levied upon every dollar of valuation for assessment of taxable property within the subdistrict and together with any other moneys of the subdistrict, will raise the amount required by the subdistrict annually to supply funds for the payment of the expenses provided in subsection (1) of this section.

(3) In accordance with the schedule prescribed by section 39-5-128, C.R.S., the board of directors shall certify to the board of county commissioners of each county within the subdistrict, or having a portion of its territory within the subdistrict, the rate so fixed in order that, at the time and in the manner required by law for the levying of taxes, such board of county commissioners shall levy such tax upon the valuation for assessment of all taxable property within the subdistrict in such county.

(4) Upon the receipt of any proceeds of tax levies made under subsection (1) of this section, if any items of expense have already been paid in whole or in part from any other sources by the subdistrict, they may be repaid from receipts of such levies. Such levies may be made, although the work proposed or any part thereof may have been found impractical or for any other reasons abandoned. The collection of data and the payment of expenses therefor, including the compensation of engineers, attorneys, and clerical assistants, to conserve water of the subdistrict, are hereby declared to be a matter of general benefit to the public welfare and such that taxes for such purposes may be properly imposed in the opinion of the general assembly.

(5) The limitations in and other provisions of part 3 of article 1 of title 29, C.R.S., and any other law which by its terms is applicable to the subdistrict and which imposes tax limitations or expenditure limitations thereon, other than the tax limitation in subsection (1) of this section, shall not apply to the subdistrict until the fifth year after the date on which the subdistrict is created or May 31, 1979, whichever date is later.

**Source: L. 79:** Entire section added, p. 1358, § 6, effective May 31.

**37-46-126.4. Levies to cover subdistrict deficiencies.** The board of directors, in certifying annual levies for the subdistrict, shall take into account the maturing indebtedness for the ensuing year as provided in its contracts, maturing bonds and interest on bonds, and deficiencies and defaults of prior years and shall make ample provision for the payment thereof. In case the moneys produced from such levies, together with other revenues of the subdistrict, are not sufficient to pay punctually the annual installments of its contracts or bonds and interest thereon and to pay defaults and deficiencies, the board shall make such additional levies of taxes as may be necessary for such purposes, and such taxes shall be made and shall continue to be levied until the indebtedness of the subdistrict is fully paid.

**Source: L. 79:** Entire section added, p. 1359, § 6, effective May 31.

**37-46-126.5. County to levy and collect.** (1) The body having authority to levy taxes within each county in which the district is situate wholly or in part if it levies taxes to pay expenses or to retire and pay indebtedness incurred by contract other than the issuance of bonds, or both to pay such expenses and to retire and pay such indebtedness, and each county in which a subdistrict is situate wholly or in part if it levies taxes pursuant to sections 37-46-126 (1) and 37-46-126.2 to 37-46-126.4, shall levy the taxes provided in this article.

(2) All officials charged with the duty of collecting taxes shall collect such taxes levied by the district or subdistrict, as the case may be, at the time and in the form and manner and with the interest and penalties as other taxes are collected and, when collected, shall pay the same to the district or subdistrict levying the tax.

(3) The payment of such collection shall be made on or before the tenth day of the next succeeding calendar month to the treasurer of the district or subdistrict levying the taxes and paid into the depository thereof to the credit of such district or subdistrict.

(4) All taxes levied under this article, together with interest thereon and penalties for default in payment thereof, and all costs of collecting the same shall constitute, until paid, a perpetual lien on and against the property taxed, and such lien shall be on a parity with the tax lien of other general ad valorem taxes.

**Source: L. 79:** Entire section added, p. 1359, § 6, effective May 31.

**37-46-126.6. Delinquent taxes.** (1) If the taxes levied are not paid, then delinquent real property shall be sold at the regular tax sale for the payment of such taxes, interest, and penalties in the manner provided by statute for selling real property for the nonpayment of taxes. If there are no bids at such tax sale for the property so offered, the property shall be struck off to the county, and the county shall account to the district or the subdistrict levying the taxes in the same manner as provided by law for accounting for school, town, and city taxes.



(2) Delinquent personal property shall be distrained and sold as provided by law.

(3) Nothing in this article, neither the tax limitations in sections 37-46-109 (1) and 37-46-126.3 (1) nor otherwise, shall be construed as preventing the collection in full of the proceeds of all levies of taxes by the district or subdistrict levying the taxes authorized by this article, including, without limitation, any delinquencies, interest, penalties, and costs.

**Source: L. 79:** Entire section added, p. 1360, § 6, effective May 31.

**37-46-127. Maintenance assessment.** (1) To maintain, operate, and preserve ditches, canals, reservoirs, or other improvements made pursuant to this article, and to strengthen, repair, and restore the same, when needed, and, for the purpose of defraying any incidental expenses of the subdistrict, upon completion of a works provided for in the plan for any such subdistrict, on or before the first Monday in November of each year thereafter, the board of directors may certify to the board of county commissioners of the county in which said subdistrict or any part thereof is located an assessment on each tract of land and upon public corporations subject to assessment under this article, for the purpose of raising funds to be used for the maintenance of said improvements. If an appraisal of benefits has been made against the lands in said district, assessments shall be apportioned by the county treasurer and by the board of directors of said district against the property therein upon the basis of the appraisal of benefits originally made. If no such appraisal has been made and the form of organization and financing is such that revenue warrants or general obligations of the subdistrict have been issued, then said assessment shall be made on the basis of the valuation for assessment of the property subject to assessment in said subdistrict.

(2) Such assessment shall not exceed five mills on each dollar of the valuation for assessment of the property in said subdistrict in any one year, unless the court shall by order authorize an assessment of a larger percentage. The assessment shall be levied by resolution of the board of directors and shall be enrolled in a well-bound record to be known as the maintenance fund assessment record and shall be substantially the form provided for similar records of conservancy districts under the laws of the state of Colorado, particularly as provided by section 37-5-107. Assessments so certified shall be levied by the board of county commissioners of the counties in which said subdistrict is situate, on the property of said district in their respective counties, to be collected by the treasurers of the several counties and delivered to the treasurer of the district in like manner and with like effect as is provided for the collection and return of other assessments under this article. The whole assessment shall be due and payable as and when taxes for county purposes levied in the same year are due and payable. The said maintenance assessments shall be in addition to any assessments which have been levied against benefits appraised for and on account of construction.

**Source: L. 37:** p. 1023, § 24. **CSA:** C. 138, § 199(24). **CRS 53:** § 149-8-24. **C.R.S. 1963:** § 150-7-24.

**37-46-128. Annual levy limit.** (1) The district has no power of taxation or right to levy or assess taxes, except as provided in sections 37-46-109 to 37-46-109.4, 37-46-126.5, and 37-46-126.6. The district has no power to contract or incur any obligation or indebtedness except as expressly provided in this article, and then any obligation or indebtedness so contracted or incurred is to be payable out of the funds derived through the limited tax provided in section 37-46-109 (1) and the unlimited tax provided in section 37-46-109.3 (2) to retire and pay indebtedness incurred by the district by contract other than the issuance of bonds and not otherwise; except that the district for and in behalf of any subdistrict or improvement district created under this article has the right to issue obligations as expressly authorized in this article and not otherwise.

(2) All assessments under this article shall be collected by the county treasurer of the respective counties in which said real estate is situated at the same time and in the same manner as is provided by law for the collection of taxes for county and state purposes, and if said assessments are not paid, then the real estate shall be sold at the regular tax sale for

the payment of said assessments, interest, and penalties in the manner provided by the statutes of the state of Colorado for selling property for the payment of general taxes. If there are no bids at said tax sale for the property so offered, said property shall be struck off to the district, and the tax certificates shall be issued in the name of the district, and the board of directors has the same power with reference to the sale of said tax certificates as is vested in county commissioners and county treasurers when property is struck off to the counties.

(3) Tax deeds may be issued, based upon said certificates of sale in the same manner that deeds are executed on tax sales on general state and county taxes.

**Source:** L. 37: p. 1026, § 27. CSA: C. 138, § 199(27). CRS 53: § 149-8-27. C.R.S. 1963: § 150-7-27. L. 69: p. 1235, § 2. L. 79: (1) amended p. 1360, § 7, effective May 31.

**Cross references:** For collection of taxes and tax sales, see articles 10 and 11 of title 39.

**37-46-129. Investment of surplus funds.** The board of directors of said district may invest any surplus funds of the district, including any funds in the construction fund assessment not needed for immediate use to pay the cost of construction of any project in any one of the subdistricts or to pay bonds or coupons or to meet current expenses, in securities meeting the investment requirements established in part 6 of article 75 of title 24, C.R.S. The board of directors of said district may require any funds of the district, or of any subdistrict, to be deposited with such depository or bank as may be designated by the board and shall likewise have authority to require the treasurer of the district to take from such depository a bond with corporate surety to insure payment of any such deposit or to require such depository to pledge securities of the same kind as those in which the district is authorized to invest its funds to insure payment of any such deposit.

**Source:** L. 37: p. 1027, § 28. CSA: C. 138, § 199(28). CRS 53: § 149-8-28. C.R.S. 1963: § 150-7-28. L. 89: Entire section amended, p. 1123, § 50, effective July 1.

**37-46-130. Sinking fund.** Such district may provide for a sinking fund for the ultimate payment of any of the obligations of any subdistrict. Said sinking fund may be invested as provided in section 37-46-129.

**Source:** L. 37: p. 1028, § 29. CSA: C. 138, § 199(29). CRS 53: § 149-8-29. C.R.S. 1963: § 150-7-29.

**37-46-131. Court confirmation.** (1) (a) In its discretion, the board of directors, on the behalf and in the name of the district or any subdistrict which is a party in interest, may file a petition at any time in the district court in and for the county in which the district's principal office is maintained or, if both the district and one or more subdistricts are parties to the petition, in the district court in and for the county in which any such subdistrict was organized, praying for a judicial examination and determination of any power conferred or of any taxes or rates or other charges levied, or of any act, proceeding, or contract of the district, the subdistrict, or the subdistricts, or any combination thereof, as the case may be, whether or not said contract has been executed, including, without limitation, proposed contracts for the acquisition, improvement, equipment, maintenance, operation, or disposal of any properties or facilities for the benefit of the district, the subdistrict, or the subdistricts, as the case may be, and so including a proposed issue of revenue warrants, revenue bonds, special assessment bonds, or general obligation bonds, issued or to be issued on behalf of any such entity. Such petition shall set forth the facts whereon the validity of such power, tax, assessment, charge, act, proceeding, or contract is founded and shall be verified by the president of the board of directors.

(b) Such action shall be in the nature of a proceeding in rem, and jurisdiction of all parties interested may be had by publication, mail, and posting, as provided in this article.



Notice of the filing of the petition shall be given by the clerk of the court, under the seal thereof, stating in brief outline the contents of the petition and also stating where a full copy of any contract therein mentioned may be examined. The notice shall be served by publication at least once a week for five consecutive weeks in a daily or a weekly newspaper of general circulation published in the county in which the principal office of the district is located, by mailing copies of the notice by registered or certified mail, return receipt requested, to the boards of county commissioners of the several counties in which the parties in interest in such action are located wholly or in part, and by posting the same in the office of the district at least thirty days prior to the date fixed in said notice for the hearing on said petition. Jurisdiction shall be complete after such publication, mailing, and posting.

(c) Any owner of property in the district or any subdistrict filing the petition or any person interested in the contract or proposed contract or in the premises may appear and move to dismiss or answer the petition at any time prior to the date fixed for the hearing or within such further time as may be allowed by the court; and the petition shall be taken as confessed by all persons who fail to appear.

(2) The petition and notice shall be sufficient to give the court jurisdiction; and, upon hearing, the court shall examine into and determine all matters and things affecting the question submitted and shall make such findings with reference thereto and render such judgment and decree thereon as the case warrants. Costs may be divided or apportioned among any contesting parties in the discretion of the trial court. Review of the judgment of the court may be had as in other similar cases; except that such review must be applied for within thirty days after the time of the rendition of such judgment or within such additional time as may be allowed by the court within thirty days. The Colorado rules of civil procedure shall govern in matters of pleadings and practice where not otherwise specified in this article. The court shall disregard any error, irregularity, or omission which does not affect the substantial rights of the parties.

**Source:** L. 37: p. 1028, § 31. CSA: C. 138, § 199(31). CRS 53: § 149-8-31. C.R.S. 1963: § 150-7-31. L. 77: Entire section R&RE, p. 1640, § 4, effective June 9.

**37-46-132. Allocation of water or service.** In order to enable a subdistrict organized under the provisions of this article to furnish water to lands which have not been irrigated and had, up to the time of the construction of the works to be constructed by said subdistrict, no water supply and, at the same time, to enable other areas within the same subdistrict to obtain a supplemental supply of water or to enable said subdistrict to furnish a complete service to certain lands, certain areas, certain persons, or municipalities within the district and to supplement an existing supply or service to other persons, localities, and municipalities, prior to the time that an appraisal of benefits is made in any such subdistrict, the board of directors may make a resolution setting forth the amount of water or the kind of service to be allocated to specified classes or areas, and such limitation shall be taken into consideration by the appraisers in the appraisal of benefits with respect to lands affected by any such limitation. Like conditions and restrictions may be provided for payment by certain lands or persons of revenue warrants which pledge the income from the works of said subdistricts, but no such limitation shall govern the payment of any general obligations of any such subdistrict.

**Source:** L. 37: p. 1029, § 32. CSA: C. 138, § 199(32). CRS 53: § 149-8-32. C.R.S. 1963: § 150-7-32.

**37-46-133. Election to authorize debt.** Except for the issuance of refunding bonds or other funding or refunding of obligations which does not increase the net indebtedness of the district or any subdistrict so proceeding, no indebtedness shall be incurred by the issuance of general obligation bonds of any subdistrict or by any contract by which the district or a subdistrict agrees to repay as general obligations or other obligations constituting a "general obligation debt by loan in any form", as such term is used in section 6 of

article XI of the state constitution, of the district or subdistrict, respectively, to the federal government, the state, any political subdivision, or any person over a term not limited to the then current fiscal year any project costs advanced thereby under any contract for the acquisition or improvement of the facilities or any interest therein, or for any project, advanced by the issuance of securities of such a political subdivision or person to defray any cost of the project or of the facilities or an interest therein thereby acquired and becoming a part of the facilities of the district or subdistrict, or otherwise advanced, unless a proposal of issuing the subdistrict's general obligation bonds or of incurring an indebtedness by the district or subdistrict by making such a contract is submitted to the electors of the district or subdistrict, as the case may be, and is approved by a majority of such electors voting on the proposal at an election held for that purpose in accordance with this article and with all laws amendatory thereof and supplemental thereto.

**Source:** L. 77: Entire section added, p. 1642, § 5, effective June 9. L. 81: Entire section amended, p. 1764, § 4, effective June 19.

**37-46-134. Definition of elector.** (1) An "elector", "elector of the district", or "elector of the subdistrict", or any term of similar import, means a person:

(a) Who, at the time of the election, is qualified to vote in general elections in this state; and

(b) Who is a resident of the district or subdistrict proposing to incur an indebtedness at the time of the election.

(2) Registration pursuant to the laws concerning general elections or any other laws shall not be required.

**Source:** L. 77: Entire section added, p. 1642, § 5, effective June 9.

**37-46-135. Elections.** Whenever in this article an election of the electors of the district or a subdistrict therein is permitted or required, the election may be held separately at a special election or may be held concurrently with any primary or general election held under the laws of this state; but no election shall be held at the same time as any regular election of any city, town, or school district if any part of the area thereof is located within the boundaries of the district.

**Source:** L. 77: Entire section added, p. 1642, § 5, effective June 9.

**37-46-136. Election resolution.** (1) The board of directors shall call any election by resolution adopted at least thirty days prior to the election.

(2) Such resolution shall recite the objects and purposes of the election, the date upon which such election shall be held, and the form of the ballot.

(3) In the case of any election not to be held concurrently with a primary or general election, the board of directors shall provide in the election resolution or by supplemental resolution for the appointment of sufficient judges and clerks of the election, who shall be electors of the district or the subdistrict holding the debt election, and in such event shall set their compensation. The election resolution or a supplemental resolution shall also then designate the precincts and polling places, but a supplemental resolution may modify such a description of precincts and polling places without repeating such description in full. The description of precincts may be made by reference to any order of the governing body of any county, municipality, or other political subdivision in which the district or subdistrict or any part thereof is situated, or by reference to any previous order or other instrument of such a governing body, or by detailed description of such precincts, or by other sufficient description.

(4) Precincts established by any such governing body may be consolidated in the election resolution by the board of directors in a sufficient number which it deems expedient for the convenience of the electors for any election not to be held concurrently with a primary or general election.



(5) If the election shall be held concurrently with a primary or general election held under the laws of this state, the judges of election for such primary or general election shall be designated as the judges of the election for the election held pursuant to this article, and they shall receive such additional compensation, if any, as the board of directors shall set by the election resolution.

**Source: L. 77:** Entire section added, p. 1642, § 5, effective June 9.

**37-46-137. Conduct of election.** (1) Except as otherwise provided in this article, an election held pursuant to this article shall be opened and conducted in the manner then provided by the laws of this state for the conduct of general elections.

(2) If an election is held concurrently with a primary or general election, the county clerk and recorder of each county in which the district or subdistrict holding the debt election is located shall perform for the district or subdistrict election the acts provided by law to be performed by such officials. If an election is not held concurrently with a primary or general election, such acts shall be performed by the secretary of the district with the assistance of the county clerk and recorders. The board of directors and county clerk and recorders are authorized to agree among themselves upon the division of such acts and the determination of persons to perform them.

(3) An elector of the district may vote in any election by absent voter’s ballot under such terms and conditions, and in substantially the same manner insofar as is practicable, as prescribed in article 8 of title 1, C.R.S., of the “Uniform Election Code of 1992” for general elections, except as specifically modified in this article.

(4) All acts required or permitted therein to be performed by a county clerk and recorder shall be performed by each one respectively in the event of a primary or general election and by the secretary or assistant secretary of the board of directors in the event of any other election, unless the services of the county clerk and recorder in each such county are contracted for, but no oath shall be administered by the secretary or assistant secretary unless he is also an officer authorized to administer oaths.

(5) Application may be made for an absent voter’s ballot not more than twenty days and not less than four days before the election.

(6) No consideration shall be given nor distinction made with reference to any person’s affiliation or the lack thereof.

(7) The return envelope for the absent voter’s ballot shall have printed on its face an affidavit substantially in the following form:

“State of Colorado, County of ....., I, ....., being first duly sworn according to law, depose and say that my residence and post-office address is .....; that I am a person qualified to vote in general elections in the State of Colorado and am a resident of the Colorado River Water Conservation District or Water Users’ Association No. .... or Special Improvement District No. .... in the Colorado River Water Conservation District, as may be appropriate, at the time of this election.

.....

Signature of voter

Subscribed and sworn to before me this ... day of....., 20....

.....

(Signature of notary public,  
county clerk and recorder,  
or other officer authorized  
to administer oaths)

(SEAL)

.....

Title of office”

(8) In any such election at which voting machines are used, the board of directors shall provide paper ballots for absent voters containing the same question as is to be submitted

to the electors by the voting machines, subject to the provisions of subsection (9) of this section.

(9) The district or subdistrict may provide for mail-in voters to cast their mail-in voters' ballots on voting machines expressly provided for that purpose, if each mail-in voter indicates by affidavit that he or she is qualified to vote at the election and will be a mail-in voter, pursuant to section 1-8-102, C.R.S., of the "Uniform Election Code of 1992" and all laws supplemental thereto.

**Source:** L. 77: Entire section added, p. 1643, § 5, effective June 9. L. 80: (3) and (9) amended, p. 416, § 33, effective January 1, 1981. L. 92: (3) and (9) amended, p. 924, § 195, effective January 1, 1993. L. 96: (9) amended, p. 1775, § 81, effective July 1. L. 99: (6) amended, p. 164, § 26, effective August 4. L. 2008: (9) amended, p. 1913, § 124, effective August 5. L. 2009: (9) amended, (HB 09-1216), ch. 165, p. 730, § 9, effective August 5.

**Cross references:** For the "Uniform Election Code of 1992", see articles 1 to 13 of title 1.

**37-46-138. Notice of election.** Notice of such election shall be given by publication by three consecutive weekly insertions in at least one newspaper of general circulation in the district or subdistrict holding the election, as determined by the board of directors. No other notice of an election held under this article need be given, unless otherwise provided by the board. A supplemental notice may be given by publication at such times and places as the board may determine to be necessary or convenient for correcting or otherwise modifying the original notice of election or for any other purpose.

**Source:** L. 77: Entire section added, p. 1644, § 5, effective June 9.

**37-46-139. Polling places.** (1) All polling places designated by resolution for an election shall be within the territorial limits of the district or subdistrict holding the election; but, if an election of the district or subdistrict is held concurrently with a primary or general election, the polling place for each precinct located wholly or partially within the district or subdistrict shall be the polling place for such precinct for the district or subdistrict election, regardless of whether or not such polling place is within the district or subdistrict.

(2) If the election of the district or subdistrict is not held concurrently with a primary or general election held under the laws of this state, there shall be one polling place in each of the election precincts which are used in the primary and general elections or in each of the consolidated precincts fixed by the board of directors, as the case may be.

**Source:** L. 77: Entire section added, p. 1644, § 5, effective June 9.

**37-46-140. Election supplies.** (1) The secretary of the district shall provide at each polling place ballots or ballot labels, or both, ballot boxes or voting machines, or both, instructions, electors' affidavits, and other materials and supplies required for an election by any law; and the secretary may provide ballots and marking devices suitable for voting and for the votes on the ballots to be counted on electronic vote-tabulating devices.

(2) Election officials may require the execution of an affidavit by any person desiring to vote at any election of the district or subdistrict to evidence his qualifications to vote, which affidavit shall be prima facie evidence of the facts stated therein.

**Source:** L. 77: Entire section added, p. 1645, § 5, effective June 9.

**37-46-141. Election returns.** (1) In the case of any election held under this article which is not held concurrently with a primary or general election, the election officials shall make their returns directly to the secretary of the district for the board of directors.

(2) In the case of any election held under this article which is consolidated with any primary or general election, the returns thereof shall be made and canvassed at the time and



in the manner provided by law for the canvass of the returns of such primary or general election. Such canvassing body shall certify promptly and shall transmit to the secretary of the district for the board of directors a statement of the result of the vote upon any proposition submitted under this article.

(3) Upon receipt by the board of directors of election returns from election officials or upon receipt of such certificate from each such canvassing body, the board shall tabulate and declare the results of the election at any regular or special meeting held not earlier than five days following the date of the election.

(4) The board of directors shall cause the results of the election to be published at least one time in at least one newspaper having general circulation in the district.

**Source: L. 77:** Entire section added, p. 1645, § 5, effective June 9.

**37-46-142. Debt election contests.** (1) Any election declared to have carried on an authorization to issue any bonds, by approval of the bond question, or otherwise to incur an indebtedness by approval of the question thereon may be contested by any elector of the district or subdistrict holding the debt election by suit against it as contestee and defendant in any district court of any county in which the district or subdistrict holding the election is wholly or partially situate:

(a) When illegal votes have been received or legal votes rejected at the polls in sufficient numbers to change the results;

(b) For any error or mistake on the part of any of the judges of election, any county clerk and recorder, the secretary of the district, or their respective officers and employees in counting or declaring the result of the election, if the error or mistake is sufficient to change the result;

(c) For malconduct, fraud, or corruption on the part of any of the judges of election, any county clerk and recorder, the secretary of the district, or their respective officers and employees, if the malconduct, fraud, or corruption is sufficient to change the result;

(d) When the bonds or other indebtedness is authorized to be issued for an invalid purpose; or

(e) For any other cause which shows that the bonds or other indebtedness is not validly authorized at the election.

(2) The style and form of process, the manner of service of process and papers, the fees of officers, and judgment for costs and execution thereon shall be according to the rules and practices of the court.

(3) Before the court shall take jurisdiction of the contest, the contestor shall file with the clerk of the court a bond, with sureties, to be approved by the judge thereof, running to the district or subdistrict holding the debt election as contestee and conditioned to pay all costs in case of failure of the contestor to maintain his contest.

(4) When the validity of any bond or other indebtedness election is contested, the plaintiff or plaintiffs, within thirty days after the returns of the election are canvassed and the results thereof declared and published, or last published, as the case may be, shall file with the clerk of the court a verified written complaint setting forth specifically:

(a) The name of the party contesting the election and a statement that the plaintiff or each plaintiff is an elector of the district or subdistrict holding the election;

(b) The proposition or propositions voted on at the election which are contested, the name of the district or the subdistrict as defendant and contestee, and the date of the election; and

(c) The particular grounds of such contest.

(5) No such contest shall be maintained and no election shall be set aside or held invalid unless such a complaint is filed within the period prescribed in subsection (4) of this section.

(6) Except as otherwise provided in this article, the election laws pertaining to contested election cases of municipal offices as provided in part 13 of article 10 of title 31, C.R.S., of the "Colorado Municipal Election Code of 1965", as from time to time amended, shall be applicable to bond or other indebtedness elections; but any such contest shall be regarded as one contesting the outcome of the vote on the proposition authorizing the issuance of securities or otherwise incurring the indebtedness, rather than election to office,

and the district or subdistrict as contestee, rather than a person declared to have been elected to office, shall be regarded as the defendant.

(7) If the board of directors declares the proposition authorizing the issuance of bonds or otherwise incurring the indebtedness to have carried and no contest is duly filed or if such a contest is filed after it is favorably terminated, the board may issue the bonds or otherwise incur the indebtedness authorized at the election at one time or from time to time.

**Source: L. 77:** Entire section added, p. 1645, § 5, effective June 9.

**37-46-143. Covenants and other provisions in bonds.** (1) Any resolution providing for the issuance of any bonds under this article payable from pledged revenues and any indenture or other instrument or proceedings pertaining thereto may at the discretion of the board of directors contain covenants or other provisions, notwithstanding that such covenants and provisions may limit the exercise of powers conferred by this article, in order to secure the payment of such bonds, in agreement with the holders of such bonds, including, without limitation, covenants or other provisions as to any one or more of the following:

(a) The pledged revenues and, in the case of general obligations, the taxes to be fixed, charged, or levied and the collection, use, and disposition thereof, including, without limitation, the foreclosure of liens for delinquencies, the discontinuance of services, facilities, or use of any properties or facilities, prohibition against free service, the collection of penalties and collection costs, and the use and disposition of any moneys of the district or subdistrict issuing bonds, derived or to be derived, from any source designated;

(b) The acquisition, improvement, or equipment of all or any part of properties pertaining to any project or any facilities;

(c) The creation and maintenance of reserves or sinking funds to secure the payment of the principal of and the interest on any bonds or of the operation and maintenance expenses of any facilities, or part thereof, and the source, custody, security, regulation, use, and disposition of any such reserves or funds, including, without limitation, the powers and duties of any trustee with regard thereto;

(d) Limitations on the powers of the district or subdistrict to acquire or operate, or permit the acquisition or operation of, any structures, facilities, or properties which may compete or tend to compete with any facilities;

(e) The vesting in a corporate or other trustee or trustees of such property, rights, powers, and duties in trust as the board of directors may determine, which may include any or all of the rights, powers, and duties of the trustee appointed by the holders of bonds, and limiting or abrogating the rights of such holders to appoint a trustee, or limiting the rights, duties, and powers of such trustee;

(f) Events of default, rights, and liabilities arising therefrom and the rights, liabilities, powers, and duties arising upon the breach by the district or subdistrict of any covenants, conditions, or obligations;

(g) The terms and conditions upon which the holders of the bonds or of a specified portion, percentage, or amount thereof, or any trustee therefor, shall be entitled to the appointment of a receiver, which receiver may enter and take possession of any facilities or service, operate and maintain the same, prescribe fees, rates, and other charges, and collect, receive, and apply all revenues thereafter arising therefrom in the same manner as the district or subdistrict itself might do;

(h) A procedure by which the terms of any resolution authorizing bonds or any other contract with any holders of district or subdistrict bonds, including, without limitation, an indenture of trust or similar instrument, may be amended or abrogated, and as to the proportion, percentage, or amount of bonds the holders of which must consent thereto, and the manner in which such consent may be given;

(i) The terms and conditions upon which any or all of the bonds shall become or may be declared due before maturity and as to the terms and conditions upon which such declaration and its consequences may be waived; and

(j) All such acts and things as may be necessary or convenient or desirable in order to secure the bonds or, in the discretion of the board of directors, tend to make the bonds more marketable, notwithstanding that such covenant, act, or thing may not be enumerated in this



article, it being the intention of this article to give to the board of directors power to do in the name and on behalf of the district or subdistrict all things in the issuance of district or subdistrict bonds and for their security, except as expressly limited in this article.

**Source: L. 77:** Entire section added, p. 1647, § 5, effective June 9.

**37-46-144. Liens on pledged revenues.** (1) Revenues pledged for the payment of any bonds, as received by or otherwise credited to the district or subdistrict issuing bonds under this article, shall immediately be subject to the lien of each such pledge without any physical delivery thereof, any filing, or any further act.

(2) The lien of each such pledge and the obligation to perform the contractual provisions made in the authorizing resolution or other instrument pertaining thereto shall have priority over any or all other obligations or liabilities of the district or subdistrict, except as may be otherwise provided in this article or in the resolution or other instrument, and subject to any prior pledges and liens theretofore created.

(3) The lien of each such pledge shall be valid and binding as against all persons having claims of any kind in tort, in contract, or otherwise against the district or subdistrict, irrespective of whether or not such persons have notice thereof.

**Source: L. 77:** Entire section added, p. 1648, § 5, effective June 9.

**37-46-145. Rights - powers of holders of bonds - trustees.** (1) Subject to any contractual limitations binding upon the holders of any issue or series of bonds of the district or subdistrict issuing bonds under this article, or the trustee therefor, including, without limitation, the restriction of the exercise of any remedy to a specified proportion, percentage, or number of such holders, and subject to any prior or superior rights of others, any holder of bonds, or the trustee therefor, shall have the right and power, for the equal benefit and protection of all holders of bonds similarly situated:

(a) By mandamus or other suit, action, or proceeding at law or in equity, to enforce his rights against the district, subdistrict, or board of directors, or any combination thereof, or any of the officers, agents, and employees of the district or subdistrict to require and compel such district, subdistrict, or board or any of such officers, agents, or employees to perform and carry out their respective duties, obligations, or other commitments under this article and their respective covenants and agreements with the holder of any bond;

(b) By action or suit in equity, to require the district or subdistrict to account as if it were the trustee of an express trust;

(c) By action or suit in equity, to have a receiver appointed, which receiver may enter and take possession of any facilities and any pledged revenues for the payment of the bonds, prescribe sufficient fees, rates, and other charges derived from the facilities, and collect, receive, and apply all pledged revenues or other moneys pledged for the payment of the bonds in the same manner as the district or subdistrict itself might do in accordance with the obligations of the district or subdistrict; and

(d) By action or suit in equity, to enjoin any acts or things which may be unlawful or in violation of the rights of the holder of any bonds and to bring suit thereupon.

**Source: L. 77:** Entire section added, p. 1648, § 5, effective June 9.

**37-46-146. Investments and securities.** (1) The board of directors of the district or subdistrict, respectively, issuing bonds under this article, subject to any contractual limitations from time to time imposed upon the district or subdistrict by any resolution authorizing the issuance of the outstanding bonds of the district or subdistrict or by any trust indenture or other proceedings pertaining thereto, may cause to be invested and reinvested any proceeds of taxes, any pledged revenues, and any proceeds of bonds issued under this article in securities meeting the investment requirements established in part 6 of article 75 of title 24, C.R.S., and may cause such proceeds of taxes, revenues, district or subdistrict bonds, and securities to be deposited in any trust bank or trust banks within or without or

both within and without this state and secured in such manner and subject to such terms and conditions as the board of directors may determine, with or without the payment of any interest on such deposit, including, without limitation, time deposits evidenced by certificates of deposit.

(2) Any such securities and any certificates of deposit thus held may, from time to time, be sold, and the proceeds may be so reinvested or redeposited as provided in this section.

(3) Sales and redemptions of any such securities and certificates of deposit thus held shall, from time to time, be made in season, so that the proceeds may be applied to the purposes for which the money with which such securities and certificates of deposit were originally acquired was placed in the district or subdistrict treasury.

(4) Any gain from any such investments or reinvestments may be credited to any fund or account pledged for the payment of any district or subdistrict bonds issued under this article, including any reserve therefor, or any other fund or account pertaining to a project or any facilities, or the district's or subdistrict's general fund, subject to any contractual limitations in any proceedings pertaining to outstanding district or subdistrict bonds.

(5) It is lawful for any commercial bank incorporated under the laws of this state which may act as depository of the proceeds of any bonds issued under this article, any securities owned by the district or subdistrict, any proceeds of taxes, any pledged revenues, and any moneys otherwise pertaining to a project or any facilities, or any combination thereof, to furnish such indemnifying bonds and to pledge such securities as may be required by the board of directors.

**Source:** L. 77: Entire section added, p. 1649, § 5, effective June 9. L. 89: (1), (2), (3), and (5) amended, p. 1123, § 51, effective July 1.

**37-46-147. Rents and charges.** (1) (a) The district, any subdistrict, and any political subdivision of the state of Colorado contracting with the district or subdistrict and fixing and collecting annual rentals, service charges, and other charges, or any combination thereof, are, in supplementation of the powers provided in this article, authorized to fix and collect rents, rates, fees, tolls, and other charges, in this article sometimes referred to as "service charges", for direct or indirect connection with, or the use or services of, a water system, electrical system, joint system, or other facilities, including, without limitation, connection charges, minimum charges, and charges for the availability of service.

(b) Such service charges may be charged to and collected in advance or otherwise by a district from any political subdivision or person and by any political subdivision from any person contracting for such connection or use or services or from the owner or occupant, or any combination thereof, of any real property which directly or indirectly is or has been or will be connected with any such facilities, and the political subdivision or owner or occupant of any such real property shall be liable for and shall pay such service charges to the district, subdistrict, or political subdivision fixing the service charges at the time when and place where such service charges are due and payable.

(c) Such service charges of the district or subdistrict may accrue from any date on which the board of directors reasonably estimates, in any resolution authorizing the issuance of any securities or other instrument pertaining thereto or in any contract with any political subdivision or person, that any facilities or project being acquired or improved and equipped will be available for service or use.

(2) (a) Such rents, rates, fees, tolls, and other charges, being in the nature of use or service charges, shall, as nearly as the district, subdistrict, or political subdivision fixing the service charges shall deem practicable and equitable, be reasonable, and such service charges shall be uniform throughout the district, subdistrict, or political subdivision for the same type, class, and amount of use or service of the facilities and may be based or computed either: On measurements of water, flow devices, or electric meters, duly provided and maintained by the district, subdistrict, or political subdivision, or any user as approved by the district, subdistrict, or political subdivision fixing such charges; or on the consumption of water or electricity in or on or in connection with the political subdivision, or any person, or real property, making due allowance for commercial use of water and infiltration of groundwater and discharge of surface runoff to the facilities, or on the number and kind



of water or electric outlets on or in connection with the political subdivision, person, or real property, or on the water or electric fixtures or facilities in or on or in connection with the political subdivision, person, or real property; or on the number of persons residing or working in or on or otherwise connected or identified with the political subdivision, person, or real property, or on the capacity of the improvements in or on or connected with the political subdivision, person, or real property; or upon the availability of service or readiness to serve by the facilities; or on any other factors determining the type, class, and amount of use or service of the facilities; or on any combination of any such factors.

(b) Reasonable penalties may be fixed for any delinquencies, including, without limitation, interest on delinquent service charges from any date due at a rate of not exceeding one percent per month or fraction thereof, reasonable attorneys' fees, and other costs of collection.

(3) The district, subdistrict, or political subdivision fixing the service charges shall prescribe and, from time to time when necessary, revise a schedule of such service charges, which shall comply with the terms of any contract of the district, subdistrict, or political subdivision fixing the service charges.

(4) The general assembly has determined and declared that the obligations, arising from time to time, of the district, any subdistrict, any political subdivision, or any person to pay service charges fixed in connection with any facilities shall constitute general obligations of the district, subdistrict, political subdivision, or person charged with their payment; but, as such obligations accrue for current services and benefits from, and the use of, any such facilities, the obligations shall not constitute an indebtedness of the district, any subdistrict, or any political subdivision within the meaning of any constitutional, charter, or statutory limitation or any other provision restricting the incurrence of any debt.

(5) No board, agency, bureau, commission, or official, other than the board of directors of the district or subdistrict, respectively, or the governing body of the political subdivision fixing the service charges, has authority to fix, prescribe, levy, modify, supervise, or regulate the making of service charges or to prescribe, supervise, or regulate the performance of services pertaining to the facilities thereof, as authorized by this article; but this subsection (5) shall not be construed to be a limitation on the contracting powers of the board of directors of the district or any subdistrict, respectively, or the governing body of any such political subdivision.

**Source: L. 77:** Entire section added, p. 1650, § 5, effective June 9.

**37-46-148. Miscellaneous powers.** (1) The district and any subdistrict thereof shall also have the following powers:

(a) To pay or otherwise defray and to contract to pay or defray, for any term not exceeding seventy-five years, without an election, except as otherwise provided in this article, the principal of, any prior redemption premiums due in connection with, any interest on, and any other charges pertaining to any securities or other obligations of the federal government, any subdistrict or the district, respectively, any political subdivision, or any person which were incurred in connection with any property thereof subsequently acquired by the district or any subdistrict and relating to either's facilities;

(b) To establish, operate, and maintain facilities within the district or any subdistrict or elsewhere, across or along any public street, highway, bridge, or viaduct or any other public right-of-way or in, upon, under, or over any vacant public lands, which public lands now are, or may become, the property of a political subdivision of this state, without first obtaining a franchise from the political subdivision having jurisdiction over the same; but the district or subdistrict shall cooperate with any political subdivision having such jurisdiction, shall promptly restore any such public street, highway, bridge, or viaduct or any such other public right-of-way to its former state of usefulness as nearly as may be and shall not use the same in such manner as permanently to impair completely or materially the usefulness thereof;

(c) To adopt, amend, repeal, enforce, and otherwise administer such reasonable resolutions, rules, regulations, and orders as the district or subdistrict shall deem necessary or convenient for the operation, maintenance, management, government, and use of the

facilities of the district or subdistrict, as the case may be, and any other facilities under its control, whether situated within or without or both within and without the territorial limits of the district or subdistrict; and

(d) (I) To adopt, amend, repeal, enforce, and otherwise administer under the police power such reasonable resolutions, rules, regulations, and orders pertaining to water or electric services performed by any person through the district's or subdistrict's facilities or pertaining to facilities of the district or subdistrict, any political subdivision, or any person, or any combination thereof, reasonably affecting the activities of the district or subdistrict, directly or indirectly, as the board of directors may from time to time deem necessary or convenient.

(II) No such resolution, rule, regulation, or order shall be adopted or amended except by action of the board of directors on the behalf and in the name of the district or subdistrict, respectively, after a public hearing thereon is held by the board of directors, in connection with which any political subdivision owning or authorizing any facilities comparable to facilities of the district or subdistrict, as the case may be, whether therein or thereout, or both therein and thereout, and other persons of interest have an opportunity to be heard, after mailed notice of the hearing is given at least thirty days prior to the hearing by the secretary to each such political subdivision wholly or partly within the district or subdistrict proceeding under this article, and after notice of such hearing is given by publication at least once a week for three consecutive weeks in at least one newspaper of general circulation in the district or such subdistrict by the secretary to persons of interest, both known and unknown, the first publication to be made at least thirty days prior to the hearing.

**Source: L. 77:** Entire section added, p. 1651, § 5, effective June 9.

**37-46-149. Cooperative powers.** (1) The district and any subdistrict have the power to utilize and may utilize private industry, by contract, to carry out the design, construction, operation, management, manufacturing, marketing, planning, and research and development functions of the district or any subdistrict proceeding under this article, unless the district or subdistrict determines that it is in the public interest to adopt another course of action. The district or subdistrict, or both, may enter into long-term contracts with private persons, not exceeding a term of seventy-five years, without an election, for the performance of any such functions of the district or subdistrict, which, in the opinion of the district or subdistrict, can desirably and conveniently be carried out by a private person under contract; but any such contract shall contain such terms and conditions as shall enable the district or subdistrict to retain reasonable supervision and control of such functions to be carried out or performed by such private persons pursuant to such contract.

(2) Subject to the provisions of section 37-46-133, the district and any subdistrict have the following powers:

(a) To accept contributions, grants, or loans from the state and the federal government for the purpose of financing the planning, acquisition, improvement, equipment, maintenance, and operation of any enterprise in which the district or subdistrict, or both, are authorized to engage, and to enter into contracts and cooperate with, and accept cooperation from, the federal government, the state, the subdistrict or the district, respectively, any political subdivision, any private firm, and any other person, or any combination thereof, in the planning, acquisition, improvement, equipment, maintenance, and operation and in financing the planning, acquisition, improvement, equipment, maintenance, and operation of any such enterprise in accordance with any legislation which the general assembly, congress, the governing body of any political subdivision, the board of directors or other governing body of any private firm, any other person, or any combination thereof may have adopted prior to the adoption of this article or may thereafter adopt, under which aid, assistance, and cooperation may be furnished by such cooperating entity or entities or other persons in the planning, acquisition, improvement, equipment, maintenance, and operation or in financing the planning, acquisition, improvement, equipment, maintenance, and operation of any such enterprise, including, without limitation, costs of engineering, architectural, and economic investigations and studies, surveys, designs, plans, working drawings, specifications, procedures, and other action preliminary to the acquisition,



improvement, or equipment of any facilities, or any part thereof, and to do any and all things necessary in order to avail itself of such aid, assistance, and cooperation under any state, federal, or other legislation;

(b) To enter into, without any election, joint operating or service contracts and agreements; acquisition, improvement, equipment, or disposal contracts; contracts for the purchase, sale, rental, lease, as lessor or lessee, or exchange of water or the purchase, sale, or exchange of water rights or electricity (or any combination thereof) but not to acquire any electricity for sale by the district or any subdistrict as a public utility either to the public or to any other user (other than any sale to any subdistrict or the district, respectively, or to any water conservancy district located wholly or in part within the Colorado river water conservation district and other than any sale of electricity by the district or any subdistrict thereof at wholesale to any person or governmental entity); or other arrangements, for any term not exceeding seventy-five years, with the federal government, the state, the subdistrict or the district, respectively, any political subdivision, any private firm, or any other person, or any combination thereof, concerning the facilities and any project or property pertaining thereto, whether acquired or undertaken by the district, by the subdistrict, by the federal government, by any political subdivision of this state or any other state, or by any person, and to accept contributions, grants, or loans from the cooperating entity or entities or other persons in connection therewith;

(c) To enter into and perform without any election, when determined by the board of directors to be in the public interest, contracts and agreements, for any term not exceeding seventy-five years, with the federal government, the subdistrict or the district, respectively, any political subdivision, or any person, or any combination thereof, for the provision and operation by the subdistrict or the district, respectively, of any facilities pertaining to such facilities of the district or subdistrict, as the case may be, any part thereof, or any project relating thereto, and the payment periodically thereby to the district or subdistrict of amounts at least sufficient, if any, in the determination of the board, to compensate the district or subdistrict for the cost of providing, operating, and maintaining such facilities serving the federal government, the subdistrict or the district, respectively, any political subdivision, or such other person, or any combination thereof, or otherwise;

(d) To enter into and perform, without any election, contracts and agreements, for any term not exceeding seventy-five years, on a public bid basis, a competitive basis, or a negotiated basis, as the board of directors may determine, with the federal government, the subdistrict or the district, respectively, any political subdivision, any private firm, or any other person, or any combination thereof, for or concerning the planning, construction, lease, other acquisition, improvement, equipment, operation, maintenance, lease, other disposal, and financing, or any other combination thereof, of any property pertaining to the facilities of the district or subdistrict or to any project of the district or subdistrict, including, without limitation, any contract or agreement, for any term not exceeding seventy-five years, pertaining to the joint ownership of the facilities as tenants in common thereamong or providing for the exchange of water or electric power for backup water or power, the pooling of resources, or the designation of a manager for any such project or facilities supervised by an engineering and operating committee of co-owners or otherwise supervised, and otherwise to contract with water or power producers or users, or any combination thereof;

(e) To cooperate with and act in conjunction with the federal government or any of its engineers, officers, boards, commissions, or departments, or with the state or any of its engineers, officers, boards, commissions, or departments, or with any political subdivision or any person in the acquisition, improvement, and equipment of any facilities or any part thereof authorized for the district or subdistrict or for any other works, acts, or purposes provided for in this article and to adopt and carry out any definite plan or system of work for any such purpose;

(f) To cooperate with the federal government, the subdistrict or district, respectively, any political subdivision, or any person, or any combination thereof, by an agreement therewith by which the district or the subdistrict may:

(I) Acquire and provide, without cost to the cooperating entity or entities, the land, easements, and rights-of-way necessary for the acquisition, improvement, and equipment of any properties;

(II) Hold the cooperating entity or entities free from and save it or them harmless from any claim for damages arising from the acquisition, improvement, equipment, maintenance, and operation of any facilities;

(III) Maintain and operate any facilities in accordance with regulations prescribed by the cooperating entity or entities; and

(IV) Establish and enforce regulations, if any, concerning the facilities which are satisfactory to the cooperating entity or entities;

(g) To provide, by any contract for any term not exceeding seventy-five years, or otherwise, without an election:

(I) For the joint use of personnel, equipment, and facilities of the district, the subdistrict, any political subdivision, or any person, or any combination thereof, including, without limitation, public buildings constructed by or under the supervision of the board of directors, the governing body of the political subdivision, or the board of directors or other governing body of a private firm or other person concerned, upon such terms and agreements and within such areas within the district or subdistrict, or otherwise, as may be determined, for the promotion and protection of health, comfort, safety, life, welfare, and property of the inhabitants of the district or subdistrict and any such political subdivision and any other persons of interest, and for water or electric services;

(II) For the joint employment of clerks, stenographers, and other employees pertaining to the facilities or any project, now existing or hereafter established, upon such terms and conditions as may be determined for the equitable apportionment of the expenses resulting therefrom;

(h) To provide for comprehensive planning and, where possible, coordinate operations of the district or subdistrict with the subdistrict or district, respectively, any and all such political subdivisions, private firms, and other persons, or any combination thereof, pertaining to water conservation and use and to the generation and use of electricity.

**Source:** L. 77: Entire section added, p. 1652, § 5, effective June 9. L. 81: (2)(b) and (2)(d) amended, p. 1765, § 5, effective June 19.

**37-46-150. Joint action entity.** (1) The district or subdistrict and any other cooperating entity or entities relating to any project or facilities in which the district or the subdistrict is a party in interest may create a joint action entity, a separate body corporate, for the planning, construction, lease, other acquisition, improvement, equipment, operation, maintenance, disposal, and financing of any enterprise or properties relating to such project or such facilities.

(2) A joint action entity may exercise the powers granted to the district or the subdistrict by this article, other than the levy or fixing and collection of taxes, assessments, and service charges and the making and revising of rules and regulations under the police power.

**Source:** L. 77: Entire section added, p. 1655, § 5, effective June 9.

**37-46-151. Correlative powers of political subdivisions.** Any political subdivision of this state has the correlative powers to enable it to participate in cooperation with the district or any subdistrict in either's exercise of powers granted thereto by this article or otherwise granted by law.

**Source:** L. 77: Entire section added, p. 1655, § 5, effective June 9.

ARTICLE 47

Southwestern Water Conservation District

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		37-47-150.	Joint action entity.
		37-47-151.	Correlative powers of political subdivisions.

**37-47-101. Legislative declaration - rivers named.** In the opinion of the general assembly of the state of Colorado, the conservation of the water of the San Juan and Dolores rivers and their tributaries for storage, irrigation, mining, and manufacturing purposes and the construction of reservoirs, ditches, and works for the purpose of irrigation and reclamation of additional lands not yet irrigated, as well as to furnish a supplemental supply of water for lands now under irrigation, is of vital importance to the growth and development of the entire district and the welfare of all its inhabitants and that, to promote the health and general welfare of the state of Colorado, an appropriate agency for the conservation, use, and development of the water resources of the San Juan and Dolores rivers and their principal tributaries should be established and given such powers as may be necessary to safeguard for Colorado, all waters to which the state of Colorado is equitably entitled.

**Source:** L. 41: p. 866, § 1. CSA: C. 173B, § 56. CRS 53: § 149-9-1. C.R.S. 1963: § 150-8-1.

### ANNOTATION

**Law reviews.** For article, "Legal Classification of Special District Corporate Forms in Colorado", see 45 Den. L.J. 347 (1968).

**Applied** in Southeastern Colo. Water Conservancy Dist. v. Huston, 197 Colo. 365, 593 P.2d 1347 (1979).

**37-47-102. Definitions.** As used in this article, unless the context otherwise requires:

- (1) "District" means the "Southwestern Water Conservation District". The district is a body corporate and politic and a political subdivision of the state of Colorado.
- (2) "Person" means a person, firm, partnership, association, or corporation.
- (3) "Property", as used in section 37-47-109 (1), includes both real and personal property. In other parts of said article relating to special assessments, unless otherwise specified, it means real estate as "real estate" is defined by the law of the state of Colorado

and embraces all railroads, tram roads, electric railroads, state and interurban railroads, highways, telephone, telegraph and transmission lines, water systems, water rights, pipelines, and rights-of-way of public service corporations, and all other real property, whether held for public or private use.

(4) "San Juan and Dolores rivers" embraces and includes any and all tributaries or streams which flow into the San Juan and Dolores rivers which may be found in any part of the territory embraced in said district.

(5) "Subdistrict" or "subdivision" embraces and includes the kind or character of special improvement districts created under the provisions of this article, including subdistricts organized under the name and style of "Water Users' Association No. .... of the Southwestern Water Conservation District" and "Special Improvement District No. .... of the Southwestern Water Conservation District". A subdistrict or subdivision is a body corporate and politic and a political subdivision of the state of Colorado.

**Source:** L. 41: p. 886, § 25. CSA: C. 173B, § 80. CRS 53: § 149-9-25. C.R.S. 1963: § 150-8-25. L. 77: (1) and (5) amended, p. 1655, § 6, effective June 9.

**37-47-103. Creation and name of district.** There is hereby created a water conservation district to be known and designated as the "Southwestern Water Conservation District". Such district is hereby declared to be a body corporate under the laws of Colorado. Said district shall comprise the following area and territory: The counties of San Miguel, Dolores, Montezuma, Archuleta, San Juan, La Plata, all that part of Hinsdale county not included in the Colorado river water conservation district as set forth in section 37-46-103, that part of Mineral county lying south and west of the continental divide and being within the drainage basin of the San Juan river, and all that part of Montrose county described as follows: Beginning at the point where the common boundary of Montrose county and San Miguel county meets the boundary of Ouray county; thence northerly along the county line to a point on the range line between ranges eleven and twelve west, township forty-seven north; thence westerly along the north line of sections twenty-four, twenty-three, twenty-two, twenty-one, twenty, and nineteen township forty-seven north, range twelve west; thence northerly on the east range line of township forty-seven north, range thirteen west; to the northeast corner of township forty-seven north, range thirteen west; thence westerly on the south line of township forty-eight north, range thirteen west; to the southeast corner of section thirty-four; thence northerly on the east line of sections thirty-four, twenty-seven, and twenty-two, to the northeast corner of section twenty-two; thence westerly on the north line of sections twenty-two, twenty-one, twenty, and nineteen township forty-eight north, range thirteen west, to the east range line of township forty-eight north, range fourteen west; thence northerly along the range line to its intersection with the south line of township forty-nine north, range thirteen west; thence westerly on the township line to the southeast corner of township forty-nine north, range fifteen west; thence northerly on the range line between ranges fourteen and fifteen west, township forty-nine north, to its intersection with the north boundary line of said Montrose county; thence westerly along the north boundary of said Montrose county to its intersection with the west boundary line of the state of Colorado; thence southerly on the west boundary of the state of Colorado to the southwest corner of said Montrose county; thence easterly on the south boundary of Montrose county to the place of beginning, all townships and ranges of the New Mexico principal meridian; all of said southwestern water conservation district lying and being in the state of Colorado.

**Source:** L. 41: p. 867, § 2. CSA: C. 173B, § 57. L. 43: p. 643, § 1. L. 45: p. 726, § 1. CRS 53: § 149-9-2. L. 61: p. 857, § 1. C.R.S. 1963: § 150-8-2.

**37-47-104. Board of directors.** (1) The southwestern water conservation district shall be managed and controlled by a board of nine directors. The members of said board shall hold their office for staggered terms of three years, with three members appointed each year, and until their successors are appointed and qualified. One member of said board shall



be selected from each of the respective counties in said water conservation district and, at the time of his appointment, shall have been a resident of said county or, if only a part of a county is included within the boundaries of said district, a resident of such included part for at least two years prior to the date of his appointment and shall be a freeholder who has paid taxes upon real estate in the county of his residence during the calendar year next preceding his appointment. He shall be appointed by the board of county commissioners of the county in which he resides. He may be a member of the board of county commissioners of such county. The members of said board shall annually select one of their number to act as president and presiding officer until the fourth Tuesday in January following his appointment.

(2) Immediately upon organization the members of said board shall be divided by lot or chance into three classes. The term of office of the members of the first class shall expire on the third Tuesday in January, 1942; the term of office of the members of the second class shall expire on the third Tuesday in January, 1943; and the term of office of the members of the third class shall expire on the third Tuesday in January, 1944; except that on and after March 11, 1943, terms of office shall expire on the fourth Tuesday in January, instead of the third Tuesday in January, as provided in this subsection (2). At the first meeting of the board of county commissioners held after the second Tuesday in January, and every three years thereafter, the boards of county commissioners of the counties of residence of the members whose terms expire shall appoint successors to take office on the fourth Tuesday in January following.

(3) The members of the board of directors of said district who are in office on April 7, 1961, shall hold their respective offices for the period of time for which they were selected to serve, and their tenure of office shall not be affected by this amendatory section. Within sixty days after April 7, 1961, the board of county commissioners of Mineral county shall appoint a director from such county, with the qualifications prescribed in this section, to serve as a member of the board of directors of the southwestern water conservation district until the fourth Tuesday in January, 1963. Upon expiration of such term of office, a successor shall be appointed as provided to serve for the regular term of three years.

**Source:** L. 41: p. 867, § 3. CSA: C. 173B, § 58. L. 43: p. 644, § 2. CRS 53: § 149-9-3. L. 61: p. 858, § 2. C.R.S. 1963: § 150-8-3.

**37-47-105. Allowance for directors.** The directors of the district shall receive as reimbursement for nontravel expenses a sum of up to one hundred dollars per day while actually engaged in the business of said district and in addition shall be entitled to their actual traveling and transportation expenses when away from their respective places of residence on district business.

**Source:** L. 41: p. 886, § 26. CSA: C. 173B, § 81. CRS 53: § 149-9-26. L. 61: p. 860, § 3. C.R.S. 1963: § 150-8-26. L. 81: Entire section amended, p. 1767, § 1, effective April 29. L. 2006: Entire section amended, p. 70, § 1, effective August 7.

**37-47-106. Vacancy in office of director.** The office of director shall become vacant when any member ceases to reside in the county from which he was appointed. In the event a vacancy occurs in said office by reason of death, resignation, removal, or otherwise, it shall be filled by the board of county commissioners of the county from which said member originally came. Before entering upon the discharge of his duties, each director shall take an oath to support and defend the constitutions of the United States and of the state of Colorado and to impartially, without fear or favor, discharge the duties of a director of said district. The board of directors of said district shall appoint a secretary and a treasurer. The same individual, at the election of the board, may hold both of said offices. The board shall likewise hire such other employees, including engineers and attorneys, as may be required to properly transact the business of the district, and said board is authorized to provide for the compensation of the secretary and treasurer and other appointees. The treasurer shall be

required by the board to give bond with corporate surety in such amount as the board may fix and which it deems sufficient to protect the funds in the hands of the treasurer or under his control. Such bond is subject to the approval of the board.

**Source: L. 41:** p. 868, § 4. **CSA:** C. 173B, § 59. **CRS 53:** § 149-9-4. **C.R.S. 1963:** § 150-8-4.

**37-47-107. Powers of district.** (1) Such district, in its corporate capacity, shall have power:

- (a) To sue and be sued in the name of the southwestern water conservation district;
- (b) To acquire, operate, and hold in the name of the district such real and personal property as may be necessary to carry out the provisions of this article and to sell and convey such property or its products as provided in this article or when said property is no longer needed for the purposes of said district;
- (c) To make surveys and conduct investigations to determine the best manner of utilizing stream flows within the district and the amount of such stream flow or other water supply, and to locate ditches, irrigation works, and reservoirs to store or utilize water for irrigation, mining, manufacturing, or other purposes, and to make filings upon said water and initiate appropriations for the use and benefit of the ultimate appropriators, and to perform all acts and things necessary or advisable to secure and insure an adequate supply of water, present and future, for irrigation, mining, manufacturing, and domestic purposes within said districts;
- (d) To make contracts with respect to the relative rights of said district under its claims and filings and the rights of any other person, association, or organization seeking to divert water from any of the streams within said district;
- (e) To contract with any agencies, officers, bureaus, and departments of the state of Colorado and the United States, including the department of corrections, to obtain services or labor for the initiation or construction of irrigation works, canals, reservoirs, power plants, or retaining ponds within said district;
- (f) To enter upon any privately-owned land or other real property for the purpose of making surveys or obtaining other information, without obtaining any order so to do, but without causing any more damage than is necessary to crops or vegetation upon such land;
- (g) To organize special assessment districts at different times for the purpose of establishing effective agencies to secure funds to construct reservoirs or other irrigation works under various types and plans of financing, including among others, by issuance of revenue warrants only, by the issuance of bond or revenue obligations constituting a lien up to a specified amount against the lands in said special improvement district, and payable out of special assessments or by general obligations of such special improvement districts;
- (h) To contract with the United States government, the bureau of reclamation, or other agencies of the United States government for the construction of any such works and the issuance of such obligations as the special improvement districts may have the power to issue in payment of costs of construction and maintenance of said works;
- (i) To exercise the power of eminent domain to acquire ditches, reservoirs, or other works or lands or rights-of-way therefor which said district or any subdivision thereof, or special improvement districts created pursuant to the power conferred, may need to carry out the plans of said district or the improvement districts therein, and in general to exercise all rights and powers of eminent domain conferred upon other agencies as provided in articles 1 to 7 of title 38, C.R.S.;
- (j) To file upon and hold for the use of the public sufficient water of any natural stream to maintain a constant stream flow in the amount necessary to preserve fish, and to use such water in connection with retaining ponds for the propagation of fish for the benefit of the public;
- (j.5) To make loans or grants to any public entity, nonprofit corporation, not-for-profit corporation, carrier ditch company, mutual ditch or reservoir company, unincorporated ditch or reservoir company, and cooperative association within the boundaries of the district to carry out the purposes of the district;



(k) To exercise such implied powers and perform such other acts as may be necessary to carry out and effect any of the express powers hereby conferred upon such district;

(l) To participate in the formulation and implementation of nonpoint source water pollution control programs related to agricultural practices in order to implement programs required or authorized under federal law and section 25-8-205 (5), C.R.S., enter into contracts and agreements, accept funds from any federal, state, or private sources, receive grants or loans, participate in education and demonstration programs, construct, operate, maintain, or replace facilities, and perform such other activities and adopt such rules and policies as the board deems necessary or desirable in connection with nonpoint source water pollution control programs related to agricultural practices.

(2) The district, in its own name, may issue revenue bonds to finance, in whole or part, the construction of works, reservoirs, or other improvements for the beneficial use of water for the purposes for which it has been or may be appropriated, whether or not the interest on such bonds may be subject to taxation. Such revenue bonds shall be issued in such denominations and with such maximum net effective interest rate as may be fixed by the board of directors of the district and shall bear interest such that the net effective interest rate of the bonds does not exceed the maximum net effective interest rate authorized. The board shall pledge only rental proceeds, service charges, and other income (or any combination thereof) from such works or other improvements, and the district shall not be otherwise obligated for the payment thereof. At the time such revenue bonds are issued, the board of directors of the district shall make and enter in the minutes of the proceeding a resolution in which the due dates of such revenue bonds, the rates of interest thereon, the general provisions of the bonds, and a recital that the same are payable only out of rental proceeds, service charges, and other income (or any combination thereof) are set forth. In addition, the board of directors shall require the payment of rental charges, service charges, or other charges by the political subdivisions or persons who are to use or derive benefits from the water or other services furnished by such works or improvements. Such charges shall be sufficient to pay operation and maintenance expenses thereof, to meet said bond payments, and to accumulate and maintain reserve and replacement accounts pertaining thereto as set forth in such resolution. Such resolution shall be irrevocable during the time that any of the revenue bonds are outstanding and unpaid. The revenue bonds shall be signed "Southwestern Water Conservation District, By ....., President. Attest ....., Secretary", and they shall be countersigned by the treasurer.

**Source:** L. 41: p. 868, § 5. CSA: C. 173B, § 60. CRS 53: § 149-9-5. C.R.S. 1963: § 150-8-5. L. 77: (2) added, p. 1655, § 7, effective June 9; (1)(e) amended, p. 954, § 30, effective August 1. L. 88: (1)(l) added, p. 1023, § 5, effective April 6. L. 89: (1)(j.5) added, p. 1416, § 1, effective April 5. L. 90: (1)(j.5) amended, p. 1618, § 1, effective May 24.

#### ANNOTATION

**Applied** in *Southeastern Colo. Water Conservancy Dist. v. Huston*, 197 Colo. 365, 593 P.2d 1347 (1979).

**37-47-108. Principal office - meetings.** The board of directors of the district shall designate a place within the district where the principal office is to be maintained and may change such place from time to time. Regular quarterly meetings of said board shall be held at said office on the fourth Tuesday in the months of January, April, July, and October. The board is also empowered to hold such special meetings as may be required for the proper transaction of business. All special meetings of the board shall be held at locations which are within the boundaries of the district or which are within the boundaries of any county in which the district is located, in whole or in part, or in any county so long as the meeting location does not exceed twenty miles from the district boundaries. The provisions of this section governing the location of meetings may be waived only if the proposed change of location of a meeting of the board appears on the agenda of a regular or special meeting of

the board and if a resolution is adopted by the board stating the reason for which a meeting of the board is to be held in a location other than under the provisions of this section and further stating the date, time, and place of such meeting. Special meetings may be called by the president of the board or by any three directors. Meetings of the board shall be public, and proper minutes of the proceedings of said board shall be preserved and shall be open to the inspection of any elector of the district during business hours.

**Source:** L. 41: p. 870, § 6. CSA: C. 173B, § 61. L. 43: p. 646, § 3. CRS 53: § 149-9-6. C.R.S. 1963: § 150-8-6. L. 90: Entire section amended, p. 1505, § 21, effective July 1.

**37-47-109. Assessment and levy by board.** (1) (a) As soon as the district has been organized and a board of directors has been appointed and qualified, such board of directors shall have the power and authority to fix the amount of an assessment upon the property within the district not to exceed six-tenths of one mill for every dollar of valuation for assessment therein, as a level or general levy to be used for the purpose of paying the expenses of organization, for surveys and plans, to pay the salary of officers and the per diem allowed to directors and their expenses, and for other incidental expenses which may be incurred in the administration of the affairs of the district. A two-thirds vote of the membership of said board shall be required to fix the amount of said levy.

(b) The amount of assessment on each dollar of valuation for assessment shall, in accordance with the schedule prescribed by section 39-5-128, C.R.S., be certified to boards of county commissioners of the various counties in which the district is located and by them included in their next annual levy for state and county purposes. Such amount so certified shall be collected for the use of such district in the same manner as are taxes for county purposes, and the revenue laws of the state for the levy and collection of taxes on real estate for county purposes, except as modified in this article, shall be applicable to the levy and collection of the amount certified by the board of directors of said district as aforesaid, including the enforcement of penalties, forfeiture, and sale for delinquent taxes.

(c) All collections made by the county treasurer pursuant to such levy shall be paid to the treasurer of the conservancy district on or before the tenth day of the next succeeding calendar month. If any items of expense have already been paid in whole or in part from any other sources by the said district, they may be repaid from receipts of such levy. Such levy may be made, although the work proposed or any part thereof may have been found impracticable or for other reasons abandoned. The collection of data and the payment of expenses therefor, including salaries of engineers and attorneys and clerical assistants, to conserve the water of said district and to enable said district to adopt plans for the orderly development of said district are hereby declared to be a matter of general benefit to the public welfare, and such that a tax for said purposes may be properly imposed, in the opinion of the general assembly.

(d) If this subsection (1) or any clause, phrase, or part thereof is held unconstitutional or invalid by any court of competent jurisdiction, such decision shall not affect the validity or force of any other part of this section or any other part of this article, and the general assembly hereby declares it would have enacted the remainder of this article without this subsection (1).

(2) In lieu of the level or general tax authorized by subsection (1) of this section, the board may levy special assessments upon all real estate within the district, except such real estate as is exempted in this article, to raise funds to pay expenses of organization, salaries, expenses, and per diem allowances of officers and directors and to prepare a general plan for the maintenance of constant stream flow and adequate water supplies in all the principal tributaries and the main stream of the San Juan and Dolores rivers in said district and provide for future development of the district and insure water therefor. Such assessments shall be made in proportion to the benefits to each piece of real estate accruing by reason of the adoption of a comprehensive plan of development of the natural resources of the district as a whole. The board of directors, if it deems it advisable at any time before levying special assessments, shall appraise the benefits to the several parcels of real estate within the district which shall result from the organization of said district and the general plans and



development. The board may adopt rules for such purpose and provide inter alia for notice and hearing to all persons affected thereby. A permanent record arranged by counties of the benefits which will accrue to each tract of land shall be kept, and such benefits shall be apportioned over a series of years, the amount to be collected each year to be in the discretion of the board; but the amount of such assessment to be levied and assessed against the real property in said district in any one year shall not exceed a total of seven thousand five hundred dollars, and it is hereby declared that the amount of special benefits accruing annually to the real estate in said district is in excess of such amount. All property owned by the state, counties, cities, towns, school districts, or other governmental agencies shall be exempt from taxation or special levies under this article.

(3) Prior to October 15 of each year in which an assessment is made, the board of directors shall appoint a time and place where it will meet within the district for the purpose of hearing objections to assessments at least thirty days prior to the dates so appointed. Notice of such hearing shall be given by posting a notice thereof at or near the door of the treasurer's office in each county in said district and by publishing said notice in a legal newspaper not less than three consecutive times within a period of thirty days, immediately prior to the hearing. The notice posted in each county shall be sufficient if it pertains to the property subject to assessment in said county only and need not contain the description of or any reference to property situated in other counties also affected by such assessment. Said notice shall contain a description of the real estate so assessed in the county in which said notice is posted and published, the amount of the assessment fixed by the board, and the time and place or places fixed by the board for the hearing of objection to such assessments. It shall not be necessary for the said notice to contain a separate description of the lots or tracts of real estate, but it shall be sufficient if the said notice contains such descriptions as will inform the owner whether or not his real estate is covered by such descriptions, and to inform the owner of the amount of special assessments thereon.

(4) If, in the opinion of any person whose real estate is assessed, his property has been assessed too high or has been erroneously or illegally assessed, at any time before the date of such hearing, he may file written objections to such assessments, stating the ground of such objections, which statement shall be verified by the affidavit of said person or some other person familiar with the facts. At such hearing the board shall hear evidence and argument offered concerning the correctness or legality of such assessment and may modify or amend the same. Any owner of property desiring to appeal from the finding of the board as to assessments within thirty days from the finding of the board shall file with the clerk of the district court of the county in which the property is situated a written notice making demand for a trial by the court. At the same time, the appellant shall file a bond with good and sufficient security, to be approved by the clerk of said court, in a sum not exceeding two hundred dollars, to the effect that, if the finding of the court is not more favorable to the appellant than the finding of the board, the appellant will pay the costs of the appeal. The appellant shall state definitely from what part of the order the appeal is taken. In case more than one appeal is taken, upon a showing that the appeals may be consolidated without injury to the interests of anyone, the court may consolidate and try the same together.

(5) The court shall not disturb the findings of the board unless the finding of the board in any case is manifestly disproportionate to the assessments imposed upon other property in the district created under this article. The trial shall be to the court, and the matter shall take precedence before the court and shall be taken up as promptly as may be after the appeal is filed. If no appeal is taken from the finding of the board within the time prescribed in this section, or after the finding of the district court in case an appeal is taken from the finding of the board, then said assessments shall be final and conclusive evidence that said assessments have been made in proportion to the benefits conferred upon each tract of real estate of said district by reason of the general plans of survey, comprehensive plan of development, and the completion of improvements to be constructed under the provisions of this article, and such assessments shall constitute a perpetual lien as provided in this article upon the real estate so assessed until paid.

**Cross references:** For publication of legal notices, see part 1 of article 70 of title 24; for collection of taxes, see article 10 of title 39.

**37-47-110. Creation of subdistricts.** (1) Notwithstanding the organization of the district provided for in this article, public irrigation districts organized under article 4 of chapter 149, CRS 53, and irrigation districts organized under articles 41 and 42 of this title, and any other form or organization designed or intended to acquire, construct, or maintain reservoirs, ditches, and similar works for irrigation or other beneficial purposes under any law of the state of Colorado or of the United States, may be organized to cover and include areas within the southwestern water conservation district and may likewise embrace territory within that district and partly out of the district. Whenever in their opinion such form of organization will help promote the local interests or accomplish improvements for any part of said district, the board of directors may recommend the organization of any such type of organization.

(2) In addition to such forms of organization, whenever in the opinion of the board of directors of said district it is feasible and necessary that ditches, canals, reservoirs, or other works which benefit only a part of the district should be constructed, a local improvement district or subdivision, or as many of such local improvement districts as may be necessary, may be created. Such local improvement district, when organized under the provisions of this article, shall be designated as "Water Users' Association No. .... in the Southwestern Water Conservation District", or as "Special Improvement District No. .... in the Southwestern Water Conservation District". Each subdistrict shall be numbered consecutively as created or organized. The board of directors, the engineers, attorneys, secretary, and other officers, agents, and employees of the district, so far as it may be necessary, shall serve in the same capacity for such subdivision or subdistricts. A contract and agreement between the main district and the subdistrict may be made in the same manner as contracts and agreements between two districts.

**Source:** L. 41: p. 874, § 8. CSA: C. 173B, § 63. CRS 53: § 149-9-8. C.R.S. 1963: § 150-8-8.

**Editor's note:** The public irrigation law, article 4 of chapter 149, CRS 53, referred to in subsection (1) of this section, was repealed, but the provisions of said article 4 were preserved as to all districts formed under that article prior to 1963. (See L. 63, p. 1009.)

**37-47-111. Rules and regulations.** Such district has the power to make general rules and regulations for the conduct of its business, as well as the conduct of the business of any subdistrict therein, and by such rules and regulations may provide for the rental of water or other services which are to be furnished by said subdistrict, to any municipality, public irrigation district, or irrigation district, or other quasi-municipal corporation in this state, and to make contracts for the payment of the rental to be charged for any such water or services.

**Source:** L. 41: p. 888, § 30. CSA: C. 173B, § 85. CRS 53: § 149-9-30. C.R.S. 1963: § 150-8-30.

**37-47-112. Procedure for establishment of subdistricts.** (1) Before any subdistrict is established under this article, a petition shall be filed in the office of the clerk of the district court of the county in which the territory to be embraced in said subdistrict or the greater part thereof is situate, signed by the board of directors of the district or by a majority of the owners of land situate within the limits of the territory proposed to be organized into a subdistrict.

(2) The petition shall set forth:

(a) The proposed name of said subdistrict, whether it shall be designated "Water Users' Association No. .... in the Southwestern Water Conservation District", or "Special Improvement District No. .... in the Southwestern Water Conservation District";



(b) That property within the proposed subdistrict will be benefited by the proposed reservoirs, ditches, canals, works, or other improvements and shall set forth in a general way the nature and estimated cost thereof, together with a general statement of the nature of the anticipated benefits to be derived therefrom;

(c) A full description of the territory to be included in the proposed subdistrict. Said description need not be given by metes and bounds or by legal subdivision, but it shall be sufficient to enable a property owner to ascertain whether his property is within the territory proposed to be organized in a subdistrict. Such territory need not be contiguous, if it is so situated that the organization as a single subdistrict of the territory described is such as to promote or tend to promote one or more of the objectives of this article as to all parts of the area proposed to be included.

(d) A general description of the methods proposed to finance the proposed works or other improvements, whether by revenue warrants pledging the income from the proposed works, special improvement bonds to be paid by special assessments on the property benefited in an amount on each tract of land not in excess of the appraised benefits, contracts of water users or water users' associations creating liens or mortgages on lands within the subdistrict, or general obligation bonds constituting a lien against the real property embraced in such subdistrict and which indebtedness shall never be an obligation of the district. If general obligations are proposed, the petition shall allege and show that all lands in the subdistrict will be benefited in an amount not less than the total amount of general obligation bonds to be issued exclusive of interest.

(e) If such a petition is filed by the board of directors of the district, it shall contain a statement to the effect that a majority of the landowners of the territory in the proposed subdistrict petitioned the board of directors to organize said subdistrict, and a copy of the petition of said landowners shall be attached as an exhibit to the petition for organization of the subdistrict;

(f) Said petition shall pray for the organization of a subdistrict by the name proposed.

(3) To determine whether a majority of landowners in said district have signed the petition, in the event the petition is signed by landowners, or have petitioned the board of directors of the district, in the event the petition is filed by the board of directors, the court may require the county treasurer of each county in which territory proposed to be included in said subdistrict is situated to furnish a certified list of names of landowners within said area, and the court shall be governed by the names as they appear upon said copy of the tax roll, and the same shall be prima facie evidence of ownership, and, if said tax roll shows a majority of the landowners have signed the main petition or petitioned the district for said organization, the same shall be considered as prima facie evidence that a majority of said landowners are in favor of the organization of said proposed subdistrict.

**Source: L. 41: p. 874, § 9. CSA: C. 173B, § 64. CRS 53: § 149-9-9. C.R.S. 1963: § 150-8-9.**

**37-47-113. Time and place of hearing on petition.** (1) Immediately after the filing of such petition the court wherein such petition, is filed, by order, shall fix a place and time, not less than sixty days nor more than ninety days after the petition is filed, for hearing thereon, and, thereupon, the clerk of said court shall cause notice by publication, which may be substantially the same as provided in section 37-8-101, to be made of the pendency of the petition and of the time and place of the hearing thereon. The clerk of said court shall also forthwith cause a copy of said notice to be mailed by United States registered mail to the board of county commissioners of each of the several counties having territory within the proposed subdistrict and to the board of directors of said district in the event that said petition is filed by the landowners.

(2) The district court in and for the county in which the petition for the organization of a subdistrict has been filed shall thereafter, for all purposes of this article, except as otherwise provided in this article, maintain and have original and exclusive jurisdiction coextensive with the boundaries of said subdistrict, of lands and other property proposed to be included in said subdistrict or effected by said subdistrict, without regard to the usual limits of its jurisdiction.

(3) No judge of such court wherein such petition is filed shall be disqualified to perform any duty imposed by this article by reason of ownership of property within any subdistrict or proposed subdistrict or by reason of ownership of any property that may be benefited, taxed, or assessed therein.

**Source:** L. 41: p. 876, § 10. CSA: C. 173B, § 65. CRS 53: § 149-9-10. C.R.S. 1963: § 150-8-10.

**37-47-114. Recording of protest - procedure - decree - fee.** (1) At any time after the filing of a petition for the organization of a subdistrict, and not less than thirty days prior to the time fixed by the order of the court for the hearing upon said petition, and not thereafter, a protest may be filed in the office of the clerk of the court wherein the proceedings for the organization of such subdistrict is pending, signed by a majority of the owners of the land in said proposed subdistrict protesting the organization or creation of said subdistrict. It is the duty of the clerk of the court forthwith, upon filing of said protest, to make as many certified copies thereof, including the signatures thereto, as there are counties into any part of which said proposed subdistrict extends and forthwith to place in the hands of the county treasurer of each of such counties one of said certified copies.

(2) It is the duty of each of such county treasurers to determine from the last tax rolls of his county, and to certify to said district court under his official seal, prior to the day fixed for the hearing, the total number of owners of land situate in such proposed subdistrict within his county and the total number of owners of land situate in such proposed subdistrict within his county who have signed such protest. Such certificate shall constitute prima facie evidence of the facts so stated therein and shall be so received and considered by the court.

(3) Upon the day set for the hearing upon the original petition, if it appears to the court from such certificate and from such other evidence as may be adduced by any party in interest that the said protest is not signed by a majority of the owners of land within the proposed subdistrict, the court shall thereupon dismiss said protest and shall proceed with the hearing on the petition. If it appears to the court at said hearing that the protest is signed by any person or corporation who signed the original petition for the organization of said subdistrict, either to the court or to the district, then the signature of any such landowner upon the protest shall be disregarded and not counted. The board of county commissioners of any county in which any part of said proposed subdistrict is situate, or any owner of real property in said proposed subdistrict who has not signed the petition for the organization of said subdistrict, on or before the date set for the cause to be heard, may file objections to the organization and incorporation of the district. Such objections shall be limited to a denial of the statements in the petition and shall be heard by the court as an advanced case without unnecessary delay.

(4) Upon said hearing, if it appears that said petition has been signed and presented in accordance with the requirements of this article and that the allegations of the petition are true, the court shall enter a decree and therein adjudicate all questions of jurisdiction and declare the subdistrict organized and designate the name of said subdistrict, by which in all subsequent proceedings it shall thereafter be designated and known, and thereafter said subdistrict shall be deemed a special improvement district.

(5) Such order shall be binding upon the real property within the subdistrict, and no appeal or other remedy lies therefrom, and entry of such order shall finally and conclusively establish the regular organization of said subdistrict against all persons except the state of Colorado in an action in the nature of quo warranto to be commenced by the attorney general within three months after said decree is entered and not otherwise. Within ten days after such subdistrict has been declared duly organized by the court, the clerk of said court shall transmit to the county clerk and recorder in each of the counties having lands in said subdistrict copies of the findings and decree of the court establishing said subdistrict. The same shall be recorded in the office of the county clerk and recorder where they shall become permanent records.

**Source:** L. 41: p. 877, § 11. CSA: C. 173B, § 66. CRS 53: § 149-9-11. C.R.S. 1963: § 150-8-11. L. 83: (5) amended, p. 1228, § 15, effective July 1.



**37-47-115. Plan for subdistrict.** Upon organization of such subdistrict, the board of directors of said district, acting as the board of directors of said subdistrict, are authorized and required to prepare and adopt as the official plans for said subdistrict a comprehensive detailed plan showing the nature of the improvements or works, including all canals, reservoirs, and ditches, whether within or without the district, and the estimated cost of each principal part of said system or works.

**Source:** L. 41: p. 878, § 12. CSA: C. 173B, § 67. CRS 53: § 149-9-12. C.R.S. 1963: § 150-8-12.

**37-47-116. Appointment of appraisers.** As soon as such official plan has been prepared and adopted and is on file in the office of said district, the court, upon petition of the district, shall appoint a board of appraisers consisting of three members. The qualifications of said appraisers and all proceedings before them shall be in accordance with the provisions of the law pertaining to the duties and qualifications of appraisers under the conservancy law of Colorado as set forth in article 4 of this title; except that, where reference is made to districts, it shall apply to subdistricts organized under this article.

**Source:** L. 41: p. 879, § 13. CSA: C. 173B, § 68. CRS 53: § 149-9-13. C.R.S. 1963: § 150-8-13.

**37-47-117. Compensation of appraisers.** Appraisers when appointed under the provisions of this article shall receive a compensation of ten dollars per day during the time that they are engaged in the performance of their duties.

**Source:** L. 41: p. 880, § 15. CSA: C. 173B, § 70. CRS 53: § 149-9-15. C.R.S. 1963: § 150-8-15.

**37-47-118. Directors bound by financing plan.** (1) The board of directors of said district shall be bound by the plan of financing set forth in the petition for the organization of the subdistrict and approved by the decree of the district court. The appointment of appraisers shall not be necessary in the event that the plan adopted provides that general obligations of the subdistrict are to be issued or provides for the issuance of revenue warrants which shall be a lien and charge upon the rental and income from the irrigation works or reservoirs or other improvements to be constructed under the plan adopted and the rental derived from any such works. Said warrants shall be payable in such denominations, with interest at a rate not exceeding six percent per annum which may be fixed by the board of directors of said district pursuant to the order and decree of the court. The board shall pledge the income and rentals from said irrigation works or water supplied therethrough, and the subdistrict shall not be otherwise obligated for the payment thereof.

(2) At the time said revenue warrants are issued, the board of directors of the district shall make and enter in the minutes of the proceeding a resolution in which the due dates of said revenue warrants, the amount of interest thereon, which shall not exceed six percent per annum, the general provisions of said revenue warrants and a recital that the same are payable out of rental and income only are set forth and shall require the payment of an assessment or annual rental charge by the persons who are to use or derive benefit from the water or other service furnished through said improvements or works, sufficient to meet said payments, and the resolution shall be irrevocable during the time that any of said revenue warrants are outstanding and unpaid. Said revenue warrants shall be signed "Water Users' Association No. .... in the Southwestern Water Conservation District, By ....., President, Attest ....., Secretary", or "Special Improvement District No. .... in the Southwestern Water Conservation District, By ....., President, Attest ....., Secretary". They shall be countersigned by the treasurer.

(3) General obligation bonds of said subdistrict shall be signed in the same manner as provided for revenue warrants and shall recite that the same are issued pursuant to the provisions of this article and are to be payable at the time and in the manner and with the

rate of interest therein specified, and that the same were issued under and pursuant to a decree of court and a resolution of the board of directors authorizing the issue of said obligations and referring to the date of said resolution. Said bonds shall further recite that they are payable from funds to be derived by assessments and tax levies against the property in said subdistrict and not otherwise, and that the same are not to be deemed as an obligation of the southwestern water conservation district but only as an obligation of said subdistrict, and that the district itself is not to be obligated in any manner for the payment of said bonds.

**Source: L. 41:** p. 879, § 14. **CSA:** C. 173B, § 69. **CRS 53:** § 149-9-14. **C.R.S. 1963:** § 150-8-14.

**37-47-119. Assessments - procedure in making.** (1) In the event that the plans for the organization of said district, including the petition and the decree entered thereon, provide for a plan of financing the construction or acquisition of the works, or other improvements proposed, by special assessments to be levied against the appraised benefits to property within said subdistrict, then said board of directors may make assessments from time to time, as required, and in making said assessments, said board shall be guided by the procedure for the levy of similar assessments under the conservancy law of the state of Colorado and particularly the provisions of said law appearing in sections 37-5-104 to 37-5-106, and the same shall apply to subdistricts created under this article.

(2) From time to time, as the affairs of the subdistrict may demand, the board of directors may levy on all property upon which benefits have been appraised an assessment of such portion of said benefits as may be found necessary by said board to pay the cost of the appraisal, the preparation, and execution of the official plan for said subdistrict, superintendence of construction and administration during the period of construction, plus ten percent of said total to be added for contingencies, but not to exceed in the total of principal the appraised benefits so adjudicated. The assessments, to be known as the "construction fund assessment", shall be apportioned to and levied on each tract of land or other property in said district in proportion to the benefits appraised and not in excess thereof, and in case bonds are issued, as provided in section 37-47-120, then the amount of interest which will accrue on such bonds as estimated by said board of directors shall be included in and added to the said assessment, but the interest to accrue on account of the issuance of said bonds shall not be construed as a part of the cost of construction in determining whether or not the expenses and cost of making said improvement are or are not equal to or in excess of the benefits appraised.

(3) As soon as said assessment is levied, the secretary of the subdistrict, at the expense thereof, shall prepare in duplicate an assessment of the subdistrict. It shall be in the form of a well-bound book endorsed and named "Construction Fund Assessment Record of Water Users' Association No. ...., or Special Improvement District No. ...., of the Southwestern Water Conservation District". Said record shall be in the form of similar records for conservancy districts under the laws of this state, particularly as provided in section 37-5-104. Said assessments may be paid in the manner provided in section 37-5-105, relating to conservancy districts under the laws of this state. All proceedings provided in said sections with respect to conservancy districts shall apply to the assessments, the records thereof, and the manner of payment of assessments of subdistricts organized under this article.

**Source: L. 41:** p. 880, § 16. **CSA:** C. 173B, § 71. **CRS 53:** § 149-9-16. **C.R.S. 1963:** § 150-8-16.

**37-47-120. Improvement district bonds.** (1) The board of directors of said district may issue as obligations of the subdistrict, not as an obligation of the southwestern water conservation district, improvement district bonds to be paid out of special assessments made by said board of directors against all lands in the subdistrict, not exceeding in the aggregate amount of ninety percent of the amount of benefits assessed against said lands and unpaid at the time of issue of said bonds. Such bonds shall contain a recital to the effect that they



are issued under and in accordance with the provisions of this article as special improvement district bonds and are payable out of special assessments to be levied against the property in said subdistrict and not otherwise.

(2) Said improvement district bonds shall be signed, "Water Users' Association No. .... or Special Improvement District No. ...., of the Southwestern Water Conservation District, By ....., President", and countersigned "....., Treasurer". Otherwise said bonds shall be in such denominations and become due at such dates, with interest at such rate, payable either annually or semiannually, but not exceeding the rate of six percent per annum, and contain such other provisions as may be fixed by the board of directors, if said provisions are not inconsistent with the terms of this article. Except as otherwise expressly modified in this article, the law relating to the form and issuance of bonds of conservancy districts under the laws of this state, particularly section 37-5-106, shall apply and govern officers of the district in the issuance and sale of said bonds, and other provisions of said law with respect to the levy of assessments for the payment of said bonds with interest, and particularly section 37-5-110, shall likewise be applicable to the bonds of a subdistrict organized under this article.

**Source: L. 41: p. 881, § 17. CSA: C. 173B, § 72. CRS 53: § 149-9-17. C.R.S. 1963: § 150-8-17.**

**37-47-121. Assessments constitute perpetual lien.** All assessments on account of special improvements against appraised benefits and interest thereon and penalties for default of payment thereof, together with the cost of collecting the same, from the date of the filing of the "construction fund assessment" record and the "maintenance fund assessment" record in the office of the treasurer of the county wherein the lands and property are situate, shall constitute a perpetual lien in an amount not in excess of the benefits severally appraised upon the land and other property against which said assessments have been levied and such benefits appraised, to which only the lien of the general, state, county, city, town, or school taxes shall be paramount, but no sale of said property, to enforce any general, state, county, city, town, school tax, or other lien, shall extinguish the perpetual lien of said assessment. At any time any landowner may pay the full amount of said assessment, and thereafter the property of any such landowner shall be clear and free from said lien and shall not be subject to assessment for and on account of benefits appraised against any other land or default in the payment of assessments made against any other land.

**Source: L. 41: p. 882, § 18. CSA: C. 173B, § 73. CRS 53: § 149-9-18. C.R.S. 1963: § 150-8-18.**

**37-47-122. Directors to remedy defects in assessments.** If any assessment made under the provisions of this article proves invalid, the board of directors shall, by subsequent or amended acts or proceedings, promptly and without delay remedy all defects or irregularities, as the case may require, by making and providing for the collection of new assessments, or otherwise.

**Source: L. 41: p. 883, § 19. CSA: C. 173B, § 74. CRS 53: § 149-9-19. C.R.S. 1963: § 150-8-19.**

**37-47-123. Record of assessments as evidence.** The record of assessments contained in the respective assessment records of the district shall be prima facie evidence in all courts of all matters therein contained.

**Source: L. 41: p. 883, § 20. CSA: C. 173B, § 75. CRS 53: § 149-9-20. C.R.S. 1963: § 150-8-20.**

**37-47-124. Defects in notice perfected.** Whenever notice is provided for in this article, if the court finds that due notice was not given, jurisdiction shall not thereby be lost or the

proceedings abated or held void, but the court shall continue the hearing until such time as proper notice may be given and shall thereupon proceed as though proper notice had been given in the first instance. If any appraisal, assessment, levy, or other proceeding relating to said district is held defective, then the board of directors may file a motion in the cause in which said district was organized to perfect any such defect, and the court shall set a time for hearing thereon. If the original notice as a whole is held to be sufficient but faulty only with reference to publication as to certain particular lands or as to service as to certain persons, publication of the defective notice may be ordered as to the particular lands, or service may be made on the persons not properly served, and said notice is thereby corrected without invalidating the original notice as to other lands or persons.

**Source: L. 41:** p. 883, § 21. **CSA:** C. 173B, § 76. **CRS 53:** § 149-9-21. **C.R.S. 1963:** § 150-8-21.

**37-47-125. Contracts of subdistricts.** (1) When the petition for the organization of a subdistrict and the decree for such organization so provide, it shall be lawful for any subdistrict to make contracts as follows:

(a) A water users' association may bind itself to levy an annual assessment for the use of water and to secure same by liens on land and water rights or in such manner as may be provided by law.

(b) Any person or corporation landowner may create a mortgage lien upon lands or give other security satisfactory to the board or any other contracting agency, and all such contracts shall provide for forfeiture of the use of water for nonpayment of assessments or installments in the same manner and procedure as provided by statute for forfeiture of stock in a mutual ditch company.

**Source: L. 41:** p. 884, § 23. **CSA:** C. 173B, § 78. **CRS 53:** § 149-9-23. **C.R.S. 1963:** § 150-8-23.

**Cross references:** For forfeiture of stock in a ditch company, see § 7-42-104 (4).

**37-47-126. Issuance of general obligation bonds and revenue bonds.** (1) In the name of the subdistrict and not otherwise, when authorized by the plan of organization and decree of court organizing said subdistrict to do so, the district may issue general obligations or bonds which shall constitute a lien against the real property in said subdistrict. Said obligations shall bear interest at a rate such that the net effective interest rate of the issue does not exceed the maximum net effective interest rate authorized. Interest shall be payable semiannually, and said obligations may be issued and made payable in series becoming due not less than five years and not more than fifty years after the date of issue. Such bonds are to be paid from assessments levied from time to time, as the bonds and interest thereon become due, against the real property in said district and not otherwise. The board of directors of said district shall certify to the boards of county commissioners of the several counties in which said subdistrict or any part thereof is located the amount of the levy necessary to pay said bonds as they mature, and also to pay the interest becoming due on all outstanding bonds, at the same time that like certificates are made under this article for assessments on special improvement district bonds, and the procedure for the assessment and collection of revenue or taxes of the county and state are, except as may be otherwise provided in this article, made applicable and are to be followed in the levy of assessments for payment of taxes and collection of principal and interest on such general obligations.

(2) The subdistrict, in its own name, may issue revenue bonds to finance, in whole or in part, the construction of works, reservoirs, or other improvements for the beneficial use of water for the purposes for which it has been or may be appropriated, whether or not the interest on such bonds may be subject to taxation. Such revenue bonds shall be issued in such denominations and with such maximum net effective interest rate as may be fixed by the board of directors of the subdistrict and shall bear interest such that the net effective



interest rate of the bonds does not exceed the maximum net effective interest rate authorized. The board shall pledge only rental proceeds, service charges, and other income (or any combination thereof) from such works or other improvements, and the subdistrict shall not be otherwise obligated for the payment thereof. At the time said revenue bonds are issued, the board of directors of the subdistrict shall make and enter in the minutes of the proceeding a resolution in which the due dates of such revenue bonds, the rates of interest thereon, the general provisions of the bonds, and a recital that the same are payable only out of rental proceeds, service charges, and other income (or any combination thereof) are set forth. In addition, the board of directors shall require the payment of rental charges, service charges, or other charges by the political subdivisions or persons who are to use or derive benefits from the water or other services furnished by such works or improvements. Such charges shall be sufficient to pay operation and maintenance expenses thereof, to meet said bond payments, and to accumulate and maintain reserve and replacement accounts pertaining thereto as set forth in such resolution. Such resolution shall be irrevocable during the time that any of the revenue bonds are outstanding and unpaid. The revenue bonds shall be signed "Water Users' Association No. ... in the Southwestern Water Conservation District, By ....., President. Attest ....., Secretary" or "Special Improvement District No. .... in the Southwestern Water Conservation District, By ....., President. Attest ....., Secretary", and they shall be countersigned by the treasurer.

**Source:** L. 41: p. 884, § 22. CSA: C. 173B, § 77. CRS 53: § 149-9-22. C.R.S. 1963: § 150-8-22. L. 77: Entire section amended, p. 1656, § 8, effective June 9.

**37-47-127. Board to certify assessments.** (1) To maintain, operate, and preserve ditches, canals, reservoirs, or other improvements made pursuant to this article, and to strengthen, repair, and restore the same, when needed, and for the purpose of defraying any incidental expenses of the subdistrict, the board of directors may, upon completion of a works provided for in the plan for any such subdistrict, on or before the first Monday in November of each year thereafter, certify to the board of county commissioners of the county in which said subdistrict or any part thereof is located an assessment on each tract of land and upon public corporations subject to assessment under this article, for the purpose of raising funds to be used for the maintenance of said improvements. If an appraisal of benefits has been made against the lands in said district, assessments shall be apportioned by the county treasurer and by the board of directors of said district against the property therein upon the basis of the appraisal of benefits originally made. If no such appraisal has been made and the form of organization and financing is such that revenue warrants or general obligations of the subdistrict have been issued, then said assessment shall be made on the basis of the valuation for assessment of the property subject to assessment in said subdistrict.

(2) Said assessment shall not exceed five mills on each dollar of the valuation for assessment of the property in said subdistrict in any one year, unless the court shall by order authorize an assessment of a larger percentage. Said assessment shall be levied by resolution of the board of directors and shall be enrolled in a well-bound record to be known as the maintenance fund assessment record and shall be substantially the form provided for similar records of conservancy districts under the laws of the state of Colorado, particularly as provided by section 37-5-107. Assessments so certified shall be levied by the board of county commissioners of the counties in which said subdistrict is situate, on the property of said district in their respective counties, to be collected by the treasurers of the several counties and delivered to the treasurer of the district in like manner and with like effect as is provided for the collection and return of other assessments under this article. The whole assessment shall be due and payable as and when taxes for county purposes levied in the same year are due and payable. The said maintenance assessments shall be in addition to any assessments which have been levied against benefits appraised for and on account of construction.

**Source:** L. 41: p. 884, § 24. CSA: C. 173B, § 79. CRS 53: § 149-9-24. C.R.S. 1963: § 150-8-24.

**37-47-128. Limitations on power to levy and contract.** (1) The district has no power of taxation or right to levy or assess taxes, except an annual levy, not exceeding six-tenths of a mill on each dollar of the valuation for assessment of property in said district, as provided in section 37-47-109. The district has no power to contract or incur any obligation or indebtedness except as expressly provided in this article, and then any obligation or indebtedness so contracted or incurred is to be payable out of the funds derived through said limited tax and not otherwise; except that said district for and in behalf of any subdistrict or improvement district created under this article has the right to issue obligations as expressly authorized in this article and not otherwise.

(2) All assessments under this article shall be collected by the county treasurer of the respective counties in which said real estate is situated at the same time and in the same manner as is provided by law for the collection of taxes for county and state purposes, and, if said assessments are not paid, then the real estate shall be sold at the regular tax sale for the payment of said assessments, interest, and penalties in the manner provided by the statutes of the state of Colorado for selling property for the payment of general taxes. If there are no bids at said tax sale for the property so offered, said property shall be struck off to the district, and the tax certificates shall be issued in the name of the district, and the board of directors has the same power with reference to the sale of said tax certificates as is now vested in county commissioners and county treasurers when property is struck off to the counties.

(3) Tax deeds may be issued, based upon said certificates of sale, in the same manner that deeds are executed on tax sales on general state and county taxes.

**Source:** L. 41: p. 887, § 27. CSA: C. 173B, § 82. CRS 53: § 149-9-27. C.R.S. 1963: § 150-8-27. L. 73: p. 1533, § 2.

**37-47-129. Investment of surplus funds.** The board of directors of said district may invest any surplus funds of the district including any funds in the construction fund assessment not needed for immediate use to pay the cost of construction of any project in any one of the subdistricts, or to pay bonds or coupons or to meet current expenses, in securities meeting the investment requirements established in part 6 of article 75 of title 24, C.R.S. The board of directors of said district may require any funds of the district, or of any subdistrict, to be deposited with such depository or bank as may be designated by the board and likewise shall have authority to require the treasurer of the district to take from such depository a bond with corporate surety to insure payment of any such deposit or to require such depository to pledge securities of the same kind as those in which the district is authorized to invest its funds to insure payment of any such deposit.

**Source:** L. 41: p. 887, § 28. CSA: C. 173B, § 83. CRS 53: § 149-9-28. C.R.S. 1963: § 150-8-28. L. 89: Entire section amended, p. 1124, § 52, effective July 1.

**37-47-130. Sinking fund.** Said district may provide for a sinking fund for the ultimate payment of any of the obligations of any subdistrict. Such sinking fund may be invested as provided in section 37-47-129.

**Source:** L. 41: p. 888, § 29. CSA: C. 173B, § 84. CRS 53: § 149-9-29. C.R.S. 1963: § 150-8-29.

**37-47-131. Court confirmation.** (1) (a) In its discretion, the board of directors, on the behalf and in the name of the district or any subdistrict which is a party in interest, may file a petition at any time in the district court in and for the county in which the district's principal office is maintained or, if both the district and one or more subdistricts are parties to the petition, in the district court in and for the county in which any such subdistrict was organized, praying for a judicial examination and determination of any power conferred or



of any taxes or rates or other charges levied, or of any act, proceeding, or contract of the district, the subdistrict, or the subdistricts, or any combination thereof, as the case may be, whether or not said contract has been executed, including, without limitation, proposed contracts for the acquisition, improvement, equipment, maintenance, operation, or disposal of any properties or facilities for the benefit of the district, the subdistrict, or the subdistricts, as the case may be, and so including a proposed issue of revenue warrants, revenue bonds, special assessment bonds, or general obligation bonds, issued or to be issued on behalf of any such entity. Such petition shall set forth the facts whereon the validity of such power, tax, assessment, charge, act, proceeding, or contract is founded and shall be verified by the president of the board of directors.

(b) Such action shall be in the nature of a proceeding in rem, and jurisdiction of all parties interested may be had by publication, mail, and posting, as provided in this article. Notice of the filing of the petition shall be given by the clerk of the court, under the seal thereof, stating in brief outline the contents of the petition and also stating where a full copy of any contract therein mentioned may be examined. The notice shall be served by publication at least once a week for five consecutive weeks in a daily or a weekly newspaper of general circulation published in the county in which the principal office of the district is located, by mailing copies of the notice by registered or certified mail, return receipt requested, to the boards of county commissioners of the several counties in which the parties in interest in such action are located wholly or in part, and by posting the same in the office of the district at least thirty days prior to the date fixed in said notice for the hearing on said petition. Jurisdiction shall be complete after such publication, mailing, and posting.

(c) Any owner of property in the district or any subdistrict filing the petition or any person interested in the contract or proposed contract or in the premises may appear and move to dismiss or answer the petition at any time prior to the date fixed for the hearing or within such further time as may be allowed by the court; and the petition shall be taken as confessed by all persons who fail to appear.

(2) The petition and notice shall be sufficient to give the court jurisdiction; and, upon hearing, the court shall examine into and determine all matters and things affecting the question submitted and shall make such findings with reference thereto and render such judgment and decree thereon as the case warrants. Costs may be divided or apportioned among any contesting parties in the discretion of the trial court. Review of the judgment of the court may be had as in other similar cases; except that such review must be applied for within thirty days after the time of the rendition of such judgment or within such additional time as may be allowed by the court within thirty days. The Colorado rules of civil procedure shall govern in matters of pleadings and practice where not otherwise specified in this article. The court shall disregard any error, irregularity, or omission which does not affect the substantial rights of the parties.

**Source:** L. 41: p. 888, § 31. CSA: C. 173B, § 86. CRS 53: § 149-9-31. C.R.S. 1963: § 150-8-31. L. 77: Entire section R&RE, p. 1657, § 9, effective June 9.

**37-47-132. Subdistrict furnishing water to nonirrigated land.** In order to enable a subdistrict organized under the provisions of this article to furnish water to lands which have not been irrigated and had, up to the time of the construction of the works to be constructed by said subdistrict, no water supply and, at the same time, to enable other areas within the same subdistrict to obtain a supplemental supply of water or to enable said subdistrict to furnish a complete service to certain lands, certain areas, certain persons or municipalities within the district and to supplement an existing supply or service to other persons, localities, and municipalities, prior to the time that an appraisal of benefits is made in any such subdistrict, the board of directors may make a resolution setting forth the amount of water or the kind of service to be allocated to specified classes or areas, and such limitation shall be taken into consideration by the appraisers in the appraisal of benefits with

respect to lands affected by any such limitation. Like conditions and restrictions may be provided for payment by certain lands or persons of revenue warrants which pledge the income from the works of said subdistricts, but no such limitation shall be contained or govern the payment of any general obligations of any such subdistrict.

**Source: L. 41:** p. 889, § 32. **CSA: C. 173B,** § 87. **CRS. 53:** § 149-9-32. **C.R.S. 1963:** § 150-8-32.

**37-47-133. Election to authorize debt.** Except for the issuance of refunding bonds or other funding or refunding of obligations which does not increase the net indebtedness of the district or any subdistrict so proceeding, no indebtedness shall be incurred by the issuance of general obligation bonds of any subdistrict or by any contract by which the district or a subdistrict agrees to repay as general obligations or other obligations constituting a "general obligation debt by loan in any form", as such term is used in section 6 of article XI of the state constitution, of the district or subdistrict, respectively, to the federal government, any political subdivision, or any person over a term not limited to the then current fiscal year any project costs advanced thereby under any contract for the acquisition or improvement of the facilities or any interest therein, or for any project, advanced by the issuance of securities of such a political subdivision or person to defray any cost of the project or of the facilities or an interest therein thereby acquired and becoming a part of the facilities of the district or subdistrict, or otherwise advanced, unless a proposal of issuing the subdistrict's general obligation bonds or of incurring an indebtedness by the district or subdistrict by making such a contract is submitted to the electors of the district or subdistrict, as the case may be, and is approved by a majority of such electors voting on the proposal at an election held for that purpose in accordance with this article and with all laws amendatory thereof and supplemental thereto.

**Source: L. 77:** Entire section added, p. 1658, § 10, effective June 9.

**37-47-134. Definition of elector.** (1) An "elector", "elector of the district", or "elector of the subdistrict", or any term of similar import, means a person:

(a) Who, at the time of the election, is qualified to vote in general elections in this state; and

(b) Who is a resident of the district or subdistrict proposing to incur an indebtedness at the time of the election.

(2) Registration pursuant to the laws concerning general elections or any other laws shall not be required.

**Source: L. 77:** Entire section added, p. 1659, § 10, effective June 9.

**37-47-135. Elections.** Whenever in this article an election of the electors of the district or a subdistrict therein is permitted or required, the election may be held separately at a special election or may be held concurrently with any primary or general election held under the laws of this state; but no election shall be held at the same time as any regular election of any city, town, or school district if any part of the area thereof is located within the boundaries of the district.

**Source: L. 77:** Entire section added, p. 1659, § 10, effective June 9.

**37-47-136. Election resolution.** (1) The board of directors shall call any election by resolution adopted at least thirty days prior to the election.



(2) Such resolution shall recite the objects and purposes of the election, the date upon which such election shall be held, and the form of the ballot.

(3) In the case of any election not to be held concurrently with a primary or general election, the board of directors shall provide in the election resolution or by supplemental resolution for the appointment of sufficient judges and clerks of the election, who shall be electors of the district or the subdistrict holding the debt election, and in such event shall set their compensation. The election resolution or a supplemental resolution shall also then designate the precincts and polling places, but a supplemental resolution may modify such a description of precincts and polling places without repeating such description in full. The description of precincts may be made by reference to any order of the governing body of any county, municipality, or other political subdivision in which the district or subdistrict or any part thereof is situated, or by reference to any previous order or other instrument of such a governing body, or by detailed description of such precincts, or by other sufficient description.

(4) Precincts established by any such governing body may be consolidated in the election resolution by the board of directors in a sufficient number which it deems expedient for the convenience of the electors for any election not to be held concurrently with a primary or general election.

(5) If the election shall be held concurrently with a primary or general election held under the laws of this state, the judges of election for such primary or general election shall be designated as the judges of the election for the election held pursuant to this article, and they shall receive such additional compensation, if any, as the board of directors shall set by the election resolution.

**Source: L. 77:** Entire section added, p. 1659, § 10, effective June 9.

**37-47-137. Conduct of election.** (1) Except as otherwise provided in this article, an election held pursuant to this article shall be opened and conducted in the manner then provided by the laws of this state for the conduct of general elections.

(2) If an election is held concurrently with a primary or general election, the county clerk and recorder of each county in which the district or subdistrict holding the debt election is located shall perform for the district or subdistrict election the acts provided by law to be performed by such officials. If an election is not held concurrently with a primary or general election, such acts shall be performed by the secretary of the district with the assistance of such county clerk and recorders. The board of directors and such county clerk and recorders are authorized to agree among themselves upon the division of such acts and the determination of persons to perform them.

(3) An elector of the district may vote in any election by absent voter's ballot under such terms and conditions, and in substantially the same manner insofar as is practicable, as prescribed in article 8 of title 1, C.R.S., of the "Colorado Election Code of 1980" for general elections, except as specifically modified in this article.

(4) All acts required or permitted therein to be performed by a county clerk and recorder shall be performed by each one respectively in the event of a primary or general election and by the secretary or assistant secretary of the board of directors in the event of any other election, unless the services of the county clerk and recorder in each such county are contracted for, but no oath shall be administered by the secretary or assistant secretary unless he is also an officer authorized to administer oaths.

(5) Application may be made for an absent voter's ballot not more than twenty days and not less than four days before the election.

(6) No consideration shall be given nor distinction made with reference to any person's political party affiliation or the lack thereof.

(7) The return envelope for the absent voter's ballot shall have printed on its face an affidavit substantially in the following form:

“State of Colorado, County of ....., I, ....., being first duly sworn according to law, depose and say that my residence and post-office address is .....; that I am a person qualified to vote in general elections in the State of Colorado and am a resident of the Southwestern Water Conservation District or Water Users’ Association No. .... or Special Improvement District No. .... in the Southwestern Water Conservation District, as may be appropriate, at the time of this election.

.....  
Signature of voter

Subscribed and sworn to before me this ... day of....., 20....

.....  
(Signature of notary public,  
county clerk and recorder,  
or other officer authorized  
to administer oaths)

(SEAL)

.....  
Title of office”

- (8) In any such election at which voting machines are used, the board of directors shall provide paper ballots for absent voters containing the same question as is to be submitted to the electors by the voting machines, subject to the provisions of subsection (9) of this section.
- (9) The district or subdistrict may provide for mail-in voters to cast their mail-in voters’ ballots on voting machines expressly provided for that purpose, if each mail-in voter indicates by affidavit that he or she is qualified to vote at the election and will be a mail-in voter, pursuant to section 1-8-102, C.R.S., of the “Uniform Election Code of 1992” and all laws supplemental thereto.

**Source: L. 77:** Entire section added, p. 1660, § 10, effective June 9. **L. 80:** (3) and (9) amended, p. 416, § 34, effective January 1, 1981. **L. 96:** (9) amended, p. 1775, § 82, effective July 1. **L. 2008:** (9) amended, p. 1913, § 125, effective August 5. **L. 2009:** (9) amended, (HB 09-1216), ch. 165, p. 730, § 10, effective August 5.

**37-47-138. Notice of election.** Notice of such election shall be given by publication by three consecutive weekly insertions in at least one newspaper of general circulation in the district or subdistrict holding the election, as determined by the board of directors. No other notice of an election held under this article need be given, unless otherwise provided by the board. A supplemental notice may be given by publication at such times and places as the board may determine to be necessary or convenient for correcting or otherwise modifying the original notice of election or for any other purpose.

**Source: L. 77:** Entire section added, p. 1661, § 10, effective June 9.

**37-47-139. Polling places.** (1) All polling places designated by resolution for an election shall be within the territorial limits of the district or subdistrict holding the election; but, if an election of the district or subdistrict is held concurrently with a primary or general election, the polling place for each precinct located wholly or partially within the district or subdistrict shall be the polling place for such precinct for the district or subdistrict election, regardless of whether or not such polling place is within the district or subdistrict.

(2) If the election of the district or subdistrict is not held concurrently with a primary or general election held under the laws of this state, there shall be one polling place in each of the election precincts which are used in the primary and general elections or in each of the consolidated precincts fixed by the board of directors, as the case may be.

**Source: L. 77:** Entire section added, p. 1661, § 10, effective June 9.



**37-47-140. Election supplies.** (1) The secretary of the district shall provide at each polling place ballots or ballot labels, or both, ballot boxes or voting machines, or both, instructions, electors' affidavits, and other materials and supplies required for an election by any law; and the secretary may provide ballots and marking devices suitable for voting and for the votes on the ballots to be counted on electronic vote-tabulating devices.

(2) Election officials may require the execution of an affidavit by any person desiring to vote at any election of the district or subdistrict to evidence his qualifications to vote, which affidavit shall be prima facie evidence of the facts stated therein.

**Source: L. 77:** Entire section added, p. 1661, § 10, effective June 9.

**37-47-141. Election returns.** (1) In the case of any election held under this article which is not held concurrently with a primary or general election, the election officials shall make their returns directly to the secretary of the district for the board of directors.

(2) In the case of any election held under this article which is consolidated with any primary or general election, the returns thereof shall be made and canvassed at the time and in the manner provided by law for the canvass of the returns of such primary or general election. Such canvassing body shall certify promptly and shall transmit to the secretary of the district for the board of directors a statement of the result of the vote upon any proposition submitted under this article.

(3) Upon receipt by the board of directors of election returns from election officials or upon receipt of such certificate from each such canvassing body, the board shall tabulate and declare the results of the election at any regular or special meeting held not earlier than five days following the date of the election.

(4) The board of directors shall cause the results of the election to be published at least one time in at least one newspaper having general circulation in the district.

**Source: L. 77:** Entire section added, p. 1662, § 10, effective June 9.

**37-47-142. Debt election contests.** (1) Any election declared to have carried on an authorization to issue any bonds, by approval of the bond question, or otherwise to incur an indebtedness by approval of the question thereon may be contested by any elector of the district or subdistrict holding the debt election by suit against it as contestee and defendant in any district court of any county in which the district or subdistrict holding the election is wholly or partially situate:

(a) When illegal votes have been received or legal votes rejected at the polls in sufficient numbers to change the results;

(b) For any error or mistake on the part of any of the judges of election, any county clerk and recorder, the secretary of the district, or their respective officers and employees in counting or declaring the result of the election, if the error or mistake is sufficient to change the result;

(c) For malconduct, fraud, or corruption on the part of any of the judges of election, any county clerk and recorder, the secretary of the district, or their respective officers and employees, if the malconduct, fraud, or corruption is sufficient to change the result;

(d) When the bonds or other indebtedness is authorized to be issued for an invalid purpose; or

(e) For any other cause which shows that the bonds or other indebtedness is not validly authorized at the election.

(2) The style and form of process, the manner of service of process and papers, the fees of officers, and judgment for costs and execution thereon shall be according to the rules and practices of the court.

(3) Before the court shall take jurisdiction of the contest, the contestor shall file with the clerk of the court a bond, with sureties, to be approved by the judge thereof, running to the district or subdistrict holding the debt election as contestee and conditioned to pay all costs in case of failure of the contestor to maintain his contest.

(4) When the validity of any bond or other indebtedness election is contested, the plaintiff or plaintiffs, within thirty days after the returns of the election are canvassed and the results thereof declared and published, or last published, as the case may be, shall file with the clerk of the court a verified written complaint setting forth specifically:

(a) The name of the party contesting the election and a statement that the plaintiff or each plaintiff is an elector of the district or subdistrict holding the election;

(b) The proposition or propositions voted on at the election which are contested, the name of the district or the subdistrict as defendant and contestee, and the date of the election; and

(c) The particular grounds of such contest.

(5) No such contest shall be maintained and no election shall be set aside or held invalid unless such a complaint is filed within the period prescribed in subsection (4) of this section.

(6) Except as otherwise provided in this article, the election laws pertaining to contested election cases of municipal offices as provided in part 13 of article 10 of title 31, C.R.S., of the "Colorado Municipal Election Code of 1965", as from time to time amended, shall be applicable to bond or other indebtedness elections; but any such contest shall be regarded as one contesting the outcome of the vote on the proposition authorizing the issuance of securities or otherwise incurring the indebtedness, rather than election to office, and the district or subdistrict as contestee, rather than a person declared to have been elected to office, shall be regarded as the defendant.

(7) If the board of directors declares the proposition authorizing the issuance of bonds or otherwise incurring the indebtedness to have carried and no contest is duly filed or if such a contest is filed after it is favorably terminated, the board may issue the bonds or otherwise incur the indebtedness authorized at the election at one time or from time to time.

**Source: L. 77:** Entire section added, p. 1662, § 10, effective June 9.

**37-47-143. Covenants and other provisions in bonds.** (1) Any resolution providing for the issuance of any bonds under this article payable from pledged revenues and any indenture or other instrument or proceedings pertaining thereto may at the discretion of the board of directors contain covenants or other provisions, notwithstanding that such covenants and provisions may limit the exercise of powers conferred by this article, in order to secure the payment of such bonds, in agreement with the holders of such bonds, including, without limitation, covenants or other provisions as to any one or more of the following:

(a) The pledged revenues and, in the case of general obligations, the taxes to be fixed, charged, or levied and the collection, use, and disposition thereof, including, without limitation, the foreclosure of liens for delinquencies, the discontinuance of services, facilities, or use of any properties or facilities, prohibition against free service, the collection of penalties and collection costs, and the use and disposition of any moneys of the district or subdistrict issuing bonds, derived or to be derived, from any source designated;

(b) The acquisition, improvement, or equipment of all or any part of properties pertaining to any project or any facilities;

(c) The creation and maintenance of reserves or sinking funds to secure the payment of the principal of and the interest on any bonds or of the operation and maintenance expenses of any facilities, or part thereof, and the source, custody, security, regulation, use, and disposition of any such reserves or funds, including, without limitation, the powers and duties of any trustee with regard thereto;

(d) Limitations on the powers of the district or subdistrict to acquire or operate, or permit the acquisition or operation of, any structures, facilities, or properties which may compete or tend to compete with any facilities;

(e) The vesting in a corporate or other trustee or trustees of such property, rights, powers, and duties in trust as the board of directors may determine, which may include any or all of the rights, powers, and duties of the trustee appointed by the holders of bonds, and limiting or abrogating the rights of such holders to appoint a trustee, or limiting the rights, duties, and powers of such trustee;



(f) Events of default, rights, and liabilities arising therefrom and the rights, liabilities, powers, and duties arising upon the breach by the district or subdistrict of any covenants, conditions, or obligations;

(g) The terms and conditions upon which the holders of the bonds or of a specified portion, percentage, or amount thereof, or any trustee therefor, shall be entitled to the appointment of a receiver, which receiver may enter and take possession of any facilities or service, operate and maintain the same, prescribe fees, rates, and other charges, and collect, receive, and apply all revenues thereafter arising therefrom in the same manner as the district or subdistrict itself might do;

(h) A procedure by which the terms of any resolution authorizing bonds or any other contract with any holders of district or subdistrict bonds, including, without limitation, an indenture of trust or similar instrument, may be amended or abrogated, and as to the proportion, percentage, or amount of bonds the holders of which must consent thereto, and the manner in which such consent may be given;

(i) The terms and conditions upon which any or all of the bonds shall become or may be declared due before maturity and as to the terms and conditions upon which such declaration and its consequences may be waived; and

(j) All such acts and things as may be necessary or convenient or desirable in order to secure the bonds or, in the discretion of the board of directors, tend to make the bonds more marketable, notwithstanding that such covenant, act, or thing may not be enumerated in this article, it being the intention of this article to give to the board of directors power to do in the name and on behalf of the district or subdistrict all things in the issuance of district or subdistrict bonds and for their security, except as expressly limited in this article.

**Source: L. 77:** Entire section added, p. 1663, § 10, effective June 9.

**37-47-144. Liens on pledged revenues.** (1) Revenues pledged for the payment of any bonds, as received by or otherwise credited to the district or subdistrict issuing bonds under this article, shall immediately be subject to the lien of each such pledge without any physical delivery thereof, any filing, or any further act.

(2) The lien of each such pledge and the obligation to perform the contractual provisions made in the authorizing resolution or other instrument pertaining thereto shall have priority over any or all other obligations or liabilities of the district or subdistrict, except as may be otherwise provided in this article or in the resolution or other instrument, and subject to any prior pledges and liens theretofore created.

(3) The lien of each such pledge shall be valid and binding as against all persons having claims of any kind in tort, in contract, or otherwise against the district or subdistrict, irrespective of whether or not such persons have notice thereof.

**Source: L. 77:** Entire section added, p. 1664, § 10, effective June 9.

**37-47-145. Rights - powers of holders of bonds - trustees.** (1) Subject to any contractual limitations binding upon the holders of any issue or series of bonds of the district or subdistrict issuing bonds under this article, or the trustee therefor, including, without limitation, the restriction of the exercise of any remedy to a specified proportion, percentage, or number of such holders, and subject to any prior or superior rights of others, any holder of bonds, or the trustee therefor, shall have the right and power, for the equal benefit and protection of all holders of bonds similarly situated:

(a) By mandamus or other suit, action, or proceeding at law or in equity, to enforce his rights against the district, subdistrict, or board of directors, or any combination thereof, or any of the officers, agents, and employees of the district or subdistrict to require and compel such district, subdistrict, or board or any of such officers, agents, or employees to perform and carry out their respective duties, obligations, or other commitments under this article and their respective covenants and agreements with the holder of any bond;

(b) By action or suit in equity, to require the district or subdistrict to account as if it were the trustee of an express trust;

(c) By action or suit in equity, to have a receiver appointed, which receiver may enter and take possession of any facilities and any pledged revenues for the payment of the bonds, prescribe sufficient fees, rates, and other charges derived from the facilities, and collect, receive, and apply all pledged revenues or other moneys pledged for the payment of the bonds in the same manner as the district or subdistrict itself might do in accordance with the obligations of the district or subdistrict; and

(d) By action or suit in equity, to enjoin any acts or things which may be unlawful or in violation of the rights of the holder of any bonds and to bring suit thereupon.

**Source: L. 77:** Entire section added, p. 1665, § 10, effective June 9.

**37-47-146. Investments and securities.** (1) The board of directors of the district or subdistrict, respectively, issuing bonds under this article, subject to any contractual limitations from time to time imposed upon the district or subdistrict by any resolution authorizing the issuance of the outstanding bonds of the district or subdistrict or by any trust indenture or other proceedings pertaining thereto, may cause to be invested and reinvested any proceeds of taxes, any pledged revenues, and any proceeds of bonds issued under this article in securities meeting the investment requirements established in part 6 of article 75 of title 24, C.R.S., and may cause such proceeds of taxes, revenues, district or subdistrict bonds, and securities to be deposited in any trust bank or trust banks within or without or both within and without this state and secured in such manner and subject to such terms and conditions as the board of directors may determine, with or without the payment of any interest on such deposit, including, without limitation, time deposits evidenced by certificates of deposit.

(2) Any such securities and any certificates of deposit thus held may, from time to time, be sold, and the proceeds may be so reinvested or redeposited as provided in this section.

(3) Sales and redemptions of any such securities and certificates of deposit thus held shall, from time to time, be made in season so that the proceeds may be applied to the purposes for which the money with which such securities and certificates of deposit were originally acquired was placed in the district or subdistrict treasury.

(4) Any gain from any such investments or reinvestments may be credited to any fund or account pledged for the payment of any district or subdistrict bonds issued under this article, including any reserve therefor, or any other fund or account pertaining to a project or any facilities, or the district's or subdistrict's general fund, subject to any contractual limitations in any proceedings pertaining to outstanding district or subdistrict bonds.

(5) It is lawful for any commercial bank incorporated under the laws of this state which may act as depository of the proceeds of any bonds issued under this article, any securities owned by the district or subdistrict, any proceeds of taxes, any pledged revenues, and any moneys otherwise pertaining to a project or any facilities, or any combination thereof, to furnish such indemnifying bonds and to pledge such securities as may be required by the board of directors.

**Source: L. 77:** Entire section added, p. 1665, § 10, effective June 9. **L. 89:** (1) to (3) and (5) amended, p. 1124, § 53, effective March 21.

**37-47-147. Rents and charges.** (1) (a) The district, any subdistrict, and any political subdivision of the state of Colorado contracting with the district or subdistrict and fixing and collecting annual rentals, service charges, and other charges, or any combination thereof, are, in supplementation of the powers provided in this article, authorized to fix and collect rents, rates, fees, tolls, and other charges, in this article sometimes referred to as "service charges", for direct or indirect connection with, or the use or services of, a water system, electrical system, joint system, or other facilities, including, without limitation, connection charges, minimum charges, and charges for the availability of service.

(b) Such service charges may be charged to and collected in advance or otherwise by a district from any political subdivision or person and by any political subdivision from any person contracting for such connection or use or services or from the owner or occupant,



or any combination thereof, of any real property which directly or indirectly is or has been or will be connected with any such facilities, and the political subdivision or owner or occupant of any such real property shall be liable for and shall pay such service charges to the district, subdistrict, or political subdivision fixing the service charges at the time when and place where such service charges are due and payable.

(c) Such service charges of the district or subdistrict may accrue from any date on which the board of directors reasonably estimates, in any resolution authorizing the issuance of any securities or other instrument pertaining thereto or in any contract with any political subdivision or person, that any facilities or project being acquired or improved and equipped will be available for service or use.

(2) (a) Such rents, rates, fees, tolls, and other charges, being in the nature of use or service charges, shall, as nearly as the district, subdistrict, or political subdivision fixing the service charges shall deem practicable and equitable, be reasonable, and such service charges shall be uniform throughout the district, subdistrict, or political subdivision for the same type, class, and amount of use or service of the facilities and may be based or computed either: On measurements of water, flow devices, or electric meters, duly provided and maintained by the district, subdistrict, or political subdivision, or any user as approved by the district, subdistrict, or political subdivision fixing such charges; or on the consumption of water or electricity in or on or in connection with the political subdivision, or any person, or real property, making due allowance for commercial use of water and infiltration of groundwater and discharge of surface runoff to the facilities, or on the number and kind of water or electric outlets on or in connection with the political subdivision, person, or real property, or on the water or electric fixtures or facilities in or on or in connection with the political subdivision, person, or real property; or on the number of persons residing or working in or on or otherwise connected or identified with the political subdivision, person, or real property, or on the capacity of the improvements in or on or connected with the political subdivision, person, or real property; or upon the availability of service or readiness to serve by the facilities; or on any other factors determining the type, class, and amount of use or service of the facilities; or on any combination of any such factors.

(b) Reasonable penalties may be fixed for any delinquencies, including, without limitation, interest on delinquent service charges from any date due at a rate of not exceeding one percent per month or fraction thereof, reasonable attorneys' fees, and other costs of collection.

(3) The district, subdistrict, or political subdivision fixing the service charges shall prescribe and, from time to time when necessary, revise a schedule of such service charges, which shall comply with the terms of any contract of the district, subdistrict, or political subdivision fixing the service charges.

(4) The general assembly has determined and declared that the obligations, arising from time to time, of the district, any subdistrict, any political subdivision, or any person to pay service charges fixed in connection with any facilities shall constitute general obligations of the district, subdistrict, political subdivision, or person charged with their payment; but, as such obligations accrue for current services and benefits from, and the use of, any such facilities, the obligations shall not constitute an indebtedness of the district, any subdistrict, or any political subdivision within the meaning of any constitutional, charter, or statutory limitation or any other provision restricting the incurrence of any debt.

(5) No board, agency, bureau, commission, or official, other than the board of directors of the district or subdistrict, respectively, or the governing body of the political subdivision fixing the service charges, has authority to fix, prescribe, levy, modify, supervise, or regulate the making of service charges or to prescribe, supervise, or regulate the performance of services pertaining to the facilities thereof, as authorized by this article; but this subsection (5) shall not be construed to be a limitation on the contracting powers of the board of directors of the district or any subdistrict, respectively, or the governing body of any such political subdivision.

**37-47-148. Miscellaneous powers.** (1) The district and any subdistrict thereof shall also have the following powers:

(a) To pay or otherwise defray and to contract to pay or defray, for any term not exceeding seventy-five years, without an election, except as otherwise provided in this article, the principal of, any prior redemption premiums due in connection with, any interest on, and any other charges pertaining to any securities or other obligations of the federal government, any subdistrict or the district, respectively, any political subdivision, or any person which were incurred in connection with any property thereof subsequently acquired by the district or any subdistrict and relating to either's facilities;

(b) To establish, operate, and maintain facilities within the district or any subdistrict or elsewhere, across or along any public street, highway, bridge, or viaduct or any other public right-of-way or in, upon, under, or over any vacant public lands, which public lands now are, or may become, the property of a political subdivision of this state, without first obtaining a franchise from the political subdivision having jurisdiction over the same; but the district or subdistrict shall cooperate with any political subdivision having such jurisdiction, shall promptly restore any such public street, highway, bridge, or viaduct or any such other public right-of-way to its former state of usefulness as nearly as may be and shall not use the same in such manner as permanently to impair completely or materially the usefulness thereof;

(c) To adopt, amend, repeal, enforce, and otherwise administer such reasonable resolutions, rules, regulations, and orders as the district or subdistrict shall deem necessary or convenient for the operation, maintenance, management, government, and use of the facilities of the district or subdistrict, as the case may be, and any other facilities under its control, whether situated within or without or both within and without the territorial limits of the district or subdistrict; and

(d) (I) To adopt, amend, repeal, enforce, and otherwise administer under the police power such reasonable resolutions, rules, regulations, and orders pertaining to water or electric services performed by any person through the district's or subdistrict's facilities or pertaining to facilities of the district or subdistrict, any political subdivision, or any person, or any combination thereof, reasonably affecting the activities of the district or subdistrict, directly or indirectly, as the board of directors may from time to time deem necessary or convenient.

(II) No such resolution, rule, regulation, or order shall be adopted or amended except by action of the board of directors on the behalf and in the name of the district or subdistrict, respectively, after a public hearing thereon is held by the board of directors, in connection with which any political subdivision owning or authorizing any facilities comparable to facilities of the district or subdistrict, as the case may be, whether therein or thereout, or both therein and thereout, and other persons of interest have an opportunity to be heard, after mailed notice of the hearing is given at least thirty days prior to the hearing by the secretary to each such political subdivision wholly or partly within the district or subdistrict proceeding under this article, and after notice of such hearing is given by publication at least once a week for three consecutive weeks in at least one newspaper of general circulation in the district or such subdistrict by the secretary to persons of interest, both known and unknown, the first publication to be made at least thirty days prior to the hearing.

**Source: L. 77:** Entire section added, p. 1668, § 10, effective June 9.

**37-47-149. Cooperative powers.** (1) The district and any subdistrict have the power to utilize and may utilize private industry, by contract, to carry out the design, construction, operation, management, manufacturing, marketing, planning, and research and development functions of the district or any subdistrict proceeding under this article, unless the district or subdistrict determines that it is in the public interest to adopt another course of action. The district or subdistrict, or both, may enter into long-term contracts with private persons, not exceeding a term of seventy-five years, without an election, for the performance of any such functions of the district or subdistrict, which, in the opinion of the district or subdistrict, can desirably and conveniently be carried out by a private person under contract; but any such contract shall contain such terms and conditions as shall enable



the district or subdistrict to retain reasonable supervision and control of such functions to be carried out or performed by such private persons pursuant to such contract.

(2) Subject to the provisions of section 37-47-133, the district and any subdistrict have the following powers:

(a) To accept contributions, grants, or loans from the state and the federal government for the purpose of financing the planning, acquisition, improvement, equipment, maintenance, and operation of any enterprise in which the district or subdistrict, or both, are authorized to engage, and to enter into contracts and cooperate with, and accept cooperation from, the federal government, the state, the subdistrict or the district, respectively, any political subdivision, any private firm, and any other person, or any combination thereof, in the planning, acquisition, improvement, equipment, maintenance, and operation and in financing the planning, acquisition, improvement, equipment, maintenance, and operation of any such enterprise in accordance with any legislation which the general assembly, congress, the governing body of any political subdivision, the board of directors or other governing body of any private firm, any other person, or any combination thereof may have adopted prior to the adoption of this article or may thereafter adopt, under which aid, assistance, and cooperation may be furnished by such cooperating entity or entities or other persons in the planning, acquisition, improvement, equipment, maintenance, and operation or in financing the planning, acquisition, improvement, equipment, maintenance, and operation of any such enterprise, including, without limitation, costs of engineering, architectural, and economic investigations and studies, surveys, designs, plans, working drawings, specifications, procedures, and other action preliminary to the acquisition, improvement, or equipment of any facilities, or any part thereof, and to do any and all things necessary in order to avail itself of such aid, assistance, and cooperation under any state, federal, or other legislation;

(b) To enter into, without any election, joint operating or service contracts and agreements; acquisition, improvement, equipment, or disposal contracts; or other arrangements for any term not exceeding seventy-five years, with the federal government, the state, the subdistrict or the district, respectively, any political subdivision, any private firm, or any other person, or any combination thereof, concerning the facilities, and any project or property pertaining thereto, whether acquired or undertaken by the district, by the subdistrict, by the federal government, by any political subdivision of this state or any other state, or by any person; and to accept contributions, grants, or loans from the cooperating entity or entities or other persons in connection therewith;

(c) To enter into and perform without any election, when determined by the board of directors to be in the public interest, contracts and agreements, for any term not exceeding seventy-five years, with the federal government, the subdistrict or the district, respectively, any political subdivision, or any person, or any combination thereof, for the provision and operation by the subdistrict or the district, respectively, of any facilities pertaining to such facilities of the district or subdistrict, as the case may be, any part thereof, or any project relating thereto, and the payment periodically thereby to the district or subdistrict of amounts at least sufficient, if any, in the determination of the board, to compensate the district or subdistrict for the cost of providing, operating, and maintaining such facilities serving the federal government, the subdistrict or the district, respectively, any political subdivision, or such other person, or any combination thereof, or otherwise;

(d) To enter into and perform, without any election, contracts and agreements, on a public bid basis, a competitive basis, or a negotiated basis, as the board of directors may determine, with the federal government, the subdistrict or the district, respectively, any political subdivision, any private firm, or any other person, or any combination thereof, for or concerning the planning, construction, lease, other acquisition, improvement, equipment, operation, maintenance, disposal, and financing of any property pertaining to the facilities of the district or subdistrict or to any project of the district or subdistrict, including, without limitation, any contract or agreement for any term not exceeding seventy-five years, pertaining to the joint ownership of the facilities as tenants in common thereamong, providing for the exchange of water or electric power, for backup water or power, pooling of resources, the designation of a manager for any such project or facilities supervised by

an engineering and operating committee of co-owners, or otherwise supervised; and otherwise to contract with water or power producers or users, or both;

(e) To cooperate with and act in conjunction with the federal government or any of its engineers, officers, boards, commissions, or departments, or with the state or any of its engineers, officers, boards, commissions, or departments, or with any political subdivision or any person in the acquisition, improvement, and equipment of any facilities or any part thereof authorized for the district or subdistrict or for any other works, acts, or purposes provided for in this article and to adopt and carry out any definite plan or system of work for any such purpose;

(f) To cooperate with the federal government, the subdistrict or district, respectively, any political subdivision, or any person, or any combination thereof, by an agreement therewith by which the district or the subdistrict may:

(I) Acquire and provide, without cost to the cooperating entity or entities, the land, easements, and rights-of-way necessary for the acquisition, improvement, and equipment of any properties;

(II) Hold the cooperating entity or entities free from and save it or them harmless from any claim for damages arising from the acquisition, improvement, equipment, maintenance, and operation of any facilities;

(III) Maintain and operate any facilities in accordance with regulations prescribed by the cooperating entity or entities; and

(IV) Establish and enforce regulations, if any, concerning the facilities which are satisfactory to the cooperating entity or entities;

(g) To provide, by any contract for any term not exceeding seventy-five years, or otherwise, without an election:

(I) For the joint use of personnel, equipment, and facilities of the district, the subdistrict, any political subdivision, or any person, or any combination thereof, including, without limitation, public buildings constructed by or under the supervision of the board of directors, the governing body of the political subdivision, or the board of directors or other governing body of a private firm or other person concerned, upon such terms and agreements and within such areas within the district or subdistrict, or otherwise, as may be determined, for the promotion and protection of health, comfort, safety, life, welfare, and property of the inhabitants of the district or subdistrict and any such political subdivision and any other persons of interest, and for water or electric services;

(II) For the joint employment of clerks, stenographers, and other employees pertaining to the facilities or any project, now existing or hereafter established, upon such terms and conditions as may be determined for the equitable apportionment of the expenses resulting therefrom;

(h) To provide for comprehensive planning and, where possible, coordinate operations of the district or subdistrict with the subdistrict or district, respectively, any and all such political subdivisions, private firms, and other persons, or any combination thereof, pertaining to water conservation and use and to the generation and use of electricity.

**Source: L. 77:** Entire section added, p. 1669, § 10, effective June 9.

**37-47-150. Joint action entity.** (1) The district or subdistrict and any other cooperating entity or entities relating to any project or facilities in which the district or the subdistrict is a party in interest may create a joint action entity, a separate body corporate, for the planning, construction, lease, other acquisition, improvement, equipment, operation, maintenance, disposal, and financing of any enterprise or properties relating to such project or such facilities.

(2) A joint action entity may exercise the powers granted to the district or the subdistrict by this article, other than the levy or fixing and collection of taxes, assessments, and service charges and the making and revising of rules and regulations under the police power.

**Source: L. 77:** Entire section added, p. 1671, § 10, effective June 9.



**37-47-151. Correlative powers of political subdivisions.** Any political subdivision of this state has the correlative powers to enable it to participate in cooperation with the district or any subdistrict in either's exercise of powers granted thereto by this article or otherwise granted by law.

**Source:** L. 77: Entire section added, p. 1671, § 10, effective June 9.

## ARTICLE 48

### Rio Grande Water Conservation District

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37-48-102.	Creation and name of district.	37-48-141.	Decree on appraisals.
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37-48-132.	Removal of structures.		
37-48-133.	Passing equipment through bridge or grade.		
37-48-134.	Functions and duties of board of managers.		
37-48-135.	Retention of personnel.		
37-48-136.	Appointment of appraisers.		
37-48-137.	Appraisals.		
37-48-138.	Report of appraisers - special improvement bonds.		

37-48-169.	Determination of revenue. (Repealed)	37-48-182.	Election supplies.
37-48-170.	Financing of project. (Repealed)	37-48-183.	Election returns.
37-48-171.	Refunding. (Repealed)	37-48-184.	Debt election contests.
37-48-172.	Application of proceeds. (Repealed)	37-48-185.	Covenants and other provisions in bonds.
37-48-173.	Limitation of actions. (Repealed)	37-48-186.	Liens on pledged revenues.
37-48-174.	Costs - board of managers to concur. (Repealed)	37-48-187.	Rights - powers of holders of bonds - trustees.
37-48-175.	Election to authorize debt.	37-48-188.	Investments and securities.
37-48-176.	Definition of elector.	37-48-189.	Rents and charges.
37-48-177.	Elections.	37-48-190.	Miscellaneous powers.
37-48-178.	Election resolution.	37-48-191.	Cooperative powers.
37-48-179.	Conduct of election.	37-48-192.	Joint action entity.
37-48-180.	Notice of election.	37-48-193.	Correlative powers of political subdivisions.
37-48-181.	Polling places.	37-48-194.	Refunding.
		37-48-195.	Costs - board of managers to concur.

**37-48-101. Legislative declaration.** In the opinion of the general assembly of the state of Colorado, the conservation of the water of the Rio Grande and its tributaries for beneficial use and the construction of reservoirs, ditches, and works for such purposes are of vital importance to the growth and development of the entire area and the welfare of all its inhabitants and that, to promote the health and general welfare of the state of Colorado, an appropriate agency for the conservation, use, and development of the water resources of the Rio Grande and its tributaries should be established and given such powers as may be necessary to safeguard for Colorado all waters to which the state of Colorado is equitably entitled.

**Source:** L. 67: p. 664, § 1. C.R.S. 1963: § 150-10-1.

**37-48-101.3. Definitions.** (1) "District" means the "Rio Grande Water Conservation District". The district is a body corporate and politic and a political subdivision of the state of Colorado.

(2) "Subdistrict" or "subdivision" embraces and includes the kind or character of special improvement districts created under the provisions of this article, including subdistricts organized under the name and style of "Water Users' Association No. .... of the Rio Grande Water Conservation District" and "Special Improvement District No. .... of the Rio Grande Water Conservation District". A subdistrict or subdivision is a body corporate and politic and a political subdivision of the state of Colorado.

**Source:** L. 77: Entire section added, p. 1672, § 11, effective June 9.

**37-48-102. Creation and name of district.** There is hereby created a water conservation district to be known and designated as "Rio Grande Water Conservation District" when the governor declares, pursuant to section 37-48-121, that such district is formed. Such district is hereby declared to be a body corporate under the laws of Colorado. Said district shall comprise the counties of Alamosa, Conejos, Rio Grande and those portions of Saguache and Mineral counties which are within the drainage basin of the Rio Grande river and its tributaries, including the closed basin thereof.

**Source:** L. 67: p. 664, § 1. C.R.S. 1963: § 150-10-2.

**37-48-103. Board of directors.** (1) The district shall be managed and controlled by a board of nine directors. The members of said board shall hold their offices for terms of three years and until their successors are appointed and qualified. Two members of such board shall be appointed from each of the counties of Conejos, Alamosa, Rio Grande, and Saguache, and one such member shall be appointed from Mineral county. At the time of his



appointment each director shall be a resident and freeholder of the county from which he is appointed or, if only a part of the county is included within the boundaries of said district, a resident and freeholder of such included part. Each director shall be appointed by the board of county commissioners of the county in which such director resides. He may be a member of the board of county commissioners of such county. The members of said board shall annually select one of their number to act as president and one of their number to act as vice-president, each to hold office for one year or until his successor is duly selected.

(2) The office of a director shall become vacant when any director ceases to reside in the county from which he was appointed or when declared vacant by a majority vote of all of the members of the board when any director has failed to attend two consecutive regular meetings without having been excused from attendance by the president. In the event a vacancy occurs in said office by reason of death, resignation, removal, or otherwise, it shall be filled for the remainder of the unexpired term by the board of county commissioners of the county from which said director originally came. Before entering upon the discharge of his duties, each director shall take an oath to support and defend the constitutions of the United States and of the state of Colorado and to impartially, without fear or favor, discharge the duties of a director of said district.

(3) Upon expiration of the terms of the present directors of the district in September, 1970, their successors shall be appointed by the respective boards of county commissioners as provided in this section for the following terms of office: One director from each of the counties of Alamosa, Rio Grande, and Saguache, whose terms of office shall expire on the date of the regular quarterly meeting of said board to be held in April, 1971, or as soon thereafter as their respective successors are appointed and qualified; one director from each of the counties of Conejos, Mineral, and Rio Grande, whose terms of office shall expire on the date of the regular quarterly meeting to be held in April, 1972, or as soon thereafter as their respective successors are appointed and qualified; and one director from each of the counties of Alamosa, Saguache, and Conejos, whose terms of office shall expire on the date of the regular quarterly meeting to be held in April, 1973, or as soon thereafter as their respective successors are appointed and qualified. Thereafter, each director shall be appointed for a term of three years, and his term shall expire on the date of the regular quarterly meeting to be held in April of the year that commences during the third year of his term, or as soon thereafter as his successor is duly appointed and qualified. For the purpose of determining such expiration date, the term of such director shall be taken as having commenced on the date of the first regular April quarterly meeting at which the term of his predecessor would have expired had he then been duly appointed and qualified.

**Source:** L. 67: p. 664, § 1. C.R.S. 1963: § 150-10-3. L. 69: p. 1236, § 1.

**37-48-104. Employees.** The board of directors of said district shall appoint a secretary and a treasurer. The same individual at the election of the board may hold both offices. The board shall likewise hire such other employees, including engineers and attorneys, as may be required to properly transact the business of the district, and said board is authorized to provide for the compensation of the secretary and treasurer and other appointees. The treasurer shall be required by the board to give bond with corporate surety in such amount as the board may fix and which it deems sufficient to protect the funds in the hands of the treasurer or under his control. Such bond is subject to the approval of the board.

**Source:** L. 67: p. 665, § 1. C.R.S. 1963: § 150-10-4.

**37-48-105. Powers of district.** (1) The district, in its corporate capacity, shall have power to:

(a) Sue and be sued in the name of the Rio Grande water conservation district and otherwise to participate in litigation;

(b) Acquire, operate, and hold in the name of the district such real and personal property as may be necessary to carry out the provisions of this article and to sell and

convey such property or its products as provided in this article or when said property is no longer needed for the purposes of said district;

(c) Borrow money and incur indebtedness and to issue bonds or other evidence of such indebtedness; except that the district may not incur any indebtedness in an aggregate amount exceeding the product of the valuation for assessment of the district multiplied by two mills;

(d) Make surveys and conduct investigations to determine the best manner of utilizing stream flows within the district and the amount of such stream flow or other water supply, and to locate ditches, irrigation works, and reservoirs to store or utilize water for irrigation, mining, manufacturing, or other purposes, and to make filings upon said water and initiate appropriations for the use and benefit of the ultimate appropriators, and to do and perform all acts and things necessary or advisable to secure and insure an adequate supply of water, present and future, for irrigation, mining, manufacturing, and domestic purposes within said district;

(e) Make contracts with respect to the relative rights of said district under its claims and filings and the rights of any other person, association, or organization seeking to divert water from any of the streams within said district;

(f) Contract with any agencies, officers, bureaus, and departments of the state of Colorado and the United States, including the department of corrections, to obtain services or labor for the initiation or construction of irrigation works, canals, reservoirs, power plants, or retaining ponds within said district;

(g) Enter upon any privately-owned land or other real property for the purpose of making surveys or obtaining other information, without obtaining any order so to do, if the same can be done without damage to the lands, crops, or improvements thereon;

(h) Contract with the United States government, the bureau of reclamation, or other agencies of the United States government for the construction of any works;

(i) Have and exercise the power of eminent domain to acquire ditches, reservoirs, or other works or lands or rights-of-way therefor which the district or a subdistrict thereof may need to carry out the plans of said district or subdistrict and in general to exercise any and all rights and powers of eminent domain conferred upon other agencies, as provided in articles 1 to 7 of title 38, C.R.S.;

(j) File upon and hold for the use of the public sufficient water of any natural stream to maintain a constant stream flow in the amount necessary to preserve fish, and to use such water in connection with retaining ponds for the propagation of fish for the benefit of the public;

(k) Exercise such implied powers and perform such other acts as may be necessary to carry out and effect any of the express powers hereby conferred upon such district;

(l) Participate in the formulation and implementation of nonpoint source water pollution control programs related to agricultural practices in order to implement programs required or authorized under federal law and section 25-8-205 (5), C.R.S., enter into contracts and agreements, accept funds from any federal, state, or private sources, receive grants or loans, participate in education and demonstration programs, construct, operate, maintain, or replace facilities, and perform such other activities and adopt such rules and policies as the board deems necessary or desirable in connection with nonpoint source water pollution control programs related to agricultural practices;

(m) Make loans or grants to any public entity, nonprofit corporation, not-for-profit corporation, carrier ditch company, mutual ditch or reservoir company, unincorporated ditch or reservoir company, or cooperative association within the boundaries of the district to carry out the purposes of the district;

(n) In connection with a plan of water management, assess annual service charges and user fees on the diversion or use of water within the district or a subdistrict. This paragraph (n) shall not allow service charges or user fees to be imposed on surface water diversions in a plan of water management to replace depletions from groundwater withdrawals or to reduce groundwater diversions.

(o) Establish a nonprofit or charitable land trust;

(p) Purchase, rent, lease, and accept donations of, or cooperate in the creation of, conservation easements; and



(q) Cooperate in the creation of conservation reserve programs and other similar programs.

(2) The district, in its own name, may issue revenue bonds to finance, in whole or in part, the construction of works, reservoirs, or other improvements for the beneficial use of water for the purposes for which it has been or may be appropriated, and to finance plans of water management, whether or not the interest on such bonds may be subject to taxation. Such revenue bonds shall be issued in such denominations and with such maximum net effective interest rate as may be fixed by the board of directors of the district and shall bear interest such that the net effective interest rate of the bonds does not exceed the maximum net effective interest rate authorized. The board shall pledge only rental proceeds, service charges, other income, or any combination thereof, from such works, plans of water management, or other improvements, and the district shall not be otherwise obligated for the payment thereof. At the time such revenue bonds are issued, the board of directors of the district shall make and enter in the minutes of the proceeding a resolution that sets out the due dates of such revenue bonds, the rates of interest thereon, the general provisions of the bonds, and a recital that the same are payable only out of rental proceeds, service charges, other income, or any combination thereof. In addition, the board of directors shall require the payment of rental charges, service charges, or other charges by the political subdivisions or persons who are to use or derive benefits from the water or other services furnished by such works, plans of water management, or improvements. Such charges shall be sufficient to pay operation and maintenance expenses thereof, to meet said bond payments, and to accumulate and maintain reserve and replacement accounts pertaining thereto as set forth in such resolution. Such resolution shall be irrevocable during the time that any of the revenue bonds are outstanding and unpaid. The revenue bonds shall be signed "Rio Grande Water Conservation District, By ....., President. Attest ....., Secretary", and they shall be countersigned by the treasurer.

**Source:** L. 67: p. 665, § 1. C.R.S. 1963: § 150-10-5. L. 75: (1)(i) amended, p. 1369, § 1, effective July 18. L. 77: (2) added, p. 1672, § 12, effective June 9; (1)(f) amended, p. 954, § 31, effective August 1. L. 88: (1)(l) added, p. 1024, § 6, effective April 6. L. 2007: (1)(m), (1)(n), (1)(o), (1)(p), and (1)(q) added and (2) amended, pp. 1271, 1272, §§ 1, 2, effective May 25.

**37-48-106. Principal office - meetings.** The board of directors of the district shall designate a place within the district where the principal office is to be maintained and may change such place from time to time. Regular quarterly meetings of said board shall be held within the district during the months of January, April, July, and October, the date and place of which shall be fixed by the board at its next preceding quarterly meeting and which shall be advertised by notice published once in a newspaper or newspapers which collectively provide general circulation throughout the district at least ten days before such meeting. The board is also empowered to hold such special meetings as may be required for the proper transaction of business. All special meetings of the board shall be held at locations which are within the boundaries of the district or which are within the boundaries of any county in which the district is located, in whole or in part, or in any county so long as the meeting location does not exceed twenty miles from the district boundaries. The provisions of this section governing the location of meetings may be waived only if the proposed change of location of a meeting of the board appears on the agenda of a regular or special meeting of the board and if a resolution is adopted by the board stating the reason for which a meeting of the board is to be held in a location other than under the provisions of this section and further stating the date, time, and place of such meeting. Special meetings may be called by the president of the board or by any three directors. Meetings of the board shall be public, and proper minutes of the proceedings of said board shall be preserved and shall be open to the inspection of any elector of the district during business hours.

**Source:** L. 67: p. 666, § 1. C.R.S. 1963: § 150-10-6. L. 69: p. 1237, § 2. L. 90: Entire section amended, p. 1506, § 22, effective July 1.

**37-48-107. Assessment and levy by board.** (1) The board of directors has the power to fix the amount of an assessment upon the property within the district not to exceed two and one-half mills for every dollar of valuation for assessment therein, as a level or general levy to be used for the purpose of paying the expenses of organization, for surveys and plans, to pay the salary of officers, and the per diem allowed to directors and their expenses, for expenses which may be incurred in the administration of the affairs of the district, and for all other lawful purposes of the district including capital construction.

(2) The amount of assessment on each dollar of valuation for assessment shall, in accordance with the schedule prescribed by section 39-5-128, C.R.S., be certified to boards of county commissioners of the various counties in which the district is located and by them included in their next annual levy for state and county purposes. Such amount so certified shall be collected for the use of such district in the same manner as are taxes for county purposes, and the revenue laws of the state for the levy and collection of taxes on real estate for county purposes, except as modified in this article, shall be applicable to the levy and collection of the amount certified by the board of directors of said district as aforesaid, including the enforcement of penalties, forfeiture, and sale for delinquent taxes.

(3) All collections made by the county treasurer pursuant to such levy shall be paid to the treasurer of the conservancy district on or before the tenth day of the next succeeding calendar month. If any items of expense have already been paid in whole or in part from any other sources by said district, they may be repaid from receipts of such levy. Such levy may be made, although the work proposed, or any part thereof, may have been found impracticable, or for other reasons abandoned. The collection of data and the payment of expenses therefor, including salaries of engineers, attorneys, and others, to conserve the water of said district and to enable said district to adopt plans for the orderly development of said district are hereby declared to be a matter of general benefit to the public welfare, and such that a tax for said purposes may be properly imposed, in the opinion of the general assembly.

(4) If any provision of this section is held unconstitutional or invalid by any court of competent jurisdiction, such decision shall not affect the validity or force of any other part of this section, or any other part of this article, and the general assembly hereby declares it would have enacted the remainder of this article without this section.

**Source:** L. 67: p. 666, § 1. C.R.S. 1963: § 150-10-7. L. 69: p. 1237, § 3. L. 83: (1) amended, p. 1397, § 1, effective March 22. L. 87: (2) amended, p. 1409, § 11, effective April 22.

**37-48-108. Creation of subdistricts.** (1) Notwithstanding the organization of the district provided for in this article, irrigation and internal improvement districts organized under articles 41, 42, 44, and 45 of this title and any other form of organization designed or intended to acquire, construct, or maintain reservoirs, ditches, and similar works for irrigation or other beneficial purposes under any law of the state of Colorado or of the United States may be organized to cover and include areas within the Rio Grande water conservation district and may likewise embrace territory within that district and partly out of the district. Whenever, in its opinion, such form of organization will help promote the local interests or accomplish improvements for any part of said district, the board of directors may recommend the organization of any such type of organization. The creation of the Rio Grande water conservation district shall not affect the existence of public irrigation districts heretofore created under article 4 of chapter 149, CRS 53, or water conservancy districts heretofore created pursuant to article 45 of this title.

(2) In addition to such forms of organization, whenever in the opinion of the board of directors of said district it is feasible and necessary that water rights, ditches, canals, reservoirs, wells, or other works which benefit only a part of the district should be acquired or constructed or that a plan of augmentation or plan of water management, or any combination of the foregoing, involving only a part of the district should be developed and put into effect, a local improvement district or subdivision or as many of such local improvement districts as may be necessary may be created. Such local improvement district, when organized under the provisions of this article, shall be designated as "Water



Users' Association No. .... in the Rio Grande Water Conservation District" or as "Special Improvement District No. .... in the Rio Grande Water Conservation District". Each subdistrict shall be numbered consecutively as created or organized.

(3) Subdistricts shall be created and managed as provided in sections 37-48-123 to 37-48-193. Except as otherwise provided in said sections, the board of directors and the engineers, attorneys, secretary, and other officers, agents, and employees of the district, so far as it may be necessary, may serve in the same capacity for such subdivision or subdistricts. A contract and agreement between the main district and a subdistrict, between subdistricts, between a subdistrict and a municipal water supplier, and between a subdistrict and an agency of the state of Colorado or the United States, may be made in the same manner as contracts and agreements between two districts.

(4) As used in this article, a "plan of water management" means a cooperative plan for the utilization of water and water diversion, storage, and use facilities in any lawful manner, so as to assure the protection of existing water rights and promote the optimum and sustainable beneficial use of the water resources available for use within the district or a subdistrict, and may include development and implementation of plans of augmentation and exchanges of water and groundwater management plans under section 37-92-501 (4) (c).

**Source:** L. 67: p. 667, § 1. C.R.S. 1963: § 150-10-8. L. 75: Entire section R&RE, p. 1369, § 2, effective July 18. L. 77: (3) amended, p. 1672, § 13, effective June 9. L. 2007: (3) and (4) amended, p. 1272, § 3, effective May 25.

**Editor's note:** The public irrigation law, article 4 of chapter 149, CRS 53, referred to in subsection (1) of this section, was repealed, but the provisions of said article 4 were preserved as to all districts formed under that article prior to 1963. (See L. 63, p. 1009.)

**37-48-109. Compensation of directors.** The directors of the district shall receive as compensation a sum not to exceed one hundred dollars per day while actually engaged in the business of said district and, in addition, shall be entitled to their actual traveling and transportation expenses when away from their respective places of residence on district business.

**Source:** L. 67: p. 667, § 1. C.R.S. 1963: § 150-10-9. L. 2007: Entire section amended, p. 357, § 3, effective April 2.

**37-48-110. Limitations on power to levy and contract.** (1) The district has no power of taxation or right to levy or assess taxes, except an annual levy not to exceed two and one-half mills on each dollar of the valuation for assessment of property in said district. The district has no power to contract or incur any obligation or indebtedness except as expressly provided in this article, and then any obligation or indebtedness so contracted or incurred is payable out of the funds derived through said limited tax and not otherwise, but said district, for and in behalf of any subdistrict or improvement district created under this article, shall have the right and authority to approve and incur subdistrict obligations and to issue warrants, notes, bonds, or other evidences of said obligations, as expressly authorized in this article and not otherwise, and such subdistrict obligations shall never be obligations or indebtednesses of the district and shall be payable only as provided in this article.

(2) All assessments under this article shall be collected by the county treasurers of the respective counties in which said real estate is situated at the same time and in the same manner as is provided by law for the collection of taxes for county and state purposes, and, if said assessments are not paid, the real estate shall be sold at regular tax sales for the payment of said assessments, interest, and penalties in the manner provided by the statutes of the state of Colorado for selling property for the payment of general taxes. If there are no bids at said tax sales for the property so offered, said property shall be struck off to the district, and the tax certificates shall be issued in the name of the district; and the board of directors has the same power with reference to the sale of said tax certificates as is now

vested in county commissioners and county treasurers when property is struck off to the counties.

(3) Tax deeds may be issued, based upon said certificates of sale, in the same manner that deeds are executed on tax sales on general state and county taxes.

**Source:** L. 67: p. 668, § 1. C.R.S. 1963: § 150-10-10. L. 73: p. 1419, § 111. L. 75: Entire section amended, p. 1370, § 3, effective July 18. L. 83: (1) amended, p. 1397, § 2, effective March 22.

**Cross references:** For use of the term "warrants", see § 37-48-146.

**37-48-111. Investment of surplus funds.** The board of directors of said district may invest any surplus funds of the district, including any amounts in the construction fund not needed for immediate use to pay the cost of construction of any project in any one of the subdistricts or to pay bonds or coupons or to meet current expenses, in securities meeting the investment requirements established in part 6 of article 75 of title 24, C.R.S. The board of directors of said district may require any funds of the district, or of any subdistrict, to be deposited with such depository or bank as may be designated by the board and likewise has authority to require the treasurer of the district to take from such depository a bond with corporate surety to insure payment of any such deposit, or to require such depository to insure payment of any such deposit, or to require such depository to pledge securities of the same kind as those in which the district is authorized to invest its funds to insure payment of any such deposit.

**Source:** L. 67: p. 668, § 1. C.R.S. 1963: § 150-10-11. L. 75: Entire section amended, p. 1371, § 4, effective July 18. L. 89: Entire section amended, p. 1125, § 54, effective July 1.

**37-48-112. Rules.** (1) The district has the power to make general rules for the conduct of its business, as well as the conduct of the business of any subdistrict therein, and by such rules may provide for the rental of water or other services that are to be furnished by said subdistrict to any municipality, public irrigation district, irrigation district, other quasi-municipal corporation in this state, or any agency of the state of Colorado or the United States, and to make contracts for the payment of the rental to be charged for any such water or services.

(2) Where a board of managers is established to carry out the general supervision and operational management of a plan of water management of a subdistrict, such board of managers shall, before undertaking any water management function, formulate and propose to the board of directors of the district rules and regulations which shall define the scope of the responsibility of the board of managers and the functional relationship between such board and the board of directors of the district in terms consistent with the requirements of this article. If such responsibility and relationship are described in the petition for the creation of the subdistrict, the rules and regulations must incorporate and be consistent therewith. Such rules and regulations shall also include operational rules and regulations for the plan of water management and any other operational function undertaken by the board of managers. Such rules and regulations, and any amendments thereto, may be adopted by the board of managers only after having been approved by the board of directors of the district.

**Source:** L. 67: p. 668, § 1. C.R.S. 1963: § 150-10-11. L. 75: Entire section R&RE, p. 1371, § 5, effective July 18. L. 2007: (1) amended, p. 1273, § 4, effective May 25.

**37-48-113. Court confirmation.** (1) (a) In its discretion, the board of directors, on the behalf and in the name of the district or any subdistrict that is a party in interest, may file a petition at any time in the district court in and for the county in which the district's principal office is maintained or, if both the district and one or more subdistricts are parties



to the petition, in the district court in and for the county in which any such subdistrict was organized praying for a judicial examination and confirmation of any power conferred or of any taxes, rates, including service charges and user fees, or other charges levied or proposed, or of any act, proceeding, or contract of the district, the subdistrict, or the subdistricts, or any combination thereof, as the case may be, whether or not said contract has been executed, including, without limitation, proposed contracts for the acquisition, improvement, equipment, maintenance, operation, or disposal of any properties or facilities for the benefit of the district, the subdistrict, or the subdistricts, as the case may be, and so including a proposed issue of revenue warrants, revenue bonds, special improvement bonds, or general obligation bonds, issued or to be issued on behalf of any such entity. Such petition shall set forth the facts whereon the validity of such power, tax, assessment, service charge, user fee, act, proceeding, or contract is founded and shall be verified by the president of the board of directors or the board of managers.

(b) Such action shall be in the nature of a proceeding in rem, and jurisdiction of all parties interested may be had by publication, mail, and posting, as provided in this article. Notice of the filing of the petition shall be given by the clerk of the court, under the seal thereof, stating in brief outline the contents of the petition and also stating where a full copy of any contract therein mentioned may be examined. The notice shall be served by publication at least once a week for five consecutive weeks in a daily or a weekly newspaper of general circulation published in the county in which the principal office of the district is located and, if said action is filed for a subdistrict organized in another county, in such county, by mailing copies of the notice by registered or certified mail, return receipt requested, to the boards of county commissioners of the several counties in which the parties in interest in such action are located wholly or in part, and by posting the same in the office of the district at least thirty days prior to the date fixed in said notice for the hearing on said petition. Jurisdiction shall be complete after such publication, mailing, and posting.

(c) Any owner of property in the district or any subdistrict filing the petition or any person interested in the contract or proposed contract or in the premises may appear and move to dismiss or answer the petition at any time prior to the date fixed for the hearing or within such further time as may be allowed by the court; and the petition shall be taken as confessed by all persons who fail to appear.

(2) The petition and notice shall be sufficient to give the court jurisdiction; and, upon hearing, the court shall examine into and determine all matters and things affecting the question submitted and shall make such findings with reference thereto and render such judgment and decree thereon as the case warrants. Costs may be divided or apportioned among any contesting parties in the discretion of the trial court. Review of the judgment of the court may be had as in other similar cases; except that such review must be applied for within thirty days after the time of the rendition of such judgment, or within such additional time as may be allowed by the court within thirty days. The Colorado rules of civil procedure shall govern in matters of pleadings and practice where not otherwise specified in this article. The court shall disregard any error, irregularity, or omission which does not affect the substantial rights of the parties.

**Source:** L. 67: p. 668, § 1. C.R.S. 1963: § 150-10-13. L. 75: Entire section R&RE, p. 1372, § 6, effective July 18. L. 77: Entire section R&RE, p. 1673, § 14, effective June 9. L. 2007: (1)(a) amended, p. 1273, § 5, effective May 25.

**Cross references:** For publication of legal notices, see part 1 of article 70 of title 24; for use of the term “warrants”, see § 37-48-146.

**37-48-114. Petition.** Before the Rio Grande water conservation district is established under this article, a petition shall be filed in the office of the clerk of the district court of the twelfth judicial district in and for Alamosa county, signed by not fewer than four hundred landowners, each of which owns eighty or more acres of land situated within the limits proposed to be organized into said district. The petition shall set forth the name of the proposed district and a general description of the boundaries of the proposed district and

shall pray for an election on the question of organization of the proposed district. No petition with the requisite signatures shall be declared void on account of alleged defects, but the court may permit the petition to be amended at any time to conform to the facts by correcting any error. Similar petitions, except for signatures, may be filed and together shall be regarded as one petition. All such petitions filed prior to the hearing on the first petition filed shall be considered by the court the same as though filed with the first petition placed on file. In determining whether the requisite number of landowners have signed the petition, the court shall be governed by the names as they appear upon the tax roll. Duplicate copies of the petition covering the lands in each county shall be prepared and sent to the treasurer of each such county. Each treasurer shall examine the copy of such petition sent to him and shall file a certificate with said district court in and for Alamosa county stating as to each signatory whether such person owns eighty acres of land or more. Such certificate shall be prima facie evidence as to such ownership. For the purposes of this article, any person owning land in joint tenancy or as a tenant in common shall be deemed an owner of all land so held.

**Source:** L. 67: p. 668, § 1. C.R.S. 1963: § 150-10-14.

**37-48-115. Notice and hearing on petition.** (1) Immediately after the filing of such petition, the court shall fix a time not less than forty-five days nor more than ninety days after the petition is filed for hearing thereon, and the clerk of said court shall cause notice by publication to be made of the pendency of the petition and of the time and place of hearing thereon. Such notice shall be published in a newspaper of general circulation published within the boundaries of the proposed district, such notice to be published once each week for four successive weeks. The clerk shall also notify the county commissioners of each of said counties of the pendency of the petition and the time and place of hearing thereon. No judge of the district court of the twelfth judicial district in and for the county of Alamosa shall be disqualified to perform duties imposed by this article by reason of ownership of property within the proposed district.

(2) Upon the day set for the hearing upon the original petition, if it appears to the court from the certificates of the county treasurers, and from such other evidence as may be adduced by any party in interest, that the petition is signed by the requisite number of owners of land, the court shall thereupon set a day certain for the holding of a meeting by the boards of county commissioners of the counties, part or all of which lands lie within the boundaries of the proposed Rio Grande water conservation district, and shall set the time and place of meeting.

**Source:** L. 67: p. 669, § 1. C.R.S. 1963: § 150-10-15.

**Cross references:** For publication of legal notices, see part 1 of article 70 of title 24.

**37-48-116. Election resolution.** On such day certain or as soon thereafter as is reasonably possible, the board of county commissioners of the counties, part or all of whose lands lie within the boundaries of the proposed Rio Grande water conservation district, shall meet at the time and place specified by such court, or at such other place as the county commissioners of said counties shall designate. The county commissioners of said counties shall call an election by resolution adopted at least thirty days prior to such election. Such resolution shall recite that the object and purpose of the election is to determine whether or not the Rio Grande water conservation district is to be formed. The county commissioners shall provide in the election resolution, or by supplemental resolution, for the appointment of sufficient judges and clerks of the election who shall be taxpaying electors residing within the proposed district and shall set their compensation. The election resolution shall also designate the precincts and polling places. The description of precincts may be made by reference to any order of the governing body of any county, municipality, or other public body in which the proposed district or any part thereof is situated, or by reference to any previous order or by other instrument of such governing body, or by detailed description of



such precincts or by other sufficient description. Precincts established by any such governing body may be consolidated in the election resolution by the county commissioners for the election.

**Source:** L. 67: p. 669, § 1. C.R.S. 1963: § 150-10-16.

**37-48-117. Conduct of election.** (1) Except as provided in this article, an election held pursuant to this article shall be opened and conducted in the manner provided by the laws of the state of Colorado for the conduct of general elections except that only taxpaying electors may vote in such election. Registration pursuant to the general election laws or any other statute is not required.

(2) Any taxpaying elector may vote in any election by absent voter's ballot under the terms and conditions and in substantially the same manner, insofar as is practicable, as prescribed in the "Uniform Election Code of 1992" for general elections.

**Source:** L. 67: p. 670, § 1. C.R.S. 1963: § 150-10-17. L. 80: (2) amended, p. 417, § 35, effective January 1, 1981. L. 92: (2) amended, p. 924, § 196, effective January 1, 1993.

**Cross references:** For the "Uniform Election Code of 1992", see articles 1 to 13 of title 1.

**37-48-118. Notice of election.** Notice of such election shall be given by publication. No other notice of election need be given.

**Source:** L. 67: p. 670, § 1. C.R.S. 1963: § 150-10-18.

**37-48-119. Polling places.** All polling places designated by the election resolution shall be within the area included within the proposed district.

**Source:** L. 67: p. 670, § 1. C.R.S. 1963: § 150-10-19.

**37-48-120. Election supplies.** The county commissioners of each county shall have provided at each polling place ballots or ballot labels, or both, ballot boxes or voting machines, or both, instructions, elector's affidavits, and other material and supplies required for a general election by law. The county commissioners, acting as a group, may procure all of the necessary supplies and may agree among themselves as to a division of the costs therefor. Election officials may require the execution of an affidavit by any person desiring to vote at any election of the district showing evidence of his qualifications as a taxpaying elector, which affidavit shall be prima facie evidence of the facts therein stated.

**Source:** L. 67: p. 670, § 1. C.R.S. 1963: § 150-10-20.

**37-48-121. Election returns.** The election officials shall make their returns directly to the county commissioners of said counties in care of the board of county commissioners of Alamosa county, Alamosa, Colorado. The county commissioners of said counties shall act as the canvassing body. The returns of said election shall be made and canvassed at any time and in the manner provided by law for the canvass of the returns of any general election. It is the duty of such canvassing body to certify promptly and to transmit to the governor of the state of Colorado a statement of the results of the vote upon the proposition submitted. If a majority of the voters voting in said election vote in favor of the formation of the Rio Grande water conservation district, the governor shall declare the same to be formed. If a majority of the voters voting in said election do not vote in favor of formation of said district, the governor shall declare that the district is not formed. If the governor declares said district to be formed, it shall be formed as of the time and date specified in his declaration of formation.

**Source: L. 67: p. 670, § 1. C.R.S. 1963: § 150-10-21.**

**37-48-122. Expenses of election - appropriation.** The expenses of the election shall be paid by the Colorado water conservation board to the extent of fifteen thousand dollars, and there is hereby appropriated to said board the sum of fifteen thousand dollars to be used for this purpose and no other. Each county is entitled to a fraction of said sum, the numerator of which is the election expense incurred by each such county and the denominator of which is the total election expense of all such counties.

**Source: L. 67: p. 670, § 1. C.R.S. 1963: § 150-10-22.**

**37-48-123. Procedure for establishment of subdistricts.** (1) Before any subdistrict is established under this article, a petition shall be filed in the office of the clerk of the district court of the county in which the territory to be embraced in said subdistrict or the greater part thereof is situate, signed by the board of directors of the district or by a majority of the owners representing a majority of the land situate within the limits of the territory proposed to be organized into a subdistrict.

(2) (a) The petition shall set forth the matters specified in this subsection (2).

(b) The proposed name of said subdistrict shall be set forth, whether it is designated "Water Users' Association No. .... in the Rio Grande Water Conservation District" or "Special Improvement District No. .... in the Rio Grande Water Conservation District".

(c) The petition shall recite that property within the proposed subdistrict will be benefited by the proposed reservoirs, ditches, canals, works, improvements, or plan of augmentation or plan of water management or combination thereof and shall set forth in a general way the nature and estimated cost thereof, together with a general statement of the nature of the anticipated benefits to be derived therefrom.

(d) A full description of the territory to be included in the proposed subdistrict shall be included in the petition. Said description need not be given by metes and bounds or by legal subdivision, but it shall be sufficient to enable a property owner to ascertain whether his property is within the territory proposed to be organized in a subdistrict. Such territory need not be contiguous if it is so situated that the organization as a single subdistrict of the territory described is such as to promote or tend to promote one or more of the objectives of this article as to all parts of the area proposed to be included.

(e) (I) The petition shall include a general description of the methods proposed to finance the proposed works and plans, including the acquisition, construction, maintenance, and operation thereof, with sufficient detail to enable a property owner within the proposed subdistrict to know whether the proposed methods of financing would result in the imposition of a lien or charge upon the taxable or assessable property within the subdistrict and the amount thereof and to know further that such proposed methods of financing would be authorized without further election by the signing of the petition by the requisite number of petitioners to authorize the creation of the subdistrict. Such methods of financing the acquisition, construction, and improvement of needed property, including planning and development, may include any one or more, or any combination, of the following:

(A) Revenue warrants pledging the income or other revenues from the proposed works, improvements, or plans;

(B) Special improvement bonds to be paid by special assessments on the property benefited and in an amount on each tract of land not in excess of the appraised benefits;

(C) Contracts of water users, mutual ditch or reservoir companies, or water users' associations creating liens upon lands within the subdistrict;

(D) The imposition of reasonable service charges or user fees by the district for the conferring by the subdistrict of any benefits upon or providing any service to any person or property;

(E) Contracts for the purchase of existing water rights or other property providing for payment of the purchase price on a deferred basis by installments or otherwise and which may provide further for pledging general or specific revenues of the subdistrict to the



payment thereof or which may create a lien to secure the payment thereof against the real property embraced in the subdistrict in the same manner as general obligation bonds;

(F) Acquisition of the use of water rights or other property by long- or short-term leases with or without a pledge of general or specific revenues of the subdistrict;

(G) General obligation bonds constituting a lien against the real property embraced in the subdistrict;

(H) The imposition of an ad valorem mill levy upon all taxable property within the subdistrict sufficient in amount to raise the funds necessary to pay any amount due on any contract, lease, or general obligation bond installment, including interest and other debt service requirement, which is entered into or issued pursuant to sub-subparagraph (E), (F), or (G) of this subparagraph (I) and the provisions of the petition and order creating the subdistrict, as general obligations of the subdistrict.

(II) None of the methods of financing or borrowing referred to in subparagraph (I) of this paragraph (e), including exercise of the authority to issue general obligation bonds, shall ever constitute or result in the creation of an indebtedness or obligation of the district or a lien or charge upon any property of the district. If general obligations are proposed, the petition shall allege and show that the benefit to the lands in the subdistrict will be not less than the total amount of general obligation bonds to be issued exclusive of interest.

(f) If such a petition is filed by the board of directors of the district, it shall contain a statement to the effect that a majority of the landowners owning a majority of the land of the territory in the proposed subdistrict petitioned the board of directors to organize said subdistrict, and a copy of the petition of said landowners shall be attached as an exhibit to the petition for organization of the subdistrict.

(g) If it is anticipated that a plan of water management, plan of augmentation, or both will be adopted for the subdistrict, the petition shall describe such plan or plans in general terms and may also request establishment of a board of managers of the subdistrict, to be made up of landowners within the subdistrict, which shall have the authority and responsibility of devising and carrying out such plan or plans. Where a board of managers is requested, the petition shall set forth in detail the qualifications, manner of selection, and terms of office of board members and may also define, in terms consistent with the requirements of this article, the scope of the responsibility of the board of managers and the functional relationship between such board and the board of directors of the district. Every such petition, when filed with the court, must be approved by the board of directors of the district, which approval shall be noted on the petition over the signature of the president or some other authorized officer thereof, unless the petition is signed and filed by the board of directors of the district.

(h) Said petition shall pray for the organization of a subdistrict by the name proposed.

(3) To determine whether a majority of landowners in said district have signed the petition, in the event the petition is signed by landowners, or have petitioned the board of directors of the district, in the event the petition is filed by the board of directors, the court may require the county treasurer of each county in which territory proposed to be included in said subdistrict is situated to furnish a certified list of names of landowners within said area, and the court shall be governed by the names as they appear upon said copy of the tax roll, and the same shall be prima facie evidence of ownership. If said tax roll shows a majority of the landowners have signed the main petition or petitioned the district for said organization, the same shall be considered as prima facie evidence that a majority of said landowners are in favor of the organization of said proposed subdistrict.

**Source:** L. 75: Entire section added, p. 1372, § 7, effective July 18. L. 2007: (2)(e)(I)(C), (2)(e)(I)(D), and (2)(g) amended, p. 1273, § 6, effective May 25.

**37-48-124. Time and place of hearing on petition.** (1) Immediately after the filing of such petition, the court wherein such petition is filed, by order, shall fix a place and time, not less than sixty days nor more than ninety days after the petition is filed, for hearing thereon, and thereupon the clerk of said court shall cause notice by publication, which may be substantially the same as provided in section 37-8-101, to be made of the pendency of the petition and of the time and place of the hearing thereon. The clerk of said court shall

also forthwith cause a copy of said notice to be mailed by United States registered mail to the board of county commissioners of each of the several counties having territory within the proposed subdistrict and to the board of directors of said district in the event that said petition is filed by the landowners.

(2) The district court in and for the county in which the petition for the organization of a subdistrict has been filed shall thereafter, for all purposes of this article, except as otherwise provided in this article, maintain and have original and exclusive jurisdiction, coextensive with the boundaries of said subdistrict, of lands and other property proposed to be included in said subdistrict or affected by said subdistrict, without regard to the usual limits of its jurisdiction.

(3) No judge of such court wherein such petition is filed shall be disqualified to perform any duty imposed by this article by reason of ownership of property within any subdistrict or proposed subdistrict or by reason of ownership of any property that may be benefited, taxed, or assessed therein.

**Source: L. 75:** Entire section added, p. 1375, § 7, effective July 18.

**37-48-125. Filing of protest - procedure - decree - fee.** (1) At any time after the filing of a petition for the organization of a subdistrict, and not less than thirty days prior to the time fixed by the order of the court for the hearing upon said petition, and not thereafter, a protest may be filed in the office of the clerk of the court wherein the proceedings for the organization of such subdistrict is pending, signed by a majority of the owners of the land in said proposed subdistrict protesting the organization or creation of said subdistrict. It is the duty of the clerk of the court forthwith, upon filing of said protest, to make as many certified copies thereof, including the signatures thereto, as there are counties into any part of which said proposed subdistrict extends and forthwith to place in the hands of the county treasurer of each of such counties one of said certified copies.

(2) It is the duty of each of such county treasurers to determine from the last tax rolls of his county and to certify to said district court under his official seal, prior to the day fixed for the hearing, the total number of owners of land situate in such proposed subdistrict within his county and the total number of owners of land situate in such proposed subdistrict within his county who have signed such protest. Such certificate shall constitute prima facie evidence of the facts so stated therein and shall be so received and considered by the court.

(3) Upon the day set for the hearing upon the original petition, if it appears to the court from such certificate and from such other evidence as may be adduced by any party in interest that the said protest is not signed by a majority of the owners of land within the proposed subdistrict, the court shall thereupon dismiss said protest and shall proceed with the hearing on the petition. If it appears to the court at said hearing that the protest is signed by any person or corporation who signed the original petition for the organization of said subdistrict, either to the court or to the district, then the signature of any such landowner upon the protest shall be disregarded and not counted. The board of county commissioners of any county in which any part of said proposed subdistrict is situate, or any owner of real property in said proposed subdistrict who has not signed the petition for the organization of said subdistrict, on or before the date set for the cause to be heard, may file objections to the organization and incorporation of the district. Such objections shall be limited to a denial of the statements in the petition and shall be heard by the court as an advanced case without unnecessary delay.

(4) Upon said hearing, if it appears that said petition has been signed and presented in accordance with the requirements of this article and that the allegations of the petition are true, the court shall enter a decree and therein adjudicate all questions of jurisdiction and declare the subdistrict organized and designate the name of said subdistrict, by which in all subsequent proceedings it shall thereafter be designated and known; and thereafter said subdistrict shall be deemed a special improvement district.

(5) Such order shall be binding upon the real property within the subdistrict, and no appeal or other remedy lies therefrom, and entry of such order shall finally and conclusively establish the regular organization of said subdistrict against all persons, except the state of Colorado, in an action in the nature of quo warranto to be commenced by the attorney



general within three months after said decree is entered, and not otherwise. Within ten days after such subdistrict has been declared duly organized by the court, the clerk of said court shall transmit to the county clerk and recorder, in each of the counties having lands in said subdistrict, copies of the findings and decree of the court establishing said subdistrict. The same shall be filed and recorded in the office of the county clerk and recorder, where they shall become permanent records. The county clerk and recorder in each county shall collect a fee of two dollars for filing and preserving the same.

**Source: L. 75:** Entire section added, p. 1375, § 7, effective July 18.

**37-48-126. Official plan for subdistrict.** (1) Upon organization of such subdistrict, the board of directors of said district, acting as the board of directors of said subdistrict, is authorized and required to prepare and adopt as the official plans for said subdistrict a comprehensive detailed plan, setting forth any plan of water management for the subdistrict, any improvements or works, including all canals, reservoirs, and ditches whether within or without the district to be constructed or used for the subdistrict, and the manner of utilization of the same in any plan of augmentation or plan of water management, together with the estimated cost of each principal part of said plan or plans, system, or works and the estimated cost of maintenance and operation thereof.

(2) Where a board of managers for the subdistrict is authorized by the petition and decree establishing the subdistrict, the preparation of the official plans for the subdistrict shall be carried out by the board of managers. Such official plans shall be submitted to and approved by the board of directors of the district before the holding of the public hearing thereon required by subsection (3) of this section. If the official plan approved by the board of directors includes a groundwater management plan within the meaning of section 37-92-501 (4) (c), the board of directors shall obtain the state engineer's approval of the groundwater management plan in accordance with section 37-92-501 (4) (c) before holding the public hearing required by subsection (3) of this section.

(3) (a) Upon the completion of such official plan, the board of directors shall cause notice thereof to be given by publication in each county in which said district may be located, in whole or in part, and shall permit the inspection thereof at the office of the district by all persons interested. Said notice shall fix the time and place for the hearing of all objections to said plan not less than twenty days or more than thirty days after the last publication of said notice. All objections to said plan shall be in writing and filed with the manager or secretary of the district at its office prior to the date established for the hearing. After said hearing before the board of directors, the board shall consult with the board of managers, if any, and shall adopt the plan as the official plan of the said subdistrict; adopt the plan with changes in which the board of managers, if any, concurs; or disapprove the plan, in which case the board of managers, if any, shall proceed as set forth in this section to prepare another plan.

(b) If any person objects to the official plan adopted pursuant to paragraph (a) of this subsection (3), such person may, within ten days after the adoption of said official plan, file in the office of the clerk of the court in the original case establishing the district his or her objections in writing, specifying the features of the plan to which objection is made, and, thereupon, the court shall fix a day for the hearing thereof before the court, at which time the court shall hear said objections and adopt, reject, or refer back the plan to the board of directors. If the official plan includes a groundwater management plan, the court may consolidate the hearing on objections to the official plan with any hearing on the groundwater management plan required by section 37-92-501 (4) (c).

(c) If the official plan includes a plan for augmentation, all issues concerning the adequacy of such plan under the applicable provisions of article 92 of this title shall be adjudicated pursuant to the procedures specified in said article.

(4) If the court should reject the plan, the board or the board of managers, as the case may be, shall proceed as in the first instance under this section to prepare another plan. If the court should refer the plan back to the board for amendment, the court shall continue the hearing to a day certain without publication of notice. If the court approves the plan as the official plan of the district, a certified copy of the order of the court approving the plan

shall be filed with the secretary of the district and incorporated into the records of the district. The official plan may be altered in detail as necessary from time to time but may not be altered in substance without notice and hearing as required in subsection (3) of this section, nor may the plan be altered in substance after the sale of bonds or warrants to finance the construction and development of the plan without notice to the holders of the bonds or warrants and opportunity for them to be heard, and in no event shall the plan be altered, except within the objects and purposes of the subdistrict as set forth in the petition to organize the same.

**Source:** L. 75: Entire section added, p. 1376, § 7, effective July 18. L. 2007: Entire section amended, p. 1274, § 7, effective May 25.

#### ANNOTATION

**Because adoption of an official water management plan is a quasi-legislative action, the most appropriate standard of review for the trial court is “reasonableness”.** When an official plan includes a groundwater management

plan, greater scrutiny is required; thus, the state engineer must approve the plan subject to the water court’s review, followed by the water court’s retained jurisdiction. In re Subdistrict No. 1, 270 P.3d 927 (Colo. 2011).

**37-48-127. Execution of plans.** The board of directors has full authority to devise, prepare for, execute, maintain, and operate all works or improvements necessary or desirable to complete, maintain, operate, and protect the works provided for by the official plan and to that end may employ and secure men and equipment under the supervision of the chief engineer or other agents or may in its discretion let contracts for such works, either as a whole or in parts.

**Source:** L. 75: Entire section added, p. 1377, § 7, effective July 18.

**37-48-128. Contracts.** When it is determined to let the work by contract, contracts in amounts in excess of ten thousand dollars shall be advertised after notice by publication calling for bids, and the board may reject any or all bids or may let the contract to the lowest responsible bidder who gives a good and approved bond with ample security, conditioned on the carrying out of the contract. Such contract shall be in writing and shall be accompanied by or shall refer to plans and specifications for the work to be done prepared by the chief engineer. Said contract shall be approved by the board of directors and signed by the president of the district and by the contractor and shall be executed in duplicate; but, in case of sudden emergency when it is necessary in order to protect the district, the advertising of contracts may be waived upon the unanimous consent of the board of directors; but the provisions of this section shall not apply if it is determined by the board of directors that the work be done on force account.

**Source:** L. 75: Entire section added, p. 1378, § 7, effective July 18. L. 2007: Entire section amended, p. 1276, § 8, effective May 25.

**37-48-129. Surveys and examinations.** The board of directors also has the right to establish and maintain stream gauges, rain gauges, and a flood warning service with telephone or telegraph lines or telephone or telegraph service, and it may make such surveys and examinations of rainfall and flood conditions, streamflow, and other scientific and engineering subjects as are necessary and proper for the purposes of the district and may issue reports thereon.

**Source:** L. 75: Entire section added, p. 1378, § 7, effective July 18.

**37-48-130. Cooperation with United States or other agencies.** The board of directors also has the authority to enter into contracts or other arrangements with the United States



government or any department thereof, with persons, railroads, or other corporations, with public corporations, with the state government of this or other states, and with irrigation, drainage, conservation, conservancy, or other improvement districts in this or other states for cooperation or assistance in constructing, maintaining, using, and operating the works of the district or for making surveys and investigations or reports thereon. It may purchase, lease, or acquire land or other property in adjoining states in order to secure outlets or for other purposes of the subdistrict and may let contracts and spend money for securing such outlets or other works in adjoining states.

**Source: L. 75:** Entire section added, p. 1378, § 7, effective July 18.

**37-48-131. Access to lands - penalty.** The board of directors or its employees or agents, including contractors and their employees and appraisers retained by the board and their assistants, may enter upon lands within or without the district in order to make surveys and examinations to accomplish the necessary preliminary purposes of the district or to have access to the work, being liable, however, for actual damage done; but no unnecessary damage shall be done. Any person or corporation preventing such entry commits a class 2 petty offense and, upon conviction thereof, shall be punished by a fine of not more than fifty dollars.

**Source: L. 75:** Entire section added, p. 1378, § 7, effective July 18.

**37-48-132. Removal of structures.** (1) For the accomplishment of the official plan, the board of directors has full power to improve in alignment, section, grade, or location, or in any other manner, any watercourse; and it may remove, widen, lengthen, lower, raise, or otherwise change any public or private road bridge or railroad bridge, any flume, aqueduct, or telephone, telegraph, gas, oil, sewer, water, or other pipeline, or any other construction over, across, in, into, under, or through any such watercourse, or it may require the same to be done. Such provisions shall apply to all such changes specified by the official plan or reasonably necessary for the accomplishment of the same; but if any such change is made necessary in any construction because of the failure of the same to permit the free flow of water in such stream in time of flood or to permit the necessary enlargement or protection of the channel, the owner of such construction shall make such change and all adjustments of grade, roadway, track, approach, or other construction incidental thereto without cost to the subdistrict and without any claim for damages against the subdistrict or district; but the subdistrict shall pay the cost of excavating the earth for the enlargement of any channel or for placing earth for the filling of any channel where such excavation or filling is required as a part of the official plan in making the changes outlined in this section. The subdistrict shall not be required to make such fill or excavation unless the same would be necessary to the official plan if the construction or work so changed did not exist.

(2) Before the removal, change, or modification of any work or construction outlined in this section, the board of directors shall give notice to the owner thereof, requiring that the same be adapted to the official plan. In case such removals, changes, or adjustments are not commenced and completed by the owner within the respective times specified therefor in such notice, which time shall be reasonable under all circumstances, such removals, changes, or adjustments may be made by the district at the expense of the owner.

**Source: L. 75:** Entire section added, p. 1378, § 7, effective July 18.

**37-48-133. Passing equipment through bridge or grade.** In case it is necessary to pass any dredge boat or other equipment through a bridge or grade of any railroad company or other corporation, county, city, town, or other municipality, the board of directors shall give notice to the owner of said bridge or grade that the same shall be removed temporarily to allow the passage of such equipment or that an agreement be immediately entered into with regard thereto. The owner of said bridge or grade shall keep an itemized account of the cost of the removal and, if necessary, of the replacing of said bridge or grade; and the

necessary and actual cost shall be paid by the subdistrict. In case the owner of said bridge or grade fails to commence or complete provision for the passage of said equipment within the time specified in the notice, the board of directors may remove such bridge or grade at the subdistrict's expense, interrupting traffic in the least degree consistent with good work and without unnecessary damage or delay. In case said board is hindered or prevented from so doing, the owner of said bridge or grade shall be liable for all damage resulting to the subdistrict therefrom.

**Source: L. 75:** Entire section added, p. 1379, § 7, effective July 18.

**37-48-134. Functions and duties of board of managers.** If the subdistrict has a board of managers, any of the functions and duties enumerated in sections 37-48-127 to 37-48-133 may be performed by the board of managers to the extent provided in the petition or in the rules and regulations of the subdistrict; except that all contracts shall be subject to approval by the board of directors and, further, except that title to all property acquired, developed, or constructed in the formulation, execution, and operation of the official plan of the subdistrict shall be taken and held in the name of the district, and the district shall hold and own the same for the purposes and objects of the subdistrict.

**Source: L. 75:** Entire section added, p. 1379, § 7, effective July 18.

**37-48-135. Retention of personnel.** If the subdistrict has a board of managers and if it is so provided in the petition or in the rules and regulations of the subdistrict, the board of managers may retain engineers, attorneys, and management and other personnel separate and apart from those employed by the district.

**Source: L. 75:** Entire section added, p. 1379, § 7, effective July 18.

**37-48-136. Appointment of appraisers.** If the plan of financing set forth in the petition and order creating the subdistrict utilizes special improvement bonds, paid by special assessments upon the property benefited within the subdistrict, as a means of financing the execution of the official plan, then, at the time of making its order organizing the district or at any time thereafter, the court shall appoint a board of three appraisers, referred to in this article as the "board of appraisers" or the "appraisers", whose duty it shall be to appraise the lands or other property within and without the district to be acquired for rights-of-way, reservoirs, and other works of the district and to appraise all benefits and damages accruing to all land within or without the district by reason of the execution of the official plan. Each of the appraisers, before taking up his duties, shall take and subscribe to an oath that he will faithfully and impartially discharge his duties as such appraiser and that he will make a true report of such work done by him. The appraisers at their first meeting shall elect one of their own number chairman, and minutes of their meetings shall be maintained. A majority of the appraisers shall constitute a quorum, and a concurrence of the majority in any matter within their duties shall be sufficient for its determination. The court, by order, may remove any appraiser at any time and shall fill all vacancies in the board of appraisers or may appoint a new board, as occasion may require, which new board, if appointed, shall perform all the duties and exercise all the powers of the board of appraisers of the district.

**Source: L. 75:** Entire section added, p. 1380, § 7, effective July 18.

**37-48-137. Appraisals.** (1) During the preparation of an official plan that utilizes special improvement bonds for financing, the board of appraisers shall examine and become acquainted with the nature of the plans for the improvement of the lands and other property affected thereby in order that they may be better prepared to make appraisals for the special improvement bonds.

(2) When the official plan utilizing special improvement bonds is adopted by the district, the secretary of the district shall at once notify the appraisers, and they shall



thereupon proceed to appraise the benefits of every kind to all land and property within the subdistrict that will result from the special improvements to be financed by the special improvement bonds in the official plan. The appraisers shall also appraise the damages sustained and the value of the land and other property necessary to be acquired by the district in carrying out the official plan. In the progress of their work, the appraisers shall have the assistance of the attorney, engineers, secretary, and other agents and employees of the district or subdistrict.

**Source:** L. 75: Entire section added, p. 1380, § 7, effective July 18. L. 2007: Entire section amended, p. 1276, § 9, effective May 25.

**37-48-138. Report of appraisers - special improvement bonds.** (1) The board of appraisers shall prepare a tabulated report of its findings, which shall be bound in book form and which shall be known as the conservation district appraisal record for special improvement bonds. Such record shall contain the names of the owners of property appraised as they appear on the tax rolls or from the records of the office of the county clerk and recorder, a description of the property appraised, and the amount of benefits appraised. No error in the names of the owners of property or in the descriptions thereof shall invalidate said appraisal or the levy of assessments or taxes based thereon if sufficient description is given to identify such property.

(2) When the report is completed, it shall be signed by at least a majority of the appraisers and deposited with the clerk of the court, who shall file it in the original case. At the same time certified copies of that part of the report giving the appraisal of benefits in any county other than that in which the original case is pending shall be made and filed with the county clerk and recorder of such county.

**Source:** L. 75: Entire section added, p. 1380, § 7, effective July 18. L. 2007: (1) amended, p. 1276, § 10, effective May 25.

**37-48-139. Notice of hearing on appraisals.** (1) Upon the filing of the report of the appraisers, the clerk of the court in which the original cause is pending shall, upon order of the court, give notice thereof by publication in each county in the subdistrict. It shall not be necessary for said clerk to name the parties interested, but the notice shall specify:

- (a) The whole cost of the improvement, work, or acquisition;
- (b) The share apportioned to each lot or tract of land;
- (c) That complaints or objections may be made thereto, in writing, by the owners of the lands affected and filed in the office of the clerk of the court within ten days after the publication of such notice and that the same shall be heard and determined by the court.

(2) Where lands in different counties are mentioned in said report, it shall not be necessary to publish in each county a description of all the lands in the district, but only of that part of the said lands situate in the county in which publication is made.

**Source:** L. 75: Entire section added, p. 1381, § 7, effective July 18.

**37-48-140. Hearing on appraisals.** Any property owner may accept the appraisals of benefits as made by the appraisers and shall be construed to have done so unless, within ten days after the last publication provided for in section 37-48-139, he has filed exceptions to said report or to any appraisal of benefits. All exceptions shall be heard by the court, beginning not less than twenty days nor more than thirty days after the last publication provided for in section 37-48-139, and determined in advance of other business so as to carry out, liberally, the purposes and needs of the subdistrict. The court may, if it deems necessary, return the report to the board of appraisers for its further consideration and amendment and may enter its order to that effect. If, however, the appraisal roll as a whole is referred back to the appraisers, the court shall not resume the hearing thereon without new

notice, as for an original hearing thereon; but the court may, without new notice, order the appraisers to revise and amend the roll when the order of the court specifies the changes to be made.

**Source: L. 75:** Entire section added, p. 1381, § 7, effective July 18.

**37-48-141. Decree on appraisals.** If it appears to the satisfaction of the court, after having heard and determined all said exceptions, that the estimated cost of constructing the improvements contemplated in the official plan is less than the benefits appraised, the court shall approve and confirm said appraisers' report as so modified and amended, and such findings and appraisals shall be final and incontestable, except as provided in this article. In case the court finds that the benefits appraised are less than the estimated total cost of the execution of the official plan, exclusive of interest on deferred payments, it may at its discretion return said official plan to the directors of the district with an order directing them to prepare new or amended plans, or it may dissolve the subdistrict after having provided for the payment of all expenses theretofore incurred.

**Source: L. 75:** Entire section added, p. 1381, § 7, effective July 18.

**37-48-142. Filing decree.** Upon the entry of the order of the court approving the report of the appraisers, the clerk of the said court in which the same is entered shall transmit to the secretary of the district a certified copy of the said decree and of the appraisals as confirmed by the court.

**Source: L. 75:** Entire section added, p. 1381, § 7, effective July 18.

**37-48-143. Validation of irregular proceedings.** (1) Minor insubstantial irregularities in any notice or proceeding shall not make any proceeding invalid.

(2) In case it is found upon a hearing that, by reason of some irregularity or defect in the proceedings, the appraisal has not been properly made, the court may, nevertheless, on having proof that expense has been incurred which is a proper charge against the property of the complainant, render a finding as to the amount of benefits to said property and appraise the proper benefits accordingly, and thereupon said land shall be assessed as other land equally benefited.

(3) In the event that at any time, either before or after the issuance of bonds, the appraisal of benefits, either as a whole or in part, is declared by any court of competent jurisdiction to be invalid by reason of any defect or irregularity in the proceedings therefor, whether jurisdictional or otherwise, the said district court where the original case is pending is authorized, on the application of the board of directors of the said district or on the application of any holder of any bonds which may have been issued pursuant to this article, promptly and without delay to remedy all defects or irregularities, as the case may require, by causing to be made a new appraisal of the amount of benefits against the whole or any part of the lands in the said district, as the case may require.

**Source: L. 75:** Entire section added, p. 1382, § 7, effective July 18.

**37-48-144. Compensation of appraisers.** Appraisers, when appointed under the provisions of this article, shall receive such reasonable compensation as shall be fixed by the court in its order of appointment.

**Source: L. 75:** Entire section added, p. 1382, § 7, effective July 18.

**37-48-145. Preliminary fund.** (1) As soon as any subdistrict has been organized, the board of directors may fix the amount of assessment upon the property within the subdistrict at a level rate to be used for the purpose of paying the expenses of organization, for surveys



and plans, and for other incidental expenses that may have been incurred prior to the time when money is received from the sale of bonds or otherwise. Such assessment shall not exceed five mills for every dollar of valuation for assessment of such property unless the petition for creation of the subdistrict and the order for the district court thereon provides for a higher rate. In accordance with the schedule prescribed by section 39-5-128, C.R.S., the amount of assessment for each dollar of valuation for assessment shall be certified to the boards of county commissioners of the various counties in which the district, or any portion thereof, is located and by them included in their next annual levy for state and county purposes. Said amount shall be collected for the use of such subdistrict in the same manner as are taxes for county purposes, and the revenue laws of the state for the levy and collection of ad valorem taxes on real estate for county purposes, except as modified in this article, shall be applicable for the levy and collection of the amount certified by the directors of such district as aforesaid, including the enforcement of penalties and forfeiture for delinquent taxes.

(2) All collections made by the county treasurer pursuant to such levy shall be paid to the treasurer of the district on or before the tenth day of the next succeeding calendar month. If such items of expense have already been paid in whole or in part from moneys advanced by the district for subdistrict use or from other sources, they may be repaid from the receipts of such levy, and such levy may be made even though the work proposed may have been found impracticable or for other reasons may have been abandoned. The information collected by the necessary surveys, the appraisal of benefits and damages, and other information and data are declared to constitute benefits for which an assessment may be levied. In case a district is dissolved or abandoned for any cause whatsoever before the work is constructed, the data, plans, and estimates which have been secured shall be filed with the clerk of the court in which the district was organized and shall be matters of public record available to any person interested.

**Source:** L. 75: Entire section added, p. 1382, § 7, effective July 18. L. 87: (1) amended, p. 1410, § 12, effective April 22. L. 2007: (1) amended, p. 1277, § 11, effective May 25.

**37-48-146. Power to borrow money for the preliminary fund.** In order to facilitate the preliminary work, the board of directors may borrow money at a net effective interest rate as determined by the board and, as evidence of the debt so contracted, may issue and sell or may issue to contractors or others negotiable evidences of debt, in this article called “warrants”, and may pledge, after it has been levied, the preliminary assessment of not exceeding five mills for the repayment thereof, or may pledge the revenue from any service charge or user fee to be levied by the subdistrict. If any warrant so issued by the board of directors is presented for payment and is not paid for want of funds in the treasury, that fact, with the date of presentation, shall be endorsed on the back of such warrant, which shall thereafter draw interest at the rate specified in the endorsement, not exceeding the net effective interest rate as when issued, until such time as there is money on hand sufficient to pay the amount of said warrant with interest.

**Source:** L. 75: Entire section added, p. 1383, § 7, effective July 18. L. 2007: Entire section amended, p. 1277, § 12, effective May 25.

**37-48-147. Directors bound by financing plan.** (1) The board of directors of the district shall be bound by the plan of financing set forth in the petition for the organization of the subdistrict and approved by the decree of the district court. The appointment of appraisers shall not be necessary if the official plan adopted does not utilize special improvement bonds as a means of financing the subdistrict official plan, but the district or the subdistrict board of managers, as the case may be, may nevertheless retain appraisers as needed to appraise the value of property to be acquired.

(2) If the plan of financing provides for the issuance of general obligation bonds of the subdistrict, such bonds shall be signed “Water Users’ Association No. .... in the Rio Grande

Water Conservation District, by ....., President, Attest ....., Secretary”, or “Special Improvement District No. .... in the Rio Grande Water Conservation District, by ....., President, Attest ....., Secretary”. They shall be countersigned by the treasurer. General obligation bonds shall recite that they are obligations of the subdistrict, are issued pursuant to the provisions of this article, and are to be payable at the time, in the manner, and with the rate of interest therein specified and that the same were issued under and pursuant to a court decree and a resolution of the board of directors authorizing the issue of said obligations and referring to the date of said resolution. Said bonds shall further recite that they are payable from funds to be derived by special assessments and tax levies against the property in said subdistrict and other revenues derived from the operation of the subdistrict’s official plan, as provided by the plan of financing in the petition for organization of the subdistrict, and not otherwise, that the same are not to be deemed to be an obligation of the Rio Grande water conservation district but only an obligation of said subdistrict, and that the district itself is not to be obligated in any manner for the payment of said bonds. If there is a board of managers for the subdistrict, the resolution of the board of directors authorizing said obligations shall be approved by the board of managers before being adopted by the board of directors.

**Source: L. 75:** Entire section added, p. 1383, § 7, effective July 18. **L. 2007:** Entire section amended, p. 1277, § 13, effective May 25.

**37-48-148. Special assessments - procedure in making.** (1) If the proceedings for the organization of the subdistrict, including the petition and the decree entered thereon, provide for the financing of the construction or acquisition of the works or other improvements proposed and of the other steps necessary to the development and implementation of the subdistrict’s official plan by special assessments to be levied against the appraised benefits to property within said subdistrict, then the board of directors may make special assessments from time to time, as required, and, in making the assessments, the board shall be guided by the procedure for the levy of similar assessments under the conservancy law of the state of Colorado, articles 1 to 8 of this title, and particularly the provisions of said law appearing in sections 37-5-104 to 37-5-106, and the same shall apply to subdistricts created under this article.

(2) From time to time, as the affairs of the subdistrict may demand, the board of directors may levy on all property to which benefits are provided by the subdistrict’s official plan a special assessment of such portion of said benefits as may be found necessary by the board to pay the cost of any appraisal, the preparation and execution of the official plan for said subdistrict, and the superintendence of construction and administration during the period of construction, plus ten percent of the total to be added for contingencies, but not to exceed in the total of principal the appraised benefits so adjudicated. The special assessments, to be known as the “construction fund special assessment”, shall be apportioned to and levied on each tract of land or other property in the district in proportion to the benefits appraised and not in excess thereof, and in case special improvement bonds are issued, as provided in section 37-48-149, then the amount of interest that will accrue on such bonds as estimated by the board of directors shall be included in and added to the assessment, but the interest to accrue on account of the issuance of the special improvement bonds shall not be construed as a part of the cost of construction in determining whether or not the expenses and cost of making the improvement are or are not equal to or in excess of the benefits appraised.

(3) As soon as the special assessment is levied, the secretary of the subdistrict, at the expense thereof, shall prepare in duplicate an assessment of the subdistrict. It shall be in the form of a well-bound book endorsed and named “Construction Fund Special Assessment Record of Water Users’ Association No. ...., or Special Improvement District No. ...., of the Rio Grande Water Conservation District”. Said record shall be in the form of similar records for conservancy districts under the laws of this state, particularly as provided in section 37-5-104. The special assessments may be paid in the manner provided in section 37-5-105 relating to conservancy districts under the laws of this state. All proceedings



provided in said sections with respect to conservancy districts shall apply to the special assessments, the records thereof, and the manner of payment of special assessments of subdistricts organized under this article.

**Source:** L. 75: Entire section added, p. 1384, § 7, effective July 18. L. 2007: Entire section amended, p. 1278, § 14, effective May 25.

**37-48-149. Special improvement bonds.** (1) The board of directors of the district may issue as obligations of the subdistrict, not as obligations of the Rio Grande water conservation district, special improvement bonds to be paid out of special improvement assessments made by the board of directors against all lands in the subdistrict benefited by the improvements financed by the bond proceeds, which special improvement assessments shall not exceed in the aggregate an amount equal to ninety percent of the amount of benefits determined to have accrued to said lands by reason of such improvements and unpaid at the time of issue of said bonds. Such bonds shall contain a recital to the effect that they are issued under and in accordance with the provisions of this article as special improvement bonds and are payable out of special improvement assessments to be levied against the property in said subdistrict and not otherwise.

(2) The special improvement bonds issued pursuant to subsection (1) of this section shall be signed "Water Users' Association No. ...., or Special Improvement District No. ...., of the Rio Grande Water Conservation District, by ....., President", and counter-signed "....., Treasurer". Otherwise said bonds shall be in such denominations and become due at such dates, with interest at such rate, payable either annually or semiannually, but not exceeding the rate of ten percent per annum, and contain such other provisions as may be fixed by the board of directors, not inconsistent with the provisions of this article. Except as otherwise expressly modified in this article, the law relating to the form and issuance of special improvement bonds of conservancy districts under the laws of this state, particularly section 37-5-106, shall apply and govern officers of the district in the issuance and sale of said bonds; and other provisions of said law with respect to the levy of assessments for the payment of said bonds with interest, particularly section 37-5-110, shall likewise be applicable to the bonds of a subdistrict organized under this article. If the subdistrict has a board of managers, the board of managers shall annually determine and certify to the board of directors of the district the total amount of the special improvement assessments to be collected; and the board of directors of the district, if it deems the amount so certified to be correct, shall order and levy the total special improvement assessments and otherwise conform to the procedure set forth in section 37-5-110.

**Source:** L. 75: Entire section added, p. 1384, § 7, effective July 18. L. 2007: Entire section amended, p. 1279, § 15, effective May 25.

**37-48-150. Manner of collection - tax sale - certificate of purchase - tax deed.** (1) Lands sold for delinquent special improvement assessments, special assessments, service charges, or user fees under this article shall be struck off to the district, or bid in for the district, in like manner and effect, including issuance of a deed therefor, as provided by law with respect to lands struck off to, or bid in for, counties, cities, or towns, as the case may be; but, when a certificate of purchase has been issued to the district with respect to any lands, no certificate of purchase for subsequent special improvement assessments, special assessments, service charges, or user fees shall be issued with respect to the same lands, except to the district, until all special improvement assessments, special assessments, service charges, or user fees represented by certificates of purchase held by the district have been redeemed or paid.

(2) No holder of such certificate of purchase, other than the district, shall be entitled to a tax deed thereon, except upon payment of all special improvement assessments, special assessments, service charges, or user fees subsequent to such certificate of purchase that are due and unpaid or unredeemed, at the time of issuance of the tax deed; and the tax deed so issued to such holder shall be subject to future unpaid special improvement assessments,

special assessments, service charges, or user fees. Any such holder of a certificate of purchase may, at any time after three years after issuance thereof, present the same to the county treasurer, together with all subsequent certificates held by him or her, as evidence of subsequent payment of special improvement assessments, special assessments, service charges, or user fees, and request the county treasurer to issue one tax deed thereon; and one tax deed shall be issued accordingly in the same manner as other tax deeds.

(3) The district may, at any time after three years after issuance of any such certificate of purchase held by the district, present the same to the county treasurer, together with all subsequent certificates of purchase held by it, as evidence of unpaid subsequent special improvement assessments, special assessments, service charges, or user fees, and request the county treasurer to issue one tax deed thereon, and one deed shall be issued accordingly in the same manner as other tax deeds; but such tax deeds shall not prejudice the parity of any existing lien for general taxes. Upon the delivery of the tax deed, the conservation district shall have and enjoy all the rights of an owner in fee simple to the lands described therein; but no sale of such land shall be made by the district, except one subject to the lien of special improvement assessments, special assessments, service charges, or user fees due and unpaid subsequent to the issuance of the tax deed to the district as well as to future unpaid special improvement assessments, special assessments, service charges, or user fees, nor shall the district convey such property by deed with covenants of warranty, nor shall any sale of such property be made for less than the principal amount of the original special improvement assessments, special assessments, service charges, or user fees thereon remaining due and unpaid, unless such sale is approved by an order of the district court in which the organization proceedings of the district are filed.

(4) The district, by resolution of its board of directors, may sell, assign, and deliver any such certificates held by the district for such sum as the board of directors may determine and authorize; but no such sale or assignment shall be made that does not include all certificates held by the district with respect to the same land. Upon presentation and surrender of such certificates by the assignee thereof to the county treasurer, such officer shall accept the same in payment of the special improvement assessments, special assessments, service charges, or user fees represented thereby, unless such purchaser requests a tax deed thereon as provided in this section. No such assignment shall be made by the district for less than the principal sum represented by the certificate assigned, except upon order approving the assignment made by the district court wherein the organization proceedings of the district are pending.

**Source:** L. 75: Entire section added, p. 1385, § 7, effective July 18. L. 2007: Entire section amended, p. 1280, § 16, effective May 25.

**37-48-151. Collection by civil action.** In addition to all other remedies for collection of assessments, including special improvement assessments, special assessments, service charges, or user fees, provided by this article, and cumulative therewith, the district may, at any time after three years after the issuance of any certificate of purchase held by the district, bring civil action to foreclose the lien for special improvement assessments, special assessments, service charges, or user fees, represented by all certificates of purchase held by the district with respect to the same land and for other relief with respect to such land as provided by the Colorado rules of civil procedure then in effect for the foreclosure of liens on real property; but no statute of limitations shall be applicable to the rights of the district arising from any special improvement assessments, special assessments, service charges, or user fees, and no decree, or sale of lands thereunder, shall be made except one subject to the lien of future unpaid installments of special improvement assessments, special assessments, service charges, or user fees. The county treasurer shall be made a party to any action of the district authorized by this section.

**Source:** L. 75: Entire section added, p. 1386, § 7, effective July 18. L. 2007: Entire section amended, p. 1281, § 17, effective May 25.

**37-48-152. Special improvement assessments constitute perpetual lien.** All special improvement assessments against appraised benefits and interest thereon and penalties for



default of payment thereof, together with the cost of collecting the same, from the date of the filing of the construction fund special assessment record in the office of the treasurer of the county wherein the lands and property are situate shall constitute a perpetual lien in an amount not in excess of the benefits severally appraised upon the land and other property against which said special improvement assessments have been levied and such benefits appraised; and no sale of said property to enforce any general state, county, city, town, or school tax or other lien shall extinguish the perpetual lien of said special improvement assessment. At any time, any landowner may pay the full amount of said special improvement assessment, and thereafter the property of any such landowner shall be clear and free from said lien and shall not be subject to special improvement assessment for and on account of benefits appraised against any other land or default in the payment of special improvement assessments made against any other land.

**Source:** L. 75: Entire section added, p. 1386, § 7, effective July 18. L. 2007: Entire section amended, p. 1281, § 18, effective May 25.

**37-48-153. Directors to remedy defects - special improvement assessments - special assessments.** If any special improvement assessment, special assessment, service charge, or user fee made under the provisions of this article proves invalid, the board of directors shall, by subsequent or amended acts or proceedings, promptly and without delay remedy all defects or irregularities, as the case may require, by making and providing for the collection of new special improvement assessments, special assessments, service charges, or user fees, or otherwise.

**Source:** L. 75: Entire section added, p. 1387, § 7, effective July 18. L. 2007: Entire section amended, p. 1282, § 19, effective May 25.

**37-48-154. Records of assessments, service charges, or user fees as evidence.** The record of special improvement assessments, special assessments, service charges, or user fees contained in the respective records of the district shall be prima facie evidence in all courts of all matters therein contained.

**Source:** L. 75: Entire section added, p. 1387, § 7, effective July 18. L. 2007: Entire section amended, p. 1282, § 20, effective May 25.

**37-48-155. Defects in notice perfected.** Whenever notice is provided for in this article, if the court finds that due notice was not given, jurisdiction shall not thereby be lost or the proceedings abated or held void, but the court shall continue the hearing until such time as proper notice may be given and shall thereupon proceed as though proper notice had been given in the first instance. If any appraisal, special improvement assessment, special assessment, levy, service charge, or user fee or other proceeding relating to said district is held defective, then the board of directors may file a motion in the cause in which said district was organized to perfect any such defect, and the court shall set a time for hearing thereon. If the original notice as a whole is held to be sufficient but faulty only with reference to publication as to certain particular lands or as to service as to certain persons, publication of the defective notice may be ordered as to the particular lands, or service may be made on the persons not properly served, and said notice is thereby corrected without invalidating the original notice as to other lands or persons.

**Source:** L. 75: Entire section added, p. 1387, § 7, effective July 18. L. 2007: Entire section amended, p. 1282, § 21, effective May 25.

**37-48-156. Contracts of subdistricts.** (1) When the official plan so provides, it shall be lawful for any subdistrict to make contracts as follows:

(a) A water users' association, public entity, nonprofit corporation, not-for-profit corporation, carrier ditch company, mutual ditch or reservoir company, unincorporated ditch or

reservoir company, or cooperative association may bind itself to levy an annual assessment for the use of water and to secure the assessment by liens on land and water rights or in such other manner as may be provided by law.

(b) Any person or corporation landowner may create a mortgage lien upon lands or give other security satisfactory to the board or any other contracting agency, and all such contracts shall provide for forfeiture of the use of water for nonpayment of assessments or installments in the same manner and procedure as provided by statute for forfeiture of stock in a mutual ditch or reservoir company.

**Source: L. 75:** Entire section added, p. 1387, § 7, effective July 18. **L. 2007:** Entire section amended, p. 1282, § 22, effective May 25.

**37-48-157. Issuance of general obligation bonds - revenue bonds.** (1) (a) In the name of the subdistrict and not otherwise, when authorized by the plan of organization and decree of court organizing said subdistrict to do so, the district may issue general obligations or bonds which shall constitute a lien against the real property in said subdistrict. Said obligations shall bear interest at a rate such that the net effective interest rate of the issue does not exceed the maximum net effective interest rate authorized. Interest shall be payable semiannually, and said obligations may be made payable in series becoming due not less than five years and not more than fifty years after the date of issue. The bonds may be sold in one or more series at par, or below or above par, at public or private sale, in such manner and for such price as the district, in its discretion, shall determine. As an incidental expense of the issuance, the district, in its discretion, may employ financial and legal consultants in regard to the financing of the official plan. The district may exchange all or a part of its bonds for all or an equivalent part of property or services included in the official plan for which the bonds are issued, the exchange to be preceded by determination of the fair value of the property or services exchanged for the bonds. Such determination shall be by resolution of the board of directors and shall be conclusive.

(b) Such bonds are to be paid from assessments levied from time to time, as the bonds and interest thereon become due, against the taxable property in said subdistrict and not otherwise. Such levies shall not be limited as to rate or amount; except that they shall not exceed a rate reasonably required to yield funds needed to pay said bonds and interest as they mature, plus any other amounts required for debt service, less the amount of any other funds available to the subdistrict for payment of said bonds and debt service. The board of directors of said district shall certify, to the boards of county commissioners of the several counties in which said subdistrict or any part thereof is located, the amount of the levy necessary to be made upon the taxable property in the subdistrict to yield the required funds becoming due on all outstanding bonds at the same time that certifications of the district's mill levy assessment for general district purposes are made, and the procedure for the assessment and collection of ad valorem taxes of the county is, except as may be otherwise provided in this article, made applicable and is to be followed in the levy of assessments for payment of taxes and collection of principal and debt service on such general obligations or bonds. If the subdistrict has a board of managers, said board of managers shall certify to the district board the amount of money needed to be raised by such assessment, and the district board shall, if it deems the amount to be correct, thereupon determine the levy necessary to raise such funds and certify the same to the boards of county commissioners as provided in this section.

(2) (a) The subdistrict, in its own name, may issue revenue bonds to finance, in whole or in part, the construction of works, reservoirs, or other improvements provided for in the official plan for the beneficial use of water for the purposes for which it has been or may be appropriated, whether or not the interest on such bonds may be subject to taxation. Such revenue bonds shall be issued in such denominations and with such maximum net effective interest rate as may be fixed by the board of directors of the district and shall bear interest such that the net effective interest rate of the bonds does not exceed the maximum net effective interest rate authorized. The bonds may be sold in one or more series at par, or below or above par, at public or private sale, in such manner and for such price as the



district, in its discretion, shall determine. As an incidental expense of the issuance, the subdistrict, in its discretion, may employ financial and legal consultants in regard to the financing of the official plan. The subdistrict may exchange all or a part of its bonds for all or an equivalent part of property or services included in the official plan for which the bonds are issued, the exchange to be preceded by determination of the fair value of the property or services exchanged for the bonds. Such determination shall be by resolution of the board of directors and shall be conclusive.

(b) The board of directors shall pledge only rental proceeds, service charges, user fees, and other income, or any combination thereof, from such works, plans of water management, or other improvements of the subdistrict, and neither the district nor the subdistrict shall be otherwise obligated for the payment thereof. At the time said revenue bonds are issued, the board of directors of the district shall make and enter in the minutes of the proceeding a resolution that sets out the due dates of such revenue bonds, the rates of interest thereon, the general provisions of the bonds, and a recital that the same are payable only out of the rental proceeds, service charges, and other income, or any combination thereof that are pledged for payment of the revenue bonds. In addition, the board of directors shall require the payment of rental charges, service charges, or other charges by the political subdivisions, persons, or land owners that are to use or derive benefits from the water or other services financed by the revenue bonds. Such charges shall be sufficient to pay operation and maintenance expenses of any works or improvements or any water management plan financed by the revenue bonds, to meet said revenue bond payments, and to accumulate and maintain reserve and replacement accounts pertaining thereto as set forth in such resolution. Such resolution shall be irrevocable during the time that any of the revenue bonds are outstanding and unpaid. The revenue bonds shall be signed "Water Users' Association No. .... in the Rio Grande Water Conservation District, By ....., President. Attest ....., Secretary" or "Special Improvement District No. .... in the Rio Grande Water Conservation District, By ....., President. Attest ....., Secretary", and they shall be countersigned by the treasurer.

**Source:** L. 75: Entire section added, p. 1387, § 7, effective July 18. L. 77: Entire section amended, p. 1674, § 15, effective June 9. L. 2007: (2) amended, p. 1283, § 23, effective May 25.

**37-48-158. Board to certify tax assessments.** To maintain, operate, and preserve ditches, canals, reservoirs, or other improvements made pursuant to this article and to strengthen, repair, and restore the same, when needed, for operation of any plan of water management, and for the purpose of defraying any incidental expenses of the subdistrict, the board of directors may, at the time of certification of the general district mill levy to the boards of county commissioners of the counties in which the district is located, certify also, to the boards of county commissioners of the counties in which said subdistrict or any part thereof is located, an additional assessment upon the taxable property within the subdistrict, not to exceed five mills for every dollar of valuation for assessment within said subdistrict, for the purpose of raising funds to be used for the maintenance and operation of the subdistrict's official plan. If there is a board of managers for the subdistrict, the amount of money needed to be raised by such assessment shall be certified by the board of managers to the district board of directors in time for inclusion of the amount in the district budget for the succeeding calendar year. Assessments so certified shall be levied by the boards of county commissioners of the counties in which said subdistrict is situated on the property of said subdistrict in their respective counties, to be collected by the county treasurers of the several counties and delivered to the treasurer of the district in like manner and with like effect as is provided for the collection and return of other assessments under this article. The whole assessment shall be due and payable as and when taxes for county purposes levied in the same year are due and payable. The said assessments shall be in addition to any special improvement assessment or special assessment that has been levied against benefits appraised for and on account of construction.

**Source:** L. 75: Entire section added, p. 1388, § 7, effective July 18. L. 2007: Entire section amended, p. 1284, § 24, effective May 25.

**37-48-159. Sinking fund.** Said district may provide for a sinking fund for the ultimate payment of any of the obligations of any subdistrict. Such sinking fund may be invested as provided in section 37-48-111.

**Source:** L. 75: Entire section added, p. 1388, § 7, effective July 18.

**37-48-160. Subdistrict budget.** A subdistrict existing pursuant to this article shall be an agency of the district for purposes of compliance with the provisions of the "Local Government Budget Law of Colorado", part 1 of article 1 of title 29, C.R.S.; and the board of managers thereof, if any, shall prepare and submit to the district the budget estimates of its expenditure requirements and its estimated revenues for the ensuing budget year, as provided in section 29-1-105, C.R.S.

**Source:** L. 75: Entire section added, p. 1388, § 7, effective July 18. L. 90: Entire section amended, p. 1436, § 7, effective January 1, 1991.

**37-48-161. Revenue bonds. (Repealed)**

**Source:** L. 75: Entire section added, p. 1389, § 7, effective July 18. L. 77: Entire section repealed, p. 1690, § 17, effective June 9.

**37-48-162. Bonds to be special obligations. (Repealed)**

**Source:** L. 75: Entire section added, p. 1389, § 7, effective July 18. L. 77: Entire section repealed, p. 1690, § 17, effective June 9.

**37-48-163. Form and terms of bonds. (Repealed)**

**Source:** L. 75: Entire section added, p. 1389, § 7, effective July 18. L. 77: Entire section repealed, p. 1690, § 17, effective June 9.

**37-48-164. Bond security. (Repealed)**

**Source:** L. 75: Entire section added, p. 1390, § 7, effective July 18. L. 77: Entire section repealed, p. 1690, § 17, effective June 9.

**37-48-165. Terms of proceedings and instruments. (Repealed)**

**Source:** L. 75: Entire section added, p. 1390, § 7, effective July 18. L. 77: Entire section repealed, p. 1690, § 17, effective June 9.

**37-48-166. Investments and bank deposits. (Repealed)**

**Source:** L. 75: Entire section added, p. 1390, § 7, effective July 18. L. 77: Entire section repealed, p. 1690, § 17, effective June 9.

**37-48-167. Limited obligation. (Repealed)**

**Source:** L. 75: Entire section added, p. 1391, § 7, effective July 18. L. 77: Entire section repealed, p. 1690, § 17, effective June 9.

**37-48-168. Rights upon default. (Repealed)**

**Source:** L. 75: Entire section added, p. 1391, § 7, effective July 18. L. 77: Entire section repealed, p. 1690, § 17, effective June 9.



**37-48-169. Determination of revenue. (Repealed)**

**Source:** L. 75: Entire section added, p. 1391, § 7, effective July 18. L. 77: Entire section repealed, p. 1690, § 17, effective June 9.

**37-48-170. Financing of project. (Repealed)**

**Source:** L. 75: Entire section added, p. 1391, § 7, effective July 18. L. 77: Entire section repealed, p. 1690, § 17, effective June 9.

**37-48-171. Refunding. (Repealed)**

**Source:** L. 75: Entire section added, p. 1391, § 7, effective July 18. L. 77: Entire section repealed, p. 1690, § 17, effective June 9.

**37-48-172. Application of proceeds. (Repealed)**

**Source:** L. 75: Entire section added, p. 1392, § 7, effective July 18. L. 77: Entire section repealed, p. 1690, § 17, effective June 9.

**37-48-173. Limitation of actions. (Repealed)**

**Source:** L. 75: Entire section added, p. 1392, § 7, effective July 18. L. 77: Entire section repealed, p. 1690, § 17, effective June 9.

**37-48-174. Costs - board of managers to concur. (Repealed)**

**Source:** L. 75: Entire section added, p. 1392, § 7, effective July 18. L. 77: Entire section repealed, p. 1690, § 17, effective June 9.

**37-48-175. Election to authorize debt.** Except for the issuance of refunding bonds or other funding or refunding of obligations which does not increase the net indebtedness of the district or any subdistrict so proceeding, no indebtedness shall be incurred by the issuance of general obligation bonds of any subdistrict or by any contract by which the district or a subdistrict agrees to repay as general obligations or other obligations constituting a "general obligation debt by loan in any form", as such term is used in section 6 of article XI of the state constitution, of the district or subdistrict, respectively, to the federal government, any political subdivision, or any person over a term not limited to the then current fiscal year any project costs advanced thereby under any contract for the acquisition or improvement of the facilities or any interest therein, or for any project, advanced by the issuance of securities of such a political subdivision or person to defray any cost of the project or of the facilities or an interest therein thereby acquired and becoming a part of the facilities of the district or subdistrict, or otherwise advanced, unless a proposal of issuing the subdistrict's general obligation bonds or of incurring an indebtedness by the district or subdistrict by making such a contract is submitted to the electors of the district or subdistrict, as the case may be, and is approved by a majority of such electors voting on the proposal at an election held for that purpose in accordance with this article and with all laws amendatory thereof and supplemental thereto.

**Source:** L. 77: Entire section added, p. 1676, § 16, effective June 9.

**37-48-176. Definition of elector.** (1) An "elector", "elector of the district", or "elector of the subdistrict", or any term of similar import, means a person:

(a) Who, at the time of the election, is qualified to vote in general elections in this state; and

(b) Who either:

(I) Is a resident of the district or subdistrict proposing to incur an indebtedness at the time of the election; or

(II) Owns real property within the district or subdistrict that is subject to special improvement assessments, special assessments, or service charges of the subdistrict.

(2) Registration pursuant to the laws concerning general elections or any other laws shall not be required.

**Source: L. 77:** Entire section added, p. 1676, § 16, effective June 9. **L. 2007:** (1) amended, p. 1284, § 25, effective May 25.

**37-48-177. Elections.** Whenever in this article an election of the electors of the district or a subdistrict therein is permitted or required, the election may be held separately at a special election or may be held concurrently with any primary or general election held under the laws of this state; but no election shall be held at the same time as any regular election of any city, town, or school district if any part of the area thereof is located within the boundaries of the district or subdistrict, as the case may be.

**Source: L. 77:** Entire section added, p. 1677, § 16, effective June 9.

**37-48-178. Election resolution.** (1) The board of directors shall call any election by resolution adopted at least thirty days prior to the election.

(2) Such resolution shall recite the objects and purposes of the election, the date upon which such election shall be held, and the form of the ballot.

(3) In the case of any election not to be held concurrently with a primary or general election, the board of directors shall provide in the election resolution or by supplemental resolution for the appointment of sufficient judges and clerks of the election, who shall be electors of the district or the subdistrict holding the debt election, and in such event shall set their compensation. The election resolution or a supplemental resolution shall also then designate the precincts and polling places, but a supplemental resolution may modify such a description of precincts and polling places without repeating such description in full. The description of precincts may be made by reference to any order of the governing body of any county, municipality, or other political subdivision in which the district or subdistrict or any part thereof is situated, or by reference to any previous order or other instrument of such a governing body, or by detailed description of such precincts, or by other sufficient description.

(4) Precincts established by any such governing body may be consolidated in the election resolution by the board of directors in a sufficient number which it deems expedient for the convenience of the electors for any election not to be held concurrently with a primary or general election.

(5) If the election shall be held concurrently with a primary or general election held under the laws of this state, the judges of election for such primary or general election shall be designated as the judges of the election for the election held pursuant to this article, and they shall receive such additional compensation, if any, as the board of directors shall set by the election resolution.

**Source: L. 77:** Entire section added, p. 1677, § 16, effective June 9.

**37-48-179. Conduct of election.** (1) Except as otherwise provided in this article, an election held pursuant to this article shall be opened and conducted in the manner then provided by the laws of this state for the conduct of general elections.

(2) If an election is held concurrently with a primary or general election, the county clerk and recorder of each county in which the district or subdistrict holding the debt election is located shall perform for the district or subdistrict election the acts provided by law to be performed by such officials. If an election is not held concurrently with a primary or general election, such acts shall be performed by the secretary of the district with the



assistance of such county clerk and recorders. The board of directors and such county clerk and recorders are authorized to agree among themselves upon the division of such acts and the determination of persons to perform them.

(3) An elector of the district may vote in any election by absent voter’s ballot under such terms and conditions, and in substantially the same manner insofar as is practicable, as prescribed in article 8 of title 1, C.R.S., of the “Uniform Election Code of 1992” for general elections, except as specifically modified in this article.

(4) All acts required or permitted therein to be performed by a county clerk and recorder shall be performed by each one respectively in the event of a primary or general election and by the secretary or assistant secretary of the board of directors in the event of any other election, unless the services of the county clerk and recorder in each such county are contracted for, but no oath shall be administered by the secretary or assistant secretary unless he is also an officer authorized to administer oaths.

(5) Application may be made for an absent voter’s ballot not more than twenty days and not less than four days before the election.

(6) No consideration shall be given nor distinction made with reference to any person’s affiliation or the lack thereof.

(7) The return envelope for the absent voter’s ballot shall have printed on its face an affidavit substantially in the following form:

State of Colorado, County of ....., I, ....., being first duly sworn according to law, depose and say that my residence and post-office address is .....; that I am a person qualified to vote in general elections in the State of Colorado and am a resident of the Rio Grande Water Conservation District or Water Users’ Association No. .... or Special Improvement District No. .... in the Rio Grande Water Conservation District, as may be appropriate, at the time of this election.

.....  
Signature of voter

Subscribed and sworn to before me this ... day of....., 20....

.....  
(Signature of notary public,  
county clerk and recorder,  
or other officer authorized  
to administer oaths)

(SEAL)

.....  
Title of office

(8) In any such election at which voting machines are used, the board of directors shall provide paper ballots for absent voters containing the same question as is to be submitted to the electors by the voting machines, subject to the provisions of subsection (9) of this section.

(9) The district or subdistrict may provide for mail-in voters to cast their mail-in voters’ ballots on voting machines expressly provided for that purpose, if each mail-in voter indicates by affidavit that he or she is qualified to vote at the election and will be a mail-in voter, pursuant to section 1-8-102, C.R.S., of the “Uniform Election Code of 1992” and all laws supplemental thereto.

**Source:** L. 77: Entire section added, p. 1677, § 16, effective June 9. L. 80: (3) and (9) amended, p. 417, § 36, effective January 1, 1981. L. 92: (3) and (9) amended, p. 924, § 197, effective January 1, 1993. L. 96: (9) amended, p. 1775, § 83, effective July 1. L. 99: (6) amended, p. 165, § 27, effective August 4. L. 2008: (9) amended, p. 1913, § 126, effective August 5. L. 2009: (9) amended, (HB 09-1216), ch. 165, p. 731, § 11, effective August 5.

**Cross references:** For the “Uniform Election Code of 1992”, see articles 1 to 13 of title 1.

**37-48-180. Notice of election.** Notice of such election shall be given by publication by three consecutive weekly insertions in at least one newspaper of general circulation in the district or subdistrict holding the election, as determined by the board of directors. No other notice of an election held under this article need be given, unless otherwise provided by the board. A supplemental notice may be given by publication at such times and places as the board may determine to be necessary or convenient for correcting or otherwise modifying the original notice of election or for any other purpose.

**Source: L. 77:** Entire section added, p. 1679, § 16, effective June 9.

**37-48-181. Polling places.** (1) All polling places designated by resolution for an election shall be within the territorial limits of the district or subdistrict holding the election; but, if an election of the district or subdistrict is held concurrently with a primary or general election, the polling place for each precinct located wholly or partially within the district or subdistrict shall be the polling place for such precinct for the district or subdistrict election, regardless of whether or not such polling place is within the district or subdistrict.

(2) If the election of the district or subdistrict is not held concurrently with a primary or general election held under the laws of this state, there shall be one polling place in each of the election precincts which are used in the primary and general elections or in each of the consolidated precincts fixed by the board of directors.

**Source: L. 77:** Entire section added, p. 1679, § 16, effective June 9.

**37-48-182. Election supplies.** (1) The secretary of the district shall provide at each polling place ballots or ballot labels, or both, ballot boxes or voting machines, or both, instructions, electors' affidavits, and other materials and supplies required for an election by any law; and the secretary may provide ballots and marking devices suitable for voting and for the votes on the ballots to be counted on electronic vote-tabulating devices.

(2) Election officials may require the execution of an affidavit by any person desiring to vote at any election of the district or subdistrict to evidence his qualifications to vote, which affidavit shall be prima facie evidence of the facts stated therein.

**Source: L. 77:** Entire section added, p. 1679, § 16, effective June 9.

**37-48-183. Election returns.** (1) In the case of any election held under this article which is not held concurrently with a primary or general election, the election officials shall make their returns directly to the secretary of the district for the board of directors.

(2) In the case of any election held under this article which is consolidated with any primary or general election, the returns thereof shall be made and canvassed at the time and in the manner provided by law for the canvass of the returns of such primary or general election. Such canvassing body shall certify promptly and shall transmit to the secretary of the district for the board of directors a statement of the result of the vote upon any proposition submitted under this article.

(3) Upon receipt by the board of directors of election returns from election officials or upon receipt of such certificate from each such canvassing body, the board shall tabulate and declare the results of the election at any regular or special meeting held not earlier than five days following the date of the election.

(4) The board of directors shall cause the results of the election to be published at least one time in at least one newspaper having general circulation in the district.

**Source: L. 77:** Entire section added, p. 1679, § 16, effective June 9.

**37-48-184. Debt election contests.** (1) Any election declared to have carried on an authorization to issue any bonds, by approval of the bond question, or otherwise to incur an indebtedness by approval of the question thereon may be contested by any elector of the district or subdistrict holding the debt election by suit against it as contestee and defendant



in any district court of any county in which the district or subdistrict holding the election is wholly or partially situate:

(a) When illegal votes have been received or legal votes rejected at the polls in sufficient numbers to change the results;

(b) For any error or mistake on the part of any of the judges of election, any county clerk and recorder, the secretary of the district, or their respective officers and employees in counting or declaring the result of the election, if the error or mistake is sufficient to change the result;

(c) For malconduct, fraud, or corruption on the part of any of the judges of election, any county clerk and recorder, the secretary of the district, or their respective officers and employees, if the malconduct, fraud, or corruption is sufficient to change the result;

(d) When the bonds or other indebtedness is authorized to be issued for an invalid purpose; or

(e) For any other cause which shows that the bonds or other indebtedness is not validly authorized at the election.

(2) The style and form of process, the manner of service of process and papers, the fees of officers, and judgment for costs and execution thereon shall be according to the rules and practices of the court.

(3) Before the court shall take jurisdiction of the contest, the contestor shall file with the clerk of the court a bond, with sureties, to be approved by the judge thereof, running to the district or subdistrict holding the debt election as contestee and conditioned to pay all costs in case of failure of the contestor to maintain his contest.

(4) When the validity of any bond or other indebtedness election is contested, the plaintiff or plaintiffs, within thirty days after the returns of the election are canvassed and the results thereof declared and published, or last published, as the case may be, shall file with the clerk of the court a verified written complaint setting forth specifically:

(a) The name of the party contesting the election and a statement that the plaintiff or each plaintiff is an elector of the district or subdistrict holding the election;

(b) The proposition or propositions voted on at the election which are contested, the name of the district or the subdistrict as defendant and contestee, and the date of the election; and

(c) The particular grounds of such contest.

(5) No such contest shall be maintained and no election shall be set aside or held invalid unless such a complaint is filed within the period prescribed in subsection (4) of this section.

(6) Except as otherwise provided in this article, the election laws pertaining to contested election cases of municipal offices as provided in part 13 of article 10 of title 31, C.R.S., of the "Colorado Municipal Election Code of 1965", as from time to time amended, shall be applicable to bond or other indebtedness elections; but any such contest shall be regarded as one contesting the outcome of the vote on the proposition authorizing the issuance of securities or otherwise incurring the indebtedness, rather than election to office, and the district or subdistrict as contestee, rather than a person declared to have been elected to office, shall be regarded as the defendant.

(7) If the board of directors declares the proposition authorizing the issuance of bonds or otherwise incurring the indebtedness to have carried and no contest is duly filed or if such a contest is filed after it is favorably terminated, the board may issue the bonds or otherwise incur the indebtedness authorized at the election at one time or from time to time.

**Source:** L. 77: Entire section added, p. 1680, § 16, effective June 9.

**37-48-185. Covenants and other provisions in bonds.** (1) Any resolution providing for the issuance of any bonds under this article payable from pledged revenues and any indenture or other instrument or proceedings pertaining thereto may at the discretion of the board of directors contain covenants or other provisions, notwithstanding that such covenants and provisions may limit the exercise of powers conferred by this article, in order to secure the payment of such bonds, in agreement with the holders of such bonds, including, without limitation, covenants or other provisions as to any one or more of the following:

(a) The pledged revenues and, in the case of general obligations, the taxes to be fixed, charged, or levied and the collection, use, and disposition thereof, including, without limitation, the foreclosure of liens for delinquencies, the discontinuance of services, facilities, or use of any properties or facilities, prohibition against free service, the collection of penalties and collection costs, and the use and disposition of any moneys of the district or subdistrict issuing bonds, derived or to be derived, from any source designated;

(b) The acquisition, improvement, or equipment of all or any part of properties pertaining to any project or any facilities;

(c) The creation and maintenance of reserves or sinking funds to secure the payment of the principal of and the interest on any bonds or of the operation and maintenance expenses of any facilities, or part thereof, and the source, custody, security, regulation, use, and disposition of any such reserves or funds, including, without limitation, the powers and duties of any trustee with regard thereto;

(d) Limitations on the powers of the district or subdistrict to acquire or operate, or permit the acquisition or operation of, any structures, facilities, or properties which may compete or tend to compete with any facilities;

(e) The vesting in a corporate or other trustee or trustees of such property, rights, powers, and duties in trust as the board of directors may determine, which may include any or all of the rights, powers, and duties of the trustee appointed by the holders of bonds, and limiting or abrogating the rights of such holders to appoint a trustee, or limiting the rights, duties, and powers of such trustee;

(f) Events of default, rights, and liabilities arising therefrom and the rights, liabilities, powers, and duties arising upon the breach by the district or subdistrict of any covenants, conditions, or obligations;

(g) The terms and conditions upon which the holders of the bonds or of a specified portion, percentage, or amount thereof, or any trustee therefor, shall be entitled to the appointment of a receiver, which receiver may enter and take possession of any facilities or service, operate and maintain the same, prescribe fees, rates, and other charges, and collect, receive, and apply all revenues thereafter arising therefrom in the same manner as the district or subdistrict itself might do;

(h) A procedure by which the terms of any resolution authorizing bonds or any other contract with any holders of district or subdistrict bonds, including, without limitation, an indenture of trust or similar instrument, may be amended or abrogated, and as to the proportion, percentage, or amount of bonds the holders of which must consent thereto, and the manner in which such consent may be given;

(i) The terms and conditions upon which any or all of the bonds shall become or may be declared due before maturity and as to the terms and conditions upon which such declaration and its consequences may be waived; and

(j) All such acts and things as may be necessary or convenient or desirable in order to secure the bonds or, in the discretion of the board of directors, tend to make the bonds more marketable, notwithstanding that such covenant, act, or thing may not be enumerated in this article, it being the intention of this article to give to the board of directors power to do in the name and on behalf of the district or subdistrict all things in the issuance of district or subdistrict bonds and for their security, except as expressly limited in this article.

**Source: L. 77:** Entire section added, p. 1681, § 16, effective June 9.

**37-48-186. Liens on pledged revenues.** (1) Revenues pledged for the payment of any bonds, as received by or otherwise credited to the district or subdistrict issuing bonds under this article, shall immediately be subject to the lien of each such pledge without any physical delivery thereof, any filing, or any further act.

(2) The lien of each such pledge and the obligation to perform the contractual provisions made in the authorizing resolution or other instrument pertaining thereto shall have priority over any or all other obligations or liabilities of the district or subdistrict, except as may be otherwise provided in this article or in the resolution or other instrument, subject to any prior pledges and liens theretofore created.



(3) The lien of each such pledge shall be valid and binding as against all persons having claims of any kind in tort, in contract, or otherwise against the district or subdistrict, irrespective of whether or not such persons have notice thereof.

**Source: L. 77:** Entire section added, p. 1682, § 16, effective June 9.

**37-48-187. Rights - powers of holders of bonds - trustees.** (1) Subject to any contractual limitations binding upon the holders of any issue or series of bonds of the district or subdistrict issuing bonds under this article, or the trustee therefor, including, without limitation, the restriction of the exercise of any remedy to a specified proportion, percentage, or number of such holders, and subject to any prior or superior rights of others, any holder of bonds, or the trustee therefor, shall have the right and power, for the equal benefit and protection of all holders of bonds similarly situated:

(a) By mandamus or other suit, action, or proceeding at law or in equity, to enforce his rights against the district, subdistrict, or board of directors or board of managers, or any combination thereof, or any of the officers, agents, and employees of the district or subdistrict to require and compel such district, subdistrict, or board or any of such officers, agents, or employees to perform and carry out their respective duties, obligations, or other commitments under this article and their respective covenants and agreements with the holder of any bond;

(b) By action or suit in equity, to require the district or subdistrict to account as if it were the trustee of an express trust;

(c) By action or suit in equity, to have a receiver appointed, which receiver may enter and take possession of any facilities and any pledged revenues for the payment of the bonds, prescribe sufficient fees, rates, and other charges derived from the facilities, and collect, receive, and apply all pledged revenues or other moneys pledged for the payment of the bonds in the same manner as the district or subdistrict itself might do in accordance with the obligations of the district or subdistrict; and

(d) By action or suit in equity, to enjoin any acts or things which may be unlawful or in violation of the rights of the holder of any bonds and to bring suit thereupon.

**Source: L. 77:** Entire section added, p. 1682, § 16, effective June 9.

**37-48-188. Investments and securities.** (1) The board of directors of the district or subdistrict, respectively, issuing bonds under this article, subject to any contractual limitations from time to time imposed upon the district or subdistrict by any resolution authorizing the issuance of the outstanding bonds of the district or subdistrict or by any trust indenture or other proceedings pertaining thereto, may cause to be invested and reinvested any proceeds of taxes, any pledged revenues, and any proceeds of bonds issued under this article in securities meeting the investment requirements established in part 6 of article 75 of title 24, C.R.S., and may cause such proceeds of taxes, revenues, district or subdistrict bonds, and securities to be deposited in any trust bank or trust banks within or without or both within and without this state and secured in such manner and subject to such terms and conditions as the board of directors may determine, with or without the payment of any interest on such deposit, including, without limitation, time deposits evidenced by certificates of deposit.

(2) Any such securities and certificates of deposit thus held may, from time to time, be sold, and the proceeds may be so reinvested or redeposited as provided in this section.

(3) Sales and redemptions of any such securities and certificates of deposit thus held shall, from time to time, be made in season so that the proceeds may be applied to the purposes for which the money with which such securities and certificates of deposit were originally acquired was placed in the district or subdistrict treasury.

(4) Any gain from any such investments or reinvestments may be credited to any fund or account pledged for the payment of any district or subdistrict bonds issued under this article, including any reserve therefor, or any other fund or account pertaining to a project

or any facilities, or the district's or subdistrict's general fund, subject to any contractual limitations in any proceedings pertaining to outstanding district or subdistrict bonds.

(5) It is lawful for any commercial bank incorporated under the laws of this state which may act as depository of the proceeds of any bonds issued under this article, any securities owned by the district or subdistrict, any proceeds of taxes, any pledged revenues, and any moneys otherwise pertaining to a project or any facilities, or any combination thereof, to furnish such indemnifying bonds and to pledge such securities as may be required by the board of directors.

**Source:** L. 77: Entire section added, p. 1683, § 16, effective June 9. L. 89: (1) to (3) and (5) amended, p. 1126, § 55, effective July 1.

**37-48-189. Rents and charges.** (1) (a) The district, any subdistrict, and any political subdivision of the state of Colorado contracting with the district or subdistrict and fixing and collecting annual rentals, service charges, user fees, and other charges, or any combination thereof, are, in supplementation of the powers provided in this article, authorized to fix and collect rents, rates, fees, tolls, and other charges, in this article sometimes referred to as "service charges", for direct or indirect connection with, or the use or services of, a water system, electrical system, joint system, or other facilities, or a plan of water management, including, without limitation, connection charges, minimum charges, water use fees, and charges for the availability of service.

(b) Such service charges may be charged to and collected in advance or otherwise by a district or subdistrict from any political subdivision, person, or owner or occupant of real property that is directly or indirectly connected with, or served or benefited by, any such facilities or plan of water management, and by any political subdivision from any person contracting for such connection or use or services or from the owner or occupant, or any combination thereof, of any real property that directly or indirectly is or has been or will be connected with or served or benefited by any such facilities or plan of water management, and the political subdivision or owner or occupant of any such real property shall be liable for and shall pay such service charges to the district, subdistrict, or political subdivision fixing the service charges at the time when and place where such service charges are due and payable.

(c) Such service charges of the district or subdistrict may accrue from any date on which the board of directors reasonably estimates, in any resolution authorizing the issuance of any securities or other instrument pertaining thereto or in any contract with any political subdivision or person, or in any plan of water management, that any facilities or project being acquired or improved and equipped or services or benefit of such plan will be available for service or use.

(2) (a) Such rents, rates, fees, tolls, and other charges, being in the nature of use or service charges, shall, as nearly as the district, subdistrict, or political subdivision fixing the service charges shall deem practicable and equitable, be reasonable, and such service charges shall be uniform throughout the district, subdistrict, or political subdivision for the same type, class, and amount of use or service of the facilities or plan of water management, and may be based or computed either on:

(I) Measurements of water, flow devices, or electric meters, duly provided and maintained by the district, subdistrict, or political subdivision, or any user as approved by the district, subdistrict, or political subdivision fixing such charges;

(II) The diversion or consumption of water or consumption of electricity in or on or in connection with the political subdivision, or by any person or owner or occupant of real property, making due allowance for commercial use of water and infiltration of groundwater and discharge of surface runoff to the facilities or property;

(III) The number and kind of water or electric outlets on or in connection with the political subdivision, person, or real property;

(IV) The water or electric fixtures or facilities in or on or in connection with the political subdivision, person, or real property;

(V) The number of persons residing or working in or on or otherwise connected or identified with the political subdivision, person, or real property;



(VI) The capacity of the improvements in or on or connected with the political subdivision, person, or real property;

(VII) The availability of service or readiness to serve by the facilities;

(VIII) The amount of surface or groundwater usage by or in connection with or for the benefit of the political subdivision, person, or owner or occupant of real property;

(IX) Any other factors determining the type, class, and amount of use or service of the facilities; or

(X) Any combination of any such factors.

(b) Reasonable penalties may be fixed for any delinquencies, including, without limitation, interest on delinquent service charges from any date due at a rate of not exceeding one percent per month or fraction thereof, reasonable attorney fees, and other costs of collection.

(3) The district, subdistrict, or political subdivision fixing the service charges shall prescribe and, from time to time when necessary, revise a schedule of such service charges, which shall comply with the terms of any contract of the district, subdistrict, or political subdivision fixing the service charges.

(4) The general assembly has determined and declared that the obligations, arising from time to time, of the district, any subdistrict, any political subdivision, or any person to pay service charges fixed in connection with any facilities shall constitute general obligations of the district, subdistrict, political subdivision, or person charged with their payment; but, as such obligations accrue for current services and benefits from, and the use of, any such facilities or plan, the obligations shall not constitute an indebtedness of the district, any subdistrict, or any political subdivision within the meaning of any constitutional, charter, or statutory limitation or any other provision restricting the incurrence of any debt.

(5) No board, agency, bureau, commission, or official, other than the board of directors or the board of managers of the district or subdistrict, respectively, or the governing body of the political subdivision fixing the service charges, has authority to fix, prescribe, levy, modify, supervise, or regulate the making of service charges or to prescribe, supervise, or regulate the performance of services pertaining to the facilities thereof, as authorized by this article; but this subsection (5) shall not be construed to be a limitation on the contracting powers of the board of directors or the board of managers of the district, respectively, or any subdistrict or the governing body of any such political subdivision.

(6) Any service charges payable by the owners or occupants of real property and any penalties for delinquency may be certified to the boards of county commissioners of the respective counties in which the real property is located and shall then be included by them in their next annual levy for state and county purposes. Such amount so certified shall be collected in the same manner as provided in section 37-48-110 (2). The proceeds of such levy shall be paid to the district as provided in section 37-48-107 (3).

**Source:** L. 77: Entire section added, p. 1684, § 16, effective June 9. L. 2007: Entire section amended, p. 1284, § 26, effective May 25.

**37-48-190. Miscellaneous powers.** (1) The district and any subdistrict thereof shall also have the following powers:

(a) To pay or otherwise defray and to contract to pay or defray, for any term not exceeding seventy-five years, without an election, except as otherwise provided in this article, the principal of, any prior redemption premiums due in connection with, any interest on, and any other charges pertaining to any securities or other obligations of the federal government, any subdistrict or the district, respectively, any political subdivision, or any person which were incurred in connection with any property thereof subsequently acquired by the district or any subdistrict and relating to either's facilities;

(b) To establish, operate, and maintain facilities within the district or any subdistrict or elsewhere, across or along any public street, highway, bridge, or viaduct or any other public right-of-way or in, upon, under, or over any vacant public lands, which public lands now are, or may become, the property of a political subdivision of this state, without first obtaining a franchise from the political subdivision having jurisdiction over the same; but the district or subdistrict shall cooperate with any political subdivision having such

jurisdiction, shall promptly restore any such public street, highway, bridge, or viaduct or any such other public right-of-way to its former state of usefulness as nearly as may be and shall not use the same in such manner as permanently to impair completely or materially the usefulness thereof;

(c) To adopt, amend, repeal, enforce, and otherwise administer such reasonable resolutions, rules, regulations, and orders as the district or subdistrict shall deem necessary or convenient for the operation, maintenance, management, government, and use of the facilities or any plan of water management of the district or subdistrict, as the case may be, and any other facilities under its control, whether situated within or without or both within and without the territorial limits of the district or subdistrict; and

(d) (I) To adopt, amend, repeal, enforce, and otherwise administer under the police power such reasonable resolutions, rules, regulations, and orders pertaining to water or electric services performed by any person through the district's or subdistrict's facilities, plan of water management, or pertaining to such facilities or plans of the district or subdistrict, any political subdivision, or any person, or any combination thereof, reasonably affecting the activities of the district or subdistrict, directly or indirectly, as the board of directors may from time to time deem necessary or convenient.

(II) No such resolution, rule, regulation, or order shall be adopted or amended except by action of the board of directors on the behalf and in the name of the district or subdistrict, respectively, after a public hearing thereon is held by the board of directors, in connection with which any political subdivision owning or authorizing any facilities comparable to facilities of the district or subdistrict, as the case may be, whether therein or thereout, or both therein and thereout, and other persons of interest have an opportunity to be heard, after mailed notice of the hearing is given at least thirty days prior to the hearing by the secretary to each such political subdivision wholly or partly within the district or subdistrict proceeding under this article, and after notice of such hearing is given by publication at least once a week for three consecutive weeks in at least one newspaper of general circulation in the district or such subdistrict by the secretary to persons of interest, both known and unknown, the first publication to be made at least thirty days prior to the hearing.

**Source:** L. 77: Entire section added, p. 1685, § 16, effective June 9. L. 2007: (1)(c) and (1)(d)(I) amended, p. 1287, § 27, effective May 25.

**37-48-191. Cooperative powers.** (1) The district and any subdistrict have the power to utilize and may utilize private industry, by contract, to carry out the design, construction, operation, management, manufacturing, marketing, planning, and research and development functions of the district or any subdistrict proceeding under this article, unless the district or subdistrict determines that it is in the public interest to adopt another course of action. The district or subdistrict, or both, may enter into long-term contracts with private persons, not exceeding a term of seventy-five years, without an election, for the performance of any such functions of the district or subdistrict, which, in the opinion of the district or subdistrict, can desirably and conveniently be carried out by a private person under contract; but any such contract shall contain such terms and conditions as shall enable the district or subdistrict to retain reasonable supervision and control of such functions to be carried out or performed by such private persons pursuant to such contract.

(2) Subject to the provisions of section 37-48-175, the district and any subdistrict have the following powers:

(a) To accept contributions, grants, or loans from the state and the federal government for the purpose of financing the planning, acquisition, improvement, equipment, maintenance, and operation of any enterprise in which the district or subdistrict, or both, are authorized to engage, and to enter into contracts and cooperate with, and accept cooperation from, the federal government, the state, the subdistrict or the district, respectively, any political subdivision, any private firm, and any other person, or any combination thereof, in the planning, acquisition, improvement, equipment, maintenance, and operation, and in financing the planning, acquisition, improvement, equipment, maintenance, and operation of any such enterprise in accordance with any legislation which the general assembly, congress, the governing body of any political subdivision, the board of directors or other



governing body of any private firm, any other person, or any combination thereof may have adopted prior to the adoption of this article or may thereafter adopt, under which aid, assistance, and cooperation may be furnished by such cooperating entity or entities or other persons in the planning, acquisition, improvement, equipment, maintenance, and operation, or in financing the planning, acquisition, improvement, equipment, maintenance, and operation of any such enterprise, including, without limitation, costs of engineering, architectural, and economic investigations and studies, surveys, designs, plans, working drawings, specifications, procedures, and other action preliminary to the acquisition, improvement, or equipment of any facilities, or any part thereof, and to do any and all things necessary in order to avail itself of such aid, assistance, and cooperation under any state, federal, or other legislation;

(b) To enter into, without any election, joint operating or service contracts and agreements; acquisition, improvement, equipment, or disposal contracts; or other arrangements for any term not exceeding seventy-five years, with the federal government, the state, the subdistrict or the district, respectively, any political subdivision, any private firm, or any other person, or any combination thereof, concerning the facilities, and any project or property pertaining thereto, whether acquired or undertaken by the district, by the subdistrict, by the federal government, by this state, by any political subdivision of this state or any other state, or by any person; and to accept contributions, grants, or loans from the cooperating entity or entities or other persons in connection therewith;

(c) To enter into and perform without any election, when determined by the board of directors to be in the public interest, contracts and agreements, for any term not exceeding seventy-five years, with the federal government, the subdistrict or the district, respectively, the state, any political subdivision, or any person, or any combination thereof, for the provision and operation by the subdistrict or the district, respectively, of any facilities pertaining to such facilities of the district or subdistrict, as the case may be, any part thereof, or any project relating thereto, and the payment periodically thereby to the district or subdistrict of amounts at least sufficient, if any, in the determination of the board, to compensate the district or subdistrict for the cost of providing, operating, and maintaining such facilities serving the federal government, the subdistrict or the district, respectively, the state, any political subdivision, or such other person, or any combination thereof, or otherwise;

(d) To enter into and perform, without any election, contracts and agreements, on a public bid basis, a competitive basis, or a negotiated basis, as the board of directors may determine, with the federal government, the subdistrict or the district, respectively, the state, any political subdivision, any private firm, or any other person, or any combination thereof, for or concerning the planning, construction, lease, other acquisition, improvement, equipment, operation, maintenance, disposal, and financing of any property pertaining to the facilities of the district or subdistrict or to any project of the district or subdistrict, including, without limitation, any contract or agreement for any term not exceeding seventy-five years, pertaining to the joint ownership of the facilities as tenants in common thereamong, providing for the exchange of water or electric power, for backup water or power, pooling of resources, the designation of a manager for any such project or facilities supervised by an engineering and operating committee of co-owners, or otherwise supervised; and otherwise to contract with water or power producers or users, or both;

(e) To cooperate with and act in conjunction with the federal government or any of its engineers, officers, boards, commissions, or departments, or with the state or any of its engineers, officers, boards, commissions, or departments, or with any political subdivision or any person in the acquisition, improvement, and equipment of any facilities or any part thereof authorized for the district or subdistrict or for any other works, acts, or purposes provided for in this article and to adopt and carry out any definite plan or system of work for any such purpose;

(f) To cooperate with the federal government, the subdistrict or district, respectively, the state, any political subdivision, or any person, or any combination thereof, by an agreement therewith by which the district or the subdistrict may:

(I) Acquire and provide, without cost to the cooperating entity or entities, the land, easements, and rights-of-way necessary for the acquisition, improvement, and equipment of any properties;

(II) Hold the cooperating entity or entities free from and save it or them harmless from any claim for damages arising from the acquisition, improvement, equipment, maintenance, and operation of any facilities;

(III) Maintain and operate any facilities in accordance with regulations prescribed by the cooperating entity or entities; and

(IV) Establish and enforce regulations, if any, concerning the facilities which are satisfactory to the cooperating entity or entities;

(g) To provide, by any contract for any term not exceeding seventy-five years, or otherwise, without an election:

(I) For the joint use of personnel, equipment, and facilities of the district, the subdistrict, the state, any political subdivision, or any person, or any combination thereof, including, without limitation, public buildings constructed by or under the supervision of the board of directors, the state, the governing body of the political subdivision, or the board of directors or other governing body of a private firm or other person concerned, upon such terms and agreements and within such areas within the district or subdistrict, or otherwise, as may be determined, for the promotion and protection of health, comfort, safety, life, welfare, and property of the inhabitants of the district or subdistrict and any such political subdivision and any other persons of interest, and for water or electric services;

(II) For the joint employment of clerks, stenographers, and other employees pertaining to the facilities or any project, now existing or hereafter established, upon such terms and conditions as may be determined for the equitable apportionment of the expenses resulting therefrom;

(h) To provide for comprehensive planning and, where possible, coordinate operations of the district or subdistrict with the subdistrict or district, respectively, any and all such political subdivisions, private firms, and other persons, or any combination thereof, pertaining to water conservation and use and to the generation and use of electricity.

**Source: L. 77:** Entire section added, p. 1686, § 16, effective June 9.

**37-48-192. Joint action entity.** (1) The district or subdistrict and any other cooperating entity or entities relating to any project or facilities in which the district or the subdistrict is a party in interest may create a joint action entity, a separate body corporate, for the planning, construction, lease, other acquisition, improvement, equipment, operation, maintenance, disposal, and financing of any enterprise or properties relating to such project or such facilities.

(2) A joint action entity may exercise the powers granted to the district or the subdistrict by this article, other than the levy or fixing and collection of taxes, assessments, and service charges and the making and revising of rules and regulations under the police power.

**Source: L. 77:** Entire section added, p. 1689, § 16, effective June 9.

**37-48-193. Correlative powers of political subdivisions.** Any political subdivision of this state has the correlative powers to enable it to participate in cooperation with the district or any subdistrict in either's exercise of powers granted thereto by this article or otherwise granted by law.

**Source: L. 77:** Entire section added, p. 1689, § 16, effective June 9.

**37-48-194. Refunding.** (1) Any revenue bonds issued under the provisions of this article and at any time outstanding may, at any time and from time to time, be refunded by the district by the issuance of its refunding bonds in such amount as the board of directors may deem necessary to refund the principal of the bonds to be refunded, any unpaid interest thereon, and any premiums and incidental expenses necessary to be paid in connection therewith.

(2) Any such refunding may be effected, whether the bonds to be refunded have matured or shall thereafter mature, either by sale of the refunding bonds and the application



of the proceeds thereof, directly or indirectly, to the payment of the bonds to be refunded thereby or by exchange of the refunding bonds for the bonds to be refunded thereby, but the holders of any bonds to be so refunded shall not be compelled, without their consent, to surrender their bonds for payment or exchange prior to the date on which they are payable by maturity date, option to redeem, or otherwise or if they are called for redemption prior to the date on which they are by their terms subject to redemption by option or otherwise. Except to the extent expressly or by implication inconsistent with the terms of this article, article 54 of title 11, C.R.S., shall govern the issuance of such refunding bonds and the establishment of any escrow in connection therewith.

(3) All refunding bonds issued under authority of this article shall be payable solely from revenues out of which bonds to be refunded thereby are payable or from revenues out of which bonds of the same character may be made payable under this article or any other law in effect at the time of the refunding.

**Source: L. 77:** Entire section added, p. 1689, § 16, effective June 9.

**37-48-195. Costs - board of managers to concur.** (1) To the extent that the costs of the proceedings for the issuance of revenue bonds are not paid by the proceeds of the bonds, they shall be budgeted and paid out of the subdistrict preliminary fund, or from funds derived from subdistrict revenues, or from the separate subdistrict mill levy.

(2) If there is a board of managers for the subdistrict, the district shall not exercise its authority to issue revenue bonds until requested by the board of managers to do so, but the board of directors of the district may, at the request of the board of managers, make the necessary determinations and conduct the necessary proceedings to authorize the issuance of such bonds prior to receipt of the request for the issuance thereof.

**Source: L. 77:** Entire section added, p. 1690, § 16, effective June 9.

## ARTICLE 50

### Republican River Water Conservation District

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**37-50-101. Legislative declaration.** The conservation of the water of the Republican river, its tributaries, and that portion of the Ogallala aquifer underlying the district for compliance with the Republican river compact are of vital importance to the growth and development of the entire area and the welfare of all its inhabitants. To promote the health and general welfare of this state, an appropriate agency should be established for the conservation, use, and development of the water resources of the Republican river, its tributaries, and that portion of the Ogallala aquifer underlying the district to cooperate with and assist this state to carry out the state's duty to comply with the limitations and duties imposed upon the state by the Republican river compact and given such powers as may be necessary to safeguard for Colorado all waters to which the state is equitably entitled.

**Source: L. 2004:** Entire article added, p. 1905, § 1, effective August 4.

**37-50-102. Definitions.** As used in this article, unless the context otherwise requires:

(1) "Board" means the board of directors of the Republican river water conservation district created pursuant to section 37-50-104.

(2) "District" means the Republican river water conservation district created pursuant to this article.

(3) "Person" means a person, firm, partnership, association, or corporation.

(4) "Property", as used in sections 37-50-109 and 37-50-111, includes both real and personal property. In other parts of this article relating to special assessments, unless otherwise specified, "property" means real estate as defined in section 2-4-401 (5), C.R.S., and includes all railroads; tram roads; electric railroads; state and interurban railroads; highways; telephone, telegraph, and transmission lines; water systems, water rights, pipelines, and rights-of-way of public service corporations; and all other real property, whether held for public or private use.

(5) "Republican river basin" means that area shown upon the map titled: "Boundaries of the Republican River Basin and Republican River Water Conservation District". The map shall be kept on file in the office of the state engineer, the Colorado ground water commission, and the district and shall be available for public inspection.

(6) "Republican river compact" means the compact entered into between the states of Colorado, Kansas, and Nebraska and approved by the United States congress as codified in article 67 of this title and as further defined by the final settlement stipulation dated December 15, 2002, and filed in *Kansas v. Colorado and Nebraska*, No. 126 Original.

**Source: L. 2004:** Entire article added, p. 1905, § 1, effective August 4.

**37-50-103. Creation and name of district.** (1) There is hereby created a water conservation district to be known and designated as the "Republican river water conservation district". The district is hereby declared to be a body corporate under the laws of Colorado. The district shall comprise the following area and territory of the state of Colorado: Phillips and Yuma counties and those portions of Kit Carson, Lincoln, Logan, Sedgwick, and Washington counties within the Republican river basin.

(2) The creation of the Republican river water conservation district shall not affect the existence or powers of public irrigation districts created pursuant to articles 41 to 43 of this title or ground water management districts created pursuant to article 90 of this title before August 4, 2004.

**Source: L. 2004:** Entire article added, p. 1906, § 1, effective August 4.

**37-50-104. Board of directors.** (1) The district shall be managed and controlled by a board of fifteen directors. The members of the board shall hold their offices for terms of



three years and until their successors are appointed and qualified. A director may serve one or more terms. The boards of county commissioners of the counties of Yuma, Phillips, Kit Carson, Washington, Sedgwick, Lincoln, and Logan shall each appoint one director, who shall be a resident of the respective county. One member of the board shall be appointed by each of the boards of the Marks Butte, Frenchman, W-Y, Sand Hills, Central Yuma, Arikaree, and Plains ground water management districts. One member of the board shall be appointed by the Colorado ground water commission and shall be a member of the Colorado ground water commission. Each director shall be, at the time of the director's appointment, a resident and owner of real property within the county or ground water management district from which he or she is appointed or, if only a part of the county or ground water management district is included within the boundaries of the district, a resident and owner of real property within such included part. The director appointed by the Colorado ground water commission shall, at the time of appointment, reside within the district. Each director shall be appointed by either the board of county commissioners of the county in which the director resides or by the ground water management district in which the director resides. The director may be a member of the board of county commissioners of such county or the board of directors of such ground water management district. Such appointments shall be made at the first meeting of the board of county commissioners, ground water management district, or Colorado ground water commission after the establishment of the district. The members of the board shall annually select one of their number to act as president and one of their number to act as vice-president, each to hold office for one year or until a successor is duly selected.

(2) The office of a director shall become vacant when the director ceases to reside in the county or ground water management district from which he or she was appointed, or in the case of the director appointed by the Colorado ground water commission when the director ceases to reside in the district or is no longer a member of the Colorado ground water commission, or when declared vacant by a majority vote of all of the members of the board when a director has failed to attend two consecutive regular meetings without having been excused from attendance by the president. If a vacancy occurs in the office by reason of death, resignation, removal, or otherwise, it shall be filled for the remainder of the unexpired term by the board of county commissioners of the county, or the ground water management district from which the director was originally appointed. Before entering upon the discharge of his or her duties, each director shall take an oath to support and defend the constitutions of the United States and of this state and to impartially, without fear or favor, discharge the duties of a director of the district.

(3) (a) Upon creation of the district, the directors shall be appointed by the respective boards of county commissioners or ground water management districts as provided in this section for the following terms of office:

(I) The directors from the counties of Phillips and Kit Carson and from the Marks Butte and Arikaree ground water management districts, whose terms of office shall expire on the date of the regular quarterly meeting of the board to be held in October 2005, or as soon thereafter as their respective successors are appointed and qualified;

(II) The directors from the counties of Washington, Sedgwick, and Lincoln and from the W-Y, Central Yuma, and Plains ground water management districts, whose terms of office shall expire on the date of the regular quarterly meeting to be held in October 2006, or as soon thereafter as their respective successors are appointed and qualified; and

(III) The directors from the counties of Yuma and Logan, the directors from the Frenchman and Sand Hills ground water management districts, and the director appointed by the ground water commission, whose terms of office shall expire on the date of the regular quarterly meeting to be held in October 2007, or as soon thereafter as their respective successors are appointed and qualified.

(b) Thereafter, each director shall be appointed for a term of three years, and the term shall expire on the date of the regular quarterly meeting to be held in October of the year that commences during the third year of the director's term, or as soon thereafter as a successor is duly appointed and qualified. For the purpose of determining such expiration date, the term of the director shall be taken as having begun on the date of the first regular October quarterly meeting at which the term of a predecessor would have expired had the director then been duly appointed and qualified.

**Source: L. 2004:** Entire article added, p. 1906, § 1, effective August 4.

**37-50-105. Compensation of directors.** The directors of the district shall receive as compensation a sum not to exceed one hundred dollars per day while actually engaged in the business of the district, and, in addition, the directors shall be entitled to their actual traveling and transportation expenses when away from their respective places of residence on district business.

**Source: L. 2004:** Entire article added, p. 1908, § 1, effective August 4. **L. 2007:** Entire section amended, p. 358, § 4, effective April 2.

**37-50-106. Employees.** The board shall appoint a secretary and a treasurer. The same individual may, at the election of the board, hold both offices. The board shall likewise hire such other employees, including engineers and attorneys, as may be required to properly transact the business of the district, and is authorized to provide for the compensation of the secretary and treasurer and other appointees. The treasurer shall be required by the board to give bond with a corporate surety in such amount as the board may fix and that it deems sufficient to protect the funds in the hands of the treasurer or under the treasurer's control. Such bond is subject to the approval of the board.

**Source: L. 2004:** Entire article added, p. 1908, § 1, effective August 4.

**37-50-107. General powers.** (1) The district is formed for the purpose of cooperating with and assisting this state to carry out its duty to comply with the limitations and duties imposed upon the state by the Republican river compact, and, in furtherance of that purpose and in its corporate capacity, the district shall have power to:

(a) Sue and be sued in the name of the Republican river water conservation district and otherwise to participate in litigation;

(b) Acquire, operate, and hold in the name of the district such real and personal property as may be necessary to carry out the provisions of this article and sell and convey such property or its products as provided in this article or when the property is no longer needed for the purposes of the district;

(c) Borrow money and incur indebtedness and issue bonds or other evidence of such indebtedness;

(d) Accept gifts, grants, or donations of personal or real property or moneys;

(e) Make surveys and conduct investigations to determine the best manner of utilizing stream flows within the district and the amount of such stream flow or other water supply, including groundwater; locate ditches, irrigation works, wells, pipelines, and reservoirs to store or utilize water for compact compliance purposes; make filings upon such water; initiate appropriations for compact compliance purposes; and do and perform all acts and things necessary or advisable to protect existing beneficial uses of water within the district through compliance with the Republican river compact;

(f) Make contracts with respect to the relative rights of the district under its claims and filings and the rights of any other person seeking to divert water from any of the streams within the district;

(g) Contract with any agencies, officers, bureaus, and departments of this state and the United States, including the department of corrections, to obtain services or labor for the initiation or construction of irrigation works, canals, reservoirs, wells, pipelines, or retaining ponds within the district;

(h) Enter upon privately owned land or other real property for the purpose of making surveys or obtaining other information, without obtaining an order to do so, if the same can be done without damage to the lands, crops, or improvements thereon;

(i) Enter into contracts, agreements, or other arrangements with the United States government or any department thereof; with persons, railroads, or other entities; with public corporations; with the state government or a political subdivision of this or other states; with irrigation, drainage, conservation, conservancy, or other improvement districts in this or



other states; with ground water management districts; or with the ground water commission for cooperation or assistance in constructing, maintaining, using, and operating the works of the district, for making surveys and investigations or related reports, or for any other purpose authorized by this article. The district may purchase, lease, or acquire land or other property in adjoining states in order to secure outlets or for other purposes of the district and may enter into contracts and spend money for securing such outlets or other works in adjoining states.

(j) Have and exercise the power of eminent domain to acquire ditches, reservoirs, or other works, lands, or rights-of-way therefor that the district may need to carry out the plans of the district and in general to exercise any and all rights and powers of eminent domain conferred upon other agencies, as provided in articles 1 to 7 of title 38, C.R.S.;

(k) Establish a water enterprise pursuant to article 45.1 of this title;

(l) Make loans or grants to any public entity, nonprofit corporation, not-for-profit corporation, carrier ditch company, mutual ditch or reservoir company, unincorporated ditch or reservoir company, or cooperative association within the boundaries of the district to carry out the purposes of the district;

(m) Impose a use fee on the diversion of water within the district or establish an annual levy for the use of water;

(n) Establish a nonprofit or charitable land trust;

(o) Purchase, rent, lease, and accept donations of, or cooperate in the creation of, conservation easements;

(p) Cooperate in the creation of conservation reserve programs and other similar programs;

(q) Exercise such implied powers and perform such other acts as may be necessary to carry out and effect any of the express powers hereby conferred upon such district as set forth in this article.

(2) The district, in its own name, may issue revenue bonds to finance, in whole or in part, the construction of works, reservoirs, wells, pipelines, or other improvements for the beneficial use of water for the purposes for which it has been or may be appropriated and to further the purposes of the district, whether or not the interest on such bonds may be subject to taxation. Such revenue bonds shall be issued in such denominations and with such maximum net effective interest rate as may be fixed by the board and shall bear interest such that the net effective interest rate of the bonds does not exceed the maximum net effective interest rate authorized. The board shall pledge only rental proceeds, service charges, and other income, or any combination thereof, from such works or other improvements, and the district shall not be otherwise obligated for the payment thereof. At the time such revenue bonds are issued, the board shall make and enter in the minutes of the proceeding a resolution in which are set forth the due dates of such revenue bonds, the rates of interest thereon, the general provisions of the bonds, and a statement that the same are payable only out of rental proceeds, service charges, and other income, or any combination thereof. In addition, the board shall require the payment of rental charges, service charges, or other charges by the political subdivisions or persons who are to use or derive benefits from the water or other services furnished by such works or improvements. Such charges shall be sufficient to pay operation and maintenance expenses thereof, to meet the bond payments, and to accumulate and maintain reserve and replacement accounts pertaining thereto as set forth in such resolution. Such resolution shall be irrevocable during the time that any of the revenue bonds are outstanding and unpaid. The revenue bonds shall be signed "Republican River Water Conservation District, By ....., president. Attest ....., secretary", and they shall be countersigned by the treasurer.

(3) The district is authorized and required to prepare and adopt as the official plan for the district a comprehensive, detailed plan showing the nature of the improvements or works, including all canals, reservoirs, ditches, wells, and pipelines, whether within or without the district, and the estimated cost of each principal part of such system or works.

(4) The board has full authority to devise, prepare for, execute, maintain, and operate all works or improvements necessary or desirable to complete, maintain, operate, and

protect the works provided for by the official plan, and to that end may employ and secure persons and equipment under the supervision of the chief engineer or other agents or may enter into contracts for such works, either as a whole or in parts.

**Source: L. 2004:** Entire article added, p. 1908, § 1; effective August 4.

**37-50-108. Principal office - meetings.** The board shall designate a place within the district where the principal office is to be maintained and may change such place from time to time. Regular quarterly meetings of the board shall be held at the office on the second Thursday in the months of January, April, July, and October. The board may hold such special meetings as may be required for the proper transaction of business. All special meetings of the board shall be held at locations that are within the boundaries of the district or that are within the boundaries of any county in which the district is located, in whole or in part, or in any county if the meeting location is within Colorado and does not exceed twenty miles from the district boundaries. The provisions of this section governing the location of meetings may be waived only if the proposed change of location of a meeting of the board appears on the agenda of a regular or special meeting of the board and if a resolution is adopted by the board stating the reason for which a meeting of the board is to be held in a location other than under the provisions of this section and further stating the date, time, and place of such meeting. Special meetings may be called by the president of the board or by any four directors. Meetings of the board shall be public, and proper minutes of the proceedings of the board shall be preserved and shall be open to inspection by any elector of the district during business hours.

**Source: L. 2004:** Entire article added, p. 1911, § 1, effective August 4.

**37-50-109. Authority of the board to levy taxes.** (1) In addition to other means of providing revenue for the district, the board has the power to fix the amount of an assessment upon the property within the district, as a level or general levy to be used for the purpose of paying the expenses of organization, for surveys and plans, to pay the salary of officers for, the per diem allowed to directors and their expenses, for expenses that may be incurred in the administration of the affairs of the district, and for all other lawful purposes of the district including capital construction.

(2) The amount of assessment on each dollar of valuation for assessment shall, in accordance with the schedule prescribed by section 39-5-128, C.R.S., be certified to boards of county commissioners of the various counties in which the district is located and by them included in their next annual levy for state and county purposes. Such amount so certified shall be collected for the use of such district in the same manner as are taxes for county purposes, and the revenue laws of the state for the levy and collection of taxes on real estate for county purposes, except as modified in this article, shall be applicable to the levy and collection of the amount certified by the board as provided in this section, including the enforcement of penalties, forfeiture, and sale for delinquent taxes.

(3) All collections made by the county treasurer pursuant to such levy shall be paid to the treasurer of the district on or before the tenth day of the next succeeding calendar month. Items of expense that have already been paid in whole or in part from any other sources by the district may be repaid from receipts of such levy. Such levy may be made regardless of whether the work proposed, or any part thereof, may have been found impracticable or for other reasons abandoned. The collection of data and the payment of expenses therefor, including salaries of engineers, attorneys, and others, to assist this state to carry out its duty to comply with limitations and duties imposed upon the state by the Republican river compact, is hereby declared to be a matter of general benefit to the public welfare, such that a tax for such purposes may be properly imposed.

**Source: L. 2004:** Entire article added, p. 1911, § 1, effective August 4.

**37-50-110. Levy and collection of uniform sales and use tax.** (1) (a) In addition to other means of providing revenue for the district, the board, in the name of the district, has



the power to levy and collect a uniform sales and use tax throughout the entire geographical area of the district, notwithstanding any provision of article 2 of title 29, C.R.S., to the contrary, and upon the approval of the eligible electors in the district at an election held in accordance with section 20 of article X of the state constitution and articles 1 to 13 of title 1, C.R.S.

(b) Such uniform sales tax rate shall not exceed one percent upon every transaction or other incident with respect to which a sales and use tax is levied by the state pursuant to the provisions of article 26 of title 39, C.R.S.

(c) The sales and use tax imposed pursuant to paragraph (a) of this subsection (1) shall not be levied on:

(I) The sale of tangible personal property delivered by a retailer, by a retailer's agent, or to a common carrier for delivery to a destination outside the district; or

(II) The sale of tangible personal property on which a specific ownership tax has been paid or is payable when such sale meets the following conditions:

(A) The purchaser does not reside in the district or the purchaser's principal place of business is outside the district; and

(B) The personal property is registered or required to be registered outside the geographical boundaries of the district under the laws of this state.

(d) The sales and use tax imposed pursuant to paragraph (a) of this subsection (1) is in addition to any other sales and use tax imposed pursuant to law.

(2) (a) The collection, administration, and enforcement of the sales and use tax shall be performed by the executive director of the department of revenue in the same manner as that for the collection, administration, and enforcement of the state sales and use tax imposed pursuant to article 26 of title 39, C.R.S., including, without limitation, the retention by a vendor of the percentage of the amount remitted to cover the vendor's expense in the collection and remittance of the sales tax as provided in section 39-26-105, C.R.S. The executive director shall make monthly distributions of sales tax collections to the district. The district shall pay the net incremental cost incurred by the department in the administration and collection of the sales and use tax.

(b) (I) A qualified purchaser may provide a direct payment permit number issued pursuant to section 39-26-103.5, C.R.S., to any vendor or retailer that is liable and responsible for collecting and remitting any sales tax levied on any sale made to the qualified purchaser pursuant to the provisions of this section. A vendor or retailer that has received a direct payment permit number in good faith from a qualified purchaser shall not be liable or responsible for collection and remittance of any sales tax imposed on the sale that is paid for directly from the qualified purchaser's funds and not the personal funds of any individual.

(II) A qualified purchaser that provides a direct payment permit number to a vendor or retailer shall be liable and responsible for the amount of sales tax levied on any sale made to the qualified purchaser pursuant to this section in the same manner as liability would be imposed on a qualified purchaser for state sales tax pursuant to section 39-26-105 (3), C.R.S.

(c) (I) The board shall designate a financial officer who shall coordinate with the department of revenue regarding the collection of a sales and use tax. This coordination shall include, but not be limited to, the financial officer identifying those businesses eligible to collect the sales and use tax and any other administrative details identified by the department.

(II) Any sales and use tax authorized pursuant to this article shall become effective on July 1 following the electors' approval of the tax.

(3) The district shall use the revenues generated from the sales and use tax imposed pursuant to this article to assure compliance with the Republican river compact.

**Source: L. 2004:** Entire article added, p. 1912, § 1, effective August 4. **L. 2008:** (1)(d) amended, p. 992, § 15, effective August 5.

**37-50-111. Limitations on power to levy and contract.** (1) The district has no power of taxation or right to levy or assess taxes pursuant to section 37-50-109, except an

annual levy. The district has no power to contract or incur any obligation or indebtedness except as expressly provided in this article.

(2) All property taxes and assessments under this article shall be collected by the county treasurers of the respective counties in which real estate is situated at the same time and in the same manner as is provided by law for the collection of taxes for county and state purposes, and, if the assessments are not paid, the real estate shall be sold at regular tax sales for the payment of the assessments, interest, and penalties in the manner provided by the laws of this state for selling property for the payment of general taxes. If there are no bids at the tax sales for the property so offered, the tax certificates shall be issued in the name of the district; and the board has the same power with reference to the sale of the tax certificates as is now vested in county commissioners and county treasurers when a tax certificate is issued in the name of a county.

(3) Tax deeds may be issued, based upon the certificates of sale, in the same manner that deeds are executed on tax sales on general state and county taxes.

**Source: L. 2004:** Entire article added, p. 1914, § 1, effective August 4.

**37-50-112. Investment of unexpended revenues.** The board may invest any unexpended revenues of the district, including any amounts in the construction fund not needed for immediate use, to pay the cost of construction of any project, or to pay bonds or coupons or to meet current expenses, in securities meeting the investment requirements established in part 6 of article 75 of title 24, C.R.S. The board may require any revenues of the district to be deposited with such depository or bank as may be designated by the board and likewise has authority to require the treasurer of the district to take from such depository a bond with corporate surety to ensure payment of any such deposit, or to require such depository to ensure payment of any such deposit, or to require such depository to pledge securities of the same kind as those in which the district is authorized to invest its funds to ensure payment of any such deposit.

**Source: L. 2004:** Entire article added, p. 1914, § 1, effective August 4.

**37-50-113. Appointment and compensation of appraisers.** (1) As soon as the official plan has been prepared and adopted pursuant to section 37-50-107 (3) and is on file in the office of the district, upon petition of the district, the board may, if the official plan includes the utilization of special improvement bonds paid by special assessments upon the property benefitted within the district, appoint a board of appraisers consisting of three members. The qualifications of the appraisers and all proceedings before them shall be in accordance with the provisions of the law pertaining to the duties and qualifications of appraisers under the conservancy law of this state as set forth in article 4 of this title.

(2) Appraisers appointed under this section shall receive compensation set by the board for the performance of their duties.

**Source: L. 2004:** Entire article added, p. 1914, § 1, effective August 4.

**37-50-114. Assessments - procedure in making.** (1) If the board provides for the financing of the construction or acquisition of the works or other improvements proposed and of the other steps necessary to the development and implementation of the district's official plan by special assessments to be levied against the appraised benefits to property within the district, then the board may make assessments from time to time, as required, and, in making the assessments, the board shall be guided by the procedure for the levy of similar assessments under the conservancy law of this state, articles 1 to 8 of this title, and particularly sections 37-5-104 to 37-5-106.

(2) From time to time, as the affairs of the district may demand, the board may levy on all property upon which benefits have been appraised an assessment of such portion of benefits as may be found necessary by the board to pay the cost of the appraisal, the preparation and execution of the official plan for the district, and the superintendence of



construction and administration during the period of construction, plus ten percent of the total to be added for contingencies, but not to exceed in the total of principal the appraised benefits so adjudicated. The assessments, to be known as the "construction fund assessment", shall be apportioned to and levied on each tract of land or other property in the district in proportion to the benefits appraised and not in excess thereof, and in case bonds are issued, then the amount of interest that will accrue on such bonds as estimated by the board shall be included in and added to the assessment; except that the interest to accrue on account of the issuance of bonds shall not be construed as a part of the cost of construction in determining whether the expenses and cost of making the improvement are equal to or in excess of the benefits appraised.

(3) As soon as the assessment is levied, the secretary of the district, at the expense thereof, shall prepare in duplicate an assessment of the district. The assessment shall be in the form of a well-bound book endorsed and named "Construction Fund Assessment Record of the Republican River Water Conservation District". The record shall be in the form of similar records for conservancy districts under the laws of this state, particularly section 37-5-104. Assessments may be paid in the manner provided in section 37-5-105 relating to conservancy districts under the laws of this state. All proceedings provided in such sections with respect to conservancy districts shall apply to the assessments, the records thereof, and the manner of payment of assessments of the district.

**Source: L. 2004:** Entire article added, p. 1915, § 1, effective August 4.

**37-50-115. Collection by civil action.** In addition to all other remedies for collection of assessments provided by this article, the district may, at any time after three years after the issuance of any certificate of purchase held by the district, bring civil action to foreclose the lien for assessments represented by all certificates of purchase held by the district with respect to the same land and for other relief with respect to such land as provided by the Colorado rules of civil procedure then in effect for the foreclosure of liens on real property. No statute of limitations shall be applicable to the rights of the district arising from any assessment. No decree, or sale of lands thereunder, shall be made except one subject to the lien of future unpaid installments of assessments. The county treasurer shall be made a party to any action of the district authorized by this section.

**Source: L. 2004:** Entire article added, p. 1915, § 1, effective August 4.

**37-50-116. Assessments perpetual lien.** All assessments on account of special improvements against appraised benefits and interest thereon and penalties for default of payment thereof, together with the cost of collecting the same, from the date of the filing of the construction fund and the assessment record in the office of the treasurer of the county in which the lands and property are situated, shall constitute a perpetual lien in an amount not in excess of the benefits severally appraised upon the land and other property against which assessments have been levied and such benefits appraised. No sale of the property to enforce any general state, county, city, town, or school tax or other lien shall extinguish the perpetual lien of the assessment. At any time, a landowner may pay the full amount of the assessment, and thereafter the property of the landowner shall be clear and free from lien and shall not be subject to assessment for and on account of benefits appraised against any other land or default in the payment of assessments made against any other land.

**Source: L. 2004:** Entire article added, p. 1916, § 1, effective August 4.

**37-50-117. Directors to remedy defects in assessments.** If any assessment made under the provisions of this article proves invalid, the board, by subsequent or amended acts or proceedings, promptly and without delay, shall remedy all defects or irregularities, as the case may require, by making and providing for the collection of new assessments or otherwise.

**Source: L. 2004:** Entire article added, p. 1916, § 1, effective August 4.

**37-50-118. Assessment record as evidence.** The record of assessments contained in the respective assessment records of the district shall be prima facie evidence in all courts of all matters contained in the record.

**Source: L. 2004:** Entire article added, p. 1916, § 1, effective August 4.

**37-50-119. Defects in notice perfected.** Whenever in this article notice is provided for, if the court finds that due notice was not given, jurisdiction shall not be lost nor the proceedings abated or held void, but the court shall continue the hearing until proper notice has been given and then shall proceed as though proper notice had been given in the first instance. If any appraisal, assessment, levy, or other proceeding relating to the district is held defective, then the board may file a motion in the cause in which the district was organized to perfect any such defect, and the court shall set a time to hear the motion. If the original notice as a whole is held to be sufficient, but faulty only with reference to publication as to certain particular lands or as to service as to certain persons, publication of the defective notice may be ordered as to the particular lands or service may be made on the persons not properly served, and the notice is thereby corrected without invalidating the original notice as to other lands or persons.

**Source: L. 2004:** Entire article added, p. 1916, § 1, effective August 4.

**37-50-120. Issuance of general obligation bonds.** (1) In the name of the district, the district may issue general obligations or bonds that shall constitute a lien against the real property in the district. Obligations shall bear interest at a rate such that the net effective interest rate of the issue does not exceed the maximum net effective interest rate authorized. Interest shall be payable semiannually, and obligations may be made payable in series becoming due not less than five years and not more than fifty years after the date of issue. The bonds may be sold in one or more series at par, or below or above par, at public or private sale, in such manner and for such price as the district, in its discretion, shall determine. As an incidental expense of the issuance, the district may employ financial and legal consultants in regard to the financing of the official plan. The district may exchange all or a part of its bonds for all or an equivalent part of property or services included in the official plan for which the bonds are issued, if the exchange is preceded by determination of the fair value of the property or services exchanged for the bonds. Such determination shall be by resolution of the board and shall be conclusive.

(2) Such bonds are to be paid from assessments levied from time to time, as the bonds and interest thereon become due, against the taxable property in the district and not otherwise. Such levies shall not be limited as to rate or amount; except that they shall not exceed a rate reasonably required to yield revenues needed to pay bonds and interest as they mature, plus any other amounts required for debt service, less the amount of any other revenues available to the district for payment of bonds and debt service. The board shall certify, to the boards of county commissioners of the several counties in which the district or any part thereof is located, the amount of the levy necessary to be made upon the taxable property in the district to yield the required revenues becoming due on all outstanding bonds at the same time that certifications of the district's mill levy assessment for general district purposes are made. The procedure for the assessment and collection of ad valorem taxes of the county is, except as may be otherwise provided in this article, made applicable and is to be followed in the levy of assessments for payment of taxes and collection of principal and debt service on such general obligations or bonds.

**Source: L. 2004:** Entire article added, p. 1917, § 1, effective August 4.

**37-50-121. Costs - board of directors to concur.** To the extent that the costs of the proceedings for the issuance of revenue bonds are not paid by the proceeds of the bonds, they shall be budgeted and paid out from district revenues or from the separate district mill levy.



**Source: L. 2004:** Entire article added, p. 1917, § 1, effective August 4.

**37-50-122. Sinking fund.** The district may provide for a sinking fund for the ultimate payment of any of the obligations of the district. The sinking fund may be invested as provided in section 37-50-112.

**Source: L. 2004:** Entire article added, p. 1917, § 1, effective August 4.

**37-50-123. Court confirmation.** (1) (a) The board, on behalf and in the name of the district, may file a petition at any time, in the district court in and for the county in which the district's principal office is maintained, for a judicial examination and determination of any power conferred or of any taxes or rates or other charges levied, or of any act, proceeding, or contract of the district, whether or not the contract has been executed, including, without limitation, proposed contracts for the acquisition, improvement, equipment, maintenance, operation, or disposal of any properties or facilities for the benefit of the district, and so including a proposed issue of revenue warrants, revenue bonds, special assessment bonds, or general obligation bonds, issued or to be issued on behalf of any such entity. The petition shall set forth the facts on which the validity of such power, tax, assessment, charge, act, proceeding, or contract is founded and shall be verified by the president of the board.

(b) An action taken pursuant to paragraph (a) of this subsection (1) shall be in the nature of a proceeding in rem, and jurisdiction of all parties interested may be had by publication, mail, and posting, as provided in this article. Notice of the filing of the petition shall be given by the clerk of the court, under the seal of the court, stating in brief outline the contents of the petition and also stating where a full copy of any contract mentioned in the petition may be examined. The notice shall be served by publication at least once a week for five consecutive weeks in a daily or a weekly newspaper of general circulation published in the county in which the principal office of the district is located by mailing copies of the notice by registered or certified mail, return receipt requested, to the boards of county commissioners of the several counties in which the parties in interest in such action are located, wholly or in part, and by posting the notice in the office of the district at least thirty days before the date fixed in the notice for the hearing on the petition. Jurisdiction shall be complete after such publication, mailing, and posting.

(c) Any owner of property in the district filing a petition pursuant to this subsection (1) or any person interested in the petition, contract, or proposed contract may appear and move to dismiss or answer the petition at any time before the date fixed for the hearing or within such further time as may be allowed by the court. All persons who fail to appear shall be deemed to have consented to the petition.

(2) The petition and notice shall be sufficient to give the court jurisdiction. Upon hearing the petition, the court shall examine and determine all matters and things affecting the question submitted and shall make such findings and render such judgment and decree as the case warrants. Costs may be divided or apportioned among any contesting parties in the discretion of the trial court. Review of the judgment of the court may be had as in other similar cases; except that such review shall be applied for within thirty days after the time of the rendition of such judgment or within such additional time as may be allowed by the court within thirty days. The Colorado rules of civil procedure shall govern in matters of pleading and practice where not otherwise specified in this article. The court shall disregard any error, irregularity, or omission that does not affect the substantial rights of the parties.

**Source: L. 2004:** Entire article added, p. 1917, § 1, effective August 4.

**37-50-124. Election to authorize debt.** Except for the issuance of refunding bonds or other funding or refunding of obligations that does not increase the net indebtedness of the district, no indebtedness shall be incurred by the issuance of general obligation bonds of the district or by any contract by which the district agrees to repay as general obligations or other obligations constituting a "general obligation debt by loan in any form", as such term

is used in section 6 of article XI of the state constitution, of the district to the federal government, the state, a political subdivision, or a person over a term not limited to the then current fiscal year any project costs advanced thereby under any contract for the acquisition or improvement of the facilities or any interest in the facilities, or for any project, advanced by the issuance of securities of such a political subdivision or person to defray any cost of the project or of the facilities or an interest in the project or facilities acquired and becoming a part of the facilities of the district, or otherwise advanced, unless a proposal for issuing the district's general obligation bonds or of incurring an indebtedness by the district by making such a contract is submitted to the electors of the district and is approved by a majority of such electors voting on the proposal at an election held for that purpose in accordance with this article.

**Source: L. 2004:** Entire article added, p. 1918, § 1, effective August 4.

**37-50-125. Definition of elector.** (1) An "elector" or "elector of the district", or any term of similar import, means a person who:

- (a) At the time of the election, is qualified to vote in general elections in this state; and
- (b) Either:
  - (I) Has been a resident of the district for not less than thirty-two days at the time of the election; or
  - (II) Owns or whose spouse owns taxable real or personal property within the district.
- (2) Registration pursuant to the laws concerning general elections or any other laws shall not be required.

**Source: L. 2004:** Entire article added, p. 1919, § 1, effective August 4.

**37-50-126. Elections.** Whenever in this article an election of the electors of the district is permitted or required, the election may be held separately at a special election or may be held concurrently with any primary, general, or other election held under the laws of this state.

**Source: L. 2004:** Entire article added, p. 1919, § 1, effective August 4.

**37-50-127. Election resolution.** (1) The board shall call any election by resolution adopted at least thirty days before the election.

(2) The resolution shall state the objects and purposes of the election, the date upon which such election shall be held, and the form of the ballot.

(3) In the case of an election not to be held concurrently with a primary or general election, the board shall provide in the election resolution or by supplemental resolution for the appointment of sufficient judges and clerks of the election, who shall be electors of the district holding the debt election, and shall set their compensation. The election resolution or a supplemental resolution shall designate the precincts and polling places, but a supplemental resolution may modify the description of precincts and polling places without repeating the description in full. The description of precincts may be made by reference to any order of the governing body of any county, municipality, or other political subdivision in which the district or any part thereof is situated, by reference to any previous order or other instrument of the governing body, by detailed description of the precincts, or by other sufficient description.

(4) Precincts established by the governing body may be consolidated in the election resolution by the board in a sufficient number that it deems expedient for the convenience of the electors for any election not to be held concurrently with a primary or general election.

(5) If the election is held concurrently with a primary or general election held under the laws of this state, the judges of election for the primary or general election shall be designated as the judges of the election for the election held pursuant to this article, and they



shall receive such additional compensation, if any, as the board shall set by the election resolution.

(6) If there is a direct conflict between this section and the provisions governing elections in section 20 of article X of the state constitution, section 20 of article X of the state constitution shall prevail.

**Source:** L. 2004: Entire article added, p. 1919, § 1, effective August 4.

**37-50-128. Conduct of election.** (1) Except as otherwise provided in this article, an election held pursuant to this article shall be opened and conducted in the manner then provided by the laws of this state for the conduct of general elections.

(2) If an election is held concurrently with a primary or general election, the county clerk and recorder of each county in which the district holding the election is located shall perform for the district election the acts provided by law to be performed by such officials. If an election is not held concurrently with a primary or general election, such acts shall be performed by the secretary of the district with the assistance of the county clerk and recorders. The board and county clerk and recorders are authorized to agree among themselves upon the division of such acts and the determination of persons to perform them.

(3) An elector of the district may vote in an election by absent voter's ballot under such terms and conditions, and in substantially the same manner insofar as is practicable, as prescribed in article 8 of title 1, C.R.S., of the "Uniform Election Code of 1992", for general elections, except as specifically modified in this article.

(4) All acts required or permitted to be performed by a county clerk and recorder shall be performed by each one respectively in the event of a primary or general election and by the secretary or assistant secretary of the board in the event of any other election, unless the services of the county clerk and recorder in each such county are contracted for, but no oath shall be administered by the secretary or assistant secretary unless he or she is also an officer authorized to administer oaths.

(5) Application may be made for an absent voter's ballot not more than twenty days and not less than four days before the election.

(6) No consideration shall be given nor distinction made with reference to any person's affiliation or the lack thereof.

(7) The return envelope for the absent voter's ballot shall have printed on its face an affidavit substantially in the following form:

State of Colorado, county of ....., I, ....., being first duly sworn according to law, depose and say that the address of my residence is .....; that I am a person qualified to vote in general elections in the state of Colorado and am a resident of the Republican river water conservation district at the time of this election.

.....  
Signature of voter

Subscribed and sworn to before me this ... day of ....., 20..

.....  
(Signature of notary public,  
county clerk and recorder,  
or other officer authorized  
to administer oaths)

(SEAL)

.....  
Title of office

(8) In any such election at which voting machines are used, the board shall provide paper ballots for absent voters containing the same question as will be submitted to the electors by the voting machines, subject to subsection (9) of this section.

(9) The district may provide for mail-in voters to cast their mail-in voters' ballots on voting machines expressly provided for that purpose, if each mail-in voter indicates by

affidavit that he or she is qualified to vote at the election and will be a mail-in voter, pursuant to section 1-8-102, C.R.S.

(10) If there is a direct conflict between this section and the provisions governing elections in section 20 of article X of the state constitution, section 20 of article X of the state constitution shall prevail.

**Source: L. 2004:** Entire article added, p. 1920, § 1, effective August 4. **L. 2008:** (9) amended, p. 1913, § 127, effective August 5. **L. 2009:** (9) amended, (HB 09-1216), ch. 165, p. 731, § 12, effective August 5.

**37-50-129. Notice of election.** Notice of an election held pursuant to this article shall be given by publication by three consecutive weekly insertions in at least one newspaper of general circulation in each county wholly or partially within the district, as determined by the board. No other notice of an election held under this article need be given, unless otherwise provided by the board. A supplemental notice may be given by publication at such times and places as the board may determine to be necessary or convenient for correcting or otherwise modifying the original notice of election or for any other purpose.

**Source: L. 2004:** Entire article added, p. 1921, § 1, effective August 4.

**37-50-130. Polling places.** (1) All polling places designated by resolution for an election shall be within the territorial limits of the district; except that, if an election of the district is held concurrently with a primary or general election, the polling place for each precinct located wholly or partially within the district shall be the polling place for such precinct for the district election, regardless of whether such polling place is within the district.

(2) If the election of the district is not held concurrently with a primary or general election held under the laws of this state, there shall be one polling place in each of the election precincts that are used in the primary and general elections or in each of the consolidated precincts fixed by the board, as the case may be.

**Source: L. 2004:** Entire article added, p. 1922, § 1, effective August 4.

**37-50-131. Election supplies.** (1) The secretary of the district shall provide at each polling place ballots or ballot labels, or both, ballot boxes or voting machines, or both, instructions, electors' affidavits, and other materials and supplies required for an election by any law; and the secretary may provide ballots and marking devices suitable for voting and for the votes on the ballots to be counted on electronic vote-tabulating devices.

(2) Election officials may require the execution of an affidavit by any person desiring to vote at any election of the district to evidence such person's qualifications to vote. The affidavit shall be prima facie evidence of the facts it states.

**Source: L. 2004:** Entire article added, p. 1922, § 1, effective August 4.

**37-50-132. Election returns.** (1) In the case of any election held under this article that is not held concurrently with a primary or general election, the election officials shall make their returns directly to the secretary of the district for the board.

(2) In the case of an election held under this article that is consolidated with any primary or general election, the returns shall be made and canvassed at the time and in the manner provided by law for the canvass of the returns of such primary or general election. The canvassing body shall certify promptly and shall transmit to the secretary of the district for the board a statement of the result of the vote upon any proposition submitted under this article.

(3) Upon receipt by the board of election returns from election officials or upon receipt of such certificate from each such canvassing body, the board shall tabulate and declare the



results of the election at any regular or special meeting held not earlier than five days following the date of the election.

(4) The board shall cause the results of the election to be published at least one time in at least one newspaper having general circulation in the district.

**Source: L. 2004:** Entire article added, p. 1922, § 1, effective August 4.

**37-50-133. Debt and tax levy election contests.** (1) An election declared to have approved an authorization to levy any tax or issue any bonds, by approval of the tax levy or bond question, or otherwise to incur an indebtedness may be contested by any elector of the district by suit against it as contestee and defendant in any district court of any county in which the district is wholly or partially situate:

(a) When illegal votes have been received or legal votes rejected at the polls in sufficient numbers to change the results;

(b) For any error or mistake on the part of any of the judges of election, any county clerk and recorder, the secretary of the district, or their respective officers and employees in counting or declaring the result of the election, if the error or mistake is sufficient to change the result;

(c) For misconduct, fraud, or corruption on the part of any of the judges of election, any county clerk and recorder, the secretary of the district, or their respective officers and employees, if the misconduct, fraud, or corruption is sufficient to change the result;

(d) When the tax levy or bonds or other indebtedness is authorized to be issued for an invalid purpose; or

(e) For any other cause that shows that the tax levy or bonds or other indebtedness is not validly authorized at the election.

(2) The style and form of process, the manner of service of process and papers, the fees of officers, and judgment for costs and execution of the judgment shall be according to the rules and practices of the court.

(3) Before the court takes jurisdiction of the contest, the contestor shall file with the clerk of the court a bond, with sureties, to be approved by the judge, running to the district as contestee and conditioned to pay all costs in case of failure of the contestor to maintain the contest.

(4) When the validity of any tax levy or bond or other indebtedness election is contested, the plaintiff or plaintiffs, within thirty days after the returns of the election are canvassed and the results declared and published, or last published, as the case may be, shall file with the clerk of the court a verified written complaint setting forth specifically:

(a) The name of the party contesting the election and a statement that the plaintiff or each plaintiff is an elector of the district;

(b) The proposition or propositions voted on at the election that are contested, the name of the district as defendant and contestee, and the date of the election; and

(c) The particular grounds of the contest.

(5) No such contest shall be maintained and no election shall be set aside or held invalid unless such a complaint is filed within the period prescribed in subsection (4) of this section.

(6) Except as otherwise provided in this article, the election laws pertaining to contested election cases of municipal offices as provided in part 13 of article 10 of title 31, C.R.S., of the "Colorado Municipal Election Code of 1965", shall apply to tax levy or bond or other indebtedness elections; except that any such contest shall be regarded as one contesting the outcome of the vote on the proposition authorizing the tax levy or issuance of securities or otherwise incurring the indebtedness, rather than election to office, and the district as contestee, rather than a person declared to have been elected to office, shall be regarded as the defendant.

(7) If the board declares the proposition authorizing the tax levy or issuance of bonds or otherwise incurring the indebtedness to have carried and no contest is duly filed or if such a contest is filed after it is favorably terminated, the board may issue the bonds or otherwise incur the tax levy or indebtedness authorized at the election at one time or from time to time.

**Source: L. 2004:** Entire article added, p. 1923, § 1, effective August 4.

**37-50-134. Covenants and other provisions in bonds.** (1) A resolution providing for the issuance of bonds under this article, payable from pledged revenues and an indenture or other related instrument or proceedings, may at the discretion of the board contain covenants or other provisions, notwithstanding that such covenants and provisions may limit the exercise of powers conferred by this article, in order to secure the payment of such bonds, in agreement with the holders of such bonds, including, without limitation, covenants or other provisions as to any one or more of the following:

(a) The pledged revenues and, in the case of general obligations, the taxes to be fixed, charged, or levied and their collection, use, and disposition, including, without limitation, the foreclosure of liens for delinquencies; the discontinuance of services, facilities, or use of any properties or facilities; prohibition against free service; the collection of penalties and collection costs; and the use and disposition of any moneys of the district, derived or to be derived, from any source designated;

(b) The acquisition, improvement, or equipment of all or any part of properties pertaining to any project or any facilities;

(c) The creation and maintenance of reserves or sinking funds to secure the payment of the principal and interest on any bonds or of the operation and maintenance expenses of any facilities, or part thereof, and the source, custody, security, regulation, use, and disposition of any such reserves or funds, including, without limitation, the related powers and duties of any trustee;

(d) Limitations on the powers of the district to acquire or operate, or permit the acquisition or operation of, structures, facilities, or properties that may compete or tend to compete with any facilities;

(e) The vesting in a corporate or other trustee or trustees of such property, rights, powers, and duties in trust as the board may determine, which may include any or all of the rights, powers, and duties of the trustee appointed by the holders of bonds, and limiting or abrogating the rights of such holders to appoint a trustee, or limiting the rights, duties, and powers of such trustee;

(f) Events of default, rights, and liabilities arising from events of default and the rights, liabilities, powers, and duties arising upon the breach by the district of any covenants, conditions, or obligations;

(g) The terms and conditions upon which the holders of the bonds or of a specified portion, percentage, or amount of the bonds, or any trustee for the holders, shall be entitled to the appointment of a receiver, which receiver may enter, take possession of, operate, and maintain any facilities or service; prescribe fees, rates, and other charges; and collect, receive, and apply all resulting revenues in the same manner as the district itself might do;

(h) A procedure by which the terms of any resolution authorizing bonds or any other contract with any holders of district bonds, including, without limitation, an indenture of trust or similar instrument, may be amended or abrogated, and as to the proportion, percentage, or amount of bonds the holders of which must consent thereto, and the manner in which such consent may be given;

(i) The terms and conditions upon which any or all of the bonds shall become or may be declared due before maturity and as to the terms and conditions upon which such declaration and its consequences may be waived; and

(j) All such acts and things as may be necessary, convenient, or desirable in order to secure the bonds or, in the discretion of the board, tend to make the bonds more marketable, notwithstanding that such covenant, act, or thing may not be enumerated in this article, it being the intention of this article to give to the board power to do in the name and on behalf of the district all things in the issuance of district bonds and for their security, except as expressly limited in this article.

**Source: L. 2004:** Entire article added, p. 1924, § 1, effective August 4.

**37-50-135. Liens on pledged revenues.** (1) Revenues pledged for the payment of bonds, as received by or otherwise credited to the district under this article, shall imme-



diately be subject to the lien of each such pledge without any physical delivery, filing, or further act.

(2) The lien of each such pledge and the obligation to perform the contractual provisions made in the authorizing resolution or other related instrument shall have priority over all other obligations or liabilities of the district, except as may be otherwise provided in this article or in the resolution or other instrument, and subject to any prior pledges and liens previously created.

(3) The lien of each such pledge shall be valid and binding as against all persons having claims of any kind in tort, in contract, or otherwise against the district, irrespective of whether such persons have notice of the lien.

**Source: L. 2004:** Entire article added, p. 1925, § 1, effective August 4.

**37-50-136. Rights - powers of holders of bonds - trustees.** (1) Subject to any contractual limitations binding upon the holders of any issue or series of bonds of the district issuing bonds under this article, or the holders' trustee, including, without limitation, the restriction of the exercise of any remedy to a specified proportion, percentage, or number of such holders, and subject to any prior or superior rights of others, a holder of bonds, or the holder's trustee, shall have the right and power, for the equal benefit and protection of all holders of bonds similarly situated:

(a) By mandamus or other suit, action, or proceeding at law or in equity, to enforce the holder's rights against the district, board, or any combination, or the officers, agents, and employees of the district to compel the district, board, or such officers, agents, or employees to perform their respective duties, obligations, or other commitments under this article and their respective covenants and agreements with the holder of a bond;

(b) By action or suit in equity, to require the district to account as if it were the trustee of an express trust;

(c) By action or suit in equity, to have a receiver appointed, which receiver may enter and take possession of facilities and pledged revenues for the payment of the bonds; prescribe sufficient fees, rates, and other charges derived from the facilities; and collect, receive, and apply all pledged revenues or other moneys pledged for the payment of the bonds in the same manner as the district itself might do in accordance with the obligations of the district; and

(d) By action or suit in equity, to enjoin any acts or things that may be unlawful or in violation of the rights of the holder of any bonds.

**Source: L. 2004:** Entire article added, p. 1926, § 1, effective August 4.

**37-50-137. Investments and securities.** (1) The board, subject to contractual limitations from time to time imposed upon the district by a resolution authorizing the issuance of the outstanding bonds of the district, a trust indenture, or other related proceedings, may invest and reinvest proceeds of taxes, pledged revenues, and proceeds of bonds issued under this article in securities meeting the investment requirements established in part 6 of article 75 of title 24, C.R.S., and may deposit such proceeds in any trust bank, secured in such manner and subject to such terms and conditions as the board may determine, with or without the payment of any interest on such deposit, including, without limitation, time deposits evidenced by certificates of deposit.

(2) Such securities and certificates of deposit thus held may, from time to time, be sold and the proceeds may be so reinvested or redeposited as provided in this section.

(3) Sales and redemptions of such securities and certificates of deposit thus held shall, from time to time, be made so that the proceeds may be applied to the purposes for which the money with which such securities and certificates of deposit were originally acquired.

(4) Gains from such investments or reinvestments may be credited to any fund or account pledged for the payment of district bonds issued under this article, including any applicable reserve, any other fund or account pertaining to a project or facility, or the

district's general fund, subject to contractual limitations in a proceeding pertaining to outstanding district bonds.

(5) It is lawful for a commercial bank incorporated under the laws of this state that may act as depository of the proceeds of bonds issued under this article, securities owned by the district, proceeds of taxes, pledged revenues, and moneys otherwise pertaining to a project, facilities, or any combination, to furnish such indemnifying bonds and to pledge such securities as may be required by the board.

**Source: L. 2004:** Entire article added, p. 1926, § 1, effective August 4.

**37-50-138. Rents and charges.** (1) (a) The district and any political subdivision of the state of Colorado contracting with the district and fixing and collecting annual rentals, service charges, other charges, or any combination thereof are authorized to fix and collect rents, rates, fees, tolls, and other charges, in this article sometimes referred to as "service charges", for direct or indirect connection with, or the use or services of, a water system, joint system, or other facilities, including, without limitation, connection charges, minimum charges, and charges for the availability of service.

(b) Such service charges may be charged to and collected in advance or otherwise by a district from a political subdivision or person and by a political subdivision from a person contracting for such connection, use, or services or from the owner, occupant, or any combination, of real property that directly or indirectly is, has been, or will be connected with such facilities. The political subdivision, owner, or occupant of such real property shall be liable for and shall pay such service charges to the district or political subdivision fixing the service charges at the time and place such service charges are due and payable.

(c) Service charges of the district may accrue from a date on which the board reasonably estimates, in a resolution authorizing the issuance of securities, other related instruments, or in a contract with any political subdivision or person, that facilities or projects being acquired or improved and equipped will be available for service or use.

(2) (a) Such rents, rates, fees, tolls, and other charges, being in the nature of use or service charges, shall, as nearly as the district shall deem practicable and equitable, be reasonable, and such service charges shall be uniform throughout the district for the same type, class, and amount of use or service of the facilities and may be based or computed either on:

(I) Measurements of water or flow devices that are duly provided and maintained by the district or any user as approved by the district;

(II) The consumption of water in, on, or in connection with the political subdivision, person, or real property, making due allowance for commercial use of water, infiltration of groundwater, and discharge of surface runoff to the facilities;

(III) The number and kind of water fixtures or facilities on or in connection with the political subdivision, person, or real property;

(IV) The water facilities in, on, or in connection with the political subdivision, person, or real property;

(V) The number of persons residing or working in, on, or otherwise connected or identified with the political subdivision, person, or real property;

(VI) The capacity of the improvements in, on, or connected with the political subdivision, person, or real property;

(VII) The availability of service or readiness to serve by the facilities;

(VIII) Any other factors determining the type, class, and amount of use or service of the facilities; or

(IX) Any combination of any such factors.

(b) Reasonable penalties may be fixed for delinquencies, including, without limitation, interest on delinquent service charges from the due date at a rate not exceeding one percent per month or monthly fraction, reasonable attorney fees, and other costs of collection.

(3) The district shall prescribe and, from time to time when necessary, revise a schedule of such service charges, which shall comply with the terms of any contract of the district or political subdivision fixing the service charges.



(4) The general assembly has determined and declared that the obligations, arising from time to time, of the district, any political subdivision, or any person to pay service charges fixed in connection with any facilities shall constitute general obligations of the district, political subdivision, or person charged with their payment; except that, as such obligations accrue for current services and benefits from, and the use of, such facilities, the obligations shall not constitute an indebtedness of the district or any political subdivision within the meaning of constitutional, charter, or statutory limitation or other provision restricting the incurrence of debt.

(5) No board, agency, bureau, commission, or official, other than the board of directors of the district, has authority to fix, prescribe, levy, modify, supervise, or regulate the making of service charges or to prescribe, supervise, or regulate the performance of services pertaining to the district's facilities, as authorized by this article; except that this subsection (5) shall not be construed to be a limitation on the contracting powers of the board.

**Source: L. 2004:** Entire article added, p. 1927, § 1, effective August 4.

**37-50-139. Miscellaneous powers.** (1) The district shall also have the following powers:

(a) To pay or otherwise defray and to contract to pay or defray, for a term not exceeding seventy-five years, without an election, except as otherwise provided in this article, the principal of, prior redemption premiums due in connection with, interest on, and other charges pertaining to securities or other obligations of the federal government, the district, a political subdivision, or a person that were incurred in connection with related property subsequently acquired by the district and relating to the district's facilities;

(b) To establish, operate, and maintain facilities within the district or elsewhere, across or along any public street, highway, bridge, or viaduct or other public right-of-way or in, upon, under, or over any vacant public lands, which public lands now are, or may become, the property of a political subdivision of this state, without first obtaining a franchise from the political subdivision having jurisdiction over the lands; except that the district shall cooperate with any political subdivision having such jurisdiction; shall promptly restore any such public street, highway, bridge, viaduct, or other public right-of-way to its former state of usefulness as nearly as may be; and shall not permanently impair completely or materially the usefulness of the right-of-way;

(c) To adopt, amend, repeal, enforce, and otherwise administer such reasonable resolutions, rules, regulations, and orders as the district shall deem necessary or convenient for the conduct of its business, including, but not limited to, the operation, maintenance, management, government, and use of the facilities of the district and any other facilities under its control, whether situated within, without, or both within and without the territorial limits of the district.

**Source: L. 2004:** Entire article added, p. 1929, § 1, effective August 4.

**37-50-140. Joint action entity.** (1) The district and another cooperating entity or entities relating to a project or facilities in which the district is a party in interest may create a joint action entity, which shall be a separate body corporate, for the planning, construction, lease, other acquisition, improvement, equipment, operation, maintenance, disposal, and financing of any enterprise or properties relating to such project or facilities.

(2) A joint action entity may exercise the powers granted to the district by this article, other than the levy or fixing and collection of taxes, assessments, and service charges and the making and revising of rules and regulations under the police power.

**Source: L. 2004:** Entire article added, p. 1929, § 1, effective August 4.

**37-50-141. Refunding.** (1) Any revenue bonds issued under this article and at any time outstanding may, at any time and from time to time, be refunded by the district by the issuance of its refunding bonds in such amount as the board may deem necessary to refund

the principal of the bonds to be refunded, unpaid interest, premiums, and necessary incidental expenses.

(2) Any such refunding may be effected, whether the bonds to be refunded have matured or shall mature later, either by sale of the refunding bonds and the application of the proceeds, directly or indirectly, to the payment of the bonds to be refunded or by exchange of the refunding bonds for the bonds to be refunded, but the holders of bonds to be so refunded shall not be compelled, without their consent, to surrender their bonds for payment or exchange before the date on which they are payable by maturity date, option to redeem, or otherwise or if they are called for redemption before the date on which they are, by their terms, subject to redemption by option or otherwise. Except to the extent expressly or by implication inconsistent with the terms of this article, article 54 of title 11, C.R.S., shall govern the issuance of such refunding bonds and the establishment of any related escrow.

(3) Refunding bonds issued under authority of this article shall be payable solely from revenues out of which bonds to be refunded are payable or from revenues out of which bonds of the same character may be made payable under this article or other law in effect at the time of the refunding.

**Source: L. 2004:** Entire article added, p. 1930, § 1, effective August 4.

**37-50-142. Severability.** If any provision of this article or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the article that can be given effect without the invalid provision or application, and to this end the provisions of this article are declared to be severable.

**Source: L. 2004:** Entire article added, p. 1930, § 1, effective August 4.

**WATER CONSERVATION BOARD AND COMPACTS**

**General and Administrative**

**ARTICLE 60**

**Colorado Water Conservation Board**

**Law reviews:** For article, “Plans and Studies: The Recent Quest for a Utopia in the Utilization of Colorado’s Water Resources”, see 55 U. Colo. L. Rev. 391 (1984); for article, “The Constitution, Property Rights and the Future of Water Law”, see 61 U. Colo. L. Rev. 257 (1990).

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37-60-122.2.	Fish and wildlife resources - legislative declaration - fund - authorization.	37-60-126.	Water conservation and drought mitigation planning - programs - relationship to state assistance for water facilities - guidelines - water efficiency grant program - repeal.
37-60-122.3.	Wild and scenic rivers fund - created.	37-60-126.5.	Drought mitigation planning - programs - relationship to state assistance.
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37-60-122.6.	Emergency infrastructure repair cash fund - authorization. (Repealed)	37-60-129.	Availability of funds.
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37-60-122.8.	Publications fund.		
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37-60-123.	Conformity with state water plan. (Repealed)		
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## PART 2

## WATER INFRASTRUCTURE REVENUE BONDS

37-60-201 to  
37-60-210. (Repealed)

## PART 1

## GENERAL PROVISIONS

**37-60-101. Definitions.** As used in this article, unless the context otherwise requires:  
(1) "Board" means the Colorado water conservation board.

**Source:** L. 37: p. 1300, § 2. CSA: C. 173B, § 2. CRS 53: § 148-1-2. C.R.S. 1963: § 149-1-2.

**37-60-102. Creation.** For the purpose of aiding in the protection and development of the waters of the state, for the benefit of the present and future inhabitants of the state there is created a Colorado water conservation board with the powers and duties set out in this article. Said board is declared to be an agency of the state, and the functions it is to perform, as set out in this article, are declared to be governmental functions for the welfare and benefit of the state and its inhabitants.

**Source:** L. 37: p. 1300, § 1. CSA: C. 173B, § 1. CRS 53: § 148-1-1. C.R.S. 1963: § 149-1-1.

**Cross references:** For the Colorado water conservation board as a division of the department of natural resources, see §§ 24-1-124 (3) and 24-33-104.

## ANNOTATION

**This section provides for the creation of the Colorado water conservation board** for the purpose of aiding in the protection and development of water for the benefit of the present and future inhabitants of the state. *Williamson v. Union Oil Co.*, 125 F. Supp. 570 (D. Colo. 1954).

**The board is an agency of the state.** The Colorado water conservation board is declared to be an agency of the state whose functions authorized by statute are declared to be governmental functions. *Williamson v. Union Oil Co.*, 125 F. Supp. 570 (D. Colo. 1954).

**37-60-103. Organization.** The board shall elect from the appointed members a chairman and a vice-chairman to serve at the pleasure of the board. The director of the board shall serve as secretary.

**Source:** L. 37: p. 1301, § 4. CSA: C. 173B, § 4. CRS 53: § 148-1-4. C.R.S. 1963: § 149-1-4. L. 67: p. 293, § 2.

**37-60-104. Personnel.** (1) The board shall consist of fifteen members. The executive director of the department of natural resources shall be a voting member ex officio. The attorney general, state engineer, director of the division of parks and wildlife, commissioner of agriculture or designee, and director of said board shall be nonvoting members ex officio. The nine remaining members shall be qualified electors of the state, well versed in water matters, and shall be appointed by the governor, by and with the consent of the senate, for terms of three years; except that no appointment shall be made that does not conform to the requirements of subsections (3) and (4) of this section. Members of the board may not vote by proxy. Pursuant to section 1 of article XII of the state constitution, unless removed according to law, members of the board shall exercise the duties of their office until a successor is duly appointed, qualified, and confirmed. Pursuant to section 6 (1) of article IV of the state constitution, no person appointed by the governor pursuant to this section to a vacancy occurring while the senate is in session may take office until confirmed by the senate. The appointments shall be made in such a manner that the terms of three members shall expire on February 12 of each year. In case any vacancy occurs in the appointed membership of the board, the governor shall appoint a successor to serve the unexpired term of any member of the board within thirty days after the creation of such vacancy.

(2) The appointed members of said board shall be chosen geographically as follows: Four from the western slope and five from the eastern slope; but, of the five members to be appointed from the eastern slope, one shall be from the Rio Grande drainage basin, one from the North Platte drainage basin, one from the Arkansas drainage basin, one from the South Platte drainage basin outside of the city and county of Denver, and one from the city and county of Denver and intimately familiar with its water problems; and that of the four members to be appointed from the western slope, one shall be from the Yampa-White drainage basin, one from the main Colorado drainage basin, one from the Gunnison-Uncompahgre drainage basin, and one from the San Miguel-Dolores-San Juan drainage basins. Before entering upon the discharge of his duties, each appointed member shall make, subscribe, and file with the secretary of state the oath prescribed by the constitution.

(3) To the extent possible, appointments to the board shall include persons representing the following areas of experience and expertise: Water resource management; water project financing; engineering, planning, and development of water projects; water law; and irrigated farming or ranching. Members of the board shall be residents of the geographic area they represent.

(4) No more than five appointees to the board shall be members of the same political party.

(5) The requirements set forth in subsections (3) and (4) of this section shall be implemented over a three-year period beginning February 12, 1993, so that upon making the appointments for the vacancies which occur on February 12, 1995, all requirements set forth in this section shall have been met.



**Source:** L. 37: p. 1301, § 3. CSA: C. 173B, §3. L. 45: p. 719, § 1. L. 47: p. 912, § 1. CRS 53: § 148-1-3. C.R.S. 1963: § 149-1-3. L. 67: p. 293, § 1. L. 81: (1) amended, p. 1768, § 1, effective June 16. L. 84: (1) amended, p. 957, § 8, effective May 21. L. 87: (1) amended, p. 1295, § 1, effective July 13. L. 92: Entire section amended, p. 2281, § 1, effective May 27. L. 99: (1) amended, p. 231, § 1, effective August 4. L. 2004: (1) amended, p. 64, § 1, effective March 8; (1) amended, p. 1067, § 1, effective May 21.

**Editor's note:** Amendments to subsection (1) by House Bill 04-1035 and Senate Bill 04-013 were harmonized.

**37-60-105. Employment of temporary personnel.** The Colorado water conservation board is authorized to employ any persons and enter into any cooperative undertakings with agencies of government as it may deem advisable for carrying out the work outlined in section 37-60-115. The employment in this section referred to is of such persons as the Colorado water conservation board finds necessary to meet an emergency by employing temporary personnel to supplement the work of regular state employees, it being the purpose of this law to provide for the utmost speed in accomplishing its purposes. The Colorado water conservation board may grant such authority as it deems necessary or proper to the persons it designates to carry out the provisions of this section and section 37-60-116.

**Source:** L. 53: p. 645, § 2. CRS 53: § 148-1-15. C.R.S. 1963: § 149-1-15.

**37-60-106. Duties of the board.** (1) It is the duty of the board to promote the conservation of the waters of the state of Colorado in order to secure the greatest utilization of such waters and the utmost prevention of floods; and in particular, and without limiting the general character of this section, the board has the power and it is its duty:

(a) To foster and encourage irrigation districts, public irrigation districts, water users' associations, conservancy districts, drainage districts, mutual reservoir companies, mutual irrigation companies, grazing districts, and any other agencies which are formed under the laws of the state of Colorado, or of the United States, for the conservation, development, and utilization of the waters of Colorado;

(b) To assist any such agencies in their financing, but not to lend or pledge the credit or faith of the state of Colorado in aid thereof, or to attempt to make the state responsible for any of the debts, contracts, obligations, or liabilities thereof;

(c) To devise and formulate methods, means, and plans for bringing about the greater utilization of the waters of the state and the prevention of flood damages therefrom, and to designate and approve storm or floodwater runoff channels or basins, and to make such designations available to legislative bodies of cities and incorporated towns, to county planning commissions, and to boards of adjustment of cities, incorporated towns, and counties of this state;

(d) To gather data and information looking toward the greater utilization of the waters of the state and the prevention of floods and for this purpose to make investigations and surveys;

(e) To cooperate with the United States and the agencies thereof, and with other states for the purpose of bringing about the greater utilization of the waters of the state of Colorado and the prevention of flood damages;

(f) To cooperate with the United States, or any of the agencies thereof, in the making of preliminary surveys, and sharing the expense thereof, when necessary, respecting the engineering and economic feasibility of any proposed water conservation or flood control project within the state of Colorado, designed for the purpose of bringing about greater utilization of the waters of this state;

(g) To formulate and prepare drafts of legislation, state and federal, designed to assist in securing greater beneficial use and utilization of the waters of the state and protection from flood damages;

(h) To investigate and assist in formulating a response to the plans, purposes, procedures, requirements, laws, proposed laws, or other activities of the federal government and other states which affect or might affect the use or development of the water resources of this state;

(i) To confer with and appear before the officers, representatives, boards, bureaus, committees, commissions, or other agencies of other states, or of the federal government, for the purpose of protecting and asserting the authority, interests, and rights of the state of Colorado and its citizens with respect to the waters of the interstate streams in this state;

(j) To acquire by grant, purchase, bequest, devise, or lease, any real property or interest therein for the purpose of the prevention or control of floods, or to acquire by eminent domain any real property or interest therein with respect to any project specifically authorized by the United States congress for the prevention or control of floods, including but not limited to easements and rights-of-way for ingress into and egress from such project, with the power in either event to lease such lands or interest therein to agencies of the federal government or to the state or any agency or political subdivision thereof for the construction, operation, or maintenance of flood control and prevention facilities;

(k) In general, to take such action and have such powers as are incidental to the foregoing specific provisions and to the general purposes of this article;

(l) To enter into contracts as provided in sections 37-60-119 to 37-60-122 for the construction of conservation projects which, as authorized by the general assembly under procedures set forth in section 37-60-122, will conserve and utilize for the best advantage of the people of this state the water and power resources of the state, including projects beyond the boundaries of the state of Colorado located on interstate waters when the benefit of such project accrues to the citizens of the state of Colorado, upon application under such rules and regulations as the board shall establish;

(m) To file applications in the name of the department of natural resources for the appropriation of water;

(n) To take all action necessary to acquire or perfect water rights for projects sponsored by the board;

(o) To sell or otherwise dispose of property owned by the board, in the name of the state of Colorado, as a result of expenditures from the Colorado water conservation board construction fund in such manner as to be most advantageous to the state. Proceeds from such sale or disposal shall accrue to the Colorado water conservation board construction fund and shall not revert to the general fund at the close of any fiscal year.

(p) To make grants pursuant to the provisions of section 37-60-122.2 (2) for fish and wildlife resources;

(q) To make a mitigation recommendation pursuant to the provisions of section 37-60-122.2 (1) constituting the official position of the state of Colorado regarding mitigation to maintain a balance between the development of the state's water resources and the protection of the state's fish and wildlife resources;

(r) To foster the conservation of the water of the state of Colorado by the promotion and implementation of sound measures to enhance water use efficiency in order to serve all the water needs of the state, to assure the availability of adequate supplies for future uses, and to assure that necessary water services are provided at a reasonable cost;

(s) Repealed.

(t) To enter into one or more agreements with the Colorado water resources and power development authority and any other entities to assist in the development of the water resources of the state.

(2) The board may coordinate with the United States secretary of the interior and the United States secretary of agriculture to develop plans that conserve and develop water resources consistent with this article for federal lands pursuant to 16 U.S.C. sec. 530, 16 U.S.C. sec. 1604, and 43 U.S.C. sec. 1712.

**Source:** L. 37: p. 1304, § 11. CSA: C. 173B, § 11. CRS 53: § 148-1-11. C.R.S. 1963: § 149-1-11. L. 66: p. 44, § 8. L. 67: p. 294, § 5. L. 71: p. 1343, § 1. L. 77: (1)(o) amended, p. 1692, § 1, effective March 4; (1)(h) R&RE, p. 1691, § 1, effective March 26. L. 80: (1)(o) amended, p. 698, § 1, effective May 2; (1)(o) amended,



p. 695, § 1, effective June 5. **L. 87:** (1)(p) and (1)(q) added, p. 1295, § 2, effective July 13. **L. 91:** (1)(r) added, p. 2023, § 3, effective June 4. **L. 2003:** (2) added, p. 1035, § 5, effective April 17; (1)(s) and (1)(t) added, p. 2410, § 2, effective June 5.

**Editor's note:** Subsection (1)(s)(II) provided for the repeal of subsection (1)(s), effective upon the rejection by the registered electors of the state voting on the ballot question submitted pursuant to § 37-60-203. (See L. 2003, p. 2410.) The vote count on the measure at the general election held November 4, 2003, was as follows:

FOR:

307,412

AGAINST:

627,716

**Cross references:** (1) For duties of the board with respect to groundwater, see § 37-90-117; for eminent domain proceedings, see articles 1 to 7 of title 38.

(2) In 1991, subsection (1)(r) was added by the "Water Conservation Act of 1991". For the short title and the legislative declaration, see sections 1 and 2 of chapter 328, Session Laws of Colorado 1991.

(3) For the legislative declaration contained in the 2003 act enacting subsection (2), see section 1 of chapter 145, Session Laws of Colorado 2003.

### ANNOTATION

**The statutory duties of the Colorado water conservation board as set out in this section are to foster the development and utilization of waters of Colorado, to gather data looking toward the greater utilization of the waters of the state and the prevention of floods and for this purpose to make investigation and surveys, to cooperate with the United States and the agencies thereof for the purpose of bringing about the greater utilization of the waters of the state of Colorado and the prevention of flood damages, and in general to take such action and have such powers as may be incidental to the powers specifically granted. Williamson v. Union Oil Co., 125 F. Supp. 570 (D. Colo. 1954).**

**There is implied authority to publish reports.** Having authority to make field investigation, not only as a basis for its own policies and action, but to foster and encourage the conservation, development and utilization of the waters of the state by public and private agencies, the authority of the Colorado water conservation board to publish the results of such investigation alone, or in cooperation with agencies of the federal government, would seem to follow by implication. *Williamson v. Union Oil Co.*, 125 F. Supp. 570 (D. Colo. 1954).

### 37-60-106.5. Study of water salvage. (Repealed)

**Source:** **L. 91:** Entire section added, p. 2023, § 4, effective June 4. **L. 96:** Entire section repealed, p. 1223, § 23, effective August 7.

**Cross references:** For the legislative declaration contained in the 1996 act repealing this section, see section 1 of chapter 237, Session Laws of Colorado 1996.

**37-60-107. Meetings - notice.** The board may provide for the holding of regular meetings and may hold a special meeting at any time and place in the state upon the call of the chairman or vice-chairman or of any two voting members. Notice of all special meetings shall be given by telegram at least forty-eight hours, or by registered mail at least four days, before any special meeting. Six voting members shall constitute a quorum, and the affirmative or negative vote of at least six voting members is necessary to bind the board. Any business may be transacted at a special meeting which could be transacted at a regular meeting.

**Source:** **L. 37:** p. 1301, § 5. **CSA:** C. 173B, § 5. **CRS 53:** § 148-1-5. **C.R.S. 1963:** § 149-1-5. **L. 83:** Entire section amended, p. 1399, § 1, effective April 29.

**37-60-108. Seal - rules and regulations.** The board shall adopt a seal, and all documents to be executed by the board shall be under such seal, signed by the chairman or

vice-chairman and attested by the secretary. From time to time, the board may adopt suitable rules and regulations as are necessary or expedient for the conduct of its business and the administration of this article.

**Source:** L. 37: p. 1302, § 6. CSA: C. 173B, § 6. CRS 53: § 148-1-6. C.R.S. 1963: § 149-1-6.

**Cross references:** For rule-making procedures, see article 4 of title 24.

**37-60-109. Commissioner.** (1) The governor from time to time, with the approval of the board, shall appoint a commissioner, who shall represent the state of Colorado upon joint commissions to be composed of commissioners representing the state of Colorado and another state or other states for the purpose of negotiating and entering into compacts or agreements between said states, with the consent of the congress when necessary, ascertaining and declaring the authority, interest, or right of the several signatory states, or any of them, over, in, and to interstate waters, all to the end that such waters may be used and disposed of by the several states and their respective citizens in accordance with an equitable apportionment or division thereof made between the signatory states by the terms of the compact or agreement; except that any compact or agreement so entered into on behalf of said states shall not be binding or obligatory upon any of said states or the citizens thereof until the same has been ratified and approved by the legislatures of all of said signatory states and by the congress of the United States when necessary.

(2) The board shall furnish such commissioners with such legal, engineering, clerical, and other assistants as the board may deem advisable and necessary, all legal assistants to be employed with the consent of the attorney general. Such commissioners shall serve at the pleasure of the governor at a compensation to be fixed by him. The compensation of the legal, engineering, and other assistants of said commissioners shall be fixed by the board, and all such compensation and necessary traveling expenses of such commissioners and their assistants shall be paid out of the funds appropriated for carrying out the purposes of this article.

**Source:** L. 37: p. 1303, § 9. CSA: C. 173B, § 9. CRS 53: § 148-1-9. C.R.S. 1963: § 149-1-9.

**37-60-110. Authority of commissioners under prior laws.** All acts or parts of acts in conflict herewith, relating to the appointment of commissioners for negotiating compacts respecting the waters of interstate streams are hereby repealed; but such repeal shall neither affect the authority of any commissioners now engaged in the process of negotiating any interstate compact respecting the waters of any interstate stream of this state nor affect the validity of any such compact when so negotiated.

**Source:** L. 37: p. 1308, § 15. CSA: C. 173B, § 14. CRS 53: § 148-1-13. C.R.S. 1963: § 149-1-13.

**37-60-111. Compensation of members - director - employees.** (1) Each appointed member of the board not otherwise in full-time employment of the state shall receive a per diem allowance of fifty dollars for each day actually and necessarily spent in the discharge of official duties, and all members shall receive traveling and other necessary expenses actually incurred in the performance of official duties. Per diem and other expenses paid under this section shall be from moneys appropriated from the Colorado water conservation board construction fund.

(2) The office of director of the water conservation board is hereby created. The board shall appoint a person who is well versed in water matters and qualified by experience, knowledge, and personality to represent the board and carry out its functions. The director shall be the chief administrative head of the board under the direction and supervision of the board and shall have general supervision and control of all its activities, functions, and



employees. The appointment or removal of such director shall be subject to section 13 of article XII of the state constitution and statutes enacted pursuant thereto relating to the state personnel system. He shall be reimbursed for all actual and necessary traveling and other expenses incurred by him in the discharge of his official duties.

(3) Pursuant to section 13 of article XII of the state constitution, the board may employ such technical, clerical, and other personnel necessary to enable it to perform its duties and carry out the purposes of this article. Such personnel shall be reimbursed for all actual and necessary traveling and other expenses incurred by them in the discharge of their official duties.

**Source:** L. 37: p. 1303, § 8. CSA: C. 173B, § 8. CRS 53: § 148-1-8. C.R.S. 1963: § 149-1-8. L. 67: p. 294, § 4. L. 2002: (1) amended, p. 988, § 1, effective August 7.

**Cross references:** For the state personnel system, see § 13 of art. XII, Colo. Const., and article 50 of title 24.

**37-60-112. Warrants for salaries and expenses.** The controller is authorized to draw warrants monthly in payment of the lawful salaries and expenses of the board or commissioners and their legal, engineering, and other assistants and employees on vouchers signed by the secretary of the board and approved by the governor.

**Source:** L. 37: p. 1307, § 12. CSA: C. 173B, § 12. CRS 53: § 148-1-12. C.R.S. 1963: § 149-1-12.

**37-60-113. Board to cooperate with attorney general.** The board shall cooperate with the attorney general in all matters relating to interstate suits concerning the waters of the rivers of the state and shall arrange for the gathering and compilation of all information, factual, engineering, or other data requisite or desirable for the use of the attorney general in the conduct of such suits.

**Source:** L. 37: p. 1304, § 10. CSA: C. 173B, § 10. CRS 53: § 148-1-10. C.R.S. 1963: § 149-1-10.

**37-60-114. Attorney general as legal advisor.** The attorney general shall act as legal advisor for the board, and with his consent the board may employ additional legal counsel.

**Source:** L. 37: p. 1302, § 7. CSA: C. 173B, § 7. CRS 53: § 148-1-7. C.R.S. 1963: § 149-1-7. L. 67: p. 294, § 3.

**37-60-115. Water studies - rules - repeal.** (1) (a) The Colorado water conservation board is authorized to forthwith make, or cause to be made, a continuous study of the water resources of the state of Colorado, and a continuous study of the present and potential uses thereof to the full extent necessary to a unified and harmonious development of all waters for beneficial use in Colorado to the fullest extent possible under the law, including the law created by compacts affecting the use of said water. The studies to be made shall include analyses of the extent to which water may be transferred from one watershed to another within the state without injury to the potential economic development of the natural watershed from which water might be diverted for the development of another watershed.

(b) In order to assure that the state of Colorado protects its allocation of interstate waters for current and future beneficial purposes, to achieve optimum development of such waters under significant constraints imposed by federal law and policy, and to achieve efficient and effective management of river systems for recognized beneficial purposes, the board is authorized to expend such moneys as may be allocated, appropriated, or otherwise credited to the Colorado water conservation board construction fund for such projects and programs as may be specifically authorized by the general assembly, including but not

limited to development of river basin models within and without the state, policy formulation, interstate negotiations, and water management within the state.

(2) (Deleted by amendment, L. 96, p. 1223, § 24, effective August 7, 1996.)

(3) The Colorado water conservation board is further authorized and directed, after consultation with the agriculture, livestock, and natural resources committee of the house of representatives and the agriculture, natural resources, and energy committee of the senate and consistent with its duties set forth in section 37-90-117 and the provisions of subsections (1) and (2) of this section, to study the state's groundwater resource, particularly that water that may prove to be nontributary, both within the Denver basin and throughout the state, including nontributary groundwater quality.

(4) (a) The Colorado water conservation board shall compile an inventory of potential dam and reservoir sites within the state of Colorado.

(b) The inventory shall be based upon a review of the state engineer's water rights tabulation and a review of all publicly available published information. Original engineering work or field investigations shall not be performed by the board for the inventory. The inventory shall be compiled and maintained on a computerized information retrieval system which is either a part of or otherwise compatible with the water data bank maintained by the state engineer.

(c) The following information concerning potential dam and reservoir sites within the state of Colorado having a capacity of twenty thousand acre-feet or more, or concerning such other sites as the board deems important, shall be included in the inventory:

(I) The location of a dam site, by river, county, and reference to surveyed section corners;

(II) The name of a dam and reservoir site if one is commonly ascribed to it;

(III) Basic data about a potential dam to the extent such is readily available;

(IV) The conditional water rights decreed to a site, if any, and their dates of adjudication and basin ranks;

(V) If available, an estimate of a reservoir's total active capacity;

(VI) The potential uses of the water supply which would be developed; and

(VII) Citations to reference materials and sources for the information specified in this paragraph (c).

(d) Utilizing the inventory, the board shall identify potential dam and reservoir sites, the development of which may be stopped because of ongoing land uses which are encroaching upon needed lands or because of other circumstances.

(e) The board is authorized to pay for the expenses of periodically updating and maintaining the inventory of potential dam and reservoir sites for which this section calls using moneys appropriated, allocated, or otherwise credited to the Colorado water conservation board construction fund.

(5) Repealed.

(6) **Precipitation harvesting pilot projects.** (a) The board shall, in consultation with the state engineer, select the sponsors of up to ten new residential or mixed-use developments that will conduct individual pilot projects to collect precipitation from rooftops and impermeable surfaces for nonpotable uses. The purpose of the pilot projects shall be to:

(I) Evaluate the technical ability to reasonably quantify the site-specific amount of precipitation that, under preexisting, natural vegetation conditions, accrues to the natural stream system via surface and groundwater return flows;

(II) Create a baseline set of data and sound, transferable methodologies for measuring local weather and precipitation patterns that account for variations in hydrology and precipitation event intensity, frequency, and duration, quantifying preexisting, natural vegetation consumption, measuring precipitation return flow amounts, identifying surface versus groundwater return flow splits, and identifying delayed groundwater return flow timing to receiving streams;

(III) Evaluate a variety of precipitation harvesting system designs;

(IV) Measure precipitation capture efficiencies;

(V) Quantify the amount of precipitation that must be augmented to prevent injury to decreed water rights;



(VI) Compile and analyze the data collected; and

(VII) Provide data to allow sponsors to adjudicate permanent augmentation plans as specified in paragraph (c) of this subsection (6).

(b) An applicant for a development permit, as that term is defined in section 29-20-103, C.R.S., for a new planned unit development or new subdivision of residential housing or mixed uses may submit an application to the board to become a sponsor of one or more of the ten pilot projects authorized by this section. The board shall establish criteria and guidelines for applications and the selection of pilot projects, including the following:

(I) An application fee and, for pilot projects that are selected, an annual review fee;

(II) The information to be included in the application, including a description of the proposed development and the proposed precipitation harvesting system;

(III) Selection of pilot projects to represent a range of project sizes and geographic and hydrologic areas in the state, with no more than three pilot projects being located within any single water division established in section 37-92-201;

(IV) The requirement that the proposed development meet any applicable local government water supply requirement through sources other than precipitation harvesting;

(V) Giving priority to pilot projects that:

(A) Are located in areas that face renewable water supply challenges; and

(B) Promote water conservation.

(c) Notwithstanding any limitations regarding phreatophytes or impermeable surfaces that would otherwise apply pursuant to section 37-92-103 (9) or 37-92-501 (4) (b) (III), each of the ten pilot projects shall:

(I) During the term of the pilot project, operate according to a substitute water supply plan, if approved annually by the state engineer pursuant to section 37-92-308 (4) or (5). Until the pilot project sponsor applies to the water court for a permanent augmentation plan, the pilot project shall be required to replace an amount of water equal to the amount of precipitation captured and measured from rooftops and impermeable surfaces for nonpotable uses.

(II) (A) Apply to the appropriate water court for a permanent augmentation plan prior to completion of the pilot project or file a plan with the state engineer to permanently retire the rainwater collection system, which plan shall be reviewed and approved prior to the cessation of augmentation. As a condition of approving the retirement of a pilot project, the state engineer shall have the authority to require the project sponsor to replace any ongoing delayed depletions caused by the pilot project after the project has ceased. Any such permanent augmentation plan shall entitle the sponsor to consume without replacement only that portion of the precipitation that the sponsor proves by a preponderance of the evidence would not have accrued to a natural stream under preexisting, natural vegetation conditions. The sponsor shall be required to fully augment any precipitation captured out of priority that would otherwise have accrued to a natural stream.

(B) After a minimum of two years of data collection and upon application to the appropriate water court for a permanent augmentation plan, the pilot project sponsor shall file an application for approval of a substitute water supply plan pursuant to section 37-92-308 (4). For any substitute supply plan application filed under section 37-92-308 (4), a pilot project sponsor may seek approval from the state engineer based on replacing only the net depletion caused by the capture of precipitation. The net depletion shall be calculated as the amount of precipitation captured minus the historical consumptive use from preexisting, natural vegetation cover on the impermeable area as demonstrated by analysis of the data collected by the sponsor during the pilot project.

(d) Each sponsor shall submit an annual preliminary report to the board and the state engineer summarizing the information set forth in paragraph (a) of this subsection (6). The board and the state engineer shall brief the water resources review committee created in section 37-98-102 on the reported results of the pilot projects by July 1, 2014. Each sponsor shall submit a final report to the board and the state engineer by January 15, 2019. The board and the state engineer shall provide a final briefing to the water resources review committee by July 1, 2019.

(e) This paragraph (e), paragraphs (a), (b), and (d), and subparagraph (I) of paragraph (c) of this subsection (6) are repealed, effective July 1, 2020.

(7) **South Platte river alluvial aquifer study - study authorized.** (a) The board shall, in consultation with the state engineer and the Colorado water institute, established in section 23-31-801, C.R.S., and also referred to in this section as the “institute”, conduct a comprehensive study to compile and evaluate available historical hydrologic data through water year 2011. The study’s objectives are:

(I) To evaluate whether current laws and rules that guide water administration in the South Platte river basin achieve the dual goals of protecting senior water rights and maximizing the beneficial use of both surface water and groundwater within the basin;

(II) To identify and delineate areas within the basin adversely impacted by high groundwater levels and to conduct a feasibility-level evaluation of the causes of high groundwater levels in the affected areas;

(III) To provide information to use as a basis for implementation of measures to mitigate adverse impacts in areas experiencing high groundwater levels; and

(IV) To provide information to the general assembly, the board, and the state engineer to facilitate the long-term sustainable use of South Platte water supplies.

(b) The board shall enter into a contract with the institute, using existing procurement mechanisms and agreements between the board and the institute, to conduct, oversee, and coordinate all aspects of the study. The board shall fund the study from existing research resources at levels agreed to between the board and the institute.

(c) The institute shall conduct the study independently using relevant, available, current, and historical hydrologic data and documents. The study must examine water use in water districts 1, 2, and 64 within water division 1. In conducting the study, the institute shall consider the impacts to all water rights and interstate obligations in water division 1 and shall investigate, compile, and evaluate hydrologic variables and factors, including:

(I) The number and location of alluvial wells that are currently withdrawing groundwater;

(II) The number and location of alluvial wells that are currently curtailed from pumping, either fully or partially;

(III) The number and location of existing artificial recharge facilities and the historical volume of water recharged;

(IV) Historical volumes of water pumped for each high-capacity irrigation, municipal, industrial, or other well not exempted under section 37-92-602;

(V) Historical amounts of water leaving the state in excess of the requirements of river compacts and of the “Platte River Cooperative Agreement” of 1997;

(VI) Historical water deliveries to surface water rights;

(VII) Groundwater level data available from existing observation wells and the historical fluctuations of groundwater levels based on the data;

(VIII) The South Platte decision support system’s existing phreatophyte groundwater evapotranspiration module and, using available data, the relationship between high groundwater levels and nonbeneficial consumptive use by phreatophytes from 2001 through 2011;

(IX) The number and size of augmentation plans in operation in the study area; and

(X) The impact of transbasin supplies, reuse of fully consumable supplies, conservation practices, and the installation of lined storage facilities in the alluvium.

(d) The institute shall evaluate and report its findings and conclusions to the board and the general assembly regarding specific issues including to what extent depletions caused by past pumping of wells have delayed impacts on surface streams and, if so, the most appropriate methods for quantifying the impacts.

(e) In addition, and without expending additional funds, the institute shall evaluate and report its findings and conclusions to the board and the general assembly regarding:

(I) To what extent augmentation plans are preventing injury to other water rights holders or potentially causing over-augmentation of well depletions;

(II) Whether additional usage of the alluvial aquifers could be permitted in a manner consistent with protecting senior surface water rights; and

(III) Whether, and to what extent, the use of water in the basin could be improved or maximized by affording the state engineer additional authority to administer water rights while ensuring protection of senior surface water rights.



(f) The board shall commission the study as soon as practicable. The institute shall prepare a final report, including its conclusions, and present it to the general assembly no later than December 31, 2013. The institute shall prepare a progress report and present it to a joint meeting of the house of representatives committee on agriculture, livestock, and natural resources and the senate committee on agriculture, natural resources, and energy, or their successor committees, during the first regular session of the sixty-ninth general assembly in 2013. The institute shall present the final report to a joint meeting of the house of representatives committee on agriculture, livestock, and natural resources and the senate committee on agriculture, natural resources, and energy, or their successor committees, during the second regular session of the sixty-ninth general assembly in 2014.

**Source:** L. 53: p. 645, § 1. CRS 53: § 148-1-14. C.R.S. 1963: § 149-1-14. L. 67: p. 294, § 6. L. 85: Entire section amended, p. 1191, § 3, effective June 13; (3) added, p. 1168, § 9, effective July 1. L. 86: (4) added, p. 1079, § 1, effective July 1. L. 88: (4)(e) amended, p. 1236, § 6, effective May 23. L. 92: (1) amended, p. 2282, § 2, effective May 27. L. 96: (2), (4)(a), (4)(d), and (4)(e) amended, p. 1223, § 24, effective August 7. L. 2006: (5) added, p. 1236, § 1, effective May 26. L. 2009: (6) added, (HB 09-1129), ch. 389, p. 2102, § 1, effective June 2. L. 2012: (7) added, (HB 12-1278), ch. 239, p. 1062, § 2, effective May 30.

**Editor's note:** Subsection (5)(d) provided for the repeal of subsection (5), effective July 1, 2008. (See L. 2006, p. 1236.)

**Cross references:** For the legislative declaration contained in the 1996 act amending subsections (2), (4)(a), (4)(d), and (4)(e), see section 1 of chapter 237, Session Laws of Colorado 1996. For the legislative declaration in the 2012 act adding subsection (7), see section 1 of chapter 239, Session Laws of Colorado 2012.

## ANNOTATION

**Law reviews.** For article, "Principles and Law of Colorado's Nontributary Ground Water", see 62 Den. U. L. Rev. 809 (1985).

**37-60-116. Reports.** The Colorado water conservation board shall cause the results of the studies to be embodied in written reports, copies of which shall be held in the offices of said board as a public record available for the use of any interested person, and a copy of each of said reports shall be sent to the senate agriculture, natural resources, and energy committee and the house of representatives agriculture, livestock, and natural resources committee.

**Source:** L. 53: p. 646, § 3. CRS 53: § 148-1-16. C.R.S. 1963: § 149-1-16. L. 67: p. 295, § 7. L. 2002: Entire section amended, p. 880, § 14, effective August 7. L. 2003: Entire section amended, p. 2014, § 112, effective May 22.

**37-60-117. Reports and publications.** (1) The board shall report to the executive director of the department of natural resources at such time and on such matters as the executive director requires.

(2) Publication of studies conducted by the board and other publications circulated in quantity outside the division shall be subject to the approval and control of the executive director of the department of natural resources.

**Source:** L. 58: pp. 325, 326, §§ 1-4. CRS 53: § 148-1-19. C.R.S. 1963: § 149-1-17. L. 64: p. 179, § 159.

**37-60-118. Assent to water resources planning act.** (1) The state of Colorado, by and through the Colorado water conservation board, hereby assents to the provisions of the

act of congress entitled "Water Resources Planning Act", approved July 22, 1965. The Colorado water conservation board is authorized, empowered, and directed to perform such acts as may be necessary to the conduct and establishment of a comprehensive water planning program as defined in title III of said act and in conformity with such rules and regulations as may be promulgated by the water resources council pursuant to said act.

(2) There is hereby created a fund designated as "federal aid water planning fund" to which shall be deposited all sums contributed to the state of Colorado by the federal government pursuant to title III of the water resources planning act. All moneys deposited under the provisions of this section are hereby specifically appropriated to the Colorado water conservation board for the purposes specified in said act of congress and no such moneys shall be expended for any other purpose.

**Source:** L. 67: p. 295, § 8. C.R.S. 1963: § 149-1-18. L. 85: (1) amended, p. 1366, § 37, effective June 28.

**Cross references:** For the "Water Resources Planning Act", see 79 Stat. 244, codified at 42 U.S.C. § 1962 et seq.

**37-60-119. Construction of water and power facilities - contracts with and charges against users.** (1) (a) In order to promote the general welfare and safety of the citizens of this state and to protect the allocation of interstate waters to the state, the board may, subject to the provisions in section 37-60-122, construct, rehabilitate, enlarge, or improve, or loan moneys to enable the construction, rehabilitation, enlargement, or improvement of, such flood control, water supply, and hydroelectric energy facilities, excluding domestic water treatment and distribution systems, together with related recreational facilities, in whole or in part, as will, in the opinion of the board, abate floods or conserve, effect more efficient use of, develop, or protect the water and hydroelectric energy resources and supplies of the state of Colorado.

(b) In carrying out this subsection (1), the board shall place special emphasis upon the adoption and incorporation of measures that will encourage the conservation and more efficient use of water, including the installation of water meters or such other measuring and control devices as the board deems appropriate in each particular case.

(2) The board may, subject to the provisions in section 37-60-122, enter into contracts for the use of, or to loan moneys to enable the construction, rehabilitation, enlargement, or improvement of, said flood control, water, power, and any related recreational facilities, excluding domestic water treatment and distribution systems, with any agency or political subdivision of this state or the federal government, individuals, corporations, or organizations composed of citizens of this state. Any such contracts may provide for such charges to the using entity as, in the opinion of the board, are necessary and reasonable to recover the board's capital investment, together with operational, maintenance, and interest charges over the term of years agreed upon by contract. Interest charges shall be recommended by the board at between zero and seven percent on the basis of the project sponsor's ability to pay and the significance of the project to the development and protection of the water supplies of the state. Interest charges shall be credited to and made a part of the Colorado water conservation board construction fund. Any other charges, as determined appropriate by the board, shall be continuously appropriated to the Colorado water conservation board for supplemental operational expenditures.

(3) (Deleted by amendment, L. 2002, p. 456, § 29, effective May 23, 2002.)

**Source:** L. 71: p. 1343, § 2. C.R.S. 1963: § 149-1-19. L. 78: Entire section R&RE, p. 465, § 1, effective May 4. L. 79: Entire section amended, p. 1361, § 1, effective July 1. L. 81: (2) amended, p. 1768, § 2, effective June 16. L. 84: Entire section amended, p. 958, § 9, effective May 21. L. 86: Entire section amended, p. 1085, § 6, effective April 24. L. 92: Entire section amended, p. 2283, § 3, effective May 27. L. 96: (3) amended, p. 1223, § 25, effective August 7. L. 2002: (2) and (3) amended, p. 456, § 29, effective May 23. L. 2004: (1)(b) and (2) amended, p. 888, § 21, effective May 21.



**Editor's note:** Subsection (1) was amended and subdivided into subsections (1)(a) and (1)(b) in HB 04-1221. A second reading house floor amendment to HB 04-1221 struck subsection (1)(a), leaving only that portion contained in subsection (1)(b). The language remaining in the original subsection (1) no longer included in the bill was relettered on revision to follow standard C.R.S. format. (See HB 04-1221, chapter 253, page 888, and the 2004 House Journal for April 2, 2004, p. 1192.)

**Cross references:** For the legislative declaration contained in the 1996 act amending subsection (3), see section 1 of chapter 237, Session Laws of Colorado 1996.

**37-60-120. Control of projects - contractual powers of board.** (1) The state of Colorado shall have the ownership and control of such portions of said projects, or shall take a sufficient security interest in property or take such bonds, notes, or other securities evidencing an obligation, as will assure repayment of funds made available by section 37-60-119. Any security interest in property taken under this subsection (1) may be perfected and enforced in the same manner as security interests under article 9 of title 4, C.R.S. The board is empowered to enter into contracts that are, in its opinion, necessary for the maintenance and continued operation of such projects.

(2) If a sponsor fails to comply with the board's procedures and requirements, the board may, at its discretion, withhold or terminate all or a portion of the board's financial contribution to or loan for a project, notwithstanding the authorization of the same by the general assembly, or the board may require such assurances from the project sponsor as the board deems necessary in order to adequately protect the board's investment in a project.

(3) The board may adjust the authorized interest rate, extend the authorized repayment period for any project, or defer one or more annual payments if, in the board's opinion, the entity requesting such adjustment, extension, and deferment demonstrates that it has encountered significant and unexpected financial difficulties and that it has been duly diligent in its efforts to comply with the repayment provisions of its contract with the board.

**Source:** L. 71: p. 1344, § 2. C.R.S. 1963: § 149-1-20. L. 84: Entire section amended, p. 958, § 10, effective May 21. L. 85: Entire section amended, p. 1153, § 3, effective June 2. L. 96: (1) and (3) amended, p. 991, § 11, effective May 23. L. 2001: (1) amended, p. 1446, § 41, effective July 1. L. 2002: (2) and (3) amended, p. 456, § 30, effective May 23.

**37-60-120.1. Chatfield reservoir reallocation project - authority - repeal.** (1) In order to promote the general welfare and safety of the citizens of this state and utilize reallocated storage space available in the federal flood control project known as Chatfield reservoir, the board has undertaken the Chatfield reservoir reallocation project, referred to in this section as the "project", in coordination and cooperation with a local coalition and with participants who have executed letters of commitment with the board. The implementation of the project will result in benefits to South Platte river water users and the downstream environment without adversely impacting other river basins. The implementation of the project will require the board to contract with the United States Army corps of engineers, referred to in this section as the "corps", to hold and allocate storage space in the reservoir and to undertake substantial activities related to the mitigation of environmental and recreation impacts caused by the increase in reservoir water levels.

(2) The board is hereby authorized to act as an agent of the project parties to implement this section. Through an agency fund the board may collect and disburse money from any entity to implement the project and to meet the obligations contained in an intergovernmental agreement, project partnership agreement, or other contract, referred to in this section as an "agreement", with the corps or other entity that is required to implement the project. Notwithstanding any other law, including section 24-30-1303, C.R.S., the board and the department of natural resources acting through its agencies shall have the authority to enter into any agreement with the corps or other entities, including consultants and contractors, that in the board's discretion is necessary to implement the project; however, sufficient funds shall have been made available to the board for such purposes. The authority granted by this subsection (2) includes: The ability to hold storage space in the reservoir; to contract with, and allocate storage to, local entities who will utilize the reservoir storage space; to undertake mitigation and long-term operation and maintenance

of the project; to pay the costs of storage or other necessary expenses; and to otherwise implement the project. The board has the express authority, in equitable partnership with the participants, to undertake such action as is necessary, including the award of contracts to public and private entities, to undertake mitigation construction and long-term operation and maintenance and related activities; to lease, sublease, or assign storage space rights; and to otherwise effectuate the storage of water in the reservoir. In the event of a conflict between the application of state or federal law or rules, including chapter 3 of the state fiscal rules in existence as of May 29, 2008, federal laws and rules shall apply.

(3) This section is repealed, effective at the end of the project. Such repeal shall not affect the validity of any action taken pursuant to this section. The director of the board shall, in writing, promptly notify the state treasurer and the revisor of statutes when the project is completed.

**Source:** L. 2008: Entire section added, p. 1572, § 25, effective May 29.

**Editor's note:** Subsection (3) provides for the repeal of this section, effective at the end of the Chatfield reservoir reallocation project, and requires the director of the Colorado water conservation board to promptly notify, in writing, the revisor of statutes when the project is completed. As of publication date, no such notice had been received.

**37-60-121. Colorado water conservation board construction fund - creation of - nature of fund - funds for investigations - contributions - use for augmenting the general fund - funds created - repeal.** (1) (a) There is hereby created a fund to be known as the Colorado water conservation board construction fund, which shall consist of all moneys which may be appropriated thereto by the general assembly or which may be otherwise made available to it by the general assembly and such charges that may become a part thereof under the terms of section 37-60-119. All interest earned from the investment of moneys in the fund shall be credited to the fund and become a part thereof. Such fund shall be a continuing fund to be expended in the manner specified in section 37-60-122 and shall not revert to the general fund of the state at the end of any fiscal year.

(b) In the consideration of making expenditures from the fund, the board shall be guided by the following criteria:

(I) The first priority of the moneys available to the fund shall be devoted to projects which will increase the beneficial consumptive use of Colorado's undeveloped compact entitled waters;

(II) The balance of the moneys available to the fund shall be devoted to projects for the repair and rehabilitation of existing water storage and delivery systems, controlled maintenance of the satellite monitoring system authorized pursuant to section 37-80-102 (10), and for investment in water management activities and studies;

(III) The board's participation in the construction cost of a project shall be repaid and the board's costs or its participation in any feasibility studies shall be repaid to the board when construction on a project commences;

(IV) The board shall participate in only those projects that can repay the board's investment. Service charges and other terms of repayment shall be established by the board. Grants shall not be made, unless specifically authorized by the general assembly acting by bill; however, the board shall have the authority to deauthorize such grants and use any remaining funds for other statutorily authorized purposes if the grant project has been completed or is no longer feasible.

(V) (Deleted by amendment, L. 2002, p. 457, § 31, effective May 23, 2002.)

(VI) After July 1, 1981, domestic water treatment and distribution systems shall not be recommended by the board to the general assembly;

(VII) The board may recommend to loan funds on floodplain projects;

(VIII) For all feasibility studies, the board shall ensure that the scope of the study is confined as nearly as possible to a single integrated project; and

(IX) Any feasibility study of a proposed project shall include, to the extent deemed necessary by the board, an evaluation of:

(A) The water rights available to a proposed project and the yield thereof;



- (B) The engineering and economic feasibility of a proposed project; and
- (C) The anticipated economic, social, and environmental effects of a proposed project.
- (c) and (d) Repealed.

(2) The board, in addition to the amount allocated to a project to cover the actual cost of construction, may allocate to the project constructed by it, under contract or otherwise, such amounts as may be determined by it for investigating, engineering, inspection, and other expenses and may provide for the repayment of the same out of the first moneys repayable from the project under the contract for its construction, and such moneys so repaid shall be accounted for within the purpose of making investigations for the development of the water resources of the state.

(2.5) (a) The board is authorized to expend, pursuant to continuous appropriation and subject to the requirements of paragraph (b) of this subsection (2.5), a total sum not to exceed the balance of the litigation fund, which is hereby created, for the purpose of engaging in litigation:

(I) In support of water users whose water supply yield is or may be diminished or the cost of said yield is or may be materially increased as a result of conditions imposed or that may be imposed, including but not limited to by-pass flows, by any agency of the United States on permits for existing or reconstructed water facilities located on federally owned lands;

(II) To oppose an application of a federal agency for an instream flow right that is not in compliance with Colorado law for establishing instream flow rights;

(III) To defend and protect Colorado's allocations of water in interstate streams and rivers; and

(IV) To ensure the maximum beneficial use of water for present and future generations by addressing important questions of federal law.

(b) Pursuant to the spending authority set forth in paragraph (a) of this subsection (2.5), moneys may be expended from the litigation fund at the discretion of the board if:

(I) With respect to litigation, the Colorado attorney general requests that the board authorize the expenditure of moneys in a specified amount not to exceed the balance of the fund for the costs of litigation associated with one or more specifically identified lawsuits meeting the criteria set forth in paragraph (a) of this subsection (2.5).

(II) (Deleted by amendment, L. 2003, p. 1769, § 19, effective May 19, 2003.)

(c) Any interest earned on the moneys in the litigation fund shall be credited on an annual basis to the litigation fund created in paragraph (a) of this subsection (2.5).

(d) The board, in conjunction with the attorney general, shall report annually to the senate agriculture, natural resources, and energy committee and the house of representatives agriculture, livestock, and natural resources committee on any litigation that involves the use of any moneys from the litigation fund created in paragraph (a) of this subsection (2.5).

(e) Any moneys remaining in the litigation fund at such time as the general assembly acts to close the fund shall be credited to the Colorado water conservation board construction fund created in subsection (1) of this section.

(f) (Deleted by amendment, L. 2001, p. 690, 27, effective May 30, 2001.)

(3) (a) The board may receive and expend contributions of money, property, or equipment from any source for use in making investigations, contracting projects, or otherwise carrying out the purposes of sections 37-60-119 to 37-60-122.

(b) The board may accept, allocate, expend, and otherwise use contributions and donations of money, property, or equipment from any source to carry out the purposes of this article, article 20 of title 36, C.R.S., and section 37-92-102 (3). Such contributions are hereby continuously appropriated to the board for the purposes established by this section.

(4) (a) The personal services, operating, travel and subsistence, and capital expenses of administering and managing the feasibility studies, engineering and design work, and construction activities associated with projects which are funded using moneys appropriated, allocated, or otherwise credited to the Colorado water conservation board construction fund may be paid from such moneys.

(b) Repealed.

(c) The legal services expenses, including the expenses of legal counsel employed by the board with the consent of the attorney general pursuant to section 37-60-114, of

negotiating and preparing contracts for the disbursement of moneys from the construction fund for the study, design, and construction of projects which are funded using moneys appropriated, allocated, or otherwise credited to the Colorado water conservation board construction fund may be paid from such moneys.

(d) (I) Notwithstanding any provision of this section to the contrary, the board may expend up to seventy-five thousand eight hundred fifty-seven dollars for the personal service expenses of the division of water resources in managing the national hydrography dataset and providing geographic information system analysis support for activities of the division of water resources.

(II) This paragraph (d) is repealed, effective June 30, 2013.

(5) Repealed.

(6) As of July 1, 1988, and July 1 of each year thereafter through July 1, 1996, fifty percent of the sum specified in this subsection (6) shall accrue to the fish and wildlife resources fund, which fund is hereby created, twenty-five percent of such sum shall accrue to the Colorado water conservation board construction fund, and twenty-five percent of such sum shall accrue to the Colorado water resources and power development authority. The state treasurer and the controller shall transfer such sum out of the general fund and into said fish and wildlife resources fund and to the authority as moneys become available in the general fund during the fiscal year beginning on said July 1. Transfers between funds pursuant to this subsection (6) and subsection (7) of this section shall not be deemed to be appropriations subject to the limitations of section 24-75-201.1, C.R.S. Subject to the provisions of subsection (7) of this section, the amount that shall accrue pursuant to this subsection (6) shall be as follows:

(a) On July 1, 1988, five million dollars;

(b) and (c) (Deleted by amendment, L. 2001, p. 690, § 27, effective May 30, 2001.)

(d) On July 1, 1994, thirty million dollars. In distributing said sum, the formula in the introductory portion to this subsection (6) shall not apply, and said sum shall accrue as follows:

(I) Ten million five hundred thousand dollars to the Colorado water conservation board construction fund;

(II) (A) (Deleted by amendment, L. 2001, p. 690, § 27, effective May 30, 2001.)

(B) (Deleted by amendment, L. 2003, p. 1769, § 19, effective May 19, 2003.)

(III) One million five hundred thousand dollars to the Colorado water resources and power development authority;

(IV) (Deleted by amendment, L. 2001, p. 1277, § 49, effective June 5, 2001.)

(V) Two million eight hundred thousand dollars to the Colorado water conservation board construction fund for a portion of the construction costs of the ridges basin dam of the Animas-La Plata project;

(VI) Four hundred forty-seven thousand forty dollars to the Colorado water conservation board construction fund for activities relating to the Arkansas river litigation.

(VII) (Deleted by amendment, L. 2001, p. 690, § 27, effective May 30, 2001.)

(e) and (f) (Deleted by amendment, L. 94, p. 1371, § 1, effective May 25, 1994.)

(6.1) Repealed.

(7) As of July 1, 1988, the state treasurer and the controller shall transfer the five million dollars specified in paragraph (a) of subsection (6) of this section to the water rights final settlement fund, which fund is hereby created. The moneys transferred to the water rights final settlement fund are hereby continuously appropriated to the board solely for the purpose of providing moneys for the tribal development funds for the Southern Ute Indian tribe and the Ute Mountain Ute Indian tribe as provided for in the Colorado Ute Indian water rights final settlement agreement of December 10, 1986. Interest earned from the investment of the moneys in such fund prior to its deposit in the tribal development funds shall be credited to the Colorado water conservation board construction fund and to the Colorado water resources and power development authority at the end of each fiscal year. Of such interest, fifty percent shall be credited to the Colorado water conservation board construction fund and fifty percent shall be transferred to the Colorado water resources and power development authority. The board shall deposit the moneys from the water rights final settlement fund in the tribal development funds, as provided for in the settlement



agreement, no later than thirty days after the deposit of federal moneys in such funds as required by the settlement agreement; except that no such moneys shall be available for disbursement from the tribal development funds until such time as the final consent decree contemplated by the settlement agreement is entered; and, except that if such final consent decree is not entered by December 31, 1991, then the moneys so deposited shall be returned, together with the interest earned thereon, to the water rights final settlement fund. If the first installment of federal moneys is not deposited in the tribal development funds before June 1, 1990, or if the state's moneys have been returned from the tribal development funds to the water rights final settlement fund because the final consent decree is not entered by December 31, 1991, then the board shall transfer fifty percent of the moneys in the water rights final settlement fund to the Colorado water resources and power development authority and fifty percent of the moneys in the water rights final settlement fund to the Colorado water conservation board construction fund.

(8) Notwithstanding any provision in this section or section 37-60-122 to the contrary, the state treasurer shall deduct five hundred thousand dollars from the Colorado water conservation board construction fund and transfer such sum to the capital account of the species conservation trust fund created in section 24-33-111 (2), C.R.S.

(9) Notwithstanding any provision of this section or of section 37-60-122 to the contrary, on April 20, 2009, the state treasurer shall deduct ten million two hundred fifty thousand dollars from the Colorado water conservation board construction fund and transfer such sum to the general fund.

**Source:** **L. 71:** p. 1344, § 2. **C.R.S. 1963:** § 149-1-21. **L. 77:** Entire section amended, p. 1692, § 2, effective March 4. **L. 80:** (1) amended and (4) added, p. 698, § 2, effective May 2; (1) amended, p. 695, § 2, effective June 5. **L. 81:** (1) and (4) amended, p. 1769, § 3, effective June 16. **L. 83:** (5) added, p. 1522, § 7, effective March 22. **L. 85:** (4)(b) repealed, p. 1154, § 5, effective June 2. **L. 86:** (1)(b)(III) and (1)(b)(IV) amended, p. 1086, § 7, effective April 24; (6) added, p. 1119, § 19, effective July 1. **L. 87:** (6) amended and (7) added, p. 1296, §§ 3, 4, effective July 13. **L. 88:** (4)(c) added, p. 1237, § 8, effective May 23; IP(6) amended, p. 1433, § 19, effective June 11. **L. 89:** IP(6) and (6)(b) to (6)(d) amended and (6)(e) and (6.1) added, pp. 1417, 1418, §§ 1, 2, effective April 11. **L. 90:** IP(6) and (6)(c) to (6)(e) amended and (6)(f) added, p. 1619, § 1, effective April 3. **L. 91:** IP(6) and (6)(d) to (6)(f) amended, p. 2014, § 1, effective April 1. **L. 91, 2nd Ex. Sess.:** (1)(d) added, p. 103, § 1, effective October 11. **L. 92:** IP(6) and (6)(d) to (6)(f) amended, p. 2302, § 1, effective February 25; (1)(b)(I) and (1)(b)(II) amended, p. 2284, § 4, effective May 27. **L. 93:** (1)(b)(II) amended, p. 3, § 1, effective February 16; (1)(d) amended, p. 11, § 1, effective February 16; IP(6) and (6)(d) to (6)(f) amended, p. 1, § 1, effective February 16. **L. 94:** (2.5) added and (6)(d) to (6)(f) amended, p. 1371, § 1, effective May 23; (1)(b)(VII) amended, p. 1532, § 11, effective May 31. **L. 95:** (2.5)(a) and (6)(d)(II) amended, p. 383, § 11, effective May 4. **L. 96:** (1)(c) repealed, p. 1224, § 26, effective August 7. **L. 98:** (3) amended, p. 540, § 14, effective April 30; (8) added, p. 1003, § 3, effective May 27. **L. 99:** (2.5)(f) added, p. 846, § 15, effective May 24. **L. 2001:** (1)(b)(VII), IP(2.5)(a), IP(2.5)(b), (2.5)(c), (2.5)(d), (2.5)(e), (2.5)(f), IP(6), (6)(b), (6)(c), (6)(d)(II)(A), and (6)(d)(VII) amended, p. 690, § 27, effective May 30; (2.5)(c), (2.5)(e), and (6)(d)(IV) amended, p. 1277, § 49, effective June 5. **L. 2002:** (1)(b)(II), (1)(b)(IV), (1)(b)(V), and (3) amended and (6.1) repealed, pp. 457, 449, §§ 31, 5, effective May 23; (2.5)(d) amended, p. 880, § 15, effective August 7; (5) repealed, p. 1006, § 2, effective August 7. **L. 2003:** (2.5), (3)(b), and (6)(d)(II)(B) amended, p. 1769, § 19, effective May 19; (2.5)(d) amended, p. 2015, § 113, effective May 22. **L. 2006:** (3)(b) amended, p. 954, § 6, effective July 1. **L. 2009:** (9) added, (SB 09-208), ch. 149, p. 627, § 33, effective April 20; (1)(b)(IV) amended, (SB 09-125), ch. 328, p. 1751, § 20, effective June 1. **L. 2012, 1st Ex. Sess.:** (4)(d) added, (SB 12S-002), ch. 1, p. 2419, § 16, effective May 19.

**Editor's note:** (1) Subsection (1)(d)(II) provided for the repeal of subsection (1)(d), effective July 1, 1994. (See L. 93, p. 11.)

(2) Amendments to subsections (2.5)(c) and (2.5)(e) by Senate Bill 01-138 and Senate Bill 01-157 were harmonized.

(3) Amendments to subsection (2.5)(d) by Senate Bill 03-110 and House Bill 03-1344 were harmonized.

**Cross references:** (1) For the legislative acknowledgment contained in the 1991 act amending this section, see section 2 of chapter 325, Session Laws of Colorado 1991.

(2) For the legislative declaration contained in the 1996 act repealing subsection (1)(c), see section 1 of chapter 237, Session Laws of Colorado 1996.

**37-60-121.1. Reserved rights litigation fund.** (1) The general assembly hereby recognizes that the claims of various agencies and organizations of the federal government to waters of the state of Colorado represent a claim to waters heretofore claimed by appropriators of the state of Colorado who have relied on the doctrine of prior appropriation to protect their property rights in and to those waters lawfully appropriated or acquired. The general assembly recognizes the need to take all actions necessary to protect such valuable property rights of its citizens, including the establishment of the fund as set forth in this section.

(2) (a) There is hereby established a reserved rights litigation fund in the office of the state treasurer to be utilized by the department of law for resolution of reserved rights claims. Moneys credited to said fund shall be expended by the attorney general only upon authorization by the general assembly and consistent with the provisions of this section. The controller, upon presentation of vouchers properly drawn and signed by the attorney general or an authorized employee of the department of law, shall issue warrants drawn on said fund. All moneys so deposited in the reserved rights litigation fund shall remain in said fund to be used for the purposes set forth in this section and shall not revert to the Colorado water conservation board construction fund, the general fund, or any other fund at the end of the year, except as directed by the general assembly. All interest earned from the investment of moneys in the reserved rights litigation fund shall be credited to and become a part of the Colorado water conservation board construction fund created by section 37-60-121.

(b) Repealed.

**Source:** L. 82: Entire section added, p. 538, § 1, effective April 9. L. 98: (2) amended, p. 1003, § 4, effective May 27. L. 99: (2)(b) repealed, p. 846, § 14, effective May 24.

**37-60-121.3. Severance tax trust fund statewide water planning account - creation. (Repealed)**

**Source:** L. 2000: Entire section added, p. 1750, § 16, effective June 1. L. 2001: Entire section repealed, p. 690, § 25, effective May 30.

**37-60-122. General assembly approval.** (1) Moneys in the Colorado water conservation board construction fund shall be expended in the following manner and under the following circumstances:

(a) Repealed.

(b) The general assembly may authorize such projects as it deems to be to the advantage of the people of the state of Colorado and shall direct the board to proceed with said projects in the priorities established by the general assembly under terms approved by the general assembly. The board is authorized to make loans without general assembly approval in amounts not to exceed ten million dollars. The unappropriated balance of moneys in the Colorado water conservation board construction fund and the state severance tax trust fund perpetual base account shall be available and continuously appropriated for this purpose. The board shall submit a written determination of the basis for such project loans to the general assembly by January 15 of the year following the year in which the loan was made.

(c) In order to determine the economic and engineering feasibility of any project proposed to be constructed from funds provided in whole or in part from the Colorado water conservation board construction fund, the board shall cause a feasibility report to be prepared on such proposed project if, in the discretion of the board, it appears to qualify for



consideration under section 37-60-119. The board may also cause a feasibility report to be prepared on any other water project proposed in this state whether funded by the Colorado water conservation board construction fund or by any other source or entity or federal or state agency, and the board shall cooperate with any such entity or federal or state agency in the planning of such project. The board shall also cause any feasibility study to be made at the direction of the general assembly. For all such feasibility investigations, the board is authorized to loan, grant, or otherwise expend on a continuing basis the moneys appropriated to the construction fund authorized by section 37-60-121, in accordance with policies adopted by the board.

(2) When a feasibility report prepared pursuant to paragraph (c) of subsection (1) of this section is funded in part by an entity or agency other than the board, then the board may, at its discretion and subject to such procedures as it deems appropriate, have such entity or agency select an engineer to provide the professional services needed to prepare such report, notwithstanding the provisions of part 14 of article 30 of title 24, C.R.S.

(3) When design and construction of a project authorized pursuant to paragraph (b) of subsection (1) of this section is funded in part by an entity or agency other than the board, then the board may, at its discretion and subject to such procedures as it deems appropriate, have such entity or agency select an engineer to provide the professional services needed for the construction management of the project, notwithstanding the provisions of part 14 of article 30 of title 24, C.R.S.

**Source:** L. 71: p. 1344, § 2. C.R.S. 1963: § 149-1-22. L. 74: (1)(b) amended, p. 443, § 1, effective March 21; (1)(d) added, p. 444, § 1, effective March 21. L. 79: (1)(a) to (1)(c) amended, p. 1362, § 2, effective July 1. L. 80: (1)(c) amended, p. 699, § 3, effective May 2. L. 81: (1)(c) amended, p. 1770, § 4, effective June 16. L. 85: (2) and (3) added, p. 1153, § 4, effective June 2. L. 92: (1)(a) amended, p. 2284, § 5, effective May 27. L. 93: (1)(a) and (1)(b) amended, p. 3, § 2, effective February 16. L. 96: (1)(a) repealed, p. 671, § 27, effective August 7. L. 2002: IP(1) and (1)(b) amended, p. 453, § 20, effective May 23. L. 2003: (1)(b) amended, p. 1770, § 20, effective May 19. L. 2004: (1)(c) amended, p. 888, § 22, effective May 21. L. 2007: (1)(b) amended, p. 1519, § 22, effective May 31.

**Cross references:** For the legislative declaration contained in the 1996 act repealing subsection (1)(a), see section 1 of chapter 141, Session Laws of Colorado 1996.

## ANNOTATION

**Law reviews.** For article, "Principles and Law of Colorado's Nontributary Ground Water", see 62 Den. U. L. Rev. 809 (1985).

**37-60-122.2. Fish and wildlife resources - legislative declaration - fund - authorization.** (1) (a) The general assembly hereby recognizes the responsibility of the state for fish and wildlife resources found in and around state waters which are affected by the construction, operation, or maintenance of water diversion, delivery, or storage facilities. The general assembly hereby declares that such fish and wildlife resources are a matter of statewide concern and that impacts on such resources should be mitigated by the project applicants in a reasonable manner. It is the intent of the general assembly that fish and wildlife resources that are affected by the construction, operation, or maintenance of water diversion, delivery, or storage facilities should be mitigated to the extent, and in a manner, that is economically reasonable and maintains a balance between the development of the state's water resources and the protection of the state's fish and wildlife resources.

(b) Except as provided in this paragraph (b), the applicant for any water diversion, delivery, or storage facility which requires an application for a permit, license, or other approval from the United States shall inform the Colorado water conservation board, parks and wildlife commission, and division of parks and wildlife of its application and submit a mitigation proposal pursuant to this section. Exempted from such requirement are the

Animas-La Plata project, the Two Forks dam and reservoir project, and the Homestake water project for which definite plan reports and final environmental impact statements have been approved or which are awaiting approval of the same, applicants for site specific dredge and fill permits for operations not requiring construction of a reservoir, and applicants for section 404 federal nationwide permits. If an applicant that is subject to the provisions of this section and the commission agree upon a mitigation plan for the facility, the commission shall forward such agreement to the Colorado water conservation board, and the board shall adopt such agreement at its next meeting as the official state position on the mitigation actions required of the applicant. In all cases the commission shall proceed expeditiously and, no later than sixty days from the applicant's notice, unless extended in writing by the applicant, make its evaluation regarding the probable impact of the proposed facility on fish and wildlife resources and their habitat and to make its recommendation regarding such reasonable mitigation actions as may be needed.

(c) The commission's evaluation and proposed mitigation recommendation shall be transmitted to the Colorado water conservation board. The board within sixty days, unless extended in writing by the applicant, shall either affirm the mitigation recommendation of the commission as the official state position or shall make modifications or additions thereto supported by a memorandum that sets out the basis for any changes made. Whenever modifications or additions are made by the board in the commission's mitigation recommendation, the governor, within sixty days, shall affirm or modify the mitigation recommendation which shall then be the official state position with respect to mitigation. The official state position, established pursuant to this subsection (1) shall be communicated to each federal, state, or other governmental agency from which the applicant must obtain a permit, license, or other approval.

(2) (a) Moneys transferred to the fish and wildlife resources fund pursuant to the provisions of section 37-60-121 (6) are hereby continuously appropriated to the Colorado water conservation board for the purpose of making grants pursuant to this subsection (2) and for offsetting the direct and indirect costs of the board for administering the grants. The interest earned from the investment of the moneys in the fund shall be credited to the fund.

(b) To the extent that the cost of implementing the mitigation recommendation made pursuant to subsection (1) of this section exceeds five percent of the costs of a water diversion, delivery, or storage facility, the board shall, upon the application of the applicant, make a mitigation grant to the applicant. The amount of the grant shall be sufficient to pay for the mitigation recommendation as determined by this section to the extent required above the applicant's five percent share. Any additional enhancement shall be at the discretion and within the means of the board. Under no circumstance shall the total amount of the grant exceed five percent of the construction costs of the project, or be disbursed in installments that exceed seventy percent of the amount of the grant during any fiscal year. Any mitigation cost in excess of ten percent of the construction costs of a project shall be borne by the applicant.

(c) An applicant may apply for an enhancement grant by submitting to the commission and the board an enhancement proposal for enhancing fish and wildlife resources over and above the levels existing without such facilities. The commission shall submit its recommendations on the proposal to the board for its consideration. The board, with the concurrence of the commission, may award a grant for fish and wildlife enhancement. Any such enhancement grant will be shared equally by the Colorado water conservation board's fish and wildlife resources fund and the division of parks and wildlife's wildlife cash funds and other funds available to the division.

(d) For the purpose of this subsection (2), construction costs means the best estimate of the physical construction costs as fixed by the Colorado water conservation board as of the date of the grant application. Costs should be limited to design, engineering and physical construction and will not include the costs of planning, financing, and environmental documentation, mitigation costs, legal expenses, site acquisition or water rights.

(e) Species recovery grants from the fish and wildlife resources fund may be made for the purpose of responding to needs of declining native species and to those species protected under the federal "Endangered Species Act of 1973", 16 U.S.C. sec. 1531, et seq., as amended, in a manner that will carry out the state water policy.



(f) (Deleted by amendment, L. 2001, p. 692, § 28, effective May 30, 2001.)

(3) Decisions relating to the official state mitigation position made pursuant to paragraph (c) of subsection (1) of this section shall not be subject to judicial review.

(4) The board shall distribute mitigation and enhancement grants reasonably and equitably among water basins toward the end that those projects sponsored by beneficiaries east of the continental divide receive fifty percent of the money granted and those projects sponsored by beneficiaries west of the continental divide receive fifty percent of the money granted under this section.

(5) The general assembly hereby recognizes the role instream flows and river restoration projects play in mitigating the effects of the construction, operation, and maintenance of water diversion, delivery, and storage facilities. Therefore, the Colorado water conservation board and the operators of existing water diversion, delivery, or storage facilities projects are hereby authorized to apply directly to the board for moneys for projects to carry out the purposes of this section. The board is authorized to grant such moneys if it finds that such projects will further the purposes of this section.

**Source:** L. 87: Entire section added, p. 1297, § 5, effective July 13. L. 97: (1)(a) and (2)(a) amended and (2)(e) added, p. 1600, § 1, effective June 4. L. 98: (2)(f) added, p. 1004, § 5, effective May 27. L. 99: (2)(a) amended, p. 628, § 36, effective August 4. L. 2001: (2)(a), (2)(c), (2)(e), and (2)(f) amended, p. 692, § 28, effective May 30. L. 2002: (5) added, p. 456, § 28, effective May 23. L. 2012: (1)(b) amended, (HB 12-1317), ch. 248, § 1238, § 103, effective June 4.

**37-60-122.3. Wild and scenic rivers fund - created.** There is hereby created in the state treasury the wild and scenic rivers fund, referred to in this section as the “fund”. The state treasurer shall transfer four hundred thousand dollars from previously unappropriated Colorado water conservation board construction fund moneys to the fund. The moneys in the fund are hereby continuously appropriated to the board to work with stakeholders within the state of Colorado to develop protection of river-dependent resources as an alternative to wild and scenic river designation under the federal “Wild and Scenic Rivers Act”, 16 U.S.C. sec. 1271 et seq. In addition to any remaining balance in the fund at the end of any fiscal year, the board is hereby authorized to annually provide, from the Colorado water conservation board construction fund, up to four hundred thousand dollars in order to restore the unencumbered balance in the fund up to four hundred thousand dollars. All interest derived from the investment of moneys in the fund shall be credited to the Colorado water conservation board construction fund. The board shall review the purpose of the fund annually and is hereby authorized to cease providing moneys in the following year if, in its discretion, the board determines that the purposes for which the fund was established have ceased. The board may set terms and conditions as it deems appropriate concerning the annual expenditures of moneys from the fund.

**Source:** L. 2009: Entire section added, (SB 09-125), ch. 328, p. 1751, § 21, effective June 1.

#### **37-60-122.4. Horse Creek basin account - creation. (Repealed)**

**Source:** L. 97: Entire section added, p. 829, § 14, effective May 21. L. 2002: Entire section repealed, p. 457, § 32, effective May 23.

**37-60-122.5. Emergency dam repair cash fund.** There is hereby created in the state treasury the emergency dam repair cash fund. The state treasurer is hereby authorized and directed to transfer moneys from the Colorado water conservation board construction fund to the emergency dam repair cash fund in such amounts and at such times as determined by the Colorado water conservation board. Such transfers shall not exceed fifty thousand dollars. The moneys in the emergency dam repair cash fund are hereby continuously appropriated to the Colorado water conservation board for the emergency repair of dams

pursuant to section 37-87-108.5. All moneys collected by the state engineer pursuant to section 37-87-108.5 shall be transmitted to the state treasurer who shall credit such moneys to the Colorado water conservation board construction fund. All interest derived from the investment of moneys in the emergency dam repair cash fund shall be credited to the Colorado water conservation board construction fund. Any balance remaining in the emergency dam repair cash fund at the end of any fiscal year shall remain in the fund.

**Source:** **L. 92:** Entire section added, p. 2307, § 10, effective June 3. **L. 2001:** Entire section amended, p. 693, § 29, effective May 30.

**37-60-122.6. Emergency infrastructure repair cash fund - authorization. (Repealed)**

**Source:** **L. 93:** Entire section added, p. 1335, § 10, effective June 6. **L. 94:** Entire section amended, p. 1532, § 12, effective May 31. **L. 2001:** (1) amended, p. 693, § 30, effective May 30. **L. 2002:** (1) amended, p. 454, § 22, effective May 23. **L. 2004:** Entire section repealed, p. 883, § 14, effective May 21.

**37-60-122.7. Feasibility study small grant fund - creation.**

(1) to (4) Repealed.

(5) (a) There is hereby created in the state treasury the feasibility study small grant fund for the purpose of making small grants to help pay the costs of preparing water project feasibility studies. The Colorado water conservation board shall approve small feasibility study grants based solely on criteria adopted by the board.

(b) The state treasurer is hereby authorized and directed to transfer two hundred thousand dollars from the Colorado water conservation board construction fund to the feasibility study small grant fund. The moneys in the feasibility study small grant fund are hereby continuously appropriated to the board for grants in compliance with this subsection (5). All interest derived from the investment of moneys in the feasibility study small grant fund shall be credited to the Colorado water conservation board construction fund. Any balance remaining in the feasibility study small grant fund at the end of any fiscal year shall remain in the fund and shall not revert to the Colorado water conservation board construction fund.

**Source:** **L. 95:** Entire section added, p. 384, § 12, effective May 4. **L. 99:** (4) amended and (5) added, p. 845, § 13, effective May 24. **L. 2001:** Entire section amended, p. 694, § 31, effective May 30. **L. 2002:** (1) to (4) repealed, p. 453, § 18, effective May 23.

**37-60-122.8. Publications fund.** (1) There is hereby created in the state treasury the publications fund. The fund shall consist of moneys paid to the board from persons outside the board for copies of public records or publications provided by the board. The moneys in the fund may be expended by the board to pay for the cost of providing copies of public records or publications to persons outside the board. The moneys in the fund are hereby continuously appropriated to the board for the purposes established in this section.

(2) The publications fund shall have no more than ten thousand dollars in it and any amount in excess shall be credited to the Colorado water conservation board construction fund. All interest derived from the investment of moneys in the publications fund shall be credited to the publications fund.

(3) The state treasurer is hereby authorized and directed to transfer five thousand dollars from the Colorado water conservation board construction fund to the publications fund.

**Source:** **L. 94:** Entire section added, p. 1532, § 13, effective May 31. **L. 2001:** Entire section amended, p. 694, § 32, effective May 30.



**37-60-122.9. Colorado river recovery program loan fund - creation.** (1) There is hereby created in the state treasury the Colorado river recovery program loan fund for the purpose of making loans to the Colorado river and San Juan river recovery programs for the construction or improvement of certain water related projects in Colorado, under agreements with power users of the federal Colorado river storage project, required to recover the four endangered fish species of the upper Colorado river, including the San Juan river.

(2) The Colorado water conservation board shall recommend loans from the Colorado river recovery program loan fund to the general assembly pursuant to section 37-60-122 (1) (b). The loans shall be subject to an interest rate and repayment provisions to be determined by the Colorado water conservation board.

(3) The state treasurer is hereby authorized and directed to transfer to the Colorado river recovery program loan fund, created in subsection (1) of this section, out of any moneys in the Colorado water conservation board construction fund not otherwise appropriated, the sum of two million dollars. Interest earned on the funds in the Colorado river recovery program loan fund shall be credited to the Colorado water conservation board construction fund, created in section 37-60-121 (1).

**Source:** L. 98: Entire section added, p. 538, § 11, effective April 30. L. 2001: Entire section amended, p. 695, § 33, effective May 30.

### **37-60-123. Conformity with state water plan. (Repealed)**

**Source:** L. 71: p. 1345, § 2. C.R.S. 1963: § 149-1-23. L. 83: Entire section repealed, p. 1404, § 7, effective June 15.

**37-60-123.1. Loan foreclosure fund - created.** There is hereby created in the state treasury the loan foreclosure fund, referred to in this section as the "foreclosure fund". The state treasurer is hereby authorized and directed to transfer one hundred thousand dollars from the Colorado water conservation board construction fund to the foreclosure fund. The Colorado water conservation board is authorized to provide funding to cover the direct costs associated with completing foreclosure proceedings against a delinquent borrower from either the Colorado water conservation board construction fund or the severance tax trust fund perpetual base account. The moneys in the foreclosure fund are hereby continuously appropriated to the board for loan foreclosure proceedings, including, but not limited to, property management costs, appraisals, assessments, taxes, local government fees, insurance costs, court costs, and legal fees. All interest derived from the investment of moneys in the foreclosure fund shall be credited to the Colorado water conservation board construction fund. Any balance remaining in the foreclosure fund at the end of any fiscal year shall remain in the fund.

**Source:** L. 2001: Entire section added, p. 689, § 24, effective May 30.

**37-60-123.2. Flood and drought response fund - created.** There is hereby created in the state treasury the flood and drought response fund, referred to in this section as the "response fund". The state treasurer is hereby authorized and directed to transfer three hundred thousand dollars from the Colorado water conservation board construction fund to the response fund. The board is authorized to provide funding for flood and drought preparedness and for response and recovery activities following flood or drought events and disasters. The moneys in the response fund are hereby continuously appropriated to the board for flood and drought response purposes, including the immediate availability of funds for aerial photography of flooded areas, flood and drought documentation and identification of specific hazards, evaluations and revisions of floodplain designations and drought-prone areas, flood and drought forecasting and preparation, and development of disaster and recovery mitigation plans. The state treasurer shall credit all interest derived from the investment of moneys in the response fund to the Colorado water conservation board construction fund. Any balance remaining in the response fund at the end of any fiscal year remains in the fund.

**Source:** L. 2001: Entire section added, p. 689, § 24, effective May 30. L. 2007: Entire section amended, p. 1519, § 24, effective May 31. L. 2012, 1st Ex. Sess.: Entire section amended, (SB 12S-002), ch. 1, p. 2416, § 6, effective May 19.

**37-60-123.5. Agricultural emergency drought response.** (1) If, pursuant to federal or state law, any portion of Colorado has received emergency drought designation or a disaster emergency has been proclaimed due to drought, notwithstanding the provisions of section 39-29-109 (1), C.R.S., in addition to any other moneys appropriated from the perpetual base account of the severance tax trust fund, created by section 39-29-109 (2) (a), C.R.S., up to one million dollars in the perpetual base account of the severance tax trust fund are continuously appropriated annually to the director of the Colorado water conservation board and the state engineer for any such designation or proclamation to make loans and grants to agricultural organizations for emergency drought-related water augmentation purposes.

(2) The director of the Colorado water conservation board and the state engineer shall consult with the commissioner of agriculture and the executive director of the department of natural resources before making any loans or grants pursuant to this section. Within three months after the end of any fiscal year during which the spending authority created pursuant to this section is exercised, the director and the state engineer shall report to the general assembly regarding how such spending authority was exercised.

**Source:** L. 2002, 3rd Ex. Sess.: Entire section added, p. 54, § 1, effective August 1. L. 2007: (1) amended, p. 1519, § 23, effective May 31. L. 2008: (1) amended, p. 1873, § 13, effective June 2.

**37-60-123.7. Acquisitions of water for instream flows.** (1) In addition to any other moneys appropriated from the Colorado water conservation board construction fund, up to one million dollars in the fund are continuously appropriated to the board annually to pay for the costs of acquiring water, water rights, and interests in water for instream flow use. The total amount of such continuous appropriation that is unencumbered in any fiscal year shall not exceed one million dollars. The primary priority for expenditures of these revenues shall be the costs of water acquisitions for existing or new instream flow water rights to preserve the natural environment to a reasonable degree. These revenues also may be used in limited circumstances for the costs of water acquisitions to preserve the natural environment of species that have been listed as threatened or endangered under state or federal law, or are candidate species or are likely to become candidate species, support wild and scenic alternative management plans, or provide federal regulatory certainty.

(1.5) In any year that the board expends all of the moneys available for the costs of acquiring water, water rights, and interests in water for instream flow use from the moneys that have been appropriated for the current fiscal year from the Colorado water conservation board construction fund pursuant to this section, the board shall apply to the parks and wildlife commission for all or any portion of the five hundred thousand dollars from habitat stamp moneys made available pursuant to section 33-4-102.7 (4) (a) (II), C.R.S. Any habitat stamp moneys received shall be used to acquire water, water rights, or interests in water pursuant to section 37-92-102 (3), subject to the limitations set forth in this section.

(2) Prior to any expenditure of funds under this section, the board shall adopt criteria and guidelines regarding its implementation of this spending authority. The board shall approve any expenditure of funds pursuant to this section. Within three months after the end of any fiscal year during which the spending authority created pursuant to this section is exercised, the board shall report to the general assembly regarding how such spending authority was exercised.

**Source:** L. 2008: Entire section added, p. 1574, § 28, effective May 29. L. 2009: (1.5) added, (SB 09-235), ch. 388, p. 2101, § 9, effective July 1, 2010. L. 2012: (1.5) amended, (HB 12-1317), ch. 248, p. 1239, § 104, effective June 4.



**37-60-124. Office of water conservation and drought planning - creation - powers and duties.** (1) There is hereby created as an office under the Colorado water conservation board the office of water conservation and drought planning. The office shall have such staff as are necessary and appropriate to carry out the duties established for the office.

(2) The office of water conservation and drought planning shall promote water conservation and drought mitigation planning by performing, to the degree feasible, duties including, but not limited to, the following:

(a) Participating as a member or chairperson of any state water availability task forces established to monitor, forecast, mitigate, or prepare for drought;

(b) Acting as a repository for water conservation and drought mitigation planning information;

(c) Disseminating water conservation, drought mitigation planning, and related information to water providers and the general public;

(d) Providing technical assistance to and working with municipal, industrial, agricultural, and other water providers and state agencies as they plan for, evaluate, and implement water conservation plans and programs, drought mitigation plans, or both;

(e) Coordination of the planning for and assistance in the implementation of water conservation plans by state agencies pursuant to section 37-96-103 (4);

(f) Administration of financial assistance for water conservation and drought mitigation planning and implementation measures and programs; and

(g) Evaluating water conservation and drought mitigation plans related to the use of such plans by water providers to address water needs and to prepare for water-related emergencies based upon policies and guidelines adopted by the board pursuant to section 37-60-126.

(3) The personal services, operating, travel and subsistence, capital, and legal services expenses of administering the office of water conservation and drought planning and the programs and activities authorized by subsection (2) of this section may be paid from such moneys as are appropriated, allocated, or otherwise credited to the Colorado water conservation board construction fund.

(4) Repealed.

**Source:** **L. 91:** Entire section added, p. 2023, § 4, effective June 4. **L. 99:** (4) repealed, p. 25, § 1, effective March 5. **L. 2004:** Entire section amended, p. 1778, § 2, effective August 4.

**Cross references:** (1) In 1991, this entire section was added by the “Water Conservation Act of 1991”. For the short title and the legislative declaration, see sections 1 and 2 of chapter 328, Session Laws of Colorado 1991.

(2) For the legislative declaration contained in the 2004 act amending this section, see section 1 of chapter 373, Session Laws of Colorado 2004.

**37-60-124.4. Stream gauge fund - created.** There is hereby created in the state treasury the stream gauge fund, referred to in this section as the “gauge fund”. The state treasurer is hereby authorized and directed to transfer two hundred fifty thousand dollars from the Colorado water conservation board construction fund to the gauge fund. The moneys in the gauge fund are hereby continuously appropriated to the board for stream gaging and data collection efforts related to instream flow monitoring, compact protection, decision support systems, and flood forecasting and analysis. In addition to any remaining balance in the gauge fund at the end of any fiscal year, the board is hereby authorized, from the water conservation board construction fund, to annually provide up to two hundred fifty thousand dollars in order to restore the unencumbered balance in the gauge fund to two hundred fifty thousand dollars. All interest derived from the investment of moneys in the gauge fund shall be credited to the Colorado water conservation board construction fund. The board shall review the purposes of the gauge fund annually and is hereby authorized to cease providing moneys in the following year if, in its discretion, the board determines

that the purposes for which the gauge fund was established have ceased. The board may set terms and conditions as it deems appropriate concerning the annual expenditures of moneys from the gauge fund.

**Source: L. 2007:** Entire section added, p. 1513, § 4, effective May 31.

**37-60-125. Authorizations for expenditures from Colorado water conservation board construction fund for demonstration of benefits of water efficiency.** (1) The Colorado water conservation board is hereby authorized to expend five hundred thousand dollars from the Colorado water conservation board construction fund, notwithstanding the requirements of sections 37-60-119 to 37-60-122, for the purpose of a pilot program demonstrating the benefits of water efficiency measures by providing incentive grants, not to exceed fifty thousand dollars to any public agency, established under Colorado law, that requests assistance in the design and implementation of pilot water efficiency and conservation measures.

(2) The board is further authorized to expend eighty thousand dollars and 1.5 FTE for the fiscal year beginning July 1, 1991, for personal services, operating, travel and subsistence, capital, and legal services expenses of administering the pilot program authorized in subsection (1) of this section from the Colorado water conservation board construction fund.

(3) The board shall develop guidelines for the range of potentially eligible projects for the pilot program authorized in subsection (1) of this section by October 1, 1991, and shall establish such criteria and feasibility measures as will assure that a range of potentially beneficial projects are demonstrated as part of the pilot program.

(4) and (5) Repealed.

**Source: L. 91:** Entire section added, p. 2023, § 4, effective June 4. **L. 96:** (4) repealed, p. 1224, § 28, effective August 7. **L. 99:** (5) repealed, p. 25, § 2, effective March 5.

**Cross references:** (1) In 1991, this entire section was added by the "Water Conservation Act of 1991". For the short title and the legislative declaration, see sections 1 and 2 of chapter 328, Session Laws of Colorado 1991.

(2) For the legislative declaration contained in the 1996 act repealing subsection (4), see section 1 of chapter 237, Session Laws of Colorado 1996.

**37-60-126. Water conservation and drought mitigation planning - programs - relationship to state assistance for water facilities - guidelines - water efficiency grant program - repeal.** (1) As used in this section and section 37-60-126.5, unless the context otherwise requires:

(a) "Agency" means a public or private entity whose primary purpose includes the promotion of water resource conservation.

(b) "Covered entity" means each municipality, agency, utility, including any privately owned utility, or other publicly owned entity with a legal obligation to supply, distribute, or otherwise provide water at retail to domestic, commercial, industrial, or public facility customers, and that has a total demand for such customers of two thousand acre-feet or more.

(c) "Grant program" means the water efficiency grant program established pursuant to subsection (12) of this section.

(d) "Office" means the office of water conservation and drought planning created in section 37-60-124.

(e) "Plan elements" means those components of water conservation plans that address water-saving measures and programs, implementation review, water-saving goals, and the actions a covered entity shall take to develop, implement, monitor, review, and revise its water conservation plan.

(f) "Public facility" means any facility operated by an instrument of government for the benefit of the public, including, but not limited to, a government building; park or other



recreational facility; school, college, university, or other educational institution; highway; hospital; or stadium.

(g) “Water conservation” means water use efficiency, wise water use, water transmission and distribution system efficiency, and supply substitution. The objective of water conservation is a long-term increase in the productive use of water supply in order to satisfy water supply needs without compromising desired water services.

(h) “Water conservation plan”, “water use efficiency plan”, or “plan” means a plan adopted in accordance with this section.

(i) “Water-saving measures and programs” includes a device, a practice, hardware, or equipment that reduces water demands and a program that uses a combination of measures and incentives that allow for an increase in the productive use of a local water supply.

(2) (a) Each covered entity shall, subject to section 37-60-127, develop, adopt, make publicly available, and implement a plan pursuant to which such covered entity shall encourage its domestic, commercial, industrial, and public facility customers to use water more efficiently. Any state or local governmental entity that is not a covered entity may develop, adopt, make publicly available, and implement such a plan.

(b) The office shall review previously submitted conservation plans to evaluate their consistency with the provisions of this section and the guidelines established pursuant to paragraph (a) of subsection (7) of this section.

(c) On and after July 1, 2006, a covered entity that seeks financial assistance from either the board or the Colorado water resources and power development authority shall submit to the board a new or revised plan to meet water conservation goals adopted by the covered entity, in accordance with this section, for the board’s approval prior to the release of new loan proceeds.

(3) The manner in which the covered entity develops, adopts, makes publicly available, and implements a plan established pursuant to subsection (2) of this section shall be determined by the covered entity in accordance with this section. The plan shall be accompanied by a schedule for its implementation. The plans and schedules shall be provided to the office within ninety days after their adoption. For those entities seeking financial assistance, the office shall then notify the covered entity and the appropriate financing authority that the plan has been reviewed and whether the plan has been approved in accordance with this section.

(4) A plan developed by a covered entity pursuant to subsection (2) of this section shall, at a minimum, include a full evaluation of the following plan elements:

(a) The water-saving measures and programs to be used by the covered entity for water conservation. In developing these measures and programs, each covered entity shall, at a minimum, consider the following:

(I) Water-efficient fixtures and appliances, including toilets, urinals, clothes washers, showerheads, and faucet aerators;

(II) Low water use landscapes, drought-resistant vegetation, removal of phreatophytes, and efficient irrigation;

(III) Water-efficient industrial and commercial water-using processes;

(IV) Water reuse systems;

(V) Distribution system leak identification and repair;

(VI) Dissemination of information regarding water use efficiency measures, including by public education, customer water use audits, and water-saving demonstrations;

(VII) (A) Water rate structures and billing systems designed to encourage water use efficiency in a fiscally responsible manner.

(B) The department of local affairs may provide technical assistance to covered entities that are local governments to implement water billing systems that show customer water usage and that implement tiered billing systems.

(VIII) Regulatory measures designed to encourage water conservation;

(IX) Incentives to implement water conservation techniques, including rebates to customers to encourage the installation of water conservation measures;

(b) A section stating the covered entity’s best judgment of the role of water conservation plans in the covered entity’s water supply planning;

(c) The steps the covered entity used to develop, and will use to implement, monitor, review, and revise, its water conservation plan;

(d) The time period, not to exceed seven years, after which the covered entity will review and update its adopted plan; and

(e) Either as a percentage or in acre-foot increments; an estimate of the amount of water that has been saved through a previously implemented conservation plan and an estimate of the amount of water that will be saved through conservation when the plan is implemented.

(4.5) (a) On an annual basis starting no later than June 30, 2014, covered entities shall report water use and conservation data, to be used for statewide water supply planning, following board guidelines pursuant to paragraph (b) of this subsection (4.5), to the board by the end of the second quarter of each year for the previous calendar year.

(b) No later than February 1, 2012, the board shall adopt guidelines regarding the reporting of water use and conservation data by covered entities and shall provide a report to the senate agriculture and natural resources committee and the house of representatives agriculture, livestock, and natural resources committee, or their successor committees, regarding the guidelines. These guidelines shall:

(I) Be adopted pursuant to the board's public participation process and shall include outreach to stakeholders from water providers with geographic and demographic diversity, nongovernmental organizations, and water conservation professionals; and

(II) Include clear descriptions of: Categories of customers, uses, and measurements; how guidelines will be implemented; and how data will be reported to the board.

(c) (I) No later than February 1, 2019, the board shall report to the senate agriculture and natural resources committee and the house of representatives agriculture, livestock, and natural resources committee, or their successor committees, on the guidelines and data collected by the board under the guidelines.

(II) This paragraph (c) is repealed, effective July 1, 2020.

(5) Each covered entity and other state or local governmental entity that adopts a plan shall follow the entity's rules, codes, or ordinances to make the draft plan available for public review and comment. If there are no rules, codes, or ordinances governing the entity's public planning process, then each entity shall publish a draft plan, give public notice of the plan, make such plan publicly available, and solicit comments from the public for a period of not less than sixty days after the date on which the draft plan is made publicly available. Reference shall be made in the public notice to the elements of a plan that have already been implemented.

(6) The board is hereby authorized to recommend the appropriation and expenditure of such revenues as are necessary from the unobligated balance of the five percent share of the operational account of the severance tax trust fund designated for use by the board for the purpose of the office providing assistance to covered entities to develop water conservation plans that meet the provisions of this section.

(7) (a) The board shall adopt guidelines for the office to review water conservation plans submitted by covered entities and other state or local governmental entities. The guidelines shall define the method for submitting plans to the office, the methods for office review and approval of the plans, and the interest rate surcharge provided for in paragraph (a) of subsection (9) of this section.

(b) If no other applicable guidelines exist as of June 1, 2007, the board shall adopt guidelines by July 31, 2007, for the office to use in reviewing applications submitted by covered entities, other state or local governmental entities, and agencies for grants from the grant program and from the grant program established in section 37-60-126.5 (3). The guidelines shall establish deadlines and procedures for covered entities, other state or local governmental entities, and agencies to follow in applying for grants and the criteria to be used by the office and the board in prioritizing and awarding grants.

(8) A covered entity may at any time adopt changes to an approved plan in accordance with this section after notifying and receiving concurrence from the office. If the proposed changes are major, the covered entity shall give public notice of the changes, make the changes available in draft form, and provide the public an opportunity to comment on such changes before adopting them in accordance with subsection (5) of this section.



(9) (a) Neither the board nor the Colorado water resources and power development authority shall release grant or loan proceeds to a covered entity unless the covered entity provides a copy of the water conservation plan adopted pursuant to this section; except that the board or the authority may release the grant or loan proceeds notwithstanding a covered entity's failure to comply with the reporting requirements of subsection (4.5) of this section or if the board or the authority, as applicable, determines that an unforeseen emergency exists in relation to the covered entity's loan application, in which case the board or the authority, as applicable, may impose a grant or loan surcharge upon the covered entity that may be rebated or reduced if the covered entity submits and adopts a plan in compliance with this section in a timely manner as determined by the board or the authority, as applicable.

(b) The board and the Colorado water resources and power development authority, to which any covered entity has applied for financial assistance for the construction of a water diversion, storage, conveyance, water treatment, or wastewater treatment facility, shall consider any water conservation plan filed pursuant to this section in determining whether to render financial assistance to such entity. Such consideration shall be carried out within the discretion accorded the board and the Colorado water resources and power development authority pursuant to which such board and authority render such financial assistance to such covered entity.

(c) The board and the Colorado water resources and power development authority may enter into a memorandum of understanding with each other for the purposes of avoiding delay in the processing of applications for financial assistance covered by this section and avoiding duplication in the consideration required by this subsection (9).

(10) Repealed.

(11) (a) Any section of a restrictive covenant that prohibits or limits xeriscape, prohibits or limits the installation or use of drought-tolerant vegetative landscapes, or requires cultivated vegetation to consist exclusively or primarily of turf grass is hereby declared contrary to public policy and, on that basis, that section of the covenant shall be unenforceable.

(b) As used in this subsection (11):

(I) "Executive board policy or practice" includes any additional procedural step or burden, financial or otherwise, placed on a unit owner who seeks approval for a landscaping change by the executive board of a unit owners' association, as defined in section 38-33.3-103, C.R.S., and not included in the existing declaration or bylaws of the association. An "executive board policy or practice" includes, without limitation, the requirement of:

- (A) An architect's stamp;
- (B) Preapproval by an architect or landscape architect retained by the executive board;
- (C) An analysis of water usage under the proposed new landscape plan or a history of water usage under the unit owner's existing landscape plan; and
- (D) The adoption of a landscaping change fee.

(II) "Restrictive covenant" means any covenant, restriction, bylaw, executive board policy or practice, or condition applicable to real property for the purpose of controlling land use, but does not include any covenant, restriction, or condition imposed on such real property by any governmental entity.

(III) "Turf grass" means continuous plant coverage consisting of hybridized grasses that, when regularly mowed, form a dense growth of leaf blades and roots.

(IV) "Xeriscape" means the application of the principles of landscape planning and design, soil analysis and improvement, appropriate plant selection, limitation of turf area, use of mulches, irrigation efficiency, and appropriate maintenance that results in water use efficiency and water-saving practices.

(c) Nothing in this subsection (11) shall preclude the executive board of a common interest community from taking enforcement action against a unit owner who allows his or her existing landscaping to die; except that:

(I) Such enforcement action shall be suspended during a period of water use restrictions declared by the jurisdiction in which the common interest community is located, in which case the unit owner shall comply with any watering restrictions imposed by the water provider for the common interest community;

(II) Enforcement shall be consistent within the community and not arbitrary or capricious; and

(III) Once the drought emergency is lifted, the unit owner shall be allowed a reasonable and practical opportunity, as defined by the association's executive board, with consideration of applicable local growing seasons or practical limitations, to reseed and revive turf grass before being required to replace it with new sod.

(12) (a) (I) There is hereby created the water efficiency grant program for purposes of providing state funding to aid in the planning and implementation of water conservation plans developed in accordance with the requirements of this section and to promote the benefits of water efficiency. The board is authorized to distribute grants to covered entities, other state or local governmental entities, and agencies in accordance with its guidelines from the moneys transferred to and appropriated from the water efficiency grant program cash fund, which is hereby created in the state treasury.

(II) Moneys in the water efficiency grant program cash fund are hereby continuously appropriated to the board for the purposes of this subsection (12) and shall be available for use until the programs and projects financed using the grants have been completed.

(III) For each fiscal year beginning on or after July 1, 2010, the general assembly shall appropriate from the fund to the board up to five hundred thousand dollars annually for the purpose of providing grants to covered entities, other state and local governmental entities, and agencies in accordance with this subsection (12). Commencing July 1, 2008, the general assembly shall also appropriate from the fund to the board fifty thousand dollars each fiscal year to cover the costs associated with the administration of the grant program and the requirements of section 37-60-124. Moneys appropriated pursuant to this subparagraph (III) shall remain available until expended or until June 30, 2020, whichever occurs first.

(IV) Any moneys remaining in the fund on June 30, 2020, shall be transferred to the operational account of the severance tax trust fund described in section 39-29-109 (2) (b), C.R.S.

(b) Any covered entity or state or local governmental entity that has adopted a water conservation plan and that supplies, distributes, or otherwise provides water at retail to customers may apply for a grant to aid in the implementation of the water efficiency goals of the plan. Any agency may apply for a grant to fund outreach or education programs aimed at demonstrating the benefits of water efficiency. The office shall review the applications and make recommendations to the board regarding the awarding and distribution of grants to applicants who satisfy the criteria outlined in this subsection (12) and the guidelines developed pursuant to subsection (7) of this section.

(c) This subsection (12) is repealed, effective July 1, 2020.

**Source:** L. 91: Entire section added, p. 2023, § 4, effective June 4. L. 99: (10) repealed, p. 25, § 3, effective March 5. L. 2003: (4)(g) amended and (11) added, p. 1368, § 4, effective April 25. L. 2004: Entire section amended, p. 1779, § 3, effective August 4. L. 2005: (11) amended, p. 1372, § 1, effective June 6; (1), (2)(b), and (7) amended and (12) added, p. 1481, § 1, effective June 7. L. 2007: (1)(a), (2)(a), (5), (7), and (12) amended, p. 1890, § 1, effective June 1. L. 2008: IP(4) amended, p. 1575, § 30, effective May 29; (12)(a) amended, p. 1873, § 14, effective June 2. L. 2009: (12)(a) amended, (HB 09-1017), ch. 297, p. 1593, § 1, effective May 21; (9)(a) amended, (SB 09-106), ch. 386, p. 2091, § 3, effective July 1. L. 2010: (4)(a)(I) and (9)(a) amended and (4.5) added, (HB 10-1051), ch. 378, p. 1772, § 1, effective June 7; (12)(a)(III), (12)(a)(IV), and (12)(c) amended, (SB 10-025), ch. 379, p. 1774, § 1, effective June 7.

**Editor's note:** Subsection (12) was originally enacted as subsection (13) in House Bill 05-1254 but was renumbered on revision for ease of location.

**Cross references:** (1) In 1991, this entire section was added by the "Water Conservation Act of 1991". For the short title and the legislative declaration, see sections 1 and 2 of chapter 328, Session Laws of Colorado 1991.

(2) For the legislative declaration contained in the 2004 act amending this section, see section 1 of chapter 373, Session Laws of Colorado 2004.



**37-60-126.5. Drought mitigation planning - programs - relationship to state assistance.** (1) As used in this section, unless the context otherwise requires, “drought mitigation” means the planning and implementation of actions and programs used in periods of unusual water scarcity, with a combination of actions and programs taken before a drought to reduce the occurrence and severity of water supply shortages, and actions and programs taken during a drought to manage water supplies and water demand appropriately.

(2) The office shall develop programs to provide technical assistance to covered entities and other state or local governmental entities in the development of drought mitigation plans.

(3) The board is hereby authorized to expend revenues from the water efficiency grant program cash fund and to recommend the appropriation and expenditure of such revenues as is necessary from the unobligated balance of the five-percent share of the operational account of the severance tax trust fund designated for use by the board for the purpose of assisting covered entities and other state or local governmental entities to develop drought mitigation plans identified as sufficient by the office.

(4) The board shall adopt guidelines for the office to use in reviewing, evaluating, and approving drought mitigation plans submitted by covered entities or other state or local governmental entities in accordance with this section.

**Source: L. 2004:** Entire section added, p. 1783, § 4, effective August 4. **L. 2007:** (3) and (4) amended, p. 1892, § 2, effective June 1.

**Cross references:** For the legislative declaration contained in the 2004 act enacting this section, see section 1 of chapter 373, Session Laws of Colorado 2004.

**37-60-127. Applicability of provisions requiring funding by political subdivisions of the state.** No provision of section 37-60-124, 37-60-125, 37-60-126, or 37-96-103 (4) to (7) which requires funding by any political subdivision of the state which is a covered entity as defined in section 37-60-126 (1) (b) shall apply to any such political subdivision if such entity submits the applicable provision and its requirements, including all costs to the inhabitants of the respective jurisdiction, to the qualified electors of any such political subdivision, and a majority of such qualified electors do not approve such applicable provision and its requirements.

**Source: L. 91:** Entire section added, p. 2023, § 4, effective June 4. **L. 2005:** Entire section amended, p. 1484, § 3, effective June 7.

**Cross references:** In 1991, this entire section was added by the “Water Conservation Act of 1991”. For the short title and the legislative declaration, see sections 1 and 2 of chapter 328, Session Laws of Colorado 1991.

**37-60-128. Sunset of water conservation provisions - review by general assembly. (Repealed)**

**Source: L. 91:** Entire section added, p. 2023, § 4, effective June 4. **L. 99:** Entire section repealed, p. 25, § 4, effective March 5.

**37-60-129. Availability of funds.** Moneys appropriated or authorized to the board from the Colorado water conservation board construction fund and from the Colorado river recovery program loan fund shall remain available to the board for the original purposes, unless deauthorized by the legislature, until any project for which the moneys were appropriated or authorized is completed.

**Source: L. 95:** Entire section added, p. 384, § 12, effective May 4. **L. 2001:** Entire section amended, p. 696, § 36, effective May 30.

**37-60-130. Well augmentation loans.**

(1) (Deleted by amendment, L. 2004, p. 884, § 16, effective May 21, 2004.)

(2) The board is hereby authorized to make loans from unreserved cash in the Colorado water conservation board construction fund to organizations or entities for the purchase of augmentation water or the rights to such water to replace out-of-priority depletions to surface water rights and to prevent material depletions of stateline flows that might result in violation of compacts or interstate decrees.

(3) The board shall approve or deny applications for loans based upon criteria including, but not limited to, whether the:

- (a) Source of augmentation water is from a reliable, permanent supply;
- (b) Applicant has adequate security or collateral to assure repayment;
- (c) Applicant has the ability to repay the loan at an interest rate and over a period of time as set by the board;
- (d) Applicant is able to collect payments for the augmented water from its members;
- (e) Loan will serve the needs of a broad group of users rather than a specific user;
- (f) Loan will assist in maintaining the agricultural viability of the area served;
- (g) Applicant obtains commitments from its members that any such member who fails to make payments in accordance with the loan agreement shall cease pumping water; and
- (h) Applicant obtains commitments from its members to comply with any rules or changes to rules as promulgated or amended by the state engineer that govern the measurement of groundwater withdrawals and the use of such groundwater.

(4) (a) The state engineer shall promptly and completely curtail the use of a well by the owner of such well if such owner has accepted the benefit of a well augmentation loan and fails to make a payment required pursuant to the terms of subsection (3) of this section.

(b) This section shall apply regardless of whether the well owner accepts the benefit of the well augmentation loan directly or through membership in a participating association or organization.

(c) Curtailment pursuant to this subsection (4) shall remain in effect for as long as any payment remains past due.

**Source:** **L. 95:** Entire section added, p. 385, § 12, effective May 4. **L. 97:** (1) and (2) amended, p. 830, § 17, effective May 21. **L. 2001:** (1), (2), (4)(a), and (4)(b) amended, p. 695, § 34, effective May 30. **L. 2004:** Entire section amended, p. 884, § 16, effective May 21.

**PART 2****WATER INFRASTRUCTURE REVENUE BONDS****37-60-201 to 37-60-210. (Repealed)**

**Editor's note:** (1) This part 2 was added in 2003 and was not amended prior to its repeal on November 4, 2003. For the text of this part 2 prior to November 4, 2003, consult the 2003 Colorado Revised Statutes.

(2) Section 37-60-210 provided for the repeal of this part 2, effective upon the rejection by the registered electors of the state voting on the ballot question regarding issuance of water infrastructure revenue bonds submitted pursuant to § 37-60-203 (1)(a). (See L. 2003, p. 2410.) The vote count on the measure at the general election held November 4, 2003, was as follows:

FOR:	307,412
AGAINST:	627,716

**Interstate Compacts**

**Editor's note:** The numbering system within the compacts in articles 61 to 69 of this title, inclusive, are those of the original compacts and are not to be confused with the numbering system of C.R.S. 1973.



ARTICLE 61

Colorado River Compact

**Law reviews:** For article, “Interstate Water Allocation Compacts: When the Virtue of Permanence Becomes the Vice of Inflexibility”, see 74 U. Colo. L. Rev. 105 (2003).

37-61-101.	Colorado River compact.	37-61-103.	Approval waived.
37-61-102.	Compact effective on ap- proval.	37-61-104.	Certified copies of compact.

**37-61-101. Colorado River compact.** The General Assembly hereby approves the compact, designated as the “Colorado River Compact”, signed at the City of Santa Fe, State of New Mexico, on the 24th day of November, A.D. 1922, by Delph E. Carpenter, as the Commissioner for the State of Colorado, under authority of and in conformity with the provisions of an act of the General Assembly of the State of Colorado, approved April 2, 1921, entitled “An Act providing for the appointment of a Commissioner on behalf of the State of Colorado to negotiate a compact and agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming and between said States and the United States respecting the use and distribution of the waters of the Colorado River and the rights of said States and the United States thereto, and making an appropriation therefor.”, the same being Chapter 246 of the Session Laws of Colorado, 1921, and signed by the Commissioners for the States of Arizona, California, Nevada, New Mexico, Utah, and Wyoming, under legislative authority, and signed by the Commissioners for said seven States and approved by the Representative of the United States of America under authority and in conformity with the provisions of an Act of the Congress of the United States, approved August 19, 1921, entitled “An Act to permit a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming, respecting the disposition and apportionment of the waters of the Colorado River, and for other purposes.”, which said compact is as follows:

Colorado River Compact

The States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming, having resolved to enter into a compact, under the Act of the Congress of the United States of America approved August 19, 1921, (42 Statutes at Large, page 171), and the Acts of the legislatures of the said states, have through their Governors appointed as their commis- sioners:

- W. S. Norviel, for the State of Arizona;
  - W. F. McClure, for the State of California;
  - Delph E. Carpenter, for the State of Colorado;
  - J. G. Scrugham, for the State of Nevada;
  - Stephen B. Davis, Jr., for the State of New Mexico;
  - R. E. Caldwell, for the State of Utah;
  - Frank C. Emerson, for the State of Wyoming;
- who, after negotiations participated in by Herbert Hoover appointed by the President as the representative of the United States of America, have agreed upon the following articles:

Article I

The major purposes of this compact are to provide for the equitable division and apportionment of the use of the waters of the Colorado River System; to establish the relative importance of different beneficial uses of water; to promote interstate comity; to remove causes of present and future controversies; and to secure the expeditious agricul- tural and industrial development of the Colorado River Basin, the storage of its waters and the protection of life and property from floods. To these ends the Colorado River Basin is

divided into two Basins, and an apportionment of the use of part of the water of the Colorado River System is made to each of them with the provision that further equitable apportionments may be made.

## Article II

As used in this Compact: -

(a) The term "Colorado River System" means that portion of the Colorado River and its tributaries within the United States of America.

(b) The term "Colorado River Basin" means all of the drainage area of the Colorado River System and all other territory within the United States of America to which the waters of the Colorado River System shall be beneficially applied.

(c) The term "States of the Upper Division" means the States of Colorado, New Mexico, Utah and Wyoming.

(d) The term "States of the Lower Division" means the States of Arizona, California and Nevada.

(e) The "Lee Ferry" means a point in the main stream of the Colorado River one mile below the mouth of the Paria River.

(f) The term "Upper Basin" means those parts of the States of Arizona, Colorado, New Mexico, Utah and Wyoming within and from which waters naturally drain into the Colorado River System above Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System above Lee Ferry.

(g) The term "Lower Basin" means those parts of the States of Arizona, California, Nevada, New Mexico and Utah within and from which waters naturally drain into the Colorado River System below Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System below Lee Ferry.

(h) The term "domestic use" shall include the use of water for household, stock, municipal, mining, milling, industrial and other like purposes, but shall exclude the generation of electrical power.

## Article III

(a) There is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin respectively the exclusive beneficial consumptive use of 7,500,000 acre feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist.

(b) In addition to the apportionment in paragraph (a) the Lower Basin is hereby given the right to increase its beneficial consumptive use of such waters by one million acre per annum.

(c) If, as a matter of international comity, the United States of America shall hereafter recognize in the United States of Mexico any right to the use of any waters of the Colorado River System, such waters shall be supplied first from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b); and if such surplus shall prove insufficient for this purpose, then, the burden of such deficiency shall be equally borne by the Upper Basin and the Lower Basin, and whenever necessary the States of the Upper Division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d).

(d) The states of the Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact.

(e) The States of the Upper Division shall not withhold water, and the States of the Lower Division shall not require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses.



(f) Further equitable apportionment of the beneficial uses of the waters of the Colorado River System unapportioned by paragraphs (a), (b) and (c) may be made in the manner provided in paragraph (g) at any time after October first, 1963, if and when either basin shall have reached its total beneficial consumptive use as set out in paragraphs (a) and (b).

(g) In the event of a desire for a further apportionment as provided in paragraph (f) any two signatory States, acting through their Governors, may give joint notice of such desire to the Governors of the other signatory States and to the President of the United States of America, and it shall be the duty of the Governor of the signatory states and of the President of the United States of America forthwith to appoint representatives, whose duty it shall be to divide and apportion equitably between the Upper Basin and Lower Basin the beneficial use of the unapportioned water of the Colorado River System as mentioned in paragraph (f), subject to the Legislative ratification of the signatory States and the Congress of the United States of America.

#### Article IV

(a) Inasmuch as the Colorado River has ceased to be navigable for commerce and the reservation of its waters for navigation would seriously limit the development of its Basin, the use of its waters for purpose of navigation shall be subservient to the uses of such waters for domestic, agricultural and power purposes. If the Congress shall not consent to this paragraph, the other provisions of this compact shall nevertheless remain binding.

(b) Subject to the provisions of this compact, water of the Colorado River System may be impounded and used for the generation of electrical power, but such impounding and use shall be subservient to the use and consumption of such water for agricultural and domestic purposes and shall not interfere with or prevent use for such dominant purposes.

(c) The provisions of this article shall not apply to or interfere with the regulation and control by any state within its boundaries of the appropriation, use and distribution of water.

#### Article V

The Chief Official of each signatory State charged with the administration of water rights, together with the Director of the United States Reclamation Service and the Director of the United States Geological Survey shall co-operate, ex officio:

(a) To promote the systematic determination and coordination of the facts as to flow, appropriation, consumption and use of water in the Colorado River Basin, and the interchange of available information in such matters.

(b) To secure the ascertainment and publication of the annual flow of the Colorado River at Lee Ferry.

(c) To perform such other duties as may be assigned by mutual consent of the signatories from time to time.

#### Article VI

Should any claim or controversy arise between any two or more of the signatory States: (a) with respect to the waters of the Colorado River System not covered by the terms of this compact; (b) over the meaning or performance of any of the terms of this compact; (c) as to the allocation of the burdens incident to the performance of any article of this compact or the delivery of waters as herein provided; (d) as to the construction or operation of works within the Colorado River Basin to be situated in two or more States, or to be constructed in one State for the benefit of another State; or (e) as to the diversion of water in one State for the benefit of another State; the Governors of the States affected, upon the request of one of them, shall forthwith appoint Commissioners with power to consider and adjust such claim or controversy, subject to ratification by the Legislatures of the States so affected.

Nothing herein contained shall prevent the adjustment of any such claim or controversy by any present method or by direct future legislative action of the interested States.

## Article VII

Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes.

## Article VIII

Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact. Whenever storage capacity of 5,000,000 acre feet shall have been provided on the main Colorado River within or for the benefit of the Lower Basin, then claims of such rights, if any, by appropriators or users of waters in the Lower Basin, against appropriators or users of water in the Upper Basin shall attach to and be satisfied from water that may be stored not in conflict with Article III.

All other rights to beneficial use of waters of the Colorado River System shall be satisfied solely from the water apportioned to that Basin in which they are situate.

## Article IX

Nothing in this compact shall be construed to limit or prevent any State from instituting or maintaining any action or proceeding, legal or equitable, for the protection of any right under this compact or the enforcement of any of its provisions.

## Article X

This compact may be terminated at any time by the unanimous agreement of the signatory States. In the event of such termination all rights established under it shall continue unimpaired.

## Article XI

This compact shall become binding and obligatory when it shall have been approved by the Legislatures of each of the signatory States and by the Congress of the United States. Notice of approval by the Legislatures shall be given by the Governor of each signatory State to the Governors of the other signatory States and to the President of the United States, and the President of the United States is requested to give notice to the Governors of the signatory States of approval by the Congress of the United States.

In Witness Whereof, The Commissioners have signed this compact in a single original, which shall be deposited in the archives of the Department of State of the United States of America and of which a duly certified copy shall be forwarded to the Governor of each of the signatory States.

Done at the City of Santa Fe, New Mexico, this Twenty-fourth day of November, A.D. One Thousand Nine Hundred and Twenty-Two.

W. S. Norviel,  
W. F. McClure,  
Delph E. Carpenter,  
J. G. Scrugham,  
Stephen B. Davis, Jr.,  
R. E. Caldwell,  
Frank E. Emerson.

Approved:  
Herbert Hoover.



ANNOTATION

**Law reviews.** For article, “Water for Oil Shale Development”, see 43 Den. L.J. 72 (1966). For comment, “Bryant v. Yellen: Perfected Rights Acquire New Status Under a Belated Clarification of Arizona v. California”, see 58 Den. L.J. 847 (1981). For article, “The Law of Equitable Apportionment Revisited, Updated and Restated”, see 56 U. Colo. L. Rev. 381 (1985). For article, “Competing Demands for the Colorado River”, see 56 U. Colo. L. Rev. 413 (1985). For article, “Management and Marketing of Indian Water: From Conflict to Pragmatism”, see 58 U. Colo. L. Rev. 515 (1988). For article, “Colorado River Governance”, see 68 U. Colo. L. Rev. 573 (1997).

**37-61-102. Compact effective on approval.** That said compact shall not be binding and obligatory on any of the parties thereto unless and until the same has been approved by the legislature of each of the said states and by the congress of the United States, and the governor of the state of Colorado shall give notice of the approval of said compact by the general assembly of the state of Colorado to the governors of each of the remaining signatory states and to the president of the United States, in conformity with article XI of said compact.

**Source:** L. 23: p. 693, § 2. CSA: omitted. CRS 53: § 148-2-2. C.R.S. 1963: § 149-2-2.

**37-61-103. Approval waived.** That the provisions of the first paragraph of article XI of the Colorado River Compact, making said compact effective when it has been approved by the legislature of each of the signatory states, are hereby waived and said compact shall become binding and obligatory upon the state of Colorado and upon the other signatory states, which have ratified or may hereafter ratify it, whenever at least six of the signatory states have consented thereto and the congress of the United States has given its consent and approval, but this article shall be of no force or effect until a similar act or resolution has been passed or adopted by the legislatures of the states of California, Nevada, New Mexico, Utah, and Wyoming.

**Source:** L. 25: p. 525, § 1. CSA: omitted. CRS 53: § 148-2-3. C.R.S. 1963: § 149-2-3.

**37-61-104. Certified copies of compact.** That certified copies of this article be forwarded by the governor of the state of Colorado to the president of the United States, the secretary of state of the United States, and the governors of the states of Arizona, California, Nevada, New Mexico, Utah, and Wyoming.

**Source:** L. 25: p. 526, § 2. CSA: omitted. CRS 53: § 148-2-4. C.R.S. 1963: § 149-2-4.

ARTICLE 62

Upper Colorado River Compact

37-62-101.	Upper Colorado River compact.	37-62-105.	member of commission. Payment of expenses of commission.
37-62-102.	When compact operative.	37-62-106.	Administrative code inapplicable.
37-62-103.	Interstate agency created by compact.		
37-62-104.	Appointment of Colorado		

**37-62-101. Upper Colorado River compact.** The general assembly hereby ratifies the compact among the states of Colorado, New Mexico, Utah, Wyoming, and Arizona, designated as the “Upper Colorado river basin compact” and signed in the city of Santa Fe,

state of New Mexico, on the 11th day of October, A. D. 1948, by Clifford H. Stone, commissioner for the state of Colorado, Fred E. Wilson, commissioner for the state of New Mexico, Edward H. Watson, commissioner for the state of Utah, L. C. Bishop, commissioner for the state of Wyoming, Charles A. Carson, commissioner for the state of Arizona, and approved by Harry W. Bashore, representative of the United States of America. Said compact is as follows:

## Article I

(a) The major purposes of this compact are to provide for the equitable division and apportionment of the use of the waters of the Colorado river system, the use of which was apportioned in perpetuity to the upper basin by the Colorado river compact; to establish the obligations of each state of the upper division with respect to the deliveries of water required to be made at Lee ferry by the Colorado river compact; to promote interstate comity; to remove causes of present and future controversies; to secure the expeditious agricultural and industrial development of the upper basin, the storage of water and to protect life and property from floods.

(b) It is recognized that the Colorado river compact is in full force and effect and all of the provisions hereof are subject thereto.

## Article II

As used in this compact:

(a) The term "Colorado river system" means that portion of the Colorado river and its tributaries within the United States of America.

(b) The term "Colorado river basin" means all of the drainage area of the Colorado river system and all other territory within the United States of America to which the waters of the Colorado river system shall be beneficially applied.

(c) The term "states of the upper division" means the states of Colorado, New Mexico, Utah and Wyoming.

(d) The term "states of the lower division" means the states of Arizona, California and Nevada.

(e) The term "Lee ferry" means a point in the main stream of the Colorado river one mile below the mouth of the Paria river.

(f) The term "upper basin" means those parts of the states of Arizona, Colorado, New Mexico, Utah and Wyoming within and from which waters naturally drain into the Colorado river system above Lee ferry, and also all parts of said states located without the drainage area of the Colorado river system which are now or shall hereafter be beneficially served by waters diverted from the Colorado river system above Lee ferry.

(g) The term "lower basin" means those parts of the states of Arizona, California, Nevada, New Mexico and Utah within and from which waters naturally drain into the Colorado river system below Lee ferry, and also all parts of said states located without the drainage area of the Colorado river system which are now or shall hereafter be beneficially served by waters diverted from the Colorado river system below Lee ferry.

(h) The term "Colorado river compact" means the agreement concerning the apportionment of the use of the waters of the Colorado river system dated November 24, 1922, executed by commissioners for the states of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming, approved by Herbert Hoover, representative of the United States of America, and proclaimed effective by the President of the United States of America, June 25, 1929.

(i) The term "Upper Colorado river system" means that portion of the Colorado river system above Lee ferry.

(j) The term "Commission" means the administrative agency created by article VIII of this compact.

(k) The term "water year" means that period of twelve months ending September 30 of each year.



- (l) The term “acre-foot” means the quantity of water required to cover an acre to the depth of one foot and is equivalent to 43,560 cubic feet.
- (m) The term “domestic use” shall include the use of water for household, stock, municipal, mining, milling, industrial and other like purposes, but shall exclude the generation of electrical power.
- (n) The term “virgin flow” means the flow of any stream undepleted by the activities of man.

Article III

(a) Subject to the provisions and limitations contained in the Colorado river compact and in this compact, there is hereby apportioned from the upper Colorado river system in perpetuity to the states of Arizona, Colorado, New Mexico, Utah and Wyoming, respectively, the consumptive use of water as follows:

- (1) To the state of Arizona the consumptive use of 50,000 acre-feet of water per annum.
- (2) To the states of Colorado, New Mexico, Utah and Wyoming, respectively, the consumptive use per annum of the quantities resulting from the application of the following percentages to the total quantity of consumptive use per annum appropriated in perpetuity to and available for use each year by upper basin under the Colorado river compact and remaining after the deduction of the use, not to exceed 50,000 acre-feet per annum, made in the state of Arizona.

State of Colorado .....	51.75 per cent,
State of New Mexico .....	11.25 per cent,
State of Utah .....	23.00 per cent,
State of Wyoming .....	14.00 per cent.

(b) The apportionment made to the respective states by paragraph (a) of this article is based upon, and shall be applied in conformity with, the following principles and each of them:

- (1) The apportionment is of any and all man-made depletions;
- (2) Beneficial use is the basis, the measure and the limit of the right to use;
- (3) No state shall exceed the apportioned use in any water year when the effect of such excess use, as determined by the commission, is to deprive another signatory state of its apportioned use during the water year; provided, that this subparagraph (b) (3) shall not be construed as:
  - (i) Altering the apportionment of use, or obligations to make deliveries as provided in article XI, XII, XIII or XIV of this compact;
  - (ii) Purporting to apportion among the signatory states of such uses of water as the upper basin may be entitled to under paragraphs (f) and (g) of article III of the Colorado river compact; or
  - (iii) Countenancing average uses by any signatory state in excess of its apportionment.
- (4) The apportionment to each state includes all water necessary for the supply of any rights which now exist.
- (c) No apportionment is hereby made, or intended to be made of such use of water as the upper basin may be entitled to under paragraphs (f) and (g) of article III of the Colorado river compact.
- (d) The apportionment made by this article shall not be taken as any basis for the allocation among the signatory states of any benefits resulting from the generation of power.

Article IV

In the event curtailment of use of water by the states of the upper division at any time shall become necessary in order that the flow at Lee ferry shall not be depleted below that required by article III of the Colorado river compact, the extent of curtailment by each state of the consumptive use of water apportioned to it by article III of this compact shall be in such quantities and at such times as shall be determined by the commission upon the application of the following principles:

(a) The extent and times of curtailment shall be such as to assure full compliance with article III of the Colorado river compact;

(b) If any state or states of the upper division, in the ten years immediately preceding the water year in which curtailment is necessary, shall have consumptively used more water than it was or they were, as the case may be, entitled to use under the apportionment made by article III of this compact, such state or states shall be required to supply at Lee ferry a quantity of water equal to its, or the aggregate of their, overdraft or the proportionate part of such overdraft, as may be necessary to assure compliance with article III of the Colorado river compact, before demand is made on any other state of the upper division;

(c) Except as provided in subparagraph (b) of this article, the extent of curtailment by each state of the upper division of the consumptive use of water apportioned to it by article III of this compact shall be such as to result in the delivery at Lee ferry of a quantity of water which bears the same relation to the total required curtailment of use by the states of the upper division as the consumptive use of the upper Colorado river system water which was made by each such state during the water year immediately preceding the year in which the curtailment becomes necessary bears to the total consumptive use of such water in the states of the upper division during the same water year; provided, that in determining such relation the uses of water under rights perfected prior to November 24, 1922, shall be excluded.

## Article V

(a) All losses of water occurring from or as the result of the storage of water in reservoirs constructed prior to the signing of this compact shall be charged to the state in which such reservoir or reservoirs are located. Water stored in reservoirs covered by this paragraph (a) shall be for the exclusive use of and shall be charged to the state in which the reservoir or reservoirs are located.

(b) All losses of water occurring from or as a result of the storage of water in reservoirs constructed after the signing of this compact shall be charged as follows:

(1) If the commission finds that the reservoir is used, in whole or in part, to assist the states of the upper division in meeting their obligations to deliver water at Lee ferry imposed by article III of the Colorado river compact, the commission shall make findings, which in no event shall be contrary to the laws of the United States of America under which any reservoir is constructed, as to the reservoir capacity allocated for that purpose. The whole or that proportion, as the case may be, of reservoir losses as found by the commission to be reasonably and properly chargeable to the reservoir or reservoir capacity utilized to assure deliveries at Lee ferry shall be charged to the states of the upper division in the proportion which the consumptive use of water in each state of the upper division during the water year in which the charge is made bears to the total consumptive use of water in all states of the upper division during the same water year. Water stored in reservoirs or in reservoir capacity covered by this subparagraph (b) (1) shall be for the common benefit of all of the states of the upper division.

(2) If the commission finds that the reservoir is used, in whole or in part, to supply water for use in a state of the upper division, the commission shall make findings, which in no event shall be contrary to the laws of the United States of America under which any reservoir is constructed, as to the reservoir or reservoir capacity utilized to supply water for use and the state in which such water will be used. The whole or that proportion, as the case may be, of reservoir losses as found by the commission to be reasonably and properly chargeable to the state in which such water will be used shall be borne by that state. As determined by the commission, water stored in reservoirs covered by this subparagraph (b) (2) shall be earmarked for and charged to the state in which the water will be used.

(c) In the event the commission finds that a reservoir site is available both to assure deliveries at Lee ferry and to store water for consumptive use in a state of the upper division, the storage of water for consumptive use shall be given preference. Any reservoir or reservoir capacity hereafter used to assure deliveries at Lee ferry shall by order of the



commission be used to store water for consumptive use in a state, provided the commission finds that such storage is reasonably necessary to permit such state to make the use of the water apportioned to it by this compact.

#### Article VI

The commission shall determine the quantity of the consumptive use of water, which use is apportioned by article III hereof, for the upper basin and for each state of the upper basin by the inflow-outflow method in terms of man-made depletions of the virgin flow at Lee ferry, unless the commission, by unanimous action, shall adopt a different method of determination.

#### Article VII

The consumptive use of water by the United States of America or any of its agencies, instrumentalities or wards shall be charged as a use by the state in which the use is made; provided, that such consumptive use incident to the diversion, impounding, or conveyance of water in one state for use in another shall be charged to such latter state.

#### Article VIII

(a) There is hereby created an interstate administrative agency to be known as the "Upper Colorado river commission." The commission shall be composed of one commissioner representing each of the states of the upper division, namely, the states of Colorado, New Mexico, Utah and Wyoming, designated or appointed in accordance with the laws of each such state and, if designated by the President, one commissioner representing the United States of America. The President is hereby requested to designate a commissioner. If so designated the commissioner representing the United States of America shall be the presiding officer of the commission and shall be entitled to the same powers and rights as the commissioner of any state. Any four members of the commission shall constitute a quorum.

(b) The salaries and personal expenses of each commissioner shall be paid by the government which he represents. All other expenses which are incurred by the commission incident to the administration of this compact, and which are not paid by the United States of America, shall be borne by the four states according to the percentage of consumptive use apportioned to each. On or before December 1 of each year, the commission shall adopt and transmit to the governors of the four states and to the President a budget covering an estimate of its expenses for the following year, and of the amount payable by each state. Each state shall pay the amount due by it to the commission on or before April 1 of the year following. The payment of the expenses of the commission and of its employees shall not be subject to the audit and accounting procedures of any of the four states; however, all receipts and disbursements of funds handled by the commission shall be audited yearly by a qualified independent public accountant and the report of the audit shall be included in and become a part of the annual report of the commission.

(c) The commission shall appoint a secretary, who shall not be a member of the commission, or an employee of any signatory state or of the United States of America while so acting. He shall serve for such term and receive such salary and perform such duties as the commission may direct. The commission may employ such engineering, legal, clerical and other personnel as, in its judgment, may be necessary for the performance of its functions under this compact. In the hiring of employees, the commission shall not be bound by the civil service laws of any state.

(d) The commission, so far as consistent with this compact, shall have the power to:

- (1) Adopt rules and regulations;
- (2) Locate, establish, construct, abandon, operate and maintain water gauging stations;
- (3) Make estimates to forecast water run-off on the Colorado river and any of its tributaries;

(4) Engage in co-operative studies of water supplies of the Colorado river and its tributaries;

(5) Collect, analyze, correlate, preserve and report on data as to the stream flows, storage, diversions and use of the waters of the Colorado river, and any of its tributaries;

(6) Make findings as to the quantity of water of the upper Colorado river system used each year in the upper Colorado river basin and in each state thereof;

(7) Make findings as to the quantity of water deliveries at Lee ferry during each water year;

(8) Make findings as to the necessity for and the extent of the curtailment of use, required, if any, pursuant to article IV hereof;

(9) Make findings as to the quantity of reservoir losses and as to the share thereof chargeable under article V hereof to each of the states;

(10) Make findings of fact in the event of the occurrence of extraordinary drought or serious accident to the irrigation system in the upper basin, whereby deliveries by the upper basin of water which it may be required to deliver in order to aid in fulfilling obligations of the United States of America to the United Mexican States arising under the treaty between the United States of America and the United Mexican States, dated February 3, 1944 (Treaty Series 994) become difficult, and report such findings to the governors of the upper basin states, the President of the United States of America, the United States section of the international boundary and water commission, and such other federal officials and agencies as it may deem appropriate to the end that the water allotted to Mexico under division III of such treaty may be reduced in accordance with the terms of such treaty;

(11) Acquire and hold such personal and real property as may be necessary for the performance of its duties hereunder and to dispose of the same when no longer required;

(12) Perform all functions required of it by this compact and do all things necessary, proper or convenient in the performance of its duties hereunder, either independently or in co-operation with any state or federal agency;

(13) Make and transmit annually to the governors of the signatory states and the President of the United States of America, with the estimated budget, a report covering the activities of the commission for the preceding water year.

(e) Except as otherwise provided in this compact the concurrence of four members of the commission shall be required in any action taken by it.

(f) The commission and its secretary shall make available to the governor of each of the signatory states any information within its possession at any time, and shall always provide free access to its records by the governors of each of the states, or their representatives or authorized representatives of the United States of America.

(g) Findings of fact made by the commission shall not be conclusive in any court, or before any agency or tribunal, but shall constitute prima facie evidence of the facts found.

(h) The organization meeting of the commission shall be held within four months from the effective date of this compact.

## Article IX

(a) No state shall deny the right of the United States of America and, subject to the conditions hereinafter contained, no state shall deny the right of another signatory state, any person, or entity of any signatory state to acquire rights to the use of water, or to construct or participate in the construction and use of diversion works and storage reservoirs with appurtenant works, canals and conduits in one state for the purpose of diverting, conveying, storing, regulating and releasing water to satisfy the provisions of the Colorado river compact relating to the obligation of the states of the upper division to make deliveries of water at Lee ferry, or for the purpose of diverting, conveying, storing or regulating water in an upper signatory state for consumptive use in a lower signatory state, when such use is within the apportionment to such lower state made by this compact. Such rights shall be subject to the rights of water users, in a state in which such reservoir or works are located, to receive and use water, the use of which is within the apportionment to such state by this compact.



(b) Any signatory state, any person or any entity of any signatory state shall have the right to acquire such property rights as are necessary to the use of water in conformity with this compact in any other signatory state by donation, purchase or through the exercise of the power of eminent domain. Any signatory state, upon the written request of the governor of any other signatory state, for the benefit of whose water users property is to be acquired in the state to which such written request is made, shall proceed expeditiously to acquire the desired property either by purchase at a price satisfactory to the requesting state, or, if such purchase cannot be made, then through the exercise of its power of eminent domain and shall convey such property to the requesting state or such entity as may be designated by the requesting state; provided, that all costs of acquisition and expenses of every kind and nature whatsoever incurred in obtaining the requested property shall be paid by the requesting state at the time and in the manner prescribed by the state requested to acquire the property.

(c) Should any facility be constructed in a signatory state by and for the benefit of another signatory state or states or the water users thereof, as above provided, the construction, repair, replacement, maintenance and operation of such facility shall be subject to the laws of the state in which the facility is located, except that, in the case of a reservoir constructed in one state for the benefit of another state or states, the water administration officials of the state in which the facility is located shall permit the storage and release of any water which, as determined by findings of the commission, falls within the apportionment of the state or states for whose benefit the facility is constructed. In the case of a regulating reservoir for the joint benefit of all states in making Lee ferry deliveries, the water administration officials of the state in which the facility is located, in permitting the storage and release of water, shall comply with the findings and orders of the commission.

(d) In the event property is acquired by a signatory state in another signatory state for the use and benefit of the former, the users of water made available by such facilities, as a condition precedent to the use thereof, shall pay to the political subdivisions of the state in which such works are located, each and every year during which such rights are enjoyed for such purposes, a sum of money equivalent to the average annual amount of taxes levied and assessed against the land and improvements thereon during the ten years preceding the acquisition of such land. Said payments shall be in full reimbursement for the loss of taxes in such political subdivisions of the state, and in lieu of any and all taxes on said property, improvements and rights. The signatory states recommend to the President and the congress that, in the event the United States of America shall acquire property in one of the signatory states for the benefit of another signatory state, or its water users, provision be made for like payment in reimbursement of loss of taxes.

#### Article X

(a) The signatory states recognize La Plata river compact entered into between the states of Colorado and New Mexico, dated November 27, 1922, approved by the congress on January 29, 1925 (43 Stat. 796), and this compact shall not affect the apportionment therein made.

(b) All consumptive use of water of La Plata river and its tributaries shall be charged under the apportionment of article III hereof to the state in which the use is made; provided, that consumptive use incident to the diversion, impounding or conveyance of water in one state for use in the other shall be charged to the latter state.

#### Article XI

Subject to the provisions of this compact, the consumptive use of the water of the Little Snake river and its tributaries is hereby apportioned between the states of Colorado and Wyoming in such quantities as shall result from the application of the following principles and procedures:

(a) Water used under rights existing prior to the signing of this compact.

(1) Water diverted from any tributary of the Little Snake river or from the main stem of the Little Snake river above a point one hundred feet above the confluence of Savery creek and the Little Snake river shall be administered without regard to rights covering the diversion of water from any down-stream points.

(2) Water diverted from the main stem of the Little Snake river below a point one hundred feet below the confluence of Savery creek and the Little Snake river shall be administered on the basis of an interstate priority schedule prepared by the commission in conformity with priority dates established by the laws of the respective states.

(b) Water used under rights initiated subsequent to the signing of this compact.

(1) Direct flow diversions shall be so administered that, in time of shortage, the curtailment of use on each acre of land irrigated thereunder shall be as nearly equal as may be possible in both of the states.

(2) The storage of water by projects located in either state, whether of supplemental supply or of water used to irrigate land not irrigated at the date of the signing of this compact, shall be so administered that in times of water shortage the curtailment of storage of water available for each acre of land irrigated thereunder shall be as nearly equal as may be possible in both states.

(c) Water users under the apportionment made by this article shall be in accordance with the principle that beneficial use shall be the basis, measure and limit of the right to use.

(d) The states of Colorado and Wyoming each assent to diversions and storage of water in one state for use in the other state, subject to compliance with article IX of this compact.

(e) In the event of the importation of water to the Little Snake river basin from any other river basin, the state making the importation shall have the exclusive use of such imported water unless by written agreement, made by the representatives of the states of Colorado and Wyoming on the commission, it is otherwise provided.

(f) Water use projects initiated after the signing of this compact, to the greatest extent possible, shall permit the full use within the basin in the most feasible manner of the waters of the Little Snake river and its tributaries, without regard to the state line; and, so far as is practicable, shall result in an equal division between the states of the use of water not used under rights existing prior to the signing of this compact.

(g) All consumptive use of the waters of the Little Snake river and its tributaries shall be charged under the apportionment of article III hereof to the state in which the use is made; provided, that consumptive use incident to the diversion, impounding or conveyance of water in one state for use in the other shall be charged to the latter state.

## Article XII

Subject to the provisions of this compact, the consumptive use of the waters of Henry's fork, a tributary of Green river originating in the state of Utah and flowing into the state of Wyoming and thence into the Green river in the state of Utah; Beaver creek, originating in the state of Utah and flowing into Henry's fork in the state of Wyoming; Burnt fork, a tributary of Henry's fork, originating in the state of Utah and flowing into Henry's fork in the state of Wyoming; Birch creek, a tributary of Henry's fork originating in the state of Utah and flowing into Henry's fork in the state of Wyoming; and Sheep creek, a tributary of Green river in the state of Utah and their tributaries, are hereby apportioned between the states of Utah and Wyoming in such quantities as will result from the application of the following principles and procedures:

(a) Waters used under rights existing prior to the signing of this compact.

Waters diverted from Henry's fork, Beaver creek, Burnt fork, Birch creek and their tributaries, shall be administered without regard to the state line on the basis of an interstate priority schedule to be prepared by the states affected and approved by the commission in conformity with the actual priority of right of use, the water requirements of the land irrigated and the acreage irrigated in connection therewith.

(b) Waters used under rights from Henry's fork, Beaver creek, Burnt fork, Birch creek and their tributaries, initiated after the signing of this compact shall be divided fifty per cent to the state of Wyoming and fifty per cent to the state of Utah and each state may use said waters as and where it deems advisable.



(c) The state of Wyoming assents to the exclusive use by the state of Utah of the water of Sheep creek, except that the lands, if any, presently irrigated in the state of Wyoming from the water of Sheep creek shall be supplied with water from Sheep creek in order of priority and in such quantities as are in conformity with the laws of the state of Utah.

(d) In the event of the importation of water to Henry's fork, or any of its tributaries, from any other river basin, the state making the importation shall have the exclusive use of such imported water unless by written agreement made by the representatives of the states of Utah and Wyoming on the commission, it is otherwise provided.

(e) All consumptive use of waters of Henry's fork, Beaver creek, Burnt fork, Birch creek, Sheep creek, and their tributaries shall be charged under the apportionment of article III hereof to the state in which the use is made; provided, that consumptive use incident to the diversion, impounding or conveyance of water in one state for use in the other shall be charged to the latter state.

(f) The states of Utah and Wyoming each assent to the diversion and storage of water in one state for use in the other state, subject to compliance with article IX of this compact. It shall be the duty of the water administrative officials of the state where the water is stored to release said stored water to the other state upon demand. If either the state of Utah or the state of Wyoming shall construct a reservoir in the other state for use in its own state, the water users of the state in which said facilities are constructed may purchase at cost a portion of the capacity of said reservoir sufficient for the irrigation of their lands thereunder.

(g) In order to measure the flow of water diverted, each state shall cause suitable measuring devices to be constructed, maintained and operated at or near the point of diversion into each ditch.

(h) The state engineers of the two states jointly shall appoint a special water commissioner who shall have authority to administer the water in both states in accordance with the terms of this article. The salary and expenses of such special water commissioner shall be paid, thirty per cent by the state of Utah and seventy per cent by the state of Wyoming.

### Article XIII

Subject to the provisions of this compact, the rights to the consumptive use of the water of the Yampa river, a tributary entering the Green river in the state of Colorado, are hereby apportioned between the states of Colorado and Utah in accordance with the following principles:

(a) The state of Colorado will not cause the flow of the Yampa river at the Maybell gauging station to be depleted below an aggregate of 5,000,000 acre-feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification and approval of this compact. In the event any diversion is made from the Yampa river or from tributaries entering the Yampa river above the Maybell gauging station for the benefit of any water use project in the state of Utah, then the gross amount of all such diversions for use in the state of Utah, less any returns from such diversions to the river above Maybell, shall be added to the actual flow at the Maybell gauging station to determine the total flow at the Maybell gauging station.

(b) All consumptive use of the waters of the Yampa river and its tributaries shall be charged under the apportionment of article III hereof to the state in which the use is made; provided, that consumptive use incident to the diversion, impounding or conveyance of water in one state for use in the other shall be charged to the latter state.

### Article XIV

Subject to the provisions of this compact, the consumptive use of the waters of the San Juan river and its tributaries is hereby apportioned between the states of Colorado and New Mexico as follows:

The state of Colorado agrees to deliver to the state of New Mexico from the San Juan river and its tributaries which rise in the state of Colorado a quantity of water which shall be sufficient, together with water originating in the San Juan basin in the state of New

Mexico, to enable the state of New Mexico to make full use of the water apportioned to the state of New Mexico by article III of this compact, subject, however, to the following:

- (a) A first and prior right shall be recognized as to:
  - (1) All uses of water made in either state at the time of the signing of this compact; and
  - (2) All uses of water contemplated by projects authorized, at the time of the signing of this compact under the laws of the United States of America whether or not such projects are eventually constructed by the United States of America or by some other entity.
- (b) The state of Colorado assents to diversions and storage of water in the state of Colorado for use in the state of New Mexico, subject to compliance with article IX of this compact.
- (c) The uses of the waters of the San Juan river and any of its tributaries within either state which are dependent upon a common source of water and which are not covered by (a) hereof, shall in times of water shortages be reduced in such quantity that the resulting consumptive use in each state will bear the same proportionate relation to the consumptive use made in each state during times of average water supply as determined by the commission; provided, that any preferential uses of water to which Indians are entitled under article XIX shall be excluded in determining the amount of curtailment to be made under this paragraph.
- (d) The curtailment of water use by either state in order to make deliveries at Lee ferry as required by article IV of this compact shall be independent of any and all conditions imposed by this article and shall be made by each state, as and when required, without regard to any provision of this article.
- (e) All consumptive use of the waters of the San Juan river and its tributaries shall be charged under the apportionment of article III hereof to the state in which the use is made; provided, that consumptive use incident to the diversion, impounding or conveyance of water in one state for use in the other shall be charged to the latter state.

#### Article XV

(a) Subject to the provisions of the Colorado river compact and of this compact, water of the upper Colorado river system may be impounded and used for the generation of electrical power, but such impounding and use shall be subservient to the use and consumption of such water for agricultural and domestic purposes and shall not interfere with or prevent use for such dominant purposes.

(b) The provisions of this compact shall not apply to or interfere with the right or power of any signatory state to regulate within its boundaries the appropriation, use and control of water, the consumptive use of which is apportioned and available to such state by this compact.

#### Article XVI

The failure of any state to use the water, or any part thereof, the use of which is apportioned to it under the terms of this compact, shall not constitute a relinquishment of the right to such use to the lower basin or to any other state, nor shall it constitute a forfeiture or abandonment of the right to such use.

#### Article XVII

The use of any water now or hereafter imported into the natural drainage basin of the upper Colorado river system shall not be charged to any state under the apportionment of consumptive use made by this compact.

#### Article XVIII

(a) The state of Arizona reserves its rights and interest under the Colorado river compact as a state of the lower division and as a state of the lower basin.



(b) The state of New Mexico and the state of Utah reserve their respective rights and interests under the Colorado river compact as states of the lower basin.

#### Article XIX

Nothing in this compact shall be construed as:

- (a) Affecting the obligations of the United States of America to Indian tribes;
- (b) Affecting the obligations of the United States of America under the treaty with the United Mexican States (Treaty Series 994);
- (c) Affecting any rights or powers of the United States of America, its agencies or instrumentalities, in or to the waters of the upper Colorado river system, or its capacity to acquire rights in and to the use of said water;
- (d) Subjecting any property of the United States of America, its agencies or instrumentalities, to taxation by any state or subdivision thereof, or creating any obligation on the part of the United States of America, its agencies or instrumentalities, by reason of the acquisition, construction or operation of any property or works of whatever kind, to make any payment to any state or political subdivision thereof, state agency, municipality or entity whatsoever, in reimbursement for the loss of taxes;
- (e) Subjecting any property of the United States of America, its agencies or instrumentalities, to the laws of any state to an extent other than the extent to which such laws would apply without regard to this compact.

#### Article XX

This compact may be terminated at any time by the unanimous agreement of the signatory states. In the event of such termination, all rights established under it shall continue unimpaired.

#### Article XXI

This compact shall become binding and obligatory when it shall have been ratified by the legislatures of each of the signatory states and approved by the congress of the United States of America. Notice of ratification by the legislatures of the signatory states shall be given by the governor of each signatory state to the governor of each of the other signatory states and to the President of the United States of America, and the President is hereby requested to give notice to the governor of each of the signatory states of approval by the congress of the United States of America.

IN WITNESS WHEREOF, the commissioners have executed six counterparts hereof each of which shall be and constitute an original, one of which shall be deposited in the archives of the department of state of the United States of America, and one of which shall be forwarded to the governor of each of the signatory states.

Done at the city of Santa Fe, state of New Mexico, this 11th day of October, 1948.

Charles A. Carlson,  
Commissioner for the  
State of Arizona.  
Clifford H. Stone,  
Commissioner for the  
State of Colorado.  
Fred E. Wilson,  
Commissioner for the  
State of New Mexico.  
Edward H. Watson,  
Commissioner for the  
State of Utah.

L. C. Bishop,  
Commissioner for the  
State of Wyoming.  
Grover A. Giles,  
Secretary.

Approved:

Harry W. Bashore,  
Representative of the  
United States of America.

**Source:** L. 49: p. 498, § 1. CSA: C. 90, § 64(1). CRS 53: § 148-8-1. C.R.S. 1963: § 149-8-1.

**37-62-102. When compact operative.** Said compact shall not become operative unless and until the same has been ratified by the legislatures of each of the signatory states and consented to by the congress of the United States. The governor of the state of Colorado shall give notice of the ratification of said compact to the governors of the states of New Mexico, Utah, Wyoming, and Arizona, and to the president of the United States.

**Source:** L. 49: p. 515, § 2. CSA: C. 90, § 64(2). CRS 53: § 148-8-2. C.R.S. 1963: § 149-8-2.

**37-62-103. Interstate agency created by compact.** It is hereby recognized, found, determined, and declared that the compact creates an interstate agency which is known as the upper Colorado river commission and which is an independent entity whose members and employees are not officers and employees of any of the states signatory to the compact.

**Source:** L. 49: p. 516, § 3. CSA: C. 90, § 64(3). CRS 53: § 148-8-3. C.R.S. 1963: § 149-8-3.

**37-62-104. Appointment of Colorado member of commission.** After the said compact becomes effective, the Colorado member of the upper Colorado river commission shall be appointed by the governor, and shall serve until revocation of his appointment by the governor, and, on behalf of the upper Colorado river commission, the state of Colorado shall pay his necessary expenses and also compensation in an amount which shall be fixed by the governor, and when so fixed shall be changed only by the governor.

**Source:** L. 49: p. 516, § 4. CSA: C. 90, § 64(4). CRS 53: § 148-8-4. C.R.S. 1963: § 149-8-4.

**37-62-105. Payment of expenses of commission.** The Colorado share of the expenses of the upper Colorado river commission and the expenses and the compensation of the Colorado member of that commission shall be paid out of funds appropriated by the general assembly to the Colorado water conservation board and warrants shall be drawn against such appropriations upon vouchers signed by the governor and the director of the Colorado water conservation board.

**Source:** L. 49: p. 516, § 5. CSA: C. 90, § 64(5). CRS 53: § 148-8-5. C.R.S. 1963: § 149-8-5.

**37-62-106. Administrative code inapplicable.** The provisions of articles 2, 3, 31, 35, and 36 of title 24, C.R.S., shall be inapplicable to any acts or proceedings taken to carry out the purpose of said compact.

**Source:** L. 49: p. 516, § 6. CSA: C. 90, § 64(6). CRS 53: § 148-8-6. C.R.S. 1963: § 149-8-6.



**ARTICLE 63****La Plata River Compact**

37-63-101. The La Plata River compact. 37-63-102. Approval of compact.

**37-63-101. The La Plata River compact.** The General Assembly hereby approves the compact, designated as the "La Plata River Compact", signed at the City of Santa Fe, State of New Mexico, on the 27th day of November, A. D. 1922, by Delph E. Carpenter as the Commissioner for the State of Colorado, under authority of and in conformity with the provisions of an Act of the General Assembly of the State of Colorado, approved April 2, 1921, entitled "An Act providing for the appointment of a commissioner on behalf of the State of Colorado to negotiate a compact or agreement between the States of Colorado and New Mexico respecting the use and distribution of the waters of the La Plata River and the rights of said States thereto, and making an appropriation therefor.", the same being Chapter 244 of the Session Laws of Colorado, 1921, and signed by Stephen B. Davis, Jr., as the Commissioner for the State of New Mexico, under legislative authority, which said compact is as follows:

**La Plata River Compact**

The State of Colorado and the State of New Mexico, desiring to provide for the equitable distribution of the waters of the La Plata River and to remove all causes of present and future controversy between them with respect thereto, and being moved by considerations of interstate comity, pursuant to Acts of their respective Legislatures, have resolved to conclude a compact for these purposes and have named as their commissioners:

Delph E. Carpenter, for the State of Colorado; and Stephen B. Davis, Jr., for the State of New Mexico; who have agreed upon the following Articles:

**Article I**

The State of Colorado, at its own expense, shall establish and maintain two permanent stream-gauging stations upon the La Plata River for the purpose of measuring and recording its flow, which shall be known as the Hesperus Station and the Interstate Station, respectively.

The Hesperus Station shall be located at some convenient place near the village of Hesperus, Colorado. Suitable devices for ascertaining and recording the volume of all diversions from the river above Hesperus Station, shall be established and maintained (without expense to the State of New Mexico), and whenever in this compact reference is made to the flow of the river at Hesperus Station, it shall be construed to include the amount of the concurrent diversions above said station.

The Interstate Station shall be located at some convenient place within one mile of, and above or below, the interstate line. Suitable devices for ascertaining and recording the volume of water diverted by the Enterprise and Pioneer Canals, now serving approximately equal areas in both States, shall be established and maintained (without expense to the State of New Mexico), and whenever in this compact reference is made to the flow of the river at the Interstate Station, it shall be construed to include one-half the volume of the concurrent diversions by such canals, and also the volume of any other water which may hereafter be diverted from said river in Colorado for use in New Mexico.

Each of said stations shall be equipped with suitable devices for recording the flow of water in said river at all times between the 15th day of February and the 1st day of December of each year. The State Engineers of the signatory States shall make provision for co-operating gauging at the two stations, for the details of the operation, exchange of records and data, and publication of the facts.

## Article II

The waters of the La Plata River are hereby equitably apportioned between the signatory States, including the citizens thereof, as follows:

1. At all times between the first day of December and the fifteenth day of the succeeding February, each State shall have the unrestricted right to use of all water which may flow within its boundaries.

2. By reason of the usual annual rise and fall, the flow of said river between the fifteenth day of February and the first day of December of each year, shall be apportioned between the States in the following manner:

(a) Each State shall have the unrestricted right to use all the waters within its boundaries on each day when the mean daily flow at the Interstate Station is one hundred cubic feet per second, or more.

(b) On all other days the State of Colorado shall deliver at the Interstate Station a quantity of water equivalent to one-half of the mean flow at the Hesperus Station for the preceding day, but not to exceed one hundred cubic feet per second.

3. Whenever the flow of the river is so low that in the judgment of the State Engineers of the States, the greatest beneficial use of its waters may be secured by distributing all of its waters successively to the land in each State in alternating periods, in lieu of delivery of water as provided in the second paragraph of this article the use of the waters may be so rotated between the two States in such manner for such periods, and to continue for such time as the State Engineers may jointly determine.

4. The State of New Mexico shall not at any time be entitled to receive nor shall the State of Colorado be required to deliver any water not then necessary for beneficial use in the State of New Mexico.

5. A substantial delivery of water under the terms of this Article shall be deemed a compliance with its provisions and minor and compensating irregularities in flow or delivery shall be disregarded.

## Article III

The State Engineers of the States by agreement, from time to time, may formulate rules and regulations for carrying out the provisions of this compact, which, when signed and promulgated by them, shall be binding until amended by agreement between them or until terminated by written notice from one to the other.

## Article IV

Whenever any official of either State is designated to perform any duty under this compact, such designation shall be interpreted to include the State official or officials upon whom the duties now performed by such official may hereafter devolve.

## Article V

The physical and other conditions peculiar to the La Plata River and the territory drained and served thereby constitute the basis for this compact, and neither of the signatory States concedes the establishment of any general principle or precedent by the concluding of this compact.

## Article VI

This compact may be modified or terminated at any time by mutual consent of the signatory States and upon such termination all rights then established hereunder shall continue unimpaired.



## Article VII

This compact shall become operative when approved by the Legislature of each of the signatory States and by the Congress of the United States. Notice of approval by the Legislatures shall be given by the Governor of each State to the Governor of the other State, and the President of the United States is requested to give notice to the Governors of the signatory States of approval by the Congress of the United States.

IN WITNESS WHEREOF, The commissioners have signed this compact in duplicate originals, one of which shall be deposited with the Secretary of State of each of the signatory States.

Done at the city of Santa Fe, in the State of New Mexico, this 27th day of November, in the year of our Lord One Thousand Nine Hundred and Twenty-Two.

Delph E. Carpenter,  
Stephen B. Davis, Jr.

**Source:** L. 23: p. 696, § 1. CSA: omitted. CRS 53: § 148-3-1. C.R.S. 1963: § 149-3-1.

## ANNOTATION

**For apportionment as a question of federal common law**, see *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 58 S.

Ct. 803, 82 L. Ed. 774 (1938), reversing 101 Colo. 73, 70 P.2d 849 (1937).

**37-63-102. Approval of compact.** Said compact shall not become binding or operative unless and until the same has been approved by the legislature of each of the signatory states and by the congress of the United States, and the governor of the state of Colorado shall give notice of the approval of said compact to the governor of the state of New Mexico and to the president of the United States.

**Source:** L. 23: p. 701, § 2. CSA: omitted. CRS 53: § 148-3-2. C.R.S. 1963: § 149-3-2.

## ARTICLE 64

## Animas-La Plata Project Compact

37-64-101. Animas-La Plata project compact.

**37-64-101. Animas-La Plata project compact.** The general assembly hereby ratifies the compact designated as the "Animas-La Plata Project Compact" to which the consent of congress was given by Public Law 90-537, section 501 (c), approved September 30, 1968, by the senate and house of representatives of the United States of America. Said compact is as follows:

## ANIMAS-LA PLATA PROJECT COMPACT

The State of Colorado and the State of New Mexico, in order to implement the operation of the Animas-La Plata Federal Reclamation Project, Colorado-New Mexico, a proposed participating project under the Colorado River Storage Project Act (70 Stat. 105; 43 U.S.C. 620) and being moved by considerations of interstate comity, have resolved to conclude a compact for these purposes and have agreed upon the following articles:

## ARTICLE I

A. The right to store and divert water in Colorado and New Mexico from the La Plata and Animas River systems, including return flow to the La Plata River from Animas River diversions, for uses in New Mexico under the Animas-La Plata Federal Reclamation Project shall be valid and of equal priority with those rights granted by decree of the Colorado state courts for the uses of water in Colorado for that project providing such uses in New Mexico are within the allocation of water made to that state by articles III and XIV of the Upper Colorado River Basin Compact (63 Stat. 31).

B. The restrictions of the last sentence of Section (a) of Article IX of the Upper Colorado River Basin Compact shall not be construed to vitiate paragraph A of this article.

## ARTICLE II

This Compact shall become binding and obligatory when it shall have been ratified by the legislatures of each of the signatory States.

Source: L. 69: p. 1231, § 1. C.R.S. 1963: § 149-13-1.

## ARTICLE 65

## South Platte River Compact

37-65-101. South Platte River compact.

**37-65-101. South Platte River compact.** The General Assembly hereby approves the compact, designated as the "South Platte River Compact", between the states of Colorado and Nebraska, signed at the City of Lincoln, State of Nebraska, on the 27th day of April, A.D. 1923, by Delph E. Carpenter as the Commissioner for the State of Colorado, under authority of Chapter 243, Session Laws of Colorado, 1921, and Chapter 190, Session Laws of Colorado, 1923, and by Robert H. Willis as the Commissioner for the State of Nebraska, thereunto duly authorized, which said compact is as follows:

South Platte River Compact Between  
The States Of  
Colorado And Nebraska

The State of Colorado and the State of Nebraska, desiring to remove all causes of present and future controversy between said States, and between citizens of one against citizens of the other, with respect to the waters of the South Platte River, and being moved by considerations of interstate comity, have resolved to conclude a compact for these purposes and, through their respective Governors, have named as their commissioners:

Delph E. Carpenter, for the State of Colorado; and Robert H. Willis, for the State of Nebraska; who have agreed upon the following articles:

## Article I

In this compact:

1. The State of Colorado and the State of Nebraska are designated, respectively, as "Colorado" and "Nebraska".

2. The provisions hereof respecting each signatory State, shall include and bind its citizens and corporations and all others engaged or interested in the diversion and use of the waters of the South Platte River in that State.

3. The term "Upper Section" means that part of the South Platte River in the State of Colorado above and westerly from the west boundary of Washington County, Colorado.



4. The term "Lower Section" means that part of the South Platte River in the State of Colorado between the west boundary of Washington County and the intersection of said river with the boundary line common to the signatory States.

5. The term "Interstate Station" means that streams gauging station described in Article II.

6. The term "flow of the river" at the Interstate Station means the measured flow of the river at said station plus all increment to said flow entering the river between the Interstate Station and the diversion works of the Western Irrigation District in Nebraska.

## Article II

1. Colorado and Nebraska, at their joint expense, shall maintain a stream gauging station upon the South Platte River at the river bridge near the town of Julesburg, Colorado, or at a convenient point between said bridge and the diversion works of the canal of the Western Irrigation District in Nebraska, for the purpose of ascertaining and recording the amount of water flowing in said river from Colorado into Nebraska and to said diversion works at all times between the first day of April and the fifteenth day of October of each year. The location of said station may be changed from year to year as the river channels and water flow conditions of the river may require.

2. The State Engineer of Colorado and the Secretary of the Department of Public Works of Nebraska shall make provision for the co-operative gauging at and the details of operation of said station and for the exchange and publication of records and data. Said state officials shall ascertain the rate of flow of the South Platte River through the Lower Section in Colorado and the time required for increases or decreases of flow, at points within said Lower Section, to reach the Interstate Station. In carrying out the provisions of Article IV of this compact, Colorado shall always be allowed sufficient time for any increase in flow (less permissible diversions) to pass down the river and be recorded at the Interstate Station.

## Article III

The waters of Lodgepole Creek, a tributary of the South Platte River flowing through Nebraska and entering said river within Colorado, hereafter shall be divided and apportioned between the signatory States as follows:

1. The point of division of the waters of Lodgepole Creek shall be located on said creek two miles north of the boundary line common to the signatory states.

2. Nebraska shall have the full and unmolested use and benefit of all waters flowing in Lodgepole Creek above the point of diversion and Colorado waives all present and future claims to the use of said waters. Colorado shall have the exclusive use and benefit of all waters flowing at or below the point of division.

3. Nebraska may use the channel of Lodgepole Creek below the point of division and the channel of the South Platte River between the mouth of Lodgepole Creek and the Interstate Station, for the carriage of any waters of Lodgepole Creek which may be stored in Nebraska above the point of division and which Nebraska may desire to deliver to ditches from the South Platte River in Nebraska, and any such waters so carried shall be free from interference by diversions in Colorado and shall not be included as a part of the flow of the South Platte River to be delivered by Colorado at the Interstate Station in compliance with Article IV of this compact, provided, however, that such runs of stored water shall be made in amounts of not less than ten cubic feet per second of time and for periods of not less than twenty-four hours.

## Article IV

The waters of the South Platte River hereafter shall be divided and apportioned between the signatory States as follows:

1. At all times between the fifteenth day of October of any year and the first day of April of the next succeeding year, Colorado shall have the full and uninterrupted use and benefit

of the waters of the river flowing within the boundaries of the State, except as otherwise provided by Article VI.

2. Between the first day of April and the fifteenth day of October of each year, Colorado shall not permit diversions from the Lower Section of the river, to supply Colorado appropriations having adjudicated dates of priority subsequent to the fourteenth day of June, 1897, to an extent that will diminish the flow of the river at the Interstate Station, on any day, below a mean flow of 120 cubic feet of water per second of time, except as limited in paragraph three (3) of this Article.

3. Nebraska shall not be entitled to receive and Colorado shall not be required to deliver, on any day, any part of the flow of the river to pass the Interstate Station, as provided by paragraph two (2) of this Article, not then necessary for beneficial use by those entitled to divert water from said river within Nebraska.

4. The flow of the river at the Interstate Station shall be used by Nebraska to supply the needs of present perfected rights to the use of water from the river within said State before permitting diversions from the river by other claimants.

5. It is recognized that variable climatic conditions, the regulation and administration of the stream in Colorado, and other causes, will produce diurnal and other unavoidable variations and fluctuations in the flow of the river at the Interstate Station, and it is agreed that, in the performance of the provisions of said paragraph two (2), minor or compensating irregularities and fluctuations in the flow at the Interstate Station shall be permitted; but where any deficiency of the mean daily flow at the Interstate Station may have been occasioned by neglect, error or failure in the performance of duty by the Colorado water officials having charge of the administration of diversions from the Lower Section of the river in that state, each such deficiency shall be made up, within the next succeeding period of seventy-two hours, by delivery of additional flow at the Interstate Station, over and above the amount specified in paragraph two (2) of this Article, sufficient to compensate for such deficiency.

6. Reductions in diversions from the Lower Section of the river, necessary to the performance of paragraph two (2) of this Article by Colorado, shall not impair the rights of appropriators in Colorado (not to include the proposed Nebraska canal described in Article VI), whose supply has been so reduced, to demand and receive equivalent amounts of water from other parts of the stream in that State according to its Constitution, laws, and the decisions of its courts.

7. Subject to compliance with the provisions of this Article, Colorado shall have and enjoy the otherwise full and uninterrupted use and benefit of the waters of the river which hereafter may flow within the boundaries of that State from the first day of April to the fifteenth day of October in each year, but Nebraska shall be permitted to divert, under and subject to the provisions and conditions of Article VI, any surplus waters which otherwise would flow past the Interstate Station.

#### Article V

1. Colorado shall have the right to maintain, operate, and extend, within Nebraska, the Peterson Canal and other canals of the Julesburg Irrigation District which now are or may hereafter be used for the carriage of water from the South Platte River for the irrigation of lands in both states, and Colorado shall continue to exercise control and jurisdiction of said canals and the carriage and delivery of water thereby. This Article shall not excuse Nebraska water users from making reports to Nebraska officials in compliance with the Nebraska laws.

2. Colorado waives any objection to the delivery of water for irrigation of lands in Nebraska by the canals mentioned in paragraph one (1) of this Article, and agrees that all interests in said canals and the use of waters carried thereby, now or hereafter acquired by owners of lands in Nebraska, shall be afforded the same recognition and protection as are the interests of similar land owners served by said canals within Colorado; provided, however, that Colorado reserves to those in control of said canals the right to enforce the collection of charges or assessments, hereafter levied or made against such interest of owners of the lands in Nebraska, by withholding the delivery of water until the payment of



such charges or assessments; provided, however, such charges or assessments shall be the same as those levied against similar interests of owners of lands in Colorado.

3. Nebraska grants to Colorado the right to acquire by purchase, prescription, or the exercise of eminent domain, such rights-of-way, easements or lands as may be necessary for the construction, maintenance, operation, and protection of those parts of the above mentioned canals which now or hereafter may extend into Nebraska.

## Article VI

It is the desire of Nebraska to permit its citizens to cause a canal to be constructed and operated for the diversion of water from the South Platte River within Colorado for irrigation of lands in Nebraska; that said canal may commence on the south bank of said river at a point southwesterly from the town of Ovid, Colorado, and may run thence easterly through Colorado along or near the line of survey of the formerly proposed "Perkins County Canal" (sometimes known as the "South Divide Canal") and into Nebraska, and that said project shall be permitted to divert waters of the river as hereinafter provided. With respect to such proposed canal it is agreed:

1. Colorado consents that Nebraska and its citizens may hereafter construct, maintain, and operate such a canal and thereby may divert water from the South Platte River within Colorado for use in Nebraska, in the manner and at the time in this Article provided, and grants to Nebraska and its citizens the right to acquire by purchase, prescription, or the exercise of eminent domain such rights-of-way, easements or lands as may be necessary for the construction, maintenance, and operation of said canal; subject, however, to the reservations and limitations and upon the conditions expressed in this Article which are and shall be limitations upon and reservations and conditions running with the rights and privileges hereby granted, and which shall be expressed in all permits issued by Nebraska with respect to said canal.

2. The net future flow of the Lower Section of the South Platte River, which may remain after supplying all present and future appropriations from the Upper Section, and after supplying all appropriations from the Lower Section perfected prior to the seventeenth day of December, 1921, and after supplying the additional future appropriations in the Lower Section for the benefit of which a prior and preferred use of thirty-five thousand acre-feet of water is reserved by subparagraph (a) of this Article, may be diverted by said canal between the fifteenth day of October of any year and the first day of April of the next succeeding year subject to the following reservations, limitations and conditions:

(a) In addition to the water now diverted from the Lower Section of the river by present perfected appropriations, Colorado hereby reserves the prior, preferred and superior right to store, use and to have in storage in readiness for use on and after the first day of April in each year, an aggregate of thirty-five thousand acre-feet of water to be diverted from the flow of the river in the Lower Section between the fifteenth day of October of each year and the first day of April of the next succeeding year, without regard to the manner or time of making such future uses, and diversions of water by said Nebraska canal shall in no manner impair or interfere with the exercise by Colorado of the right of future use of the water hereby reserved.

(b) Subject at all times to the reservation made by subparagraph (a) and to the other provisions of this Article, said proposed canal shall be entitled to divert five hundred cubic feet of water per second of time from the flow of the river in the Lower Sections, as of priority of appropriation of date December 17, 1921, only between the fifteenth day of October of any year and the first day of April of the next succeeding year upon the express condition that the right to so divert water is and shall be limited exclusively to said annual period and shall not constitute the basis for any claim to water necessary to supply all present and future appropriations in the Upper Section or present appropriations in the Lower Section and those hereafter to be made therein as provided in subparagraph (a).

3. Neither this compact nor the construction and operation of such a canal nor the diversion, carriage and application of water thereby shall vest in Nebraska, or in those in charge or control of said canal or in the users of water therefrom, any prior, preferred or superior servitude upon or claim or right to the use of any water of the South Platte River

in Colorado from the first day of April to the fifteenth day of October of any year or against any present or future appropriator or use of water from said river in Colorado during said period of every year, and Nebraska specifically waives any such claims and agrees that the same shall never be made or asserted. Any surplus waters of the river, which otherwise would flow past the Interstate Station during such period of any year after supplying all present and future diversions by Colorado, may be diverted by such a canal, subject to the other provisions and conditions of this Article.

4. Diversion of water by said canal shall not diminish the flow necessary to pass the Interstate Station to satisfy superior claims of users of water from the river in Nebraska.

5. No appropriations of water from the South Platte River by any other canal within Colorado shall be transferred to said canal or be claimed or asserted for diversion and carriage for use on lands in Nebraska.

6. Nebraska shall have the right to regulate diversions of water by said canal for the purposes of protecting other diversions from the South Platte River within Nebraska and of avoiding violations of the provisions of Article IV; but Colorado reserves the right at all times to regulate and control the diversions by said canal to the extent necessary for the protection of all appropriations and diversions within Colorado or necessary to maintain the flow at the Interstate Stations as provided by Article IV of this compact.

#### Article VII

Nebraska agrees that compliance by Colorado with the provisions of this compact and the delivery of water in accordance with its terms shall relieve Colorado from any further or additional demand or claim by Nebraska upon the waters of the South Platte River within Colorado.

#### Article VIII

Whenever any official of either State is designated herein to perform any duty under this compact, such designation shall be interpreted to include the state official or officials upon whom the duties now performed by such official may hereafter devolve, and it shall be the duty of the officials of the State of Colorado charged with the duty of the distribution of the waters of the South Platte River for irrigation purposes, to make deliveries of water at the Interstate Station in compliance with this compact without necessity of enactment of special statutes for such purposes by the General Assembly of the State of Colorado.

#### Article IX

The physical and other conditions peculiar to the South Platte River and to the territory drained and served thereby constitute the basis for this compact and neither of the signatory States hereby concedes the establishment of any general principle or precedent with respect to other interstate streams.

#### Article X

This compact may be modified or terminated at any time by mutual consent of the signatory States, but, if so terminated and Nebraska or its citizens shall seek to enforce any claims of vested rights in the waters of the South Platte River, the statutes of limitation shall not run in favor of Colorado or its citizens with reference to claims of the Western Irrigation District to the water of the South Platte River from the sixteenth day of April, 1916, and as to all other present claims from the date of the approval of this compact to the date of such termination, and the State of Colorado and its citizens who may be made defendants in any action brought for such purpose shall not be permitted to plead the statutes of limitation for such period of time.



## Article XI

This compact shall become operative when approved by the Legislature of each of the signatory States and by the Congress of the United States. Notice of approval by the Legislature shall be given by the Governor of each State to the Governor of the other State and to the President of the United States, and the President of the United States is requested to give notice to the Governors of the signatory States of the approval by the Congress of the United States.

IN WITNESS WHEREOF, the Commissioners have signed this compact in duplicate originals, one of which shall be deposited with the Secretary of State of each of the Signatory States.

Done at Lincoln, in the State of Nebraska, this 27th day of April, in the year of our Lord One Thousand Nine Hundred and Twenty-three.

Delph E. Carpenter,  
Robert H. Willis.

Source: L. 25: p. 529, § 1. CSA: omitted. CRS 53: § 148-4-1. C.R.S. 1963: § 149-4-1.

## ANNOTATION

**State engineer may make supplementary rules.** As a result of changed conditions that have occurred since the South Platte river compact was created, the compact is deficient in establishing standards for administration within Colorado. Therefore, the compact is no longer

self-executing, and the state engineer may adopt rules as necessary to ensure compliance, subject to the statutory conditions imposed by § 37-92-308 and other applicable sections. *Simpson v. Bijou Irrigation Co.*, 69 P.3d 50 (Colo. 2003).

## ARTICLE 66

## Rio Grande River Compact

37-66-101. Rio Grande River compact. 37-66-102. Compact to be ratified.

**37-66-101. Rio Grande River compact.** The general assembly hereby approves the compact between the states of Colorado, New Mexico, and Texas, designated as the "Rio Grande compact", signed at the city of Santa Fe, state of New Mexico, on the 18th day of March, A. D. 1938, by M. C. Hinderlinder, commissioner for the state of Colorado; Thomas M. McClure, commissioner for the state of New Mexico; Frank B. Clayton, commissioner for the state of Texas, and approved by S. O. Harper, representative of the President of the United States, which said compact is as follows:

## Rio Grande Compact

The state of Colorado, the state of New Mexico, and the state of Texas, desiring to remove all causes of present and future controversy among these states and between citizens of one of these states and citizens of another state with respect to the use of the waters of the Rio Grande above Fort Quitman, Texas, and being moved by considerations of interstate comity, and for the purpose of effecting an equitable apportionment of such waters, have resolved to conclude a compact for the attainment of these purposes, and to that end, through their respective governors, have named as their respective commissioners:

For the state of Colorado—M. C. Hinderlinder

For the state of New Mexico—Thomas M. McClure

For the state of Texas—Frank B. Clayton

who, after negotiations participated in by S. O. Harper, appointed by the President as the representative of the United States of America, have agreed upon the following articles, to-wit:

## Article I

(a) The state of Colorado, the state of New Mexico, the state of Texas, and the United States of America, are hereinafter designated "Colorado," "New Mexico," "Texas," and the "United States," respectively.

(b) "The commission" means the agency created by this compact for the administration thereof.

(c) The term "Rio Grande basin" means all of the territory drained by the Rio Grande and its tributaries in Colorado, in New Mexico, and in Texas above Fort Quitman, including the closed basin in Colorado.

(d) The "closed basin" means that part of the Rio Grande basin in Colorado where the streams drain into the San Luis lakes and adjacent territory, and do not normally contribute to the flow of the Rio Grande.

(e) The term "tributary" means any stream which naturally contributes to the flow of the Rio Grande.

(f) "Transmountain diversion" is water imported into the drainage basin of the Rio Grande from any stream system outside of the Rio Grande basin, exclusive of the closed basin.

(g) "Annual debits" are the amounts by which actual deliveries in any calendar year fall below scheduled deliveries.

(h) "Annual credits" are the amounts by which actual deliveries in any calendar year exceed scheduled deliveries.

(i) "Accrued debits" are the amounts by which the sum of all annual debits exceeds the sum of all annual credits over any common period of time.

(j) "Accrued credits" are the amounts by which the sum of all annual credits exceeds the sum of all annual debits over any common period of time.

(k) "Project storage" is the combined capacity of Elephant Butte reservoir and all other reservoirs actually available for the storage of usable water below Elephant Butte and above the first diversion to lands of the Rio Grande project, but not more than a total of 2,638,860 acre-feet.

(l) "Usable water" is all water, exclusive of credit water, which is in project storage and which is available for release in accordance with irrigation demands, including deliveries to Mexico.

(m) "Credit water" is that amount of water in project storage which is equal to the accrued credit of Colorado, or New Mexico, or both.

(n) "Unfilled capacity" is the difference between the total physical capacity of project storage and the amount of usable water then in storage.

(o) "Actual release" is the amount of usable water released in any calendar year from the lowest reservoir comprising project storage.

(p) "Actual spill" is all water which is actually spilled from Elephant Butte reservoir, or is released therefrom for flood control, in excess of the current demand on project storage and which does not become usable water by storage in another reservoir; provided, that actual spill of usable water cannot occur until all credit water shall have been spilled.

(q) "Hypothetical spill" is the time in any year at which usable water would have spilled from project storage if 790,000 acre-feet had been released therefrom at rates proportional to the actual release in every year from the starting date to the end of the year in which hypothetical spill occurs, in computing hypothetical spill the initial condition shall be the amount of usable water in project storage at the beginning of the calendar year following the effective date of this compact, and thereafter the initial condition shall be the amount of usable water in project storage at the beginning of the calendar year following each actual spill.

## Article II

The commission shall cause to be maintained and operated a stream gauging station equipped with an automatic water stage recorder at each of the following points, to-wit:



- (a) On the Rio Grande near Del Norte above the principal points of diversion to the San Luis valley;
- (b) On the Conejos river near Mogote;
- (c) On the Los Pinos river near Ortiz;
- (d) On the San Antonio river at Ortiz;
- (e) On the Conejos river at its mouths near Los Sauces;
- (f) On the Rio Grande near Lobatos;
- (g) On the Rio Chama below El Vado reservoir;
- (h) On the Rio Grande at Otowi bridge near San Ildefonso;
- (i) On the Rio Grande near San Acacia;
- (j) On the Rio Grande at San Marcial;
- (k) On the Rio Grande below Elephant Butte reservoir;
- (l) On the Rio Grande below Caballo reservoir.

Similar gauging stations shall be maintained and operated below any other reservoir constructed after 1929, and at such other points as may be necessary for the securing of records required for the carrying out of the compact; and automatic water stage recorders shall be maintained and operated on each of the reservoirs mentioned, and on all others constructed after 1929.

Such gauging stations shall be equipped, maintained and operated by the commission directly or in co-operation with an appropriate federal or state agency, and the equipment, method and frequency of measurement at such stations shall be such as to produce reliable records at all times.

Article III

The obligation of Colorado to deliver water in the Rio Grande at the Colorado-New Mexico state line, measured at or near Lobatos, in each calendar year, shall be ten thousand acre-feet less than the sum of those quantities set forth in the two following tabulations of relationship, which correspond to the quantities at the upper index stations:

Discharge of Conejos River  
Quantities in thousands of acre-feet

Conejos Index Supply (1)	Conejos River at Mouths (2)
100	0
150	20
200	45
250	75
300	109
350	147
400	188
450	232
500	278
550	326
600	376
650	426
700	476

- Intermediate quantities shall be computed by proportional parts.
- (1) Conejos index supply is the natural flow Conejos river at the U. S. G. S. gauging station near Mogote during the calendar year, plus the natural flow of Los Pinos river at the U. S. G. S. gauging station near Ortiz and the natural flow of San Antonio river at the U. S. G. S. gauging station at Ortiz, both during the months of April to October, inclusive.
  - (2) Conejos river at mouths is the combined discharge of branches of this river at the U. S. G. S. gauging stations near Los Sauces during the calendar year.

Discharge of Rio Grande Exclusive of Conejos River  
Quantities in thousands of acre-feet

Rio Grande at Del Norte (3)	Rio Grande at Lobatos less Conejos at Mouths (4)
200	60
250	65
300	75
350	86
400	98
450	112
500	127
550	144
600	162
650	182
700	204
750	229
800	257
850	292
900	335
950	380
1,000	430
1,100	540
1,200	640
1,300	740
1,400	840

Intermediate quantities shall be computed by proportional parts.

(3) Rio Grande at Del Norte is the recorded flow of the Rio Grande at the U. S. G. S. gauging station near Del Norte during the calendar year (measured above all principal points of diversion to San Luis Valley) corrected for the operation of reservoirs constructed after 1937.

(4) Rio Grande at Lobatos less Conejos at mouths is the total flow of the Rio Grande at the U. S. G. S. gauging station near Lobatos, less the discharge of Conejos river at its mouths, during the calendar year.

The application of these schedules shall be subject to the provisions hereinafter set forth and appropriate adjustments shall be made for (a) any change in location of gauging stations; (b) any new or increased depletion of the runoff above inflow index gauging stations; and (c) any transmountain diversions into the drainage basin of the Rio Grande above Lobatos.

In event any works are constructed after 1937 for the purpose of delivering water into the Rio Grande from the closed basin, Colorado shall not be credited with the amount of such water delivered, unless the proportion of sodium ions shall be less than forty-five per cent of the total positive ions in that water when the total dissolved solids in such water exceeds three hundred fifty parts per million.

#### Article IV

The obligation of New Mexico to deliver water in the Rio Grande at San Marcial, during each calendar year, exclusive of the months of July, August and September, shall be that quantity set forth in the following tabulation of relationship, which corresponds to the quantity at the upper index station:



Discharge of Rio Grande at Otowi Bridge  
And at San Marcial Exclusive of July,  
August and September  
Quantities in thousands of acre-feet

Otowi Index Supply (5)	San Marcial Index Supply (6)
100	0
200	65
300	141
400	219
500	300
600	383
700	469
800	557
900	648
1000	742
1100	839
1200	939
1300	1042
1400	1148
1500	1257
1600	1370
1700	1489
1800	1608
1900	1730
2000	1856
2100	1985
2200	2117
2300	2253

Intermediate quantities shall be computed by proportional parts.

(5) The Otowi index supply is the recorded flow of the Rio Grande at the U. S. G. S. gauging station at Otowi Bridge near San Ildefonso (formerly station near Buckman) during the calendar year, exclusive of the flow during the months of July, August and September, corrected for the operation of reservoirs constructed after 1929 in the drainage basin of the Rio Grande between Lobatos and Otowi Bridge.

(6) San Marcial index supply is the recorded flow of the Rio Grande at the gauging station at San Marcial during the calendar year exclusive of the flow during the months of July, August and September.

The application of this schedule shall be subject to the provisions hereinafter set forth and appropriate adjustments shall be made for (a) any change in location of gauging stations; (b) depletion after 1929 in New Mexico at any time of the year of the natural runoff at Otowi Bridge; (c) depletion of the runoff during July, August and September of tributaries between Otowi Bridge and San Marcial, by works constructed after 1937; and (d) any transmountain diversions into the Rio Grande between Lobatos and San Marcial.

Concurrent records shall be kept of the flow of the Rio Grande at San Marcial, near San Acacia, and of the release from Elephant Butte reservoir, to the end that the records at these three stations may be correlated.

Article V

If at any time it should be the unanimous finding and determination of the commission that because of changed physical conditions, or for any other reason, reliable records are not obtainable, or cannot be obtained, at any of the stream gauging stations herein referred to, such stations may, with the unanimous approval of the Commission, be abandoned, and with such approval another station, or other stations, shall be established and new measurements shall be substituted which, in the unanimous opinion of the commission, will

result in substantially the same results, so far as the rights and obligations to deliver water are concerned, as would have existed if such substitution of stations and measurements had not been so made.

## Article VI

Commencing with the year following the effective date of this compact, all credits and debits of Colorado and New Mexico shall be computed for each calendar year; provided, that in a year of actual spill no annual credits nor annual debits shall be computed for that year.

In the case of Colorado, no annual debit nor accrued debit shall exceed 100,000 acre-feet, except as either or both may be caused by holdover storage of water in reservoirs constructed after 1937 in the drainage basin of the Rio Grande above Lobatos. Within the physical limitations of storage capacity in such reservoirs, Colorado shall retain water in storage at all times to the extent of its accrued debit.

In the case of New Mexico, the accrued debit shall not exceed 200,000 acre-feet at any time, except as such debit may be caused by holdover storage of water in reservoirs constructed after 1929 in the drainage basin of the Rio Grande between Lobatos and San Marcial. Within the physical limitations of storage capacity in such reservoirs, New Mexico shall retain water in storage at all times to the extent of its accrued debit. In computing the magnitude of accrued credits or debits, New Mexico shall not be charged with any greater debt in any one year than the sum of 150,000 acre-feet and all gains in the quantity of water in storage in such year.

The commission by unanimous action may authorize the release from storage of any amount of water which is then being held in storage by reason of accrued debits of Colorado or New Mexico; provided, that such water shall be replaced at the first opportunity thereafter.

In computing the amount of accrued credits and accrued debits of Colorado or New Mexico, any annual credits in excess of 150,000 acre-feet shall be taken as equal to that amount.

In any year in which actual spill occurs, the accrued credits of Colorado, or New Mexico, or both, at the beginning of the year shall be reduced in proportion to their respective credits by the amount of such actual spill; provided, that the amount of actual spill shall be deemed to be increased by the aggregate gain in the amount of water in storage, prior to the time of spill, in reservoirs above San Marcial constructed after 1929; provided, further, that if the commissioners for the states having accrued credits authorized the release of part, or all, of such credits in advance of spill, the amount so released shall be deemed to constitute actual spill.

In any year in which there is actual spill of usable water, or at the time of hypothetical spill thereof, all accrued debits of Colorado, or New Mexico, or both, at the beginning of the year shall be cancelled.

In any year in which the aggregate of accrued debits of Colorado and New Mexico exceeds the minimum unfilled capacity of project storage, such debits shall be reduced proportionally to an aggregate amount equal to such minimum unfilled capacity.

To the extent that accrued credits are impounded in reservoirs between San Marcial and Courchesne, and to the extent that accrued debits are impounded in reservoirs above San Marcial, such credits and debits shall be reduced annually to compensate for evaporation losses in the proportion that such credits or debits bore to the total amount of water in such reservoirs during the year.

## Article VII

Neither Colorado nor New Mexico shall increase the amount of water in storage in reservoirs constructed after 1929 whenever there is less than 400,000 acre-feet of usable water in project storage; provided, that if the actual releases of usable water from the beginning of the calendar year following the effective date of this compact, or from the



beginning of the calendar year following actual spill, have aggregated more than an average of 790,000 acre-feet per annum, the time at which such minimum stage is reached shall be adjusted to compensate for the difference between the total actual release and releases at such average rate; provided, further, that Colorado or New Mexico, or both, may relinquish accrued credits at any time, and Texas may accept such relinquished water, and in such event the state, or states, so relinquishing shall be entitled to store water in the amount of the water so relinquished.

#### Article VIII

During the month of January of any year the commissioner for Texas may demand of Colorado and New Mexico, and the commissioner for New Mexico may demand of Colorado, the release of water from storage reservoirs constructed after 1929 to the amount of the accrued debits of Colorado and New Mexico, respectively, and such releases shall be made by each at the greatest rate practicable under the conditions then prevailing, and in proportion to the total debit of each, and in amounts, limited by their accrued debits, sufficient to bring the quantity of usable water in project storage to 600,000 acre-feet by March first and to maintain this quantity in storage until April thirtieth, to the end that a normal release of 790,000 acre-feet may be made from project storage in that year.

#### Article IX

Colorado agrees with New Mexico that in event the United States or the state of New Mexico decides to construct the necessary works for diverting the waters of the San Juan river, or any of its tributaries, into the Rio Grande, Colorado hereby consents to the construction of said works and the diversion of waters from the San Juan river, or the tributaries thereof, into the Rio Grande in New Mexico, provided the present and prospective uses of water in Colorado by other diversions from the San Juan river, or its tributaries are protected.

#### Article X

In the event water from another drainage basin shall be imported into the Rio Grande basin by the United States or Colorado or New Mexico, or any of them jointly, the state having the right to the use of such water shall be given proper credit therefor in the application of the schedules.

#### Article XI

New Mexico and Texas agree that upon the effective date of this compact all controversies between said states relative to the quantity or quality of the water of the Rio Grande are composed and settled; however, nothing herein shall be interpreted to prevent recourse by a signatory state to the supreme court of the United States for redress should the character or quality of the water, at the point of delivery, be changed hereafter by one signatory state to the injury of another. Nothing herein shall be construed as an admission by any signatory state that the use of water for irrigation causes increase of salinity for which the user is responsible in law.

#### Article XII

To administer the provisions of this compact there shall be constituted a commission composed of one representative from each state, to be known as the Rio Grande compact commission. The state engineer of Colorado shall be ex officio the Rio Grande compact commissioner for Colorado. The state engineer of New Mexico shall be ex officio the Rio Grande compact commissioner for New Mexico. The Rio Grande compact commissioner

for Texas shall be appointed by the governor of Texas. The President of the United States shall be requested to designate a representative of the United States to sit with such commission, and such representative of the United States, if so designated by the President, shall act as chairman of the commission without vote.

The salaries and personal expenses of the Rio Grande compact commissioners for the three states shall be paid by their respective states, and all other expenses incident to the administration of this compact, not borne by the United States, shall be borne equally by the three states.

In addition to the powers and duties hereinbefore specifically conferred upon such commission, and the members thereof, the jurisdiction of such commission shall extend only to the collection, correlation and presentation of factual data and the maintenance of records having a bearing upon the administration of this compact, and, by unanimous action, to the making of recommendations to the respective states upon matters connected with the administration of this compact. In connection therewith, the commission may employ such engineering and clerical aid as may be reasonably necessary within the limit of funds provided for that purpose by the respective states. Annual reports compiled for each calendar year shall be made by the commission and transmitted to the governors of the signatory states on or before March first following the year covered by the report. The commission may, by unanimous action, adopt rules and regulations consistent with the provisions of this compact to govern their proceedings.

The findings of the Commission shall not be conclusive in any court or tribunal which may be called upon to interpret or enforce this compact.

### Article XIII

At the expiration of every five year period after the effective date of this compact, the commission may, by unanimous consent, review any provisions hereof which are not substantive in character and which do not affect the basic principles upon which the compact is founded, and shall meet for the consideration of such questions on the request of any member of the commission; provided, however, that the provisions hereof shall remain in full force and effect until changed and amended within the intent of the compact by unanimous action of the commissioners, and until any changes in this compact are ratified by the legislatures of the respective states and consented to by the congress, in the same manner as this compact is required to be ratified to become effective.

### Article XIV

The schedules herein contained and the quantities of water herein allocated shall never be increased nor diminished by reason of any increase or diminution in the delivery or loss of water to Mexico.

### Article XV

The physical and other conditions characteristic of the Rio Grande and peculiar to the territory drained and served thereby, and to the development thereof, have actuated this compact and none of the signatory states admits that any provisions herein contained establishes any general principle or precedent applicable to other interstate streams.

### Article XVI

Nothing in this compact shall be construed as affecting the obligations of the United States of America to Mexico under existing treaties, or to the Indian tribes, or as impairing the rights of the Indian tribes.



## Article XVII

This compact shall become effective when ratified by the legislatures of each of the signatory states and consented to by the congress of the United States. Notice of ratification shall be given by the governor of each state to the governors of the other states and to the President of the United States, and the President of the United States is requested to give notice to the governors of each of the signatory states of the consent of the congress of the United States.

IN WITNESS WHEREOF, the commissioners have signed this compact in quadruplicate original, one of which shall be deposited in the archives of the Department of State of the United States of America and shall be deemed the authoritative original, and of which a duly certified copy shall be forwarded to the governor of each of the signatory states.

Done at the city of Santa Fe, in the state of New Mexico, on the 18th day of March, in the year of our Lord, One Thousand Nine Hundred and Thirty-eight.

(Sgd.) M. C. Hinderlider

(Sgd.) Thomas M. McClure

(Sgd.) Frank B. Clayton

APPROVED:

(Sgd.) S. O. Harper.

**Source:** L. 39: p. 489, § 1. CSA: omitted. CRS 53: § 148-5-1. C.R.S. 1963: § 149-5-1.

## ANNOTATION

**Law reviews.** For article, "Recent Developments in Colorado Groundwater Law", see 58 Den. L.J. 801 (1981). For article, "The Law of Equitable Apportionment Revisited, Updated and Restated", see 56 U. Colo. L. Rev. 381 (1985). For article, "The Rio Grande Convention of 1906: A Brief History of An International and Interstate Apportionment of the Rio Grande", 77 Den. U. L. Rev. 287 (1999).

**State engineer may promulgate and enforce appropriate rule.** In order to promulgate and enforce rules for compliance with Rio

Grande river compact commitments, the state engineer may promulgate and enforce appropriate rules for the administration of water rights. In re Rules & Regulations Governing Water Rights, 196 Colo. 197, 583 P.2d 910 (1978).

**Separate water delivery rules in accord with compact.** Separate delivery rules which subject use of the Conejos river and the Rio Grande mainstem to separate administration are in accord with this compact, specifically with article III. Alamosa-La Jara Water Users Prot. Ass'n v. Gould, 674 P.2d 914 (Colo. 1983).

**37-66-102. Compact to be ratified.** Said compact shall not become binding or operative unless and until the same has been ratified by the legislature of each of the signatory states and consented to by the congress of the United States, and the governor of the state of Colorado shall give notice of the approval of said compact to the governor of the state of New Mexico, to the governor of the state of Texas, and to the president of the United States, in conformity with article XVII of said compact.

**Source:** L. 39: p. 500, § 2. CSA: omitted. CRS 53: § 148-5-2. C.R.S. 1963: § 149-5-2.

## ARTICLE 67

## Republican River Compact

37-67-101. Ratification, purpose, and articles of compact.

37-67-102. When compact binding.

**37-67-101. Ratification, purpose, and articles of compact.** The general assembly hereby ratifies the compact between the states of Colorado, Kansas, and Nebraska,

designated as the "Republican River Compact", signed in the city of Lincoln, state of Nebraska, on the 31st day of December, A. D. 1942, by M. C. Hinderlider, commissioner for the state of Colorado; George S. Knapp, commissioner for the state of Kansas; Wardner G. Scott, commissioner for the state of Nebraska, which said compact is as follows:

### Republican River Compact

The states of Colorado, Kansas, and Nebraska, parties signatory to this compact (hereinafter referred to as Colorado, Kansas, and Nebraska, respectively, or individually as a state, or collectively as the states), having resolved to conclude a compact with respect to the waters of the Republican River Basin, and being duly authorized therefor by the Act of the Congress of the United States of America, approved August 4, 1942, (Public No. 696, 77th Congress, chapter 545, 2nd Session) and pursuant to acts of their respective legislatures have, through their respective governors, appointed as their commissioners:

M. C. Hinderlider, for Colorado

George S. Knapp, for Kansas

Wardner G. Scott, for Nebraska

who, after negotiations participated in by Glenn L. Parker, appointed by the President as the representative of the United States of America, have agreed upon the following articles:

### Article I

The major purposes of this compact are to provide for the most efficient use of the waters of the Republican River Basin (hereinafter referred to as the "Basin") for multiple purposes; to provide for an equitable division of such waters; to remove all causes, present and future, which might lead to controversies; to promote interstate comity; to recognize that the most efficient utilization of the waters within the Basin is for beneficial consumptive use; and to promote joint action by the states and the United States in the efficient use of water and the control of destructive floods.

The physical and other conditions peculiar to the Basin constitute the basis for this compact, and none of the states hereby, nor the Congress of the United States by its consent, concedes that this compact establishes any general principle or precedent with respect to any other interstate stream.

### Article II

The Basin is all the area in Colorado, Kansas, and Nebraska, which is naturally drained by the Republican River, and its tributaries, to its junction with the Smoky Hill River in Kansas. The main stem of the Republican River extends from the junction near Haigler, Nebraska, of its North Fork and the Arikaree River, to its junction with Smoky Hill River near Junction City, Kansas. Frenchman Creek (River) in Nebraska is a continuation of Frenchman Creek (River) in Colorado. Red Willow Creek in Colorado is not identical with the stream having the same name in Nebraska. A map of the Basin approved by the commissioners is attached and made a part hereof.

The term "Acre-foot," as herein used, is the quantity of water required to cover an acre to the depth of one foot and is equivalent to forty-three thousand, five hundred sixty (43,560) cubic feet.

The term "Virgin Water Supply," as herein used, is defined to be the water supply within the Basin undepleted by the activities of man.

The term "Beneficial Consumptive Use" is herein defined to be that use by which the water supply of the Basin is consumed through the activities of man, and shall include water consumed by evaporation from any reservoir, canal, ditch, or irrigated area.

Beneficial consumptive use is the basis and principle upon which the allocations of water hereinafter made are predicated.



## Article III

The specific allocations in acre-feet hereinafter made to each state are derived from the computed average annual virgin water supply originating in the following designated drainage basins, or parts thereof, in the amounts shown:

North Fork of the Republican River drainage basin in Colorado, 44,700 acre-feet;

Arikaree River drainage basin, 19,610 acre-feet;

Buffalo Creek drainage basin, 7,890 acre-feet;

Rock Creek drainage basin, 11,000 acre-feet;

South Fork of the Republican River drainage basin, 57,200 acre-feet;

Frenchman Creek (River) drainage basin in Nebraska, 98,500 acre-feet;

Blackwood Creek drainage basin, 6,800 acre-feet;

Driftwood Creek drainage basin, 7,300 acre-feet;

Red Willow Creek drainage basin in Nebraska, 21,900 acre-feet;

Medicine Creek drainage basin, 50,800 acre-feet;

Beaver Creek drainage basin, 16,500 acre-feet;

Sappa Creek drainage basin, 21,400 acre-feet;

Prairie Dog Creek drainage basin, 27,600 acre-feet;

The North Fork of the Republican River in Nebraska and the main stem of the Republican River between the junction of the North Fork and Arikaree River and the lowest crossing of the river at the Nebraska-Kansas state line and the small tributaries thereof, 87,700 acre-feet.

Should the future computed virgin water supply of any source vary more than ten (10) per cent from the virgin water supply as hereinabove set forth, the allocations hereinafter made from such source shall be increased or decreased in the relative proportions that the future computed virgin water supply of such source bears to the computed virgin water supply used herein.

## Article IV

There is hereby allocated for beneficial consumptive use in Colorado, annually, a total of fifty-four thousand, one hundred (54,100) acre-feet of water. This total is to be derived from the sources and in the amounts hereinafter specified and is subject to such quantities being physically available from those sources:

North Fork of the Republican River drainage basin, 10,000 acre-feet;

Arikaree River drainage basin, 15,400 acre-feet;

South Fork of the Republican River drainage basin, 25,400 acre-feet;

Beaver Creek drainage basin, 3,300 acre-feet; and

In addition, for beneficial consumptive use in Colorado annually, the entire water supply of the Frenchman Creek (River) drainage basin in Colorado and the Red Willow Creek drainage basin in Colorado.

There is hereby allocated for beneficial consumptive use in Kansas, annually, a total of one hundred ninety thousand, three hundred (190,300) acre-feet of water. This total is to be derived from the sources and in the amounts hereinafter specified and is subject to such quantities being physically available from those sources:

Arikaree River drainage basin, 1,000 acre-feet;

South Fork of the Republican River drainage basin, 23,000 acre-feet;

Driftwood Creek drainage basin, 500 acre-feet;

Beaver Creek drainage basin, 6,400 acre-feet;

Sappa Creek drainage basin, 8,800 acre-feet;

Prairie Dog Creek drainage basin, 12,600 acre-feet;

From the main stem of the Republican River upstream from the lowest crossing of the river at the Nebraska-Kansas state line and from water supplies of upstream basins otherwise unallocated herein, 138,000 acre-feet; provided, that Kansas shall have the right to divert all or any portion thereof at or near Guide Rock, Nebraska; and

In addition there is hereby allocated for beneficial consumptive use in Kansas, annually, the entire water supply originating in the Basin downstream from the lowest crossing of the river at the Nebraska-Kansas state line.

There is hereby allocated for beneficial consumptive use in Nebraska, annually, a total of two hundred thirty-four thousand, five hundred (234,500) acre-feet of water. This total is to be derived from the sources and in the amounts hereinafter specified and is subject to such quantities being physically available from those sources:

North Fork of the Republican River drainage basin in Colorado, 11,000 acre-feet;

Frenchman Creek (River) drainage basin in Nebraska, 52,800 acre-feet;

Rock Creek drainage basin, 4,400 acre-feet;

Arikaree River drainage basin, 3,300 acre-feet;

Buffalo Creek drainage basin, 2,600 acre-feet;

South Fork of the Republican River drainage basin, 800 acre-feet;

Driftwood Creek drainage basin, 1,200 acre-feet;

Red Willow Creek drainage basin in Nebraska, 4,200 acre-feet;

Medicine Creek drainage basin, 4,600 acre-feet;

Beaver Creek drainage basin, 6,700 acre-feet;

Sappa Creek drainage basin, 8,800 acre-feet;

Prairie Dog Creek drainage basin, 2,100 acre-feet;

From the North Fork of the Republican River in Nebraska, the main stem of the Republican River between the junction of the North Fork and Arikaree River and the lowest crossing of the river at the Nebraska-Kansas state line, from the small tributaries thereof, and from water supplies of upstream basins otherwise unallocated herein, 132,000 acre-feet.

The use of the waters hereinabove allocated shall be subject to the laws of the state, for use in which the allocations are made.

#### Article V

The judgment and all provisions thereof in the case of Adelbert A. Weiland, as state engineer of Colorado, et al. v. The Pioneer Irrigation Company, decided June 5, 1922, and reported in 259 U. S. 498, affecting the Pioneer irrigation ditch or canal, are hereby recognized as binding upon the states; and Colorado, through its duly authorized officials, shall have the perpetual and exclusive right to control and regulate diversions of water at all times by said canal in conformity with said judgment.

The water heretofore adjudicated to said Pioneer Canal by the district court of Colorado, in the amount of fifty (50) cubic feet per second of time is included in and is a part of the total amounts of water hereinbefore allocated for beneficial consumptive use in Colorado and Nebraska.

#### Article VI

The right of any person, entity, or lower state to construct, or participate in the future construction and use of any storage reservoir or diversion works in an upper state for the purpose of regulating water herein allocated for beneficial consumptive use in such lower state, shall never be denied by an upper state; provided, that such right is subject to the rights of the upper state.

#### Article VII

Any person, entity, or lower state shall have the right to acquire necessary property rights in an upper state by purchase, or through the exercise of the power of eminent domain, for the construction, operation and maintenance of storage reservoirs, and of appurtenant works, canals and conduits, required for the enjoyment of the privileges granted by Article VI; provided, however, that the grantees of such rights shall pay to the political subdivisions of the state in which such works are located, each and every year during which such rights are enjoyed for such purposes, a sum of money equivalent to the average annual amount of



taxes assessed against the lands and improvements during the ten years preceding the use of such lands, in reimbursement for the loss of taxes to said political subdivisions of the state.

### Article VIII

Should any facility be constructed in an upper state under the provisions of Article VI, such construction and the operation of such facility shall be subject to the laws of such upper state.

Any repairs to or replacements of such facility shall also be made in accordance with the laws of such upper state.

### Article IX

It shall be the duty of the three states to administer this compact through the official in each state who is now or may hereafter be charged with the duty of administering the public water supplies, and to collect and correlate through such officials the data necessary for the proper administration of the provisions of this compact. Such officials may, by unanimous action, adopt rules and regulations consistent with the provisions of this compact.

The United States geological survey, or whatever federal agency may succeed to the functions and duties of that agency, in so far as this compact is concerned, shall collaborate with the officials of the states charged with the administration of this compact in the execution of the duty of such officials in the collection, correlation, and publication of water facts necessary for the proper administration of this compact.

### Article X

Nothing in this compact shall be deemed:

(a) To impair or affect any rights, powers or jurisdiction of the United States, or those acting by or under its authority, in, over, and to the waters of the Basin; nor to impair or affect the capacity of the United States, or those acting by or under its authority, to acquire rights in and to the use of waters of the Basin;

(b) To subject any property of the United States, its agencies or instrumentalities, to taxation by any state, or subdivision thereof, nor to create an obligation on the part of the United States, its agencies or instrumentalities, by reason of the acquisition, construction, or operation of any property or works of whatsoever kind, to make any payments to any state or political subdivision thereof, state agency, municipality, or entity whatsoever in reimbursement for the loss of taxes;

(c) To subject any property of the United States, its agencies or instrumentalities, to the laws of any state to any extent other than the extent these laws would apply without regard to this compact.

### Article XI

This compact shall become operative when ratified by the legislature of each of the states, and when consented to by the Congress of the United States by legislation providing, among other things, that:

(a) Any beneficial consumptive uses by the United States, or those acting by or under its authority, within a state, of the waters allocated by this compact, shall be made within the allocations hereinabove made for use in that state and shall be taken into account in determining the extent of use within that state.

(b) The United States, or those acting by or under its authority, in the exercise of rights or powers arising from whatever jurisdiction the United States has in, over and to the waters of the Basin shall recognize, to the extent consistent with the best utilization of the waters for multiple purposes, that beneficial consumptive use of the waters within the Basin is of

paramount importance to the development of the Basin; and no exercise of such power or right thereby that would interfere with the full beneficial consumptive use of the waters within the Basin shall be made except upon a determination, giving due consideration to the objectives of this compact and after consultation with all interested federal agencies and the state officials charged with the administration of this compact, that such exercise is in the interest of the best utilization of such waters for multiple purposes.

(c) The United States, or those acting by or under its authority, will recognize any established use, for domestic and irrigation purposes, of the waters allocated by this compact which may be impaired by the exercise of federal jurisdiction in, over, and to such waters; provided, that such use is being exercised beneficially, is valid under the laws of the appropriate state and in conformity with this compact at the time of the impairment thereof, and was validly initiated under state law prior to the initiation or authorization of the federal program or project which causes such impairment.

IN WITNESS WHEREOF, the commissioners have signed this compact in quadruplicate original, one of which shall be deposited in the archives of the department of state of the United States of America and shall be deemed the authoritative original, and of which a duly certified copy shall be forwarded to the governor of each of the states.

Done in the city of Lincoln, in the state of Nebraska, on the 31st day of December, in the year of our Lord, one thousand nine hundred forty-two.

M. C. Hinderlider  
Commissioner for Colorado  
George S. Knapp  
Commissioner for Kansas  
Wardner G. Scott  
Commissioner for Nebraska

I have participated in the negotiations leading to this proposed compact and propose to report to the Congress of the United States favorably thereon.

Glenn L. Parker  
Representative of the United States

**Source:** L. 43: p. 362, § 1. CSA: C. 90, § 74(3). CRS 53: § 148-6-1. C.R.S. 1963: § 149-6-1.

**Editor's note:** The map of the Republican river basin is shown in L. 43, p. 371.

#### ANNOTATION

**Colorado authorities may regulate canal used to irrigate Nebraska lands.** This compact allows Colorado authorities to control and reg-

ulate the water flowing through a canal used to irrigate Nebraska lands. Pioneer Irrigation Dists. V. Danielson, 658 P.2d 842 (Colo. 1983).

**37-67-102. When compact binding.** Said compact shall not become operative unless and until the same has been ratified by the legislature of each of the signatory states and consented to by the congress of the United States, in the manner provided by, and in conformity with, said compact, and the governor of the state of Colorado shall give notice of the approval of said compact to the governor of the state of Kansas, to the governor of the state of Nebraska, and to the president of the United States.

**Source:** L. 43: p. 372, § 2. CSA: C. 90, § 74(4). CRS 53: § 148-6-2. C.R.S. 1963: § 149-6-2.

#### ARTICLE 68

##### Amended Costilla Creek Compact

**Cross references:** For Costilla Creek Compact prior to 1963 amendment, see article 7 of chapter 148, CRS 53.



37-68-101. Amended Costilla Creek compact.

37-68-102. When compact operative.

**37-68-101. Amended Costilla Creek compact.** The general assembly hereby ratifies the amended compact between the state of Colorado and the state of New Mexico, designated as the "Amended Costilla Creek Compact", signed in the city of Santa Fe, state of New Mexico, on the seventh day of February, A. D. 1963, by J. E. Whitten, commissioner for the state of Colorado, and S. E. Reynolds, commissioner for the state of New Mexico, which said amended compact is as follows:

### Amended Costilla Creek Compact

The state of Colorado and the state of New Mexico, parties signatory to this compact (hereinafter referred to as "Colorado" and "New Mexico," respectively, or individually as a "state," or collectively as the "states"), having on September 30, 1944 concluded, through their duly authorized commissioners, to-wit: Clifford H. Stone for Colorado and Thomas M. McClure for New Mexico, a compact with respect to the water of Costilla Creek, an interstate stream, which compact was ratified by the states in 1945 and was approved by the congress of the United States in 1946; and

The states, having resolved to conclude an amended compact with respect to the waters of Costilla Creek, have designated, pursuant to the acts of their respective legislatures and through their appropriate executive agencies, as their commissioners:

J. E. Whitten, for Colorado

S. E. Reynolds, for New Mexico  
who, after negotiations, have agreed upon these articles:

### Article I

The major purposes of this compact are to provide for the equitable division and apportionment of the use of the waters of Costilla Creek; to promote interstate comity; to remove causes of present and future interstate controversies; to assure the most efficient utilization of the waters of Costilla Creek; to provide for the integrated operation of existing and prospective irrigation facilities on the stream in the two states; to adjust the conflicting jurisdictions of the two states over irrigation works and facilities diverting and storing waters in one state for use in both states; to equalize the benefits of water from Costilla Creek, used for the irrigation of contiguous lands lying on either side of the Boundary, between the citizens and water users of one state and those of the other; and to place the beneficial application of water diverted from Costilla Creek for irrigation by the water users of the two states on a common basis.

The physical and other conditions peculiar to the Costilla Creek and its basin, and the nature and location of the irrigation development and the facilities in connection therewith, constitute the basis for this compact; and neither of the States hereby, nor the Congress of the United States by its consent, concedes that this compact establishes any general principle or precedent with respect to any other interstate stream.

### Article II

As used in this compact, the following names, terms and expressions are described, defined, applied and taken to mean as in this article set forth:

(a) "Costilla Creek" is a tributary of the Rio Grande which rises on the west slope of the Sangre de Cristo range in the extreme southeastern corner of Costilla County in Colorado and flows in a general westerly direction crossing the boundary three times above its confluence with the Rio Grande in New Mexico.

(b) The "Canyon Mouth" is that point on Costilla Creek in New Mexico where the stream leaves the mountains and emerges into the San Luis Valley.

(c) The "Amalia Area" is that irrigated area in New Mexico above the Canyon Mouth and below the Costilla Reservoir which is served by decreed direct flow water rights.

(d) The "Costilla-Garcia Area" is that area extending from the Canyon Mouth in New Mexico to a point in Colorado about four miles downstream from the boundary, being a compact body of irrigated land on either side of Costilla Creek served by decreed direct flow water rights.

(e) The "Eastdale Reservoir No. 1" is that off-channel reservoir located in Colorado in sections 7, 8 and 18, township 1 north, range 73 west, and sections 12 and 13, township 1 north, range 74 west, of the Costilla Estates survey, with a nominal capacity of three thousand four hundred sixty-eight (3,468) acre-feet and a present usable capacity of two thousand (2,000) acre-feet.

(f) The "Eastdale Reservoir No. 2" is that off-channel reservoir located in Colorado in sections 3, 4, 9 and 10, township 1 north, range 73 west, of the Costilla Estates survey, with nominal capacity of three thousand forty-one (3,041) acre-feet.

(g) The "Costilla Reservoir" is that channel reservoir, having a nominal capacity of fifteen thousand seven hundred (15,700) acre-feet, located in New Mexico near the headwaters of Costilla Creek. The present usable capacity of the reservoir is eleven thousand (11,000) acre-feet, subject to future adjustment by the state engineer of New Mexico. The condition of Costilla Dam may be such that the state engineer of New Mexico will not permit storage above a determined stage except for short periods of time.

(h) The "Cerro Canal" is that irrigation canal which diverts water from the left bank of Costilla Creek in New Mexico near the southwest corner of section 12, township 1 south, range 73 west, of the Costilla Estates survey, and runs in a northwesterly direction to the boundary near Boundary Monument No. 140.

(i) The "boundary" is the term used herein to describe the common boundary line between Colorado and New Mexico.

(j) The term "Costilla Reservoir System" means and includes the Costilla Reservoir and the Cerro Canal, the permits for the storage of water in Costilla Reservoir, the twenty-four and fifty-two hundredths (24.52) cubic feet per second of time of direct flow water rights transferred to the Cerro Canal, and the permits for the diversion of direct flow water by the Cerro Canal as adjusted herein to seventy-five and forty-eight hundredths (75.48) cubic feet per second of time.

(k) The term "Costilla Reservoir System Safe Yield" means that quantity of usable water made available each year by the Costilla Reservoir System. The safe yield represents the most beneficial operation of the Costilla Reservoir System through the use, first, of the total usable portion of the yield of the twenty-four and fifty-two hundredths (24.52) cubic feet per second of time of direct flow rights transferred to the Cerro Canal, second, of the total usable portion of the yield of the direct flow Cerro Canal permits, and third, of that portion of the water stored in Costilla Reservoir required to complete such safe yield.

(l) The term "usable capacity" is defined and means that capacity of Costilla Reservoir at the stage above which the state engineer of New Mexico will not permit storage except for short periods of time.

(m) The term "temporary storage" is defined and means the water permitted by the state engineer of New Mexico to be stored in Costilla Reservoir for short periods of time above the usable capacity of that reservoir.

(n) The term "additional storage facilities" is defined and means storage capacity which may be provided in either state to impound waters of Costilla Creek and its tributaries in addition to the nominal capacity of Costilla Reservoir and the Costilla Creek complement of the Eastdale Reservoir No. 1 capacity.

(o) The term "duty of water" is defined as the rate in cubic feet per second of time at which water may be diverted at the headgate to irrigate a specified acreage of land during the period of maximum requirement.



(p) The term "surplus water" is defined and means water which cannot be stored in operating reservoirs during the storage season or water during the irrigation season which cannot be stored in operating reservoirs and which is in excess of the aggregate direct flow rights and permits recognized by this compact.

(q) The term "irrigation season" is defined and means that period of each calendar year from May 16 to September 30, inclusive.

(r) The term "storage season" is defined and means that period of time extending from October 1 of one year to May 15 of the succeeding year, inclusive.

(s) The term "points of interstate delivery" means and includes (1) the Acequia Madre where it crosses the boundary; (2) the Costilla Creek where it crosses the boundary; (3) the Cerro Canal where it reaches the boundary; and (4) any other interstate canals which might be constructed with the approval of the commission at the point or points where they cross the boundary.

(t) The term "water company" means The San Luis Power and Water Company, a Colorado corporation, or its successor.

(u) The word "commission" means the Costilla Creek Compact commission created by Article VIII of this compact for the administration thereof.

### Article III

1. To accomplish the purposes of this compact, as set forth in Article I, the following adjustments in the operation of irrigation facilities on Costilla Creek, and in the use of water diverted, stored and regulated thereby, are made:

(a) The quantity of water delivered for use in the two states by direct flow ditches in the Costilla-Garcia Area and by the Cerro Canal is based on a duty of water of one cubic foot per second of time for each eighty (80) acres, to be applied in the order of priority; provided, however, that this adjustment in each instance is based on the acreage as determined by the court in decreeing the water rights for the Costilla-Garcia Area, and in the case of the Cerro Canal such basis shall apply to eight thousand (8,000) acres of land. In order to better maintain a usable head for the diversion of water for beneficial consumptive use the adjusted maximum diversion rate under the water right of each of the ditches supplying water for the Costilla-Garcia Area in Colorado is not less than one cubic foot per second of time.

(b) There is transferred from certain ditches in the Costilla-Garcia Area twenty-four and fifty-two hundredths (24.52) cubic feet per second of time of direct flow water rights, which rights of use are held by the water company or its successors in title, to the headgate of the Cerro Canal. The twenty-four and fifty-two hundredths (24.52) cubic feet of water per second of time hereby transferred represents an evaluation of these rights after adjustment in the duty of water, pursuant to subsection (a) of this Article, and includes a reduction thereof to compensate for increased use of direct flow water which otherwise would have been possible under these rights by this transfer.

(c) Except for the rights to store water from Costilla Creek in Eastdale Reservoir No. 1 as hereinafter provided, all diversion and storage rights from Costilla Creek for Eastdale Reservoirs No. 1 and No. 2 are relinquished and the water decreed thereunder is returned to the creek for use in accordance with the plan of integrated operation effectuated by this compact.

(d) The Cerro Canal direct flow permit shall be seventy-five and forty-eight hundredths (75.48) cubic feet per second of time.

(e) There is transferred to and made available for the irrigation of lands in Colorado a portion of the Costilla Reservoir complement of the Costilla Reservoir System Safe Yield in order that the storage of water in that reservoir may be made for the benefit of water users in both Colorado and New Mexico under the provisions of this compact for the allocations of water and the operation of facilities.

2. Each state grants for the benefit of the other and its water users the rights to change the points of diversion of water from Costilla Creek, to divert water from the stream in one

state for use in the other and to store water in one state for the irrigation of lands in the other, insofar as the exercise of such rights may be necessary to effectuate the provisions of this Article and to comply with the terms of this compact.

3. The water company has consented to and approved the adjustments contained in this Article; and such consent and approval shall be evidenced in writing and filed with the commission.

#### Article IV

The apportionment and allocation of the use of Costilla Creek water shall be as follows:

(a) There is allocated for diversion from the natural flow of Costilla Creek and its tributaries sufficient water for beneficial use on meadow and pasture lands above Costilla Reservoir in New Mexico to the extent and in the manner now prevailing in that area.

(b) There is allocated for diversion from the natural flow of Costilla Creek and its tributaries thirteen and forty-two hundredths (13.42) cubic feet of water per second of time for beneficial use on lands in the Amalia Area in New Mexico.

(c) In addition to allocations made in subsections (e), (f) and (g) of this Article, there is allocated for diversion from the natural flow of Costilla Creek fifty and sixty-two hundredths (50.62) cubic feet of water per second of time for Colorado and eighty-nine and eight hundredths (89.08) cubic feet of water per second of time for New Mexico, subject to adjustment as provided in Article V (e), and such water shall be delivered for beneficial use in the two states in accordance with the schedules and under the conditions set forth in Article V.

(d) There is allocated for diversion from the natural flow of Costilla Creek sufficient water to provide each year one thousand (1,000) acre-feet of stored water in Eastdale Reservoir No. 1, such water to be delivered as provided in Article V.

(e) There is allocated for diversion to Colorado thirty-six and five-tenths per cent (36.5%) and to New Mexico sixty-three and five-tenths per cent (63.5%) of the water stored by Costilla Reservoir for release therefrom for irrigation purposes each year, subject to adjustment as provided in Article V (e) and such water shall be delivered for beneficial use in the two states on a parity basis in accordance with the provisions of Article V. By "parity basis" is meant that neither state shall enjoy a priority of right of use.

(f) There is allocated for beneficial use in each of the states of Colorado and New Mexico one-half of the surplus water, as defined in Article II (p), to be delivered as provided in Article V.

(g) There is allocated for beneficial use in each of the states of Colorado and New Mexico one-half of any water made available and usable by additional storage facilities which may be constructed in the future.

#### Article V

The operation of the facilities of Costilla Creek and the delivery of water for the irrigation of land in Colorado and New Mexico, in accordance with the allocations made in Article IV, shall be as follows:

(a) Diversions of water for use on lands in the Amalia Area shall be made as set forth in Article IV (b) in the order of decreed priorities in New Mexico and of relative priority dates in the two states, subject to the right of New Mexico to change the points of diversion and places of use of any of such water to other points of diversion and places of use; provided, however, that the rights so transferred shall be limited in each instance to the quantity of water actually consumed on the lands from which the right is transferred.



(b) Deliveries to Colorado of direct flow water below the Canyon Mouth shall be made by New Mexico in accordance with the following schedule:

Usable Discharge of Creek at Canyon Mouth Gaging Station (C.F.S.)	Incremental Allocations to Colorado (C.F.S.)	Points of Interstate Delivery	Cumulative Allocations to Colorado (C.F.S.)	Remarks
(1)	(2A) (2B)	(3)	(4)	(5)
25.00	1.05	Acequia Madreof		Incremental allocation is 4.2% the usable discharge when usable discharge is less than 25.00 C.F.S.
	2.53	Cerro Canal		Incremental allocation is 10.13% of the usable discharge when usable discharge is less than 25.00 C.F.S.
	4.70	Cerro Canal	8.28	This 4.70 C.F.S. is not a part of the Colorado allocation of the direct flow water of the Costilla Reservoir System and is not subject to adjustment in the event of a change in the usable capacity of Costilla Reservoir. Incremental allocation is 18.8% of the usable discharge when usable discharge is less than 25.00 C.F.S. This 4.70 C.F.S. allocated to Colorado for delivery through the Cerro Canal is 5.50 C.F.S. of the original 6.55 C.F.S. allocated to Colorado for delivery through the Acequia Madre less 0.8 C.F.S. correction for losses.
36.88	.38	Cerro Canal		This 0.38 C.F.S. is not a part of the Colorado allocation of the direct flow water of the Costilla Reservoir System and is not subject to adjustment in the event of a change in the usable capacity of Costilla Reservoir. Incremental allocation is 3.26% of the usable discharge in excess of 25.38 C.F.S. and less than 36.88 C.F.S.
	4.04	Cerro Canal	12.70	Incremental allocation is 35.11% of the usable discharge in excess of 25.38 C.F.S. and less than 36.88 C.F.S.
38.62	1.00	Creek	13.70	Incremental allocation is 100% of the usable discharge in excess of 37.62 C.F.S. and less than 38.62 C.F.S.

Usable Discharge of Creek at Canyon Mouth Gaging Station (C.F.S.)	Incremental Allocations to Colorado (C.F.S.)		Points of Interstate Delivery	Cumulative Allocations to Colorado (C.F.S.)	Remarks
(1)	(2A)	(2B)	(3)	(4)	(5)
44.76	2.24		Cerro Canal	15.94	Incremental allocation is 36.5% of the usable discharge in excess of 38.62 C.F.S. and less than 44.76 C.F.S.
50.91		6.00	Creek	21.94	Incremental allocation is 100% of the usable discharge in excess of 44.91 C.F.S. and less than 50.91 C.F.S.
56.48	.13		Cerro Canal	22.07	Incremental allocation is 11.18% of the usable discharge in excess of 55.35 C.F.S. and less than 56.48 C.F.S.
61.48		1.00	Creek	23.07	Incremental allocation is 100% of the usable discharge in excess of 60.48 C.F.S. and less than 61.48 C.F.S.
64.22					At usable creek discharge of 64.22 C.F.S. the Cerro Canal direct flow permit becomes operative after 1,000 acre-feet has been stored in Eastdale Reservoir No. 1.
139.70	27.55		Cerro Canal	50.62	Incremental allocation is 36.5% of the usable discharge in excess of 64.22 C.F.S. and less than 139.70 C.F.S.

The actual discharges of Costilla Creek at the Canyon Mouth Gaging Station at which the various blocks of direct flow water become effective shall equal the flows set forth in column (1) increased by the transmission losses necessary to deliver those flows to the headgates of the respective direct flow ditches diverting in New Mexico.

The delivery of ditch water at the boundary shall equal the allocation set forth in columns (2a) and (2b) reduced by the transmission losses between the headgate of the ditch and the point where the ditch crosses the boundary. The allocations to be delivered to Colorado through the Cerro Canal represent, except as otherwise indicated in column (5) of the table above, 36.5 percent of those blocks of direct flow water of the Costilla Reservoir System which are subject to adjustment as provided in subsection (e) of this article.

The provisions of article III (1) (a) shall not be applicable to the Colorado allocation of 5.08 C.F.S. which is transferred from the Acequia Madre to the Cerro Canal by this amendment to the Costilla Creek compact and shall not be applicable to the 0.8 C.F.S. which is transferred from Colorado to New Mexico by this amendment to the Costilla Creek compact.

The above table is compiled on the basis of the delivery to Colorado at the boundary of thirty-six and five-tenths percent (36.5%) of all direct flow water of the Costilla Reservoir System diverted by the Cerro Canal and the delivery at the boundary of all other direct flow water allocated to Colorado, in the order of priority, all such deliveries to be adjusted for



transmission losses. In the event of change in the usable capacity of the Costilla Reservoir, Colorado's share of all direct flow water of the Costilla Reservoir System diverted by the Cerro Canal, to be delivered at the boundary and adjusted for transmission losses, shall be determined by the percentages set forth in column (4) of the table which appears in subsection (e) of this article.

(c) During the storage season, no water shall be diverted under direct flow rights unless there is water in excess of the demand of all operating reservoirs for water from Costilla Creek for storage.

(d) In order to assure the most efficient utilization of the available water supply, the filling of Eastdale Reservoir No. 1 from Costilla Creek shall be commenced as early in the spring as possible and shall be completed as soon thereafter as possible. The Cerro Canal or any other ditch which may be provided for that purpose shall be used, insofar as practicable, to convey the water from the Canyon Mouth to Eastdale Reservoir No. 1. During any season when the commission determines that there will be no surplus water, any diversions, waste or spill from any canal or canals supplying Eastdale Reservoir No. 1 will be charged to the quantity of water diverted for delivery to said reservoir.

(e) The commission shall estimate each year the safe yield of Costilla Reservoir System and its component parts as far in advance of the irrigation season as possible, and shall review and revise such estimates from time to time as may be necessary.

In the event the usable capacity of the Costilla Reservoir changes, the average safe yield and the equitable division thereof between the states shall be determined in accordance with the following table:

Usable Capacity of Costilla Reservoir (1)	Average Annual Safe Yield (acre-feet) (2)	Division of Safe Yield			
		Colorado (acre-feet) (3)	(percent) (4)	New Mexico (acre-feet) (5)	(percent) (6)
0	1,800	1,510	83.9	290	16.1
1,000	3,400	2,000	58.8	1,400	41.2
2,000	4,900	2,450	50.0	2,450	50.0
3,000	6,400	2,910	45.5	3,490	54.5
4,000	7,900	3,370	42.7	4,530	57.3
5,000	9,300	3,800	40.9	5,500	59.1
6,000	10,700	4,220	39.4	6,480	60.6
7,000	12,000	4,620	38.5	7,380	61.5
8,000	13,200	4,990	37.8	8,210	62.2
9,000	14,300	5,320	37.2	8,980	62.8
10,000	15,200	5,600	36.8	9,600	63.2
11,000	16,000	5,840	36.5	10,160	63.5
12,000	16,600	6,020	36.3	10,580	63.7
13,000	17,000	6,140	36.1	10,860	63.9
14,000	17,400	6,270	36.0	11,130	64.0
15,000	17,700	6,360	35.91	1,340	64.1
15,700	17,900	6,420	35.91	1,480	64.1

Intermediate quantities shall be computed by proportionate parts.

In the event of change in the usable capacity of the Costilla Reservoir, the Costilla Reservoir complement of the Costilla Reservoir System Safe Yield shall be divided between Colorado and New Mexico in accordance with the percentages given in columns 4 and 6, respectively, of the above table.

Each state may draw from the reservoir in accordance with the allocations made herein, up to its proportion of the Costilla Reservoir complement of the Costilla Reservoir System Safe Yield and its proportion of temporary storage and no more. Colorado may call for the delivery of its share thereof at any of the specified points of interstate delivery.

Deliveries of water from Costilla Reservoir to the Canyon Mouth shall be adjusted for transmission losses, if any, between the two points. Deliveries to Colorado at the boundary

shall be further adjusted for transmission losses from the Canyon Mouth to the respective points of interstate delivery.

Water stored in Costilla Reservoir and not released during the current season shall not be held over to the credit of either state but shall be apportioned when the safe yield is subsequently determined.

(f) The Colorado apportionment of surplus water, as allocated in Article IV (f), shall be delivered by New Mexico at such points of interstate delivery and in the respective quantities, subject to transmission losses, requested by the Colorado member of the commission.

(g) In the event that additional water becomes usable by the construction of additional storage facilities, such water shall be made available to each state in accordance with rules and regulations to be prescribed by the commission.

(h) When it appears to the commission that any part of the water allocated to one state for use in a particular year will not be used by that state, the commission may permit its use by the other state during that year, provided that a permanent right to the use of such water shall not thereby be established.

## Article VI

The desirability of consolidating various of the direct flow ditches serving the Costilla-Garcia Area, which are now or which would become interstate in character by consolidation, and diverting the water available to such ditches through a common headgate is recognized. Should the owners of any of such ditches, or a combination of them, desire to effectuate a consolidation and provide for a common headgate diversion, application therefor shall be made to the commission which, after review of the plans submitted, may grant permission to make such consolidation.

## Article VII

The commission shall cause to be maintained and operated a streamgaging-station, equipped with an automatic water-stage recorder, at each of the following points, to-wit:

- (a) On Costilla Creek immediately below Costilla Reservoir.
- (b) On Costilla Creek at or near the Canyon Mouth above the headgate of Cerro Canal and below the Amalia Area.
- (c) On Costilla Creek at or near the boundary.
- (d) On the Cerro Canal immediately below its headgate.
- (e) On the Cerro Canal at or near the boundary.
- (f) On the intake from Costilla Creek to the Eastdale Reservoir No. 1, immediately above the point where the intake discharges into the reservoir.
- (g) On the Acequia Madre immediately below its headgate.
- (h) On the Acequia Madre at the boundary.
- (i) Similar gaging stations shall be maintained and operated at such other points as may be necessary in the discretion of the commission for the securing of records required for the carrying out of the provisions of the compact.

Such gaging stations shall be equipped, maintained, and operated by the commission directly or in cooperation with an appropriate federal or state agency, and the equipment, method, and frequency of measurement at such stations shall be such as to produce reliable records at all times.

## Article VIII

The two states shall administer this compact through the official in each state who is now or may hereafter be charged with the duty of administering the public water supplies, and such officials shall constitute the Costilla Creek Compact Commission. In addition to the powers and duties hereinbefore specifically conferred upon such commission, the commission shall collect and correlate factual data and maintain records having a bearing upon the



administration of this compact. In connection therewith, the commission may employ such engineering and other assistance as may be reasonably necessary within the limits of funds provided for that purpose by the states. The commission may, by unanimous action, adopt rules and regulations consistent with the provisions of this compact to govern its proceedings. The salaries and expenses of the members of the commission shall be paid by their respective states. Other expenses incident to the administration of the compact, including the employment of engineering or other assistance and the establishment and maintenance of compact gaging stations, not borne by the United States shall be assumed equally by the two states and paid directly to the commission upon vouchers submitted for that purpose.

The United States geological survey, or whatever federal agency may succeed to the functions and duties of that agency, shall collaborate with the commission in the correlation and publication of water facts necessary for the proper administration of this compact.

### Article IX

This amended compact shall become operative when ratified by the legislatures of the signatory states and consented to by the Congress of the United States; provided, that, except as changed herein, the provisions, terms, conditions and obligations of the Costilla Creek Compact executed on September 30, 1944, continue in full force and effect.

IN WITNESS WHEREOF, the commissioners have signed this compact in triplicate original, one copy of which shall be deposited in the archives of the department of state of the United States of America, and one copy of which shall be forwarded to the governor of each of the signatory states.

Done in the city of Santa Fe, New Mexico, on the 7th day of February, in the year of our Lord, one thousand nine hundred and sixty-three.

(Signed) J. E. Whitten,  
Commissioner for Colorado.

(Signed) S. E. Reynolds,  
Commissioner for New Mexico.

**Source:** L. 45: p. 278, § 1. CSA: C. 90, § 51(1). CRS 53: § 148-7-1. L. 63: p. 982, § 1. C.R.S. 1963: § 149-7-1.

**37-68-102. When compact operative.** (1) Said compact shall not become operative unless and until the same has been ratified by the legislature of each of the signatory states and consented to by the congress of the United States, in the manner provided by, and in conformity with, said compact, and the governor of the state of Colorado shall give notice of the approval of said compact, by this act, to the governor of the state of New Mexico and to the president of the United States.

(2) The amendments to said compact shall not become operative unless and until the same shall have been ratified by the legislature of each of the signatory states and consented to by the congress of the United States, in the manner provided by, and in conformity with, said compact, and the governor of the state of Colorado shall give notice of the approval of said compact, by this article, to the governor of the state of New Mexico and to the president of the United States.

**Source:** L. 45: p. 292, § 2. CSA: C. 90, § 51(2). CRS 53: § 148-7-2. L. 63: p. 999, § 2. C.R.S. 1963: § 149-7-2.

### ARTICLE 69

#### Arkansas River Compact

37-69-101. Arkansas River compact.  
37-69-102. When compact effective.

37-69-103. Interstate agency created by compact.

37-69-104.	Appointment of members of compact administration.	37-69-106.	pact administration. Administrative code inapplicable.
37-69-105.	Payment of expenses of com-		

**37-69-101. Arkansas River compact.** The general assembly hereby ratifies the compact between the state of Colorado and the state of Kansas designated as the "Arkansas river compact" signed in the city of Denver, state of Colorado, on the 14th day of December, A. D. 1948, by Henry C. Vidal, Gail L. Ireland, and Harry B. Mendenhall, commissioners for the state of Colorado, and George S. Knapp, Edward F. Arn, William E. Leavitt, and Roland H. Tate, commissioners for the state of Kansas, and approved by Hans Kramer, representative of the United States of America. Said compact is as follows:

### Arkansas River Compact

The state of Colorado and the state of Kansas, parties signatory to this compact (hereinafter referred to as "Colorado" and "Kansas," respectively, or individually as a "state," or collectively as the "states") having resolved to conclude a compact with respect to the waters of the Arkansas river, and being moved by considerations of interstate comity, having appointed commissioners as follows:

Henry C. Vidal, Gail L. Ireland, and Harry B. Mendenhall, for Colorado; and George S. Knapp, Edward F. Arn, William E. Leavitt, and Roland H. Tate, for Kansas; and the consent of the congress of the United States to negotiate and enter into an interstate compact not later than January 1, 1950, having been granted by Public Law 34, 79th Congress, 1st Session, and pursuant thereto the President having designated Hans Kramer as the representative of the United States, the said commissioners for Colorado and Kansas, after negotiations participated in by the representative of the United States, have agreed as follows:

### Article I

The major purposes of this compact are to:

A. Settle existing disputes and remove causes of future controversy between the states of Colorado and Kansas, and between citizens of one and citizens of the other state, concerning the waters of the Arkansas river and their control, conservation and utilization for irrigation and other beneficial purposes.

B. Equitably divide and apportion between the states of Colorado and Kansas the waters of the Arkansas river and their utilization as well as the benefits arising from the construction, operation and maintenance by the United States of John Martin reservoir project for water conservation purposes.

### Article II

The provisions of this compact are based on (1) the physical and other conditions peculiar to the Arkansas river and its natural drainage basin, and the nature and location of irrigation and other developments and facilities in connection therewith; (2) the opinion of the United States supreme court entered December 6, 1943, in the case of Colorado v. Kansas (320 U. S. 383) concerning the relative rights of the respective states in and to the use of waters of the Arkansas river; and (3) the experience derived under various interim executive agreements between the two states apportioning the waters released from the John Martin reservoir as operated by the corps of engineers.



## Article III

As used in this compact:

A. The word "stateline" means the geographical boundary line between Colorado and Kansas.

B. The term "waters of the Arkansas river" means the waters originating in the natural drainage basin of the Arkansas river, including its tributaries, upstream from the stateline, and excluding waters brought into the Arkansas river basin from other river basins.

C. The term "stateline flow" means the flow of waters of the Arkansas river as determined by gauging stations located at or near the stateline. The flow as determined by such stations, whether located in Colorado or Kansas, shall be deemed to be the actual stateline flow.

D. "John Martin reservoir project" is the official name of the facility formerly known as Caddoa reservoir project, authorized by the Flood Control Act of 1936, as amended, for construction, operation and maintenance by the war department, corps of engineers, later designated as the corps of engineers, department of the army, and herein referred to as the "corps of engineers." "John Martin reservoir" is the water storage space created by "John Martin dam".

E. The "flood control storage" is that portion of the total storage space in John Martin reservoir allocated to flood control purposes.

F. The "conservation pool" is that portion of the total storage space in John Martin reservoir lying below the flood control storage.

G. The "ditches of Colorado water district 67" are those ditches and canals which divert water from the Arkansas river or its tributaries downstream from John Martin dam for irrigation use in Colorado.

H. The term "river flow" means the sum of the flows of the Arkansas and the Purgatoire rivers into John Martin reservoir as determined by gauging stations appropriately located above said reservoir.

I. The term "the administration" means the Arkansas river compact administration established under article VIII.

## Article IV

Both states recognize that:

A. This compact deals only with the waters of the Arkansas river as defined in article III.

B. This compact is not concerned with the rights, if any, of the state of New Mexico or its citizens in and to the use in New Mexico of waters of Trinchera creek or other tributaries of the Purgatoire river, a tributary of the Arkansas river.

C. (1) John Martin dam will be operated by the corps of engineers to store and release the waters of the Arkansas river in and from John Martin reservoir for its authorized purposes.

(2) The bottom of the flood control storage is presently fixed by the chief of engineers, U. S. Army, at elevation 3,851 feet above mean sea level. The flood control storage will be operated for flood control purposes and to those ends will impound or regulate the streamflow volumes that are in excess of the then available storage capacity of the conservation pool. Releases from the flood control storage may be made at times and rates determined by the corps of engineers to be necessary or advisable without regard to ditch diversion capacities or requirements in either or both states.

(3) The conservation pool will be operated for the benefit of water users in Colorado and Kansas, both upstream and downstream from John Martin dam, as provided in this compact. The maintenance of John Martin dam and appurtenance works may at times require the corps of engineers to release waters then impounded in the conservation pool or to prohibit the storage of water therein until such maintenance work is completed. Flood control operation may also involve temporary utilization of conservation storage.

D. This compact is not intended to impede or prevent future beneficial development of the Arkansas river basin in Colorado and Kansas by federal or state agencies, by private enterprise, or by combinations thereof, which may involve construction of dams, reservoirs and other works for the purposes of water utilization and control, as well as the improved or prolonged functioning of existing works: Provided, that the waters of the Arkansas river, as defined in article III, shall not be materially depleted in usable quantity or availability for use to the water users in Colorado and Kansas under this compact by such future development or construction.

## Article V

Colorado and Kansas hereby agree upon the following basis of apportionment of the waters of the Arkansas river:

A. Winter storage in John Martin reservoir shall commence on November 1st of each year and continue to and include the next succeeding March 31st. During said period all water entering said reservoir up to the limit of the then available conservation capacity shall be stored: Provided, that Colorado may demand releases of water equivalent to the river flow, but such releases shall not exceed 100 c.f.s. (cubic feet per second) and water so released shall be used without avoidable waste.

B. Summer storage in John Martin reservoir shall commence on April 1st of each year and continue to and include the next succeeding October 31st. During said period, except when Colorado water users are operating under decreed priorities as provided in paragraphs F and G of this article, all water entering said reservoir up to the limit of the then available conservation capacity shall be stored: Provided, that Colorado may demand releases of water equivalent to the river flow up to 500 c.f.s., and Kansas may demand releases of water equivalent to that portion of the river flow between 500 c.f.s. and 750 c.f.s., irrespective of releases demanded by Colorado.

C. Releases of water stored pursuant to the provisions of paragraphs A and B of this article shall be made upon demands by Colorado and Kansas concurrently or separately at any time during the summer storage period. Unless increases to meet extraordinary conditions are authorized by the administration, separate releases of stored water to Colorado shall not exceed 750 c.f.s., separate releases of stored water to Kansas shall not exceed 500 c.f.s., and concurrent releases of stored water shall not exceed a total of 1250 c.f.s.: Provided, that when water stored in the conservation pool is reduced to a quantity less than 20,000 acre-feet, separate releases of stored water to Colorado shall not exceed 600 c.f.s., and separate releases of stored water to Kansas shall not exceed 400 c.f.s., and concurrent releases of stored water shall not exceed 1,000 c.f.s.

D. Releases authorized by paragraphs A, B, and C of this article, except when all Colorado water users are operating under decree priorities as provided in paragraphs F and G of this article, shall not impose any call on Colorado water users that divert waters of the Arkansas river upstream from John Martin dam.

E. (1) Releases of stored water and releases of river flow may be made simultaneously upon the demands of either or both states.

(2) Water released upon concurrent or separate demands shall be applied promptly to beneficial use unless storage thereof downstream is authorized by the administration.

(3) Releases of river flow and of stored water to Colorado shall be measured by gauging stations located at or near John Martin dam and the releases to which Kansas is entitled shall be satisfied by an equivalent in state line flow.

(4) When water is released from John Martin reservoir appropriate allowances as determined by the administration shall be made for the intervals of time required for such water to arrive at the points of diversion in Colorado and at the state line.

(5) There shall be no allowance or accumulation of credits or debits for or against either state.

(6) Storage, releases from storage and releases of river flow authorized in this article shall be accomplished pursuant to procedures prescribed by the administration under the provisions of article VIII.



F. In the event the administration finds that within a period of fourteen days the water in the conservation pool will be or is liable to be exhausted, the administration shall forthwith notify the state engineer of Colorado, or his duly authorized representative, that commencing upon a day certain within said fourteen day period, unless a change of conditions justifies cancellation or modification of such notice, Colorado shall administer the decreed rights of water users in Colorado water district 67 as against each other and as against all rights now or hereafter decreed to water users diverting upstream from John Martin dam on the basis of relative priorities in the same manner in which their respective priority rights were administered by Colorado before John Martin reservoir began to operate and as though John Martin dam had not been constructed. Such priority administration by Colorado shall be continued until the administration finds that water is again available in the conservation pool for release as provided in this compact, and timely notice of such finding shall be given by the administration to the state engineer of Colorado or his duly authorized representative; provided, that except as controlled by the operation of the preceding provisions of this paragraph and other applicable provisions of this compact, when there is water in the conservation pool the water users upstream from John Martin reservoir shall not be affected by the decrees to the ditches in Colorado water district 67. Except when administration in Colorado is on a priority basis the water diversions in Colorado water district 67 shall be administered by Colorado in accordance with distribution agreements made from time to time between the water users in such district and filed with the administration and with the state engineer of Colorado or, in the absence of such agreement, upon the basis of the respective priority decrees, as against each other, in said district.

G. During periods when Colorado reverts to administration of decree priorities, Kansas shall not be entitled to any portion of the river flow entering John Martin reservoir. Waters of the Arkansas river originating in Colorado which may flow across the state line during such periods are hereby apportioned to Kansas.

H. If the usable quantity and availability for use of the waters of the Arkansas river to water users in Colorado water district 67 and Kansas will be thereby materially depleted or adversely affected, (1) priority rights now decreed to the ditches of Colorado water district 67 shall not hereafter be transferred to other water districts in Colorado or to points of diversion or places of use upstream from John Martin dam; and (2) the ditch diversion rights from the Arkansas river in Colorado water district 67 and of Kansas ditches between the state line and Garden City shall not hereafter be increased beyond the total present rights of said ditches, without the administration, in either case (1) or (2), making findings of fact that no such depletion or adverse effect will result from such proposed transfer or increase. Notice of legal proceedings for any such proposed transfer or increase shall be given to the administration in the manner and within the time provided by the laws of Colorado or Kansas in such cases.

## Article VI

A. (1) Nothing in this compact shall be construed as impairing the jurisdiction of Kansas over the waters of the Arkansas river that originate in Kansas and over the waters that flow from Colorado across the state line into Kansas.

(2) Except as otherwise provided, nothing in this compact shall be construed as supplanting the administration by Colorado of the rights of appropriators of waters of the Arkansas river in said state as decreed to said appropriators by the courts of Colorado, nor as interfering with the distribution among said appropriators by Colorado, nor as curtailing the diversion and use for irrigation and other beneficial purposes in Colorado of the waters of the Arkansas river.

B. Inasmuch as the Frontier canal diverts waters of the Arkansas river in Colorado west of the state line for irrigation uses in Kansas only, Colorado concedes to Kansas and Kansas hereby assumes exclusive administrative control over the operation of the Frontier canal and its headworks for such purposes, to the same extent as though said works were located entirely within the state of Kansas. Water carried across the state line in Frontier canal or any other similarly situated canal shall be considered to be part of the state line flow.

## Article VII

A. Each state shall be subject to the terms of this compact. Where the name of the state or the term "state" is used in this compact these shall be construed to include any person or entity of any nature whatsoever using, claiming or in any manner asserting any right to the use of the waters of the Arkansas river under the authority of that state.

B. This compact establishes no general principle or precedent with respect to any other interstate stream.

C. Wherever any state or federal official agency is referred to in this compact such reference shall apply to the comparable official or agency succeeding to their duties and functions.

## Article VIII

A. To administer the provisions of this compact there is hereby created an interstate agency to be known as the Arkansas river compact administration herein designated as "the administration".

B. The administration shall have power to:

(1) Adopt, amend and revoke by-laws, rules and regulations consistent with the provisions of this compact;

(2) Prescribe procedures for the administration of this compact: Provided, that where such procedures involve the operation of John Martin reservoir project they shall be subject to the approval of the district engineer in charge of said project;

(3) Perform all functions required to implement this compact and to do all things necessary, proper or convenient in the performance of its duties.

C. The membership of the administration shall consist of three representatives from each state who shall be appointed by the respective governors for a term not to exceed four years. One Colorado representative shall be a resident of and water right owner in water districts 14 or 17, one Colorado representative shall be a resident of and water right owner in water district 67, and one Colorado representative shall be the director of the Colorado water conservation board. Two Kansas representatives shall be residents of and water right owners in the counties of Finney, Kearny or Hamilton, and one Kansas representative shall be the chief state official charged with the administration of water rights in Kansas. The President of the United States is hereby requested to designate a representative of the United States, and if a representative is so designated he shall be an ex officio member and act as chairman of the administration without vote.

D. The state representatives shall be appointed by the respective governors within thirty days after the effective date of this compact. The administration shall meet and organize within sixty days after such effective date. A quorum for any meeting shall consist of four members of the administration: Provided, that at least two members are present from each state. Each state shall have but one vote in the administration and every decision, authorization or other action shall require unanimous vote. In case of a divided vote on any matter within the purview of the administration, the administration may, by subsequent unanimous vote, refer the matter for arbitration to the representative of the United States or other arbitrator or arbitrators, in which event the decision made by such arbitrator or arbitrators shall be binding upon the administration.

E. (1) The salaries, if any, and the personal expenses of each member shall be paid by the government which he represents. All other expenses incident to the administration of this compact which are not paid by the United States shall be borne by the states on the basis of 60 per cent by Colorado and 40 per cent by Kansas.

(2) In each even numbered year the administration shall adopt and transmit to the governor of each state its budget covering anticipated expenses for the forthcoming biennium and the amount thereof payable by each state. Each state shall appropriate and pay the amount due by it to the administration.

(3) The administration shall keep accurate accounts of all receipts and disbursements and shall include a statement thereof, together with a certificate of audit by a certified public



accountant, in its annual report. Each state shall have the right to make an examination and audit of the accounts of the administration at any time.

F. Each state shall provide such available facilities, equipment and other assistance as the administration may need to carry out its duties. To supplement such available assistance the administration may employ engineering, legal, clerical and other aid as in its judgment may be necessary for the performance of its functions. Such employees shall be paid by and be responsible to the administration, and shall not be considered to be employees of either state.

G. (1) The administration shall co-operate with the chief official of each state charged with the administration of water rights and with federal agencies in the systematic determination and correlation of the facts as to the flow and diversion of the waters of the Arkansas river and as to the operation and siltation of John Martin reservoir and other related structures. The administration shall co-operate in the procurement, interchange, compilation and publication of all factual data bearing upon the administration of this compact without, in general, duplicating measurements, observations or publications made by state or federal agencies. State officials shall furnish pertinent factual data to the administration upon its request. The administration shall, with the collaboration of the appropriate federal and state agencies, determine as may be necessary from time to time, the location of gauging stations required for the proper administration of this compact and shall designate the official records of such stations for its official use.

(2) The director, U. S. geological survey, the commissioner of reclamation and the chief of engineers, U. S. Army, are hereby requested to collaborate with the administration and with appropriate state officials in the systematic determination and correlation of data referred to in paragraph G (1) of this article and in the execution of other duties of such officials which may be necessary for the proper administration of this compact.

(3) If deemed necessary for the administration of this compact, the administration may require the installation and maintenance, at the expense of water users, of measuring devices of approved type in any ditch or group of ditches diverting water from the Arkansas river in Colorado or Kansas. The chief official of each state charged with the administration of water rights shall supervise the execution of the administration's requirements for such installations.

H. Violation of any of the provisions of this compact or other actions prejudicial thereto which come to the attention of the administration shall be promptly investigated by it. When deemed advisable as the result of such investigation, the administration may report its findings and recommendations to the state official who is charged with the administration of water rights for appropriate action, it being the intent of this compact that enforcement of its terms shall be accomplished in general through the state agencies and officials charged with the administration of water rights.

I. Findings of fact made by the administration shall not be conclusive in any court or before any agency or tribunal but shall constitute prima facie evidence of the facts found.

J. The administration shall report annually to the governors of the states and to the President of the United States as to matters within its purview.

## Article IX

A. This compact shall become effective when ratified by the legislature of each state and when consented to by the congress of the United States by legislation providing substantially, among other things, as follows:

Nothing contained in this act or in the compact herein consented to shall be construed as impairing or affecting the sovereignty of the United States or any of its rights or jurisdiction in and over the area or waters which are the subject of such compact: Provided, that the chief of engineers is hereby authorized to operate the conservation features of the John Martin reservoir project in a manner conforming to such compact with such exceptions as he and the administration created pursuant to the compact may jointly approve.

B. This compact shall remain in effect until modified or terminated by unanimous action of the states and in the event of modification or termination all rights then established or recognized by this compact shall continue unimpaired.

IN WITNESS WHEREOF, the commissioners have signed this compact in triplicate original, one of which shall be forwarded to the secretary of state of the United States of America and one of which shall be forwarded to the governor of each signatory state.

Done in the city and county of Denver, in the state of Colorado, on the fourteenth day of December, in the year of our Lord one thousand nine hundred and forty-eight.

Henry C. Vidal,

Gail L. Ireland,

Harry B. Mendenhall,

Commissioners for Colorado.

Attest:

Warden L. Noe, Secretary.

George S. Knapp,

Edward F. Arn,

William E. Leavitt,

Roland H. Tate,

Commissioners for Kansas.

Approved:

Hans Kramer,  
Representative of the  
United States.

**Source:** L. 49: p. 485, § 1. CSA: C. 90, § 39(1). CRS 53: § 148-9-1. C.R.S. 1963: § 149-9-1.

#### ANNOTATION

**Law reviews.** For article, "Revision of Water and Irrigation Statutes", see 31 Dicta 29 (1954). For article, "The Law of Equitable Apportionment Revisited, Updated and Restated", see 56 U. Colo. L. Rev. 381 (1985).

**Specific, detailed findings of violations required.** Water court erred in failing to enter specific, detailed findings of violations of the Arkansas Compact, if any, caused by diminished return flows and to enter additional modifications and conditions in the final decrees to prevent or compensate such violations of the com-

pact. S.E. Colo. Water Cons. v. Ft. Lyon Canal Co., 720 P.2d 133 (Colo. 1986).

**Where the terms of the Arkansas River Compact give the state of Kansas "exclusive administrative control" over the operation of a canal,** Kansas has the exclusive jurisdiction to determine the water rights of the canal company. Frontier Ditch v. S.E. Colo. Water Cons., 761 P.2d 1117 (Colo. 1988).

**Applied** in People ex rel. Danielson v. Amity Mut. Irrigation Co., 668 P.2d 1368 (Colo. 1983).

**37-69-102. When compact effective.** Said compact shall not become effective unless and until the same has been ratified by the legislature of each of the signatory states and consented to by the congress of the United States. The governor of the state of Colorado shall give notice of the ratification of the said compact to the governor of the state of Kansas and to the president of the United States.

**Source:** L. 49: p. 496, § 2. CSA: C. 90, § 39(2). CRS 53: § 148-9-2. C.R.S. 1963: § 149-9-2.

**37-69-103. Interstate agency created by compact.** It is hereby recognized, found, determined, and declared that the compact creates an interstate agency which is known as the Arkansas river compact administration and which is an independent entity whose members and employees are not officers and employees of either of the states signatory to the compact.

**Source:** L. 49: p. 496, § 3. CSA: C. 90, § 39(3). CRS 53: § 148-9-3. C.R.S. 1963: § 149-9-3.

**37-69-104. Appointment of members of compact administration.** After the said compact becomes effective the Colorado members of the Arkansas river compact admin-



istration shall be appointed by the governor, shall serve until revocation of their appointment by the governor, and, on behalf of the Arkansas river compact administration, the state of Colorado shall pay the necessary expenses and also compensation of said members in an amount which shall be fixed by the governor and when so fixed shall be changed only by action of the governor.

**Source:** L. 49: p. 496, § 4. CSA: C. 90, § 39(4). CRS 53: § 148-9-4. C.R.S. 1963: § 149-9-4.

**37-69-105. Payment of expenses of compact administration.** The Colorado share of the expenses of the Arkansas river compact administration and the expenses and compensation of the Colorado members of that administration shall be paid out of funds appropriated by the general assembly to the Colorado water conservation board and warrants shall be drawn against such appropriation upon vouchers signed by the governor and the director of the Colorado water conservation board.

**Source:** L. 49: p. 496, § 5. CSA: C. 90, § 39(5). CRS 53: § 148-9-5. C.R.S. 1963: § 149-9-5.

**37-69-106. Administrative code inapplicable.** The provisions of articles 2, 3, 31, 35, and 36 of title 24, C.R.S., shall be inapplicable to any acts or proceedings taken to carry out the purposes of said compact.

**Source:** L. 49: p. 496, § 6. CSA: C. 90, § 39(6). CRS 53: § 148-9-6. C.R.S. 1963: § 149-9-6.

ARTICLE 75

Interbasin Compacts

37-75-101.	Short title.	37-75-105.	Interbasin compact committee
37-75-102.	Water rights - protections.		- report.
37-75-103.	Director of compact negotiations.	37-75-106.	Public education - outreach.
		37-75-107.	Interbasin compact committee
37-75-104.	Basin roundtables.		operation fund - creation.

**37-75-101. Short title.** This article shall be known and may be cited as the “Colorado Water for the 21st Century Act”.

**Source:** L. 2005: Entire article added, p. 1472, § 1, effective June 7.

**37-75-102. Water rights - protections.** (1) It is the policy of the general assembly that the current system of allocating water within Colorado shall not be superseded, abrogated, or otherwise impaired by this article. Nothing in this article shall be interpreted to repeal or in any manner amend the existing water rights adjudication system. The general assembly affirms the state constitution’s recognition of water rights as a private usufructuary property right, and this article is not intended to restrict the ability of the holder of a water right to use or to dispose of that water right in any manner permitted under Colorado law.

(2) The general assembly affirms the protections for contractual and property rights recognized by the contract and takings protections under the state constitution and related statutes. This article shall not be implemented in any way that would diminish, impair, or cause injury to any property or contractual right created by intergovernmental agreements, contracts, stipulations among parties to water cases, terms and conditions in water decrees, or any other similar document related to the allocation or use of water. This article shall not be construed to supersede, abrogate, or cause injury to vested water rights or decreed

conditional water rights. The general assembly affirms that this article does not impair, limit, or otherwise affect the rights of persons or entities to enter into agreements, contracts, or memoranda of understanding with other persons or entities relating to the appropriation, movement, or use of water under other provisions of law.

**Source: L. 2005:** Entire article added, p. 1472, § 1, effective June 7.

**37-75-103. Director of compact negotiations.** (1) Within thirty days after June 7, 2005, the governor shall appoint a director of compact negotiations, which office is hereby created in the office of the governor. The director of compact negotiations shall act as the overseer and caretaker of the compact negotiations process established in this article.

(2) The director of compact negotiations shall have the following responsibilities:

(a) Provide support and assistance to applicable local stakeholders in the formation of permanent basin roundtables established pursuant to section 37-75-104;

(b) Oversee and direct the expenditure of moneys appropriated pursuant to this article; and

(c) Serve as the chairperson of the interbasin compact committee and oversee implementation of the interbasin compact committee's responsibilities consistent with section 37-75-105, including the timely completion and referral of the interbasin compact charter.

**Source: L. 2005:** Entire article added, p. 1473, § 1, effective June 7. **L. 2006:** (1) amended, p. 1283, § 4, effective May 26.

**37-75-104. Basin roundtables.** (1) (a) To facilitate continued discussions within and between basins on water management issues, and to encourage locally driven collaborative solutions to water supply challenges, permanent basin roundtables are hereby created in Colorado's eight water basins and in a demographically unique subregion within water division 1 as specified in subsection (3) of this section.

(b) The executive director of the department of natural resources shall take such actions as may be necessary to ensure proper integration and nonduplication of activities occurring pursuant to the statewide water supply initiative and this article.

(2) Each basin roundtable shall have the following powers and responsibilities:

(a) (I) As soon as practicable following June 7, 2005, each basin roundtable shall establish bylaws, operating procedures, goals, and objectives to govern the actions and decisions of the applicable roundtable. Basin roundtables and their representatives on the interbasin compact committee may opt out of the procedures established in this article at any time.

(II) As deemed appropriate by the executive director, the roundtables established pursuant to this section may take on the duties and functions of the roundtables created pursuant to the statewide water supply initiative.

(b) Select two basin representatives to represent the views and interests of the basin on the interbasin compact committee established pursuant to section 37-75-105. Basin representatives need not be members of the basin roundtable.

(c) Using data and information from the statewide water supply initiative and other appropriate sources and in cooperation with the on-going statewide water supply initiative, develop a basin-wide consumptive and nonconsumptive water supply needs assessment, conduct an analysis of available unappropriated waters within the basin, and propose projects or methods, both structural and nonstructural, for meeting those needs and utilizing those unappropriated waters where appropriate. Basin roundtables shall actively seek the input and advice of affected local governments, water providers, and other interested stakeholders and persons in establishing its needs assessment, and shall propose projects or methods for meeting those needs. Recommendations from this assessment shall be forwarded to the interbasin compact committee and other basin roundtables for analysis and consideration after the general assembly has approved the interbasin compact charter.

(d) Serve as a forum for education and debate regarding methods for meeting water supply needs; and



(e) As needed, establish roundtable subcommittees or other mechanisms to facilitate dialogue and resolution of issues and conflicts within the basin.

(3) (a) As used in this subsection (3), unless the context otherwise requires:

(I) "Water division" has the same meaning as set forth in section 37-92-201.

(II) "Water management district" means those districts established by the division of water resources and depicted on maps published by the division.

(b) The following basin roundtables are hereby created:

(I) The South Platte basin roundtable, consisting of water division 1 excepting those portions of water division 1 listed in subparagraphs (VIII) and (IX) of this paragraph (b);

(II) The Arkansas basin roundtable, consisting of water division 2;

(III) The Rio Grande basin roundtable, consisting of water division 3;

(IV) The Gunnison basin roundtable, consisting of water division 4 excepting water management districts 60, 61, and 63;

(V) The Colorado basin roundtable, consisting of water division 5;

(VI) The Yampa-White roundtable, consisting of water division 6 excepting water management district 47;

(VII) The Dolores, San Miguel, and San Juan basins roundtable, consisting of water division 7 and water management districts 60, 61, and 63;

(VIII) The metro roundtable, consisting of the following areas in water division 1: Those portions of water management districts 7 to 9 that lie east of the boundary between ranges 71 and 72 west and that portion of water management district 2 that lies south of the boundary between township 1 north and township 1 south; and

(IX) The North Platte roundtable, consisting of water management districts 47, 48, and 76.

(4) (a) Each basin roundtable shall consist of the following members, each of whom shall reside within the borders of the roundtable, except as otherwise provided in this paragraph (a):

(I) One member appointed by the governing body of each county or city and county within the borders of the basin roundtable. A county or city and county shall be entitled to a member on each basin roundtable that overlaps its boundaries.

(II) One municipal member for each county located in whole or in part within the basin roundtable, who shall be appointed jointly by the governing bodies of all municipalities within that portion of the county that is located within the roundtable;

(III) One member appointed by the board of directors of each water conservancy and water conservation district within the borders of the roundtable. A water conservancy or water conservation district shall be entitled to one member on each basin roundtable that overlaps its jurisdiction.

(IV) One member appointed by mutual agreement of the chairperson of the house agriculture, livestock, and natural resources committee and the chairperson of the senate agriculture, natural resources, and energy committee;

(V) Ten at large members appointed by the roundtable members appointed pursuant to subparagraphs (I) to (IV) of this paragraph (a) in consultation with the director of compact negotiations, one of whom shall represent environmental interests and who shall be selected from nominees submitted by one or more regionally, state-wide, or nationally recognized environmental conservation organizations that have operated in Colorado for at least five years, one of whom shall represent agricultural interests, one of whom shall represent recreation interests, one of whom shall represent local domestic water provider interests, one of whom shall represent industrial interests, and at least five of whom shall own adjudicated water rights, including owners of shares in a ditch or reservoir company or their agents, or shall have a contract for water with the federal bureau of reclamation or their agents. Any such agent shall be appointed by the member the agent represents and shall reside within the borders of the member's roundtable.

(VI) (A) Three nonvoting members shall be selected by the roundtable members appointed pursuant to subparagraphs (I) to (V) of this paragraph (a), who shall represent entities outside of the basin that own water rights within the basin. Members appointed pursuant to this subparagraph (VI) shall not be required to reside within the borders of the roundtable.

(B) If no one qualifies for selection pursuant to sub-subparagraph (A) of this subparagraph (VI), three nonvoting members shall be selected from outside the basin who have interests in and are knowledgeable about water matters.

(b) Members shall serve for a term of five years; except that initial terms shall be staggered pursuant to each roundtable's bylaws. Vacancies shall be filled pursuant to the same criteria as the original appointment.

(c) The member of the Colorado water conservation board who resides within the borders of the basin roundtable shall act as the board's liaison to the basin roundtable and to the interbasin compact committee for the purpose of ensuring the proper coordination of Colorado water conservation board information, policies, and resources. Such coordination shall be subject to available staff resources as determined by the director of the board and the executive director of the department of natural resources.

(5) A basin roundtable shall be deemed to be a local public body for purposes of the open meetings law, part 4 of article 6 of title 24, C.R.S.

**Source:** L. 2005: Entire article added, p. 1473, § 1, effective June 7. L. 2006: (3)(b)(IV) and (3)(b)(VII) amended, p. 1283, § 3, effective May 26.

**37-75-105. Interbasin compact committee - report.** (1) (a) To facilitate the process of interbasin compact negotiations, a twenty-seven-member interbasin compact committee is hereby created. The interbasin compact committee shall include two representatives from each basin roundtable, at least one of whom shall reside within the borders of the roundtable and at least one of whom shall own adjudicated water rights, including owners of shares in a ditch or reservoir company or their agents, six at-large members appointed by the governor, one member appointed by the chairperson of the house agriculture, livestock, and natural resources committee, one member appointed by the chairperson of the senate agriculture, natural resources, and energy committee, and the director of compact negotiations. The governor's appointments shall come from geographically diverse parts of the state and shall include individuals with expertise in environmental, recreational, local governmental, industrial, and agricultural matters. No more than three of the governor's appointees shall be affiliated with the same political party. Any such agent shall be appointed by the member the agent represents and shall reside within the borders of the member's roundtable.

(b) As soon as practicable following June 7, 2005, the committee shall establish bylaws to govern its actions, including a procedure whereby basin roundtables that opt out of the procedures established in this article are no longer represented on the committee but may opt back in.

(2) (a) Not later than July 1, 2006, the interbasin compact committee shall establish and refer to the general assembly an interbasin compact charter that shall govern and guide all negotiations between basin roundtables under this article. Upon receipt, consideration, and approval of the charter by the general assembly acting by bill, negotiations between basin roundtables may commence. Any compact or other agreement established using the procedures established in this article shall fully comply with the terms, requirements, and procedures established in the interbasin compact charter as approved pursuant to this subsection (2).

(b) The general assembly hereby approves the interbasin compact charter as submitted to the general assembly on April 6, 2006, by the interbasin compact committee. The revisor of statutes shall publish the full text of the charter in the Colorado Revised Statutes as nonstatutory matter in accordance with section 2-5-102 (9), C.R.S.

(3) At a minimum, the interbasin compact charter shall include the following:

(a) A negotiating framework and foundational principles to guide voluntary negotiations between basin roundtables, including present and future consumptive and nonconsumptive water uses and such policies as may be necessary to ensure that compacts or other agreements between roundtables do not conflict or otherwise not conform with one another;

(b) Subject to the principles established in section 37-75-102, procedures for ratifying compacts or other agreements between basin roundtables, including the requirement that every basin roundtable whose waters are affected by a proposed compact or other agreement



shall provide its affirmative support for such proposed compact or other agreement before such compact or agreement is final or binding;

(c) As deemed appropriate by the interbasin compact committee but subject to the principles established in section 37-75-102, authorities and procedures for making compacts or other agreements between roundtables legally binding and enforceable; and

(d) As deemed appropriate by the interbasin compact committee, procedures for integrating the processes established in this article with existing planning, permitting, and public participation processes related to the conservation and development of water within Colorado; except that no provision of the charter shall supercede, impair, or otherwise modify the authority, jurisdiction, or permitting powers of counties or other local government entities.

(4) Commencing in 2006, the committee shall submit an annual report to the house of representatives committee on agriculture, livestock, and natural resources and the senate committee on agriculture, natural resources, and energy, or their successor committees, by October 31 concerning the status of compact negotiations and, in consultation with the Colorado water conservation board created in section 37-60-102, how moneys from the water supply reserve fund created in section 39-29-109 (2) (c), C.R.S., were allocated during the previous twelve months for water activities approved by basin roundtables.

(5) The committee shall be deemed to be a state public body for purposes of the open meetings law, part 4 of article 6 of title 24, C.R.S.

**Source:** **L. 2005:** Entire article added, p. 1476, § 1, effective June 7. **L. 2006:** (2) amended, p. 1282, § 1, effective May 26. **L. 2007:** (2)(a) amended, p. 2048, § 94, effective June 1. **L. 2009:** (4) amended, (SB 09-106), ch. 386, p. 2091, § 4, effective July 1. **L. 2012, 1st Ex. Sess.:** (4) amended, (SB 12S-002), ch. 1, p. 2420, § 17, effective May 19.

**Editor's note:** Subsection (2) provides that the revisor of statutes shall publish the full text of the "Colorado Water for the 21st Century Interbasin Compact Committee Charter" in the Colorado Revised Statutes as nonstatutory matter in accordance with section 2-5-102 (9), Colorado Revised Statutes. The charter is as follows:

### **The Colorado Water for the 21st Century Interbasin Compact Committee Charter**

#### **I. Preamble**

The Colorado Water for the 21st Century Act creates a voluntary, collaborative process to help the state address its water challenges. The process is based upon the premise that Coloradans can work together to address the water needs within the state. The Act sets up a framework that provides a permanent forum for broad-based water discussions. It creates nine Basin Roundtables and the Interbasin Compact Committee (IBCC), a statewide committee that will guide discussions and voluntary negotiations between basins.

The IBCC is mandated to: 1) Establish bylaws to govern its actions, 2) Establish and refer to the general assembly an interbasin compact charter that shall govern and guide all negotiations between Basin Roundtables, 3) Submit an annual report to the legislature concerning the status of compact negotiations, and 4) Develop a public education, participation, and outreach working group.

HB 05-1177 states that the IBCC Charter should contain a negotiating framework and foundational principles to guide voluntary negotiations between Basin Roundtables, including present and future consumptive and nonconsumptive water uses and such policies as may be necessary to ensure that compacts or other agreements between Roundtables do not conflict or otherwise not conform with one another.

#### **II. Foundational Legal Principles**

The following foundational legal principles are drawn from the text of the legislation.

1. The current system of allocating water within Colorado shall not be superseded, abrogated, or otherwise impaired by this article.

2. Nothing in HB 05-1177 shall be interpreted to repeal or in any manner amend the existing water rights adjudication system.

3. HB 05-1177 affirms the state constitution's recognition of water rights as a private usufructuary property right, and is not intended to restrict the ability of the holder of a water right to use or to dispose of that water right in any manner permitted under Colorado law.

4. HB 05-1177 affirms the protections for contractual and property rights recognized by the contract and takings protections under the state constitution and related statutes.

5. HB 05-1177 shall not be implemented in any way that would diminish, impair, or cause injury to any property or contractual right created by intergovernmental agreements, contracts, stipulations among parties to water cases, terms and conditions in water decrees, or any other similar document related to the allocation or use of water.

6. HB 05-1177 shall not be construed to supersede, abrogate, or cause injury to vested water rights or decreed conditional water rights.

7. HB 05-1177 does not impair, limit, or otherwise affect the rights of persons or entities to enter into agreements, contracts, or memoranda of understanding with other persons or entities relating to the appropriation, movement, or use of water under other provisions of law.

### **III. Foundational Guiding Principles**

The IBCC is informed and guided by the following foundational principles, which will provide a framework for future discussions.

1. All Colorado water users must share in solving Colorado's water resource problems.

2. The State of Colorado should provide assistance, when requested, for local water supply planning and assist in the implementation of consensus-based water resource solutions that respect local authorities, private property and water rights.

3. During the process of planning to meet future needs, water suppliers and utilities should give preference to development of economically viable local water sources and demand management as they consider other options, including development of new water transfers.

4. Additional water storage should be pursued through the improvement and rehabilitation of existing structures and the development of new structures. These activities should be accomplished with local consensus.

5. The right of water rights owners to market their water rights must be protected.

a. Colorado must fully explore flexible, market-based approaches to water supply management, including interruptible water contracts, water banking, in-state water leasing and groundwater recharge management.

b. Those seeking to transfer agricultural water to another use should consider leasing or other temporary arrangements for transfer of water, rather than relying exclusively on the purchase of water rights. Leasing or other such temporary arrangements could allow for reversion of the water to agricultural purposes under certain conditions.

c. In the event that agricultural water is transferred, the transaction must adequately address the need for maintaining the existing tax base, protecting the remaining water rights in the area, and maintaining the proper stewardship of the land including revegetation and weed control.

6. Appropriate recognition should be given to preservation of flows necessary to support recreational, hydroelectric and environmental needs concurrent with development of water for beneficial consumptive uses.

7. Adverse economic, environmental, and social impacts of future water projects and water transfers should be minimized; unavoidable adverse impacts must be reasonably mitigated; all communities involved should commit themselves to identifying and implementing reasonable mitigation measures as an integral part of future water projects or transfers.

8. Future water supply solutions must benefit both the area of origin and the area of use.

9. Water conservation measures that do not injure other water rights should be aggressively pursued.

10. There must be an ongoing, concerted effort to educate all Coloradans on the importance of water, and the need to conserve, manage, and plan for the needs of this and future generations.



#### **IV. Roles of the Committee**

The IBCC will:

1. Provide a forum to develop and disseminate information, create a positive environment for a statewide perspective, and develop a vision for statewide water negotiations;
2. Serve as a forum for discussing and addressing the socio-economic, recreation and environmental impacts of water development and management, as well as potential impacts on the ability of the state to use its entitlements and meet its Interstate Compact requirements.
3. Assist in finding resources to enable Roundtables to develop basin-wide visions;
4. Encourage development of a common technical platform upon which negotiations can be based;
5. Guide the process of negotiating interbasin compacts and other agreements by providing a framework that creates incentives for successful deliberations, agreements, and their implementation; and
6. Perform all other roles and functions of the IBCC identified in legislation.

#### **V. Use of the Negotiation Charter**

1. Discussions or negotiations conducted under the framework of the IBCC offer an opportunity for parties with water rights, project proponents, others concerned about water issues and Basin Roundtables to collaboratively search for solutions that hold mutual benefit, avoid litigation, and are sustainable and stable.
2. While all negotiations are voluntary and may be conducted directly between the parties with water rights, project proponents, others concerned about water issues and Basin Roundtables involved, parties are encouraged but not compelled to use the IBCC framework as a forum for discussions and as a way to keep all parties informed.
3. Should the Basin Roundtables feel it necessary or beneficial to bring discussion of a particular topic, issue, or proposal of interest to one or more basins before the entire IBCC, the committee members representing the basin(s) may raise the issue during a meeting of the IBCC. The IBCC will then decide on a procedure that will be utilized by the IBCC for discussing the issue or proposal.
4. Every Basin Roundtable whose waters are affected by a proposed compact or other agreement negotiated under the framework of the IBCC and Basin Roundtables, must provide its affirmative support for such proposed compact or other agreement before such compact or other agreement can be approved or ratified by the IBCC.

#### **VI. Negotiating Framework**

1. The IBCC, in helping Roundtables reach agreements, will encourage the use of a collaborative decision making process. Collaborative decision making processes may include but are not limited to:
  - a. Unassisted cooperative problem solving and/or negotiation.
  - b. Assisted cooperative problem solving and/or negotiation by facilitation and/or mediation.
  - c. Adaptive management.
  - d. Any other procedures on which Roundtables can mutually agree.
2. Informed constituencies will enhance the prospects for acceptance of compacts or other agreements negotiated by the Roundtables or decisions made by the IBCC.
  - a. Members of the IBCC who represent constituencies or agencies will inform their constituents and solicit their opinions about the issues under discussion. They will represent the interests of their constituent group and bring their constituents' concerns and ideas to the deliberations.
  - b. Members of the IBCC may elect to hold regular meetings with their constituent group (a formal caucus), to provide copies of work session minutes to their constituents and request comments, and to communicate informally with their constituents.
  - c. Prior to any decision being made by the IBCC, representatives will have adequate time to consult with their constituents or other relevant officials to explain deliberations and gain their input and/or approval.
  - d. IBCC meetings will be open to the public. In order for the IBCC to achieve its mission, discussion and deliberation at work sessions must be focused and manageable. Participation by non-members of the IBCC will be at the discretion of the Director of Compact Negotiations. IBCC will include a period for public comment at each of its meetings.

## **VII. Agreements Between Roundtables**

1. Basin Roundtables choosing to enter into agreements with other Basin Roundtables are responsible for the form and structure of those agreements. Where appropriate and in a mutually agreed upon manner, agreements will have authorities and procedures addressing the extent to which the agreements are legally binding and enforceable.

## **VIII. Integration with other Processes**

1. The IBCC will coordinate as appropriate with existing planning, permitting, and public participation processes related to the conservation and development of water within Colorado. No provision of this Charter is intended to supersede, impair, or otherwise modify the authority, jurisdiction, planning or permitting powers of counties or other local government entities.

## **IX. Ratification of Negotiated Agreements**

1. Every Basin Roundtable whose waters are affected by a proposed compact or other agreement negotiated under the framework of the IBCC and Basin Roundtables must provide its affirmative support for such proposed compact or other agreement before such compact or other agreement can be approved or ratified by the IBCC.

2. The IBCC will review from a statewide perspective all compacts or other agreements reached by Basin Roundtables or other concerned parties, which are referred to it for assessment and ratification. If questions or concerns arise during the IBCC's review and approval process, the Committee will communicate its questions or concerns to involved Roundtables or parties through appropriate Basin representatives to the IBCC. The IBCC may choose to defer further discussion of a compact or other agreement until its questions or concerns have been adequately addressed.

3. When reviewing or ratifying compacts or other agreements reached by Basin Roundtables or other concerned parties, the IBCC will first use a decision making process that seeks to identify and positively affirm a broad general level of support for or approval of the issue or proposal in question by all Committee members. An agreement will be considered to have been reached when either the facilitator or a group member has articulated the proposed agreement, and all IBCC members either verbally affirm their support for it, or at a minimum agree not to actively oppose or subvert it. The above process does not require all Committee members to support a proposal or ultimate agreement to the same degree for an agreement to have been reached. Some members may strongly endorse an agreement, while others may believe it to be not ideal, but ultimately workable and acceptable.

4. When a decision is being made using the above process, any IBCC member may request a non-binding poll of Committee members to determine their views. Members may voice affirmative support for a proposal or agreement, remain silent and allow the agreement to be approved without objection, or state that a broad general level of agreement has not been reached, and request the committee to continue deliberations.

5. If the IBCC cannot reach a mutually acceptable agreement on a proposed compact or other agreement that has been brought to it for review and ratification, its members will use the following procedure. After a complete discussion of the issue(s) in question has occurred at three or more IBCC meetings, and all members have had an opportunity to consult their Basin Roundtables and been given a fair opportunity to present their views and be heard, the Committee may change its decision making process from one seeking broad support for or agreement on an issue or proposal in question, to a majority/minority vote. The shift from one decision making procedure to another will require a 75% or greater majority of the members attending the meeting in favor of the shift. In addition, all IBCC members must have been given the opportunity to be present at the meeting at which the vote to shift decision making procedures is taken, and properly notified of the proposed action.

6. If a 75% majority of IBCC members attending the meeting do not approve changing the decision making process, the issue(s) under consideration along with IBCC members questions or concerns will be returned to concerned Roundtables or parties for further clarification and/or to be addressed by the Roundtables or parties.

7. If a 75% majority of IBCC members attending the meeting vote to shift the IBCC's decision making process to voting, a decision by vote may be made at the next regularly scheduled IBCC meeting. A compact or other agreement will be considered to have been approved or ratified by the IBCC if a 75% majority of IBCC members attending the meeting vote to approve it. All IBCC members must have been given the



opportunity to be present at the meeting at which the vote is taken, and properly notified of the proposed action. Following the vote, majority and minority reports will be prepared. Reports will indicate the number of IBCC members that support each view. Reports will be forwarded to concerned parties and made available to the general public.

#### **X. Provisions for Modification of the Charter**

1. Proposals for revision of the Charter can be raised by any IBCC member at any time.

2. Final revisions to the IBCC Charter can only be made after discussions of revisions have occurred at two consecutive regularly scheduled meetings. This procedure will allow time for members to deliberate and consult other parties as appropriate. If an agreement cannot be reached in two meetings, a third may be allowed.

3. When revising the IBCC's Charter, the Committee will first use a decision making process similar to the one described above for review and approval of compacts or agreements between Basin Roundtables or other concerned parties. The process will seek to identify and positively affirm a broad general level of support for or approval of a proposed change to the Charter by all Committee members. An agreement will be considered to have been reached when either the facilitator or a group member has articulated the proposed change in the Charter, and all IBCC members either verbally affirm their support for it, or at a minimum agree not to actively oppose or subvert it.

4. When a decision is being made using the above process, any IBCC member may request a non-binding poll of Committee members to determine their views on the proposed change to the Charter.

5. If the IBCC cannot reach a mutually acceptable agreement on a proposed change to the Charter, Committee members will use the following procedure. After a complete discussion of issue(s) in question has occurred at two or more IBCC meetings, and all members have had an opportunity to consult their Basin Roundtables and been given a fair opportunity to present their views and be heard, the Committee may change its decision making process from one seeking broad support for or agreement on a proposal, to a majority/minority vote. The shift from one decision making procedure to another will require a 75% or greater majority of IBCC members present at the meeting in favor of the shift. All IBCC members must have been given the opportunity to be present at the meeting at which the vote to shift decision making procedures is taken, and properly notified of the proposed change.

6. If a 75% majority of IBCC members present at the meeting do not approve a shift in the decision making procedure, the charter modification under consideration may be dropped. Alternatively, the IBCC may continue to discuss the proposed change with the goal of developing either a broad level of support for it or another mutually acceptable option, or the issue may be deferred until such time as a 75% majority of Committee members agree to change the decision making process.

7. If a 75% majority vote to shift the IBCC's decision has been attained, the proposal for a change may be voted on at the Committee's next regularly scheduled meeting. Approval of proposed changes will require a 75% majority of IBCC members. All IBCC members must have been given the opportunity to be present at the meeting at which the vote to change the Charter is taken, and properly notified of the proposed change.

#### **ANNOTATION**

##### **Proposed initiative contains at least two subjects in violation of article V, § 1(5.5) by:**

(1) Creating and administering a beverage container tax, and (2) prohibiting the general assembly from exercising its legislative authority over the basin roundtables and interbasin compact committee until the year 2015, while embedding these entities within the water sections of the constitution and vesting them with significant new authority. Submission Clause for 2009-2010 No. 91, 235 P.3d 1071 (Colo. 2010).

There is no necessary and proper connection between the establishment and administration of a beverage container tax and a prolonged prohibition on the exercise of the general assembly's authority over the basin roundtables and the interbasin compact committee. Submission Clause for 2009-2010 No. 91, 235 P.3d 1071 (Colo. 2010).

**37-75-106. Public education - outreach.** (1) The interbasin compact committee shall develop a public education, participation, and outreach working group.

(2) The public education, participation, and outreach working group shall:

(a) Create a process to inform, involve, and educate the public on the interbasin compact committee's activities and progress of the interbasin compact negotiations; and

(b) Create a mechanism by which public input and feedback can be relayed to the interbasin compact committee and compact negotiators.

**Source: L. 2005:** Entire article added, p. 1478, § 1, effective June 7.

**37-75-107. Interbasin compact committee operation fund - creation.** There is hereby created in the state treasury the interbasin compact committee operation fund, which shall be administered by the Colorado water conservation board and shall consist of all moneys transferred by the treasurer as specified in section 39-29-109.3 (2) (i), C.R.S. All moneys in the fund are continuously appropriated to the Colorado water conservation board for the purposes stated in this article. All moneys in the fund at the end of each fiscal year shall be retained in the fund and shall not revert to the general fund or any other fund.

**Source: L. 2008:** Entire section added, p. 1868, § 3, effective June 2.

## WATER RIGHTS AND IRRIGATION

### General and Administrative

#### ARTICLE 80

#### State Engineer

**Cross references:** For the appointments and functions of water division engineers, see § 37-92-202.

37-80-101.	State engineer.	37-80-111.7.	Water resources cash fund - created - uses.
37-80-102.	General duties of state engineer - supervision and utilization of employees - satellite monitoring system.	37-80-112.	Report of state engineer.
37-80-103.	Additional duties of engineer.	37-80-113.	State engineer - qualifications - salary - conflict of interest.
37-80-104.	Compact requirements - state engineer's duties.	37-80-114.	Deputy state engineer - powers.
37-80-105.	Supervision over division engineers.	37-80-115.	Performance of personnel - duties.
37-80-106.	Appointment of deputies.	37-80-116.	Legal services authorized.
37-80-107.	Employment of engineers or geologists.	37-80-117.	Regulation of water for measurements.
37-80-108.	Appoint deputy for special work.	37-80-118.	False reports of gauge heights.
37-80-109.	State engineer's authority to contract for services.	37-80-119.	Interference with recording instruments.
37-80-110.	Fees collected by state engineer.	37-80-120.	Upstream storage - substitute supply - historic natural depletion.
37-80-111.	Fees deposited with department of the treasury.	37-80-121.	Water administration fee - cash fund - rules - report - definitions - repeal. (Repealed)
37-80-111.5.	Fees - satellite monitoring system cash fund - well inspection cash fund - created.		



**37-80-101. State engineer.** The governor shall appoint a state engineer, pursuant to section 13 of article XII of the state constitution. The state engineer shall have his office at the state capital, in suitable rooms to be provided for him with suitable furniture, postage, and such proper and necessary stationery, books, and instruments as are required to best enable him to discharge the duties of his office. The state engineer, before entering on the discharge of his duties, shall take and subscribe to an oath, before the judge of a state court of record, to faithfully perform the duties of his office and file said oath with the secretary of state, together with his official bond, in the penal sum of ten thousand dollars, said bond to be executed by a responsible surety company authorized to do business within the state, and conditioned upon the faithful discharge of the duties of his office and for delivering to his successor or other officer authorized by the governor to receive the same all moneys, books, instruments, and other property belonging to the state then in his possession or under his control, or with which he may be legally chargeable as such state engineer.

**Source:** L. 1889: p. 371, § 1. R.S. 08: § 3321. C.L. § 1803. CSA: C. 90, § 201. CRS 53: § 147-11-1. C.R.S. 1963: § 148-11-1.

**Cross references:** For the state personnel system, see § 13 of art. XII, Colo. Const., and article 50 of title 24.

#### ANNOTATION

**Law reviews.** For article, "Recent Developments in Colorado Groundwater Law", see 58 Den. L.J. 801 (1981).

**This section and the following sections provide for the appointment of a state engineer and define his duties.** Whitten v. Coit, 153 Colo. 157, 385 P.2d 131 (1963).

**The governor could appoint a state hydraulic engineer under general statutes of 1883, section 1807, by his own act, and without the advice and consent of the senate, the power**

**to appoint being expressly conferred and such advice and consent not being required. In re Question Propounded by Governor, 12 Colo. 399, 21 P. 488 (1888).**

**This section and the following sections were not designed or intended to apply to wells drawing water from a closed artesian basin from a supply which is not tributary to any stream.** Whitten v. Coit, 153 Colo. 157, 385 P.2d 131 (1963).

**37-80-102. General duties of state engineer - supervision and utilization of employees - satellite monitoring system.** (1) The state engineer is the executive officer in charge of supervising the work of all division engineers and may direct their supervision of their employees. The state engineer has executive responsibility and authority with respect to:

(a) Discharge of the obligations of the state of Colorado imposed by compact or judicial order on the office of the state engineer;

(b) Securing and implementing legal opinions and assistance regarding the work within his jurisdiction;

(c) Coordinating the work of the division of water resources with other departments of the state government, including executive departments, the general assembly, educational institutions, and also related local government authorities and municipal and quasi-municipal corporations, subject to the provisions of subsection (6) of this section;

(d) The supervision of employees in the office of the division of water resources, together with defining their duties so that all obligations of the division of water resources will be efficiently discharged;

(e) Construction contracts, professional and technical consultants, and other contracts related to the operation of the division of water resources;

(f) The keeping and preparation of records and investigations as related to carrying out the functions of the division of water resources, including water well licensing;

(g) Rule-making for the division of water resources;

(h) General supervisory control over measurement, record-keeping, and distribution of the public waters of the state;

(i) Collection and distribution of data on snowfall and prediction of probable runoff therefrom;

(j) The making and implementing of contracts with public and private agencies and with individuals and corporations necessary or incidental to the operation of the division of water resources and performance of the duties of his office;

(k) Such other acts as may be reasonably necessary to enable him to secure the effective and efficient operation of the division of water resources, including power and authority to make and enforce such rules or regulations as he may find necessary or desirable to effectuate the performance of his duties. The making of such rules or regulations shall not be a prerequisite to control of personnel of the division of water resources or the performance of his duties under the constitution or laws of Colorado or any compact, treaty, or judicial decree or decision which does not, by its specific terms, require implementation by such rule or regulation.

(l) Receiving and expending grants and distributions of money, property, and equipment from the Colorado water conservation board for use in making investigations, contracting projects, or otherwise carrying out the purposes of this article. The grants and distributions from the Colorado water conservation board are continuously appropriated to the state engineer for the purposes set forth in this section.

(2) The state engineer has authority to delegate to any other person the obligation to discharge one or more portions of the duties imposed upon him, but no such delegation shall relieve the state engineer of ultimate responsibility for proper and efficient conduct of his office or the duties devolving upon him. The state engineer may reassign or delegate duties and responsibilities as he may find necessary or desirable.

(3) In addition to statutory duties devolving upon division engineers and others who are within the general supervision of the state engineer, their duties may be enlarged by the state engineer who shall collaborate with those having statutory duties so as to provide sufficient ancillary assistance to them so as to enable them to efficiently discharge their duties and obligations as state officers or employees. Insofar as reasonably possible, duties and lines of authority shall be established in written form and related to particular offices or employment.

(4) Employees within each general classification shall be deployed by the state engineer to work in such locations and according to patterns of accomplishment to be established from time to time by the state engineer. The state engineer shall avoid unnecessary or unreasonable changes in location of the place of performance of duties of those under his authority, but, within limits of the exercise of reasonable judgment, he has full, final, and complete authority to require persons within the division of water resources, temporarily or on a basis of relative permanence, to perform their duties in those areas which the state engineer finds necessary or desirable for the most efficient or effective operation and discharge of the functions under his authority.

(5) To such extent as is reasonably necessary to keep employees of the division of water resources abreast of developments and knowledge in the field of their duties, the state engineer has authority to make necessary arrangements for educational opportunities and experiences for the various employees in the division of water resources including himself, in order that all personnel of the division of water resources may be qualified to effectively meet their responsibilities.

(6) (a) The state engineer and those under his supervision shall be subject to the direction of the executive director of the department of natural resources with respect to those matters concerning the division of water resources which require coordination with other branches of the department of natural resources.

(b) Repealed.

(7) Under the control and direction of the state engineer, and in cooperation with the Colorado water conservation board, there shall be a water supply section, which has the duty to collect and study data and distribute such information on the water supplies, both surface and groundwater, of the state of Colorado in order to make a more efficient administration of the uses thereof. The state engineer shall employ such hydrologists and hydraulic engineers as are necessary to determine sources of water supply, forecast runoff,



define characteristics and amounts of return flows, and determine diversion requirements, transmission losses, evaporation losses, historic usage, and general stream regimen.

(8) The state engineer shall use in all his calculations; measurements, records, and reports the cubic foot per second as the unit of measurement of flowing water and the cubic foot or acre-foot as the unit of measurement of volume.

(9) Repealed.

(10) The state engineer is authorized to accept, operate, and house in the Centennial Building at 1313 Sherman Street, Denver, Colorado, automated data processing equipment and programs associated with a satellite monitoring system to be acquired by the Colorado water resources and power development authority and dedicated to the state of Colorado for operation and use by the Colorado state engineer.

**Source:** L. 1889: p. 372, § 2. R.S. 08: § 3322. C.L. § 1804. CSA: C. 90, § 203. CRS 53: § 147-11-3. C.R.S. 1963: § 148-11-3. L. 64: p. 178, § 156. L. 69: p. 1192, § 2. L. 77: (6)(b) repealed, p. 289, § 69, effective June 29. L. 83: (9) added, p. 1405, § 1, effective June 1. L. 84: (10) added, p. 960, § 1, effective April 2; (9) repealed, p. 969, § 13, effective April 30. L. 88: (10) amended, p. 1433, § 20, effective June 11. L. 2012, 1st Ex. Sess.: IP(1) amended and (1)(l) added, (SB 12S-002), ch. 1, p. 2420, § 18, effective May 19.

**Cross references:** For the state engineer as head of the division of water resources, see §§ 24-1-124 (3)(a) and 24-33-104 (1)(e); for fees collected by state engineer, see § 37-80-110; for compensation of state engineer, see § 37-80-113; for powers of the state engineer to enforce laws concerning ground water, see § 37-90-110; for duty of state engineer to appoint water division engineers, see § 37-92-202.

## ANNOTATION

**Law reviews.** For article, "Water for Recreation: A Plea for Recognition", see 44 Den. L.J. 288 (1967). For article, "The Colorado Satellite-Linked Water Resources Monitoring System", see 14 Colo. Law. 1637 (1985).

**The state engineer is expressly invested with a general supervisory control over the public waters of the state,** and is required either in person or by those under his authority to do many things in connection with the streams, ditches, reservoirs, etc. *Chew v. Bd. of Comm'rs*, 18 Colo. App. 162, 70 P. 764 (1902).

**The state engineer and those working under him act within their authority in regulat-**

**ing the waters stored in the reservoirs and that,** whenever it is made to appear that a reservoir interferes with the use by prior appropriators of such water, their authority extends to requiring that such waters be released for application to proper beneficial use by such appropriators. *Cline v. Whitten*, 150 Colo. 179, 372 P.2d 145 (1962).

**When a court directed the state engineer to distribute undecreed waters from a drainage ditch,** it was directing the officer to do that for which there was no authority. *Fort Morgan Reservoir & Irrigation Co. v. McCune*, 71 Colo. 256, 206 P. 393 (1922).

**37-80-103. Additional duties of engineer.** The state engineer shall perform all duties imposed upon him by law and, when called upon by the governor, shall give his counsel and services to any state department or institution. He shall be allowed all actual traveling and other necessary expenses and the actual cost of preparing necessary maps and drawings, which actual expenses shall be paid by the department or institution requiring his services.

**Source:** L. 1889: p. 373, § 6. R.S. 08: § 3325. C.L. § 1808. CSA: C. 90, § 207. CRS 53: § 147-11-6. C.R.S. 1963: § 148-11-6.

**Cross references:** For the state engineer as head of the division of water resources, see §§ 24-1-124 (3)(a) and 24-33-104 (1)(e); for fees collected by state engineer, see § 37-80-110; for compensation of state engineer, see § 37-80-113; for powers of the state engineer to enforce laws concerning ground water, see § 37-90-110; for duty of state engineer to appoint water division engineers, see § 37-92-202.

**37-80-104. Compact requirements - state engineer's duties.** The state engineer shall make and enforce such regulations with respect to deliveries of water as will enable the state of Colorado to meet its compact commitments. In those cases where the compact is deficient in establishing standards for administration within Colorado to provide for meeting its terms, the state engineer shall make such regulations as will be legal and equitable to regulate distribution among the appropriators within Colorado obligated to curtail diversions to meet compact commitments, so as to restore lawful use conditions as they were before the effective date of the compact insofar as possible.

**Source:** L. 69: p. 1195, § 5. C.R.S. 1963: § 148-11-24.

#### ANNOTATION

**Applicability of section.** A compact that was not deficient in establishing standards for administration of water rights in Colorado precluded the application of this section other than as the source of the compact rule power. *Alamosa-La Jara Water Users Prot. Ass'n v. Gould*, 674 P.2d 914 (Colo. 1983).

**Where a compact had become deficient in establishing standards for administration of water rights within Colorado, this section was held to authorize the state engineer to adopt rules as necessary to ensure compliance with the compact.** However, in adopting such rules, the state engineer is subject to all statutory conditions imposed upon exercise of the water rule power. *Simpson v. Bijou Irrigation Co.*, 69 P.3d 50 (Colo. 2003).

**State engineer's authority to apply compact tributary rule.** A compact requiring administration of the Rio Grande mainstem and Conejos river according to delivery schedules that did not include the contributions of three creeks as significant to the delivery obligation did away with the state engineer's authority to apply the tributary rule of the compact to the three creeks. *Alamosa-La Jara Water Users Prot. Ass'n v. Gould*, 674 P.2d 914 (Colo. 1983).

**Stream administration.** Streams independently appropriated remain independent under

the doctrine of prior appropriation unless the water of those streams becomes subject to equitable apportionment by compact, in which case the streams must be administered as mandated by the compact or statutory provisions for priority administration of water rights. *Alamosa-La Jara Water Users Prot. Ass'n v. Gould*, 674 P.2d 914 (Colo. 1983).

**State engineer may promulgate and enforce appropriate rules.** In order to promulgate and enforce rules for compliance with Rio Grande river compact commitments, the state engineer may promulgate and enforce appropriate rules for the administration of water rights. *In re Rules & Regulations Governing Water Rights*, 196 Colo. 197, 583 P.2d 910 (1978).

**Procedures specified in other statutes.** This section vests the state engineer with power to administer water use within the state and also with a duty to ensure compliance with Colorado's interstate obligations. However, where neither the compact nor this section set forth specific procedures, the state engineer must necessarily promulgate and enforce rules pursuant to the water rule power granted in § 37-92-501. *Simpson v. Bijou Irrigation Co.*, 69 P.3d 50 (Colo. 2003).

**37-80-105. Supervision over division engineers.** The state engineer shall have general charge over the work of the division engineers; shall furnish them with all the data and information necessary for the proper and intelligent discharge of the duties of their offices; shall require them to report to him at suitable times their official actions; and shall require of them annual statements, on blanks to be furnished by him, of the amount of water diverted from the public streams in their respective divisions and such other statistics as, in the judgment of the state engineer, will be of benefit to the state.

**Source:** L. 1889: p. 373, § 4. R.S. 08: § 3324. C.L. § 1807. CSA: C. 90, § 206. CRS 53: § 147-11-5. C.R.S. 1963: § 148-11-5. L. 69: p. 1222, § 15.

#### ANNOTATION

**The state engineer and those working under him act within their authority in regulating the waters stored in the reservoirs and,**

**whenever it is made to appear that a reservoir interferes with the use by prior appropriators of such water, their authority extends to requiring**



that such waters be released for application to proper beneficial use by such appropriators. *Cline v. Whitten*, 150 Colo. 179, 372 P.2d 145 (1962).

**The accuracy and completeness of the reports required by this section will constitute their value,** and under this section, therefore,

the commissioner must do enough work to answer the demands of the state engineer, and that seems to require him at least to be able to state at all times the amount of water being taken from the public streams in his district. *Cutler v. Bd. of Comm'rs*, 75 Colo. 248, 225 P. 211 (1924).

**37-80-106. Appointment of deputies.** (1) The state engineer may appoint one or more deputies as he may deem proper for assisting him in the discharge of the duties of his office, or he may deputize any person to do a particular service, and he has the power to revoke such appointments when, in his judgment, there is no further need for the services of anyone so appointed or deputized. Such appointments and revocations thereof shall be in writing over the signature and official seal of the state engineer, the original of which shall be filed in the office of the secretary of state. All persons so appointed or deputized shall take and subscribe to an oath, before a judge of a court of record, to faithfully perform the duties of the office to which he is appointed or required to perform; and such oath shall be filed with his appointment in the office of the secretary of state. All such persons so appointed or deputized by the state engineer shall furnish an official bond with surety executed by a responsible surety company, authorized to do business within the state, in the penal sum of not less than one thousand dollars nor more than five thousand dollars. The cost of such bonds shall be paid by said deputies.

(2) In addition to the deputies provided for in this section, the state engineer may employ, pursuant to section 13 of article XII of the state constitution, such assistants in performing the duties of his office as he may deem necessary.

**Source:** L. 1889: p. 373, § 7. R.S. 08: § 3327. C.L. § 1810. L. 35: p. 1058, § 1. CSA: C. 90, § 209. CRS 53: § 147-11-9. C.R.S. 1963: § 148-11-9.

**Cross references:** For the state personnel system, see § 13 of art. XII, Colo. Const., and article 50 of title 24.

**37-80-107. Employment of engineers or geologists.** The state engineer has the authority to employ one or more consulting engineers, geologists, or other specialists to advise him or any division engineer concerning any diversion or proposed diversion of the waters of the state including the sufficiency of any reservoirs or other structures involved in such diversion.

**Source:** L. 35: p. 1060, § 1. CSA: C. 90, § 212. CRS 53: § 147-11-11. C.R.S. 1963: § 148-11-11. L. 69: p. 1222, § 16.

**37-80-108. Appoint deputy for special work.** The state engineer, on request of any party interested and on payment of his per diem charges and reasonable expenses, shall appoint a deputy to measure, compute, and ascertain all necessary data of any canal, dam, reservoir, or other construction, as required or as may be desired to establish court decrees, or for filing statements in compliance with law in the county clerk and recorder's records.

**Source:** L. 1889: p. 373, § 5. R.S. 08: § 3326. C.L. § 1809. CSA: C. 90, § 208. CRS 53: § 147-11-8. C.R.S. 1963: § 148-11-8.

**37-80-109. State engineer's authority to contract for services.** (1) The state engineer shall secure the limited or temporary services of persons necessary to implement carrying out the duties or functions of the division of water resources in those cases where performance by regular state employees is infeasible or impractical and more especially in the following instances:

(a) In which work is of such a nature as to require such special training or aptitudes and is of such limited application that the full-time regular employment normally expected of state employees would be unduly expensive;

(b) In nonrecurring situations of such limited duration as to make the use of regular employees infeasible where the situation can be concluded within a reasonable time by the securing of special assistants but could not be concluded without such assistance so as to fulfill the proper functions of the division of water resources;

(c) To meet emergencies which reasonable foresight could not have anticipated;

(d) To furnish services which may be required by the state engineer of those dealing with his office and who will fully reimburse the state engineer for the services.

(2) During any period when there are more hearings or determinations before the state engineer and the division engineers than can be acted upon promptly, the state engineer shall employ and maintain adequate personnel to assist him and the division engineers in arriving at required determinations. Such personnel may be regular employees or, in those cases falling within the purview of subsection (1) of this section, may be temporary employees on a contract basis and may perform their work jointly or severally as directed by the state engineer.

(3) In the same manner as is provided for a hearings section in subsection (2) of this section, the state engineer may provide personnel as required to adequately staff any water conservation project provided for by law.

(4) The state engineer shall provide appropriate personnel for keeping records and making investigations respecting the performance of the functions of his office and shall provide similar personnel to function under the general direction of his office in the offices of each of the division engineers.

**Source:** L. 69: p. 1195, § 4. C.R.S. 1963: § 148-11-23.

#### ANNOTATION

**Law reviews.** For article, "A Review of Recent Activity in Colorado Water Law", see 47 Den. L.J. 181 (1970).

**37-80-110. Fees collected by state engineer.** (1) Fees shall be collected by the state engineer for work done in his office, as follows:

(a) For examination and filing of each map and statement describing a claim to a water right, twenty dollars if the amount of water claimed does not exceed twenty cubic feet per second of time and an additional one dollar for each cubic foot per second of time claimed in excess of twenty; but the total collected for examination and filing of each claim shall not exceed the sum of one hundred fifty dollars;

(b) For examination and filing of each map and statement describing a claim to water for storage, twenty dollars for each one thousand acre-feet or fraction thereof of storage capacity claimed; but no fees shall be charged for amended maps and statements where no additional capacity is claimed, and, where additional capacity is claimed, the fees shall be charged for such additional capacity as for original filings; but the total amount of fees collected for examination and filing of each claim on any original or amended map and statement shall not exceed the sum of one hundred fifty dollars. In cases where no fee is charged for filing a map and statement describing a claim to water, the claimant shall pay the required fee for all blueprints or other reproductions.

(c) For filing each judicial decree ordering the transfer of a water right or the change of a point of diversion, two dollars;

(d) For each certificate, other than those which may be required in the case of original filings of claims to water rights, requiring official signature and seal, two dollars;

(e) For the examination and filing of each set of plans and specifications required by law to be filed in the office of the state engineer, three dollars for each one thousand dollars or fraction thereof of the estimated cost thereof; but the total amount of fees for examination and filing of each set of plans and specifications shall not be less than one hundred dollars nor more than three thousand dollars;

(f) For copies of maps, two dollars for each hour or fraction thereof necessary for the making of such copies;



- (g) For each blueprint of a tracing forming a public record, two dollars;
- (h) For copies of records, fifty cents a folio;
- (i) For rating any ditch, canal, reservoir inlet or outlet, at the request of the owner thereof or of any agent or employee having control of the same, twenty-five dollars per day and actual expenses for each day actually and necessarily employed by the engineers in making such rating.
- (2) The provisions of this section shall not apply to operations conducted under the supervision of the United States for irrigation of lands entirely within the state of Colorado.

**Source:** L. 03: p. 294, § 1. R.S. 08: § 3332. L. 11: p. 607, § 1. L. 19: p. 657, § 1. C.L. § 1815. L. 25: p. 479, § 1. L. 35: p. 1062, § 1. CSA: C. 90, § 216. CRS 53: § 147-11-15. L. 57: p. 861, § 1. C.R.S. 1963: § 148-11-15. L. 90: (1)(e) amended, p. 1616, § 2, effective July 1.

**37-80-111. Fees deposited with department of the treasury.** At the end of each month, the sum of the fees collected during the month, as provided in section 37-80-110, shall be transmitted to the department of the treasury with a complete statement showing the amounts thus received and the sources from which they are derived, and the said amounts shall be credited to the general fund.

**Source:** L. 03: p. 295, § 2. R.S. 08: § 3333. C.L. § 1816. CSA: C. 90, § 217. CRS 53: § 147-11-16. C.R.S. 1963: § 148-11-16. L. 69: pp. 1196, 1223, §§ 7, 17. L. 85: Entire section amended, p. 1155, § 1, effective July 1.

**37-80-111.5. Fees - satellite monitoring system cash fund - well inspection cash fund - created.**

- (1) (a) and (b) Repealed.
- (c) The state engineer shall set and collect fees by rule and regulation for the use of the equipment and programs of the satellite monitoring system authorized pursuant to section 37-80-102 (10). All such fees collected by the state engineer and all other moneys received from whatever source for the satellite monitoring system shall be transmitted to the satellite monitoring system cash fund, which fund is hereby created. Moneys in the satellite monitoring system cash fund may be expended by the state engineer for the purposes of section 37-80-102 (10) and this paragraph (c), subject to appropriation by the general assembly.
- (d) Of each fee collected pursuant to sections 37-90-105 (3) (a) (I) and (4) (a), 37-90-107 (7) (d) (I), 37-90-116 (1) (a), (1) (c), and (1) (h), 37-90-137 (2) (a), and 37-92-602 (3) (a) and (5), forty dollars shall be credited to the well inspection cash fund, which fund is hereby created. Moneys in the well inspection cash fund shall be appropriated to and expended by the state engineer for the purposes established in section 37-91-113. Any moneys credited to the well inspection cash fund and unexpended at the end of any given fiscal year remain in the fund and do not revert to the general fund. All interest derived from the deposit and investment of this fund remain in the fund and do not revert to the general fund.
- (2) Repealed.
- (3) Nothing in this section shall be interpreted to require the purchase of any publication referred to in this section.
- (4) Repealed.

**Source:** L. 85: Entire section added, p. 1155, § 2, effective July 1. L. 87: (1)(d) added and (2) amended, pp. 1300, 1301, §§1, 2, effective July 1. L. 89: (4) repealed, p. 1419, § 1, effective April 20. L. 93: (1)(c) amended, p. 4, § 3, effective February 16. L. 98: (1)(d) amended, p. 1211, § 1, effective August 5. L. 2002: (1)(d) amended, p. 463, § 2, effective May 23. L. 2003: (1)(d) amended, p. 42, § 2, effective March 1; (1)(d) amended, p. 1682, § 13, effective May 14. L. 2006: (1)(d) amended, p. 1002, § 5, effective May 25.

**L. 2009:** (1)(d) amended, (SB 09-080), ch. 179, p. 788, § 1, effective July 1. **L. 2012:** (1)(a), (1)(b), and (2) repealed and (1)(d) amended, (SB 12-009), ch. 197, p. 790, § 2, effective July 1.

**Editor's note:** (1) Section 10 of chapter 7, Session Laws of Colorado 2003, provides for an effective date of March 1, 2003; however, the Governor did not sign the act until March 5, 2003.

(2) Section 13 of chapter 197, Session Laws of Colorado 2012, provides that the act repealing subsections (1)(a), (1)(b), and (2) and amending subsection (1)(d) applies to revenues credited on or after July 1, 2012.

**Cross references:** For the legislative declaration contained in the 2003 act amending subsection (1)(d), see section 1 of chapter 7, Session Laws of Colorado 2003.

## ANNOTATION

**Law reviews.** For article, "Substitute Supply Plans: Recent Water Law Developments", see 31 Colo. Law. 67 (August 2002).

**37-80-111.7. Water resources cash fund - created - uses.** (1) There is hereby created in the state treasury the water resources cash fund, referred to in this section as the "fund". Revenues credited to the fund and unexpended at the end of each fiscal year remain in the fund and do not revert to the general fund. All interest derived from the deposit and investment of revenues in the fund remain in the fund and do not revert to the general fund.

(2) The state engineer shall collect the following fees and transmit them to the state treasurer, who shall credit them to the fund, except as specified in paragraph (b) of this subsection (2):

(a) The state engineer shall set fees by rule for:

(I) The distribution of data generated, collected, studied, and compiled about the water supplies of this state, which fees shall reflect the direct and indirect costs of such distribution;

(II) The sale of publications of the division of water resources, which fees shall reflect the direct and indirect costs of such publications;

(b) The state engineer shall collect fees pursuant to sections 37-90-105 (3) (a) and (4); 37-90-107 (7) (c) (I) and (7) (d) (I); 37-90-108 (4) and (6); 37-90-116 (1) (a), (1) (c), (1) (h), and (1) (i); 37-90-137 (2), (3) (a), and (3) (c); 37-90.5-106; 37-92-305 (17); 37-92-308; and 37-92-602 (1) (g) (III) (C), (3) (a), and (5). The treasurer shall credit the fees collected pursuant to this paragraph (b) to the fund except as specified in section 37-80-111.5 (1) (d) and except that, of each fee collected pursuant to the following sections, the treasurer shall credit the following amounts to the general fund:

(I) Section 37-90-107 (7) (c) (I) and (7) (d) (I) and section 37-90-116 (1) (a), (1) (h), and (1) (i), thirty dollars;

(II) Section 37-90-137 (2) and (3) (a) (I) and section 37-92-602 (3) (a) for wells applied for pursuant to section 37-92-602 (3) (b), twenty-five dollars;

(III) Section 37-90-116 (1) (c), ten dollars; and

(IV) Section 37-90-105 (3) (a) and (4) (a) and section 37-92-602 (3) (a) for wells applied for pursuant to section 37-92-602 (3) (c) and (5), five dollars.

(3) The state engineer may expend moneys in the fund, subject to appropriation by the general assembly, for the purposes specified in the sections listed in the introductory portion to paragraph (b) of subsection (2) of this section and for the following purposes:

(a) Developing an automated well permit processing system that will expedite the issuance of well permits, creating and maintaining a groundwater information management system, establishing a groundwater data network, establishing groundwater recharge programs, conducting groundwater investigations, monitoring compliance with rooftop precipitation capture laws and permits pursuant to section 37-92-602 (1) (g), the administration of rotational crop management contracts, and for other groundwater-related activities that are deemed necessary by the state engineer in performing statutory duties, subject to



appropriation by the general assembly. The office of the state engineer shall make data in the groundwater data network available to the public as expeditiously as possible.

(b) Paying for publications made pursuant to section 37-90-116 (1) (f) to process final permits pursuant to section 37-90-108;

(c) Reviewing applications for approval of a plan for augmentation or a plan of substitute supply pursuant to section 37-90-137 (11) (f);

(d) Investigating and conducting enforcement of violations of orders issued by the state engineer or the ground water commission for the illegal withdrawal of designated groundwater, including costs associated with the implementation of section 37-90-111.5;

(e) Reviewing engineering reports, field inspections, and administering rotational crop management contracts pursuant to section 37-92-305 (17);

(f) Publishing and administrative costs incurred in processing applications and renewals and administering substitute water supply plans pursuant to section 37-92-308;

(g) Publishing and administrative costs incurred in processing applications, reviewing engineering reports, and administering interruptible water supply agreements pursuant to section 37-92-309; and

(h) Funding the operations and administration of the division based on ongoing priorities of the division.

**Source: L. 2012:** Entire section added, (SB 12-009), ch. 197, p. 788, § 1, effective July 1.

**Editor's note:** Section 13 of chapter 197, Session Laws of Colorado 2012, provides that the act adding this section applies to revenues credited on or after July 1, 2012.

**37-80-112. Report of state engineer.** The state engineer shall report to the executive director of the department of natural resources at such times and on such matters concerning his office and the division of water resources as the executive director may require.

**Source: L. 1889:** p. 374, § 11. **R.S. 08:** § 3331. **C.L.** § 1814. **CSA:** C. 90, § 215. **CRS 53:** § 147-11-14. **C.R.S. 1963:** § 148-11-14. **L. 64:** p. 178, § 157.

**Cross references:** For publication of reports and statistics concerning water development and supply, see § 37-60-117.

#### ANNOTATION

**The objects of the requirement of this section are plain;** first, to inform the executive and general assembly in regard to the department; second, to allow the governor to recommend legislation, should the law be found defective, or suggest necessary legislation if recommended by the officer. *Henderson v. Collier & C. Lithographing Co.*, 2 Colo. App. 251, 30 P. 40 (1892).

**When the report has been made as required by law, and the state engineer has performed all the functions required,** and subsequent action is taken to print a large number of copies for gratuitous distribution, the right to contract the debt can be predicated upon this section. *Henderson v. Collier & C. Lithographing Co.*, 2 Colo. App. 251, 30 P. 40 (1892).

**37-80-113. State engineer - qualifications - salary - conflict of interest.** (1) The state personnel director shall require that the state engineer is a person qualified to be a registered engineer in Colorado having the background of knowledge and experience in areas essential to the proper discharge of his duties and functions.

(2) The salary of the state engineer shall be fixed, within the authority granted by section 13 of article XII of the state constitution at a grade requiring compensation adequate to attract and hold in regular employment a person qualified to carry out the functions, duties, and responsibilities of the office, and shall be paid out of general funds of the state as the salaries of the executive officers of the state are paid.

(3) If the state engineer has any personal interest in any matter coming before his office for decision, he shall immediately notify the governor in writing, delineating that interest,

and the governor has authority to designate some appropriate person to carry out the functions of the state engineer regarding such matters and to cause such person to be paid a reasonable amount for his services. Personal interest does not mean those matters which members of the public generally may have with respect to any given subject.

**Source:** L. 27: p. 648, § 1. CSA: C. 90, § 202. CRS 53: § 147-11-2. C.R.S. 1963: § 148-11-2. L. 69: p. 1192, § 1.

**Cross references:** For the state personnel system, see § 13 of art. XII, Colo. Const., and article 50 of title 24; for compensation of state engineer for county boundary surveys, see § 30-6-111.

### ANNOTATION

**Law reviews.** For article, "Plans and Studies: The Recent Quest for a Utopia in the Utilization of Colorado's Water Resources", which discusses the role of the state engineer's office historically in state water planning, see 55 U. Colo. L. Rev. 391 (1984).

**37-80-114. Deputy state engineer - powers.** (1) The state engineer shall appoint a deputy state engineer, subject to the provisions of section 13 of article XII of the state constitution relating to the state personnel system, whose duties shall be to assist the state engineer in the administration of his office. The deputy state engineer has the power to act for the state engineer in all his official duties, including the administration of interstate river compacts, during the absence of the state engineer from his office or when so directed by the state engineer.

(2) The salary of the deputy state engineer shall be paid as the salaries of the officers of the executive department of the state are paid. He shall also receive reimbursement monthly for the actual necessary expenses incurred in the performance of his official duties, as shall be allotted by the state engineer from funds appropriated for such purpose. The controller is authorized to pay warrants for said salary and expenses upon vouchers approved by the state engineer.

(3) The deputy state engineer, before entering on the discharge of his duties, shall take and subscribe to an oath before the judge of a state court of record to faithfully perform the duties of his office and file said oath with the secretary of state, together with his official bond in the penal sum of ten thousand dollars. The bond shall be executed by a responsible surety company authorized to do business within the state and conditioned upon the faithful discharge of the duties of his office.

**Source:** L. 43: p. 374, §§ 1-3. CSA: C. 90, § 207(1). CRS 53: § 147-11-7. C.R.S. 1963: § 148-11-7.

**Cross references:** For the state personnel system, see § 13 of art. XII, Colo. Const., and article 50 of title 24.

**37-80-115. Performance of personnel - duties.** (1) The state engineer shall furnish such directions and require such performance with respect to the work of those under his jurisdiction as will insure continuous, efficient, and effective discharge of the functions of the division of water resources.

(2) It is the duty of the state engineer to call to the attention of the state personnel director any conduct or failure of conduct of any employee in the division of water resources which would merit discharge or discipline beyond the authority of the state engineer, and, if necessary, he shall file formal charges with respect to such matters.

(3) Default in performance of his duties by the state engineer may be made the subject of charges by the executive director of the department of natural resources or the governor.

(4) Effective administration being essential to good government, it is the duty of the state personnel board to promptly hear, determine, and take action necessary to make effective the provisions of this section whenever the occasion may rise, and such board may,



of its own motion, undertake whatever action may be necessary to insure efficient and honorable conduct on the part of employees within the division of water resources.

**Source:** L. 69: R&RE, p. 1194, § 3. C.R.S. 1963: § 148-11-4.

#### ANNOTATION

**Law reviews.** For article, "Plans and Studies: The Recent Quest for a Utopia in the Utilization of Colorado's Water Resources", which dis-

cusses the role of the state engineer's office historically in state water planning, see 55 U. Colo. L. Rev. 391 (1984).

**37-80-116. Legal services authorized.** (1) (a) The attorney general shall assign an assistant from his office to act as an advisor to the state engineer and to the various employees of the state who are subject to the administrative authority of the state engineer. The state engineer shall avail himself of the services of such assistant to whatever extent the performance of his duties can be facilitated by legal consultation.

(b) To whatever extent additional legal services are required, they shall be procured at the request of the state engineer, but the cost of their services shall be paid for out of funds budgeted to the state engineer for professional services, and in preparing budgets the state engineer shall anticipate his probable requirements for such additional assistants. All such assistants shall be selected by and serve at the pleasure of the attorney general and may include attorneys employed for special areas of the state or for the performance of specific duties on a fee rather than salary basis.

(2) The state engineer and the various division engineers may call on the assistant attorney general assigned to the state engineer, or any additional assistants who may be employed, to furnish services customarily furnished by lawyers.

**Source:** L. 69: R&RE, p. 1196, § 6. C.R.S. 1963: § 148-11-13.

**37-80-117. Regulation of water for measurements.** Whenever it is necessary for any duly authorized hydrographer from the office of the state engineer, or any hydrographer duly authorized by the state engineer or division engineer or water commissioner, or for any water official to make a rating of any weir or flume or measuring section of any canal, the owners, superintendent, or persons having charge and control of the diversion of water into said canal shall increase and decrease the flow of water into said canal as may be ordered and required by the person making such measurements in order that accurate ratings may be taken of the water flowing in said canal at different depths and gauge heights. Any person refusing so to regulate the flow of water into said canal for such purpose is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than one hundred dollars for the first offense and not more than five hundred dollars for the second and succeeding offenses.

**Source:** L. 21: p. 481, § 5. C.L. § 1822. CSA: C. 90, § 223. CRS 53: § 147-11-21. C.R.S. 1963: § 148-11-21.

**37-80-118. False reports of gauge heights.** Any headgate keeper, owner, employee, or other person having charge of any automatic self-registering device installed and operated pursuant to order of the state engineer or a division engineer or compiling gauge height records pursuant to order of the state engineer or division engineer, or any gauge height observer at any river station in this state, installed, maintained, and operated for the purpose of recording the amount of water flowing in said stream, or any reservoir keeper having charge of the keeping of gauge height records on weirs on intakes or outlets of reservoirs who makes false or fictitious reports of gauge heights or who alters, changes, or falsifies any gauge height record or report or who alters or modifies the record made by any automatic self-registering device is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than five hundred dollars for each violation of the provisions of this section.

**Source:** L. 21: p. 480, § 3. C.L. § 1820. CSA: C. 90, § 221. CRS 53: § 147-11-19. C.R.S. 1963: § 148-11-19. L. 69: p. 1223, § 18.

**37-80-119. Interference with recording instruments.** It is unlawful for any person who does not have charge of any weir, headgate, automatic self-registering device, or other measuring recording device or any canal or reservoir intake or outlet, who does not have authority to install, repair, maintain, or operate any such device or to inspect the same from the owners thereof or from the water officials of the state of Colorado, or who represents any other canal diverting water from the same stream to interfere with or seek to examine or regulate any such instrument or device or structure. Any person who willfully injures or destroys any automatic self-registering device, gauge, or other instrument installed upon any canal or weir for the measuring and recording of the water depths upon such weir, who tampers with or falsifies any record made or being made by any such instrument or device, or who violates the provisions of this section is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than five hundred dollars for the first offense and not more than one thousand dollars for the second and succeeding offenses.

**Source:** L. 21: p. 480, § 4. C.L. § 1821. CSA: C. 90, § 222. CRS 53: § 147-11-20. C.R.S. 1963: § 148-11-20.

**37-80-120. Upstream storage - substitute supply - historic natural depletion.**

(1) In every case in which the state engineer finds that water can be stored out of priority under circumstances such that the water so stored can be promptly made available to downstream senior storage appropriators in case they are unable to completely store their entire appropriative right due to insufficient water supply, the state engineer may permit such upstream storage out of priority, but such storage water shall be promptly released on demand of a downstream senior whenever needed by such senior for actual use.

(2) Individuals and private or public entities, alone or in concert, may provide a substituted supply of water to one or more appropriators senior to them, not to exceed that to which any senior appropriator is entitled from time to time by virtue of his appropriations, and, to the extent that such substituted water is made available to meet the appropriative requirements of such senior, the right of such senior to draw water pursuant to his appropriation shall be deemed to be satisfied. The rights of such senior may be used for effectuating such substitution during the period while it is in operation, and the practice may be confirmed by court order as provided for determining water rights.

(3) Any substituted water shall be of a quality and continuity to meet the requirements of use to which the senior appropriation has normally been put.

(4) Whenever substitute water is supplied to a senior ditch, the supplier or his assignee may take an equivalent amount for beneficial use from water of the state of Colorado to the fullest extent possible without impairing the availability of water lawfully divertible by others. A practice of substitution or exchange pursuant to law may constitute an appropriative right and may be adjudicated or otherwise evidenced as any other right of appropriation.

(5) In determining the quantity of water required as a substitute supply to replace evaporation from groundwater exposed to the atmosphere in connection with the extraction of sand and gravel by open mining as defined in section 34-32-103 (9), C.R.S., there shall be no requirement to replace the amount of historic natural depletion to the waters of the state, if any, caused by the preexisting natural vegetative cover on the surface of the area which will be, or which has been, permanently replaced by an open water surface. The applicant shall bear the burden of proving the historic natural depletion.

(6) In determining the quantity of water required as a substitute supply to replace stream depletions in connection with any mining operation as defined in section 34-32-103



(8), C.R.S., for which a reclamation permit has been obtained as set forth in section 34-32-109, C.R.S., there is no requirement to replace the amount of historic natural depletion to the waters of the state, if any, caused by the preexisting natural vegetative cover and evaporation on the surface of the area that will be, or that has been, eliminated or made impermeable as part of the permitted mining operation. The applicant bears the burden of proving the historic natural depletion.

**Source:** L. 69: p. 1196, § 8. C.R.S. 1963: § 148-11-25. L. 89: (5) added, p. 1425, § 4, effective July 15. L. 2012: (6) added, (HB 12-1022), ch. 15, p. 38, § 1, effective August 8.

**Editor's note:** Section 3 of chapter 15, Session Laws of Colorado 2012, provides that the act adding subsection (6) applies to substitute supply plans approved and augmentation plans decreed on or after August 8, 2012.

### ANNOTATION

**Law reviews.** For article, "A Review of Recent Activity in Colorado Water Law", see 47 Den. L.J. 181 (1970). For comment, "Maximum Utilization Collides With Prior Appropriation in A-B Cattle Co. v. United States", see 57 Den. L.J. 103 (1979). For article, "The Emerging Relationship Between Environmental Regulations and Colorado Water Law", see 53 U. Colo. L. Rev. 597 (1982). For article, "The Physical Solution in Western Water Law", see 57 U. Colo. L. Rev. 445 (1986). For article, "Quality Versus Quantity: The Continued Right to Appropriate — Part I", see 15 Colo. Law. 1035 (1986). For article, "Colorado's Law of 'Underground Water': A Look at the South Platte Basin and Beyond", see 59 U. Colo. L. Rev. 579 (1988). For article, "The Constitution, Property Rights and the Future of Water Law", see 61 U. Colo. L. Rev. 257 (1990). For article, "Water Banking: A New Tool For Water Management", see 23 Colo. Law. 595 (1994).

**"Quality" requirement of statute is not violated when person slows down movement of water,** resulting in the settling of silt to the bottom and leaving only clear water for the senior appropriator. In re A-B Cattle Co. v. United States, 196 Colo. 539, 589 P.2d 57 (1978).

**Any substituted water shall be of a quality and continuity to meet the requirements of**

**use to which the senior appropriation has normally been put.** City of Thornton v. Bijou Irrigation Co., 926 P.2d 1 (Colo. 1996).

**Delegation to the state engineer to make the necessary determinations concerning the quality of the substitute water supply is consistent** with this statute, which confers certain authority on the state engineer to regulate exchanges in the absence of adjudication by the applicant. City of Thornton v. Bijou Irrigation Co., 926 P.2d 1 (Colo. 1996).

**The state engineer's water quality control responsibilities are integrated into the general administration of water quality under the Water Quality Control Act.** City of Thornton v. Bijou Irrigation Co., 926 P.2d 1 (Colo. 1996).

**Other than exchanges involving upstream reservoirs, this section does not give the state engineer statutory authority to approve substitute supply plans for out-of-priority diversions when a decreed plan for augmentation is required under § 37-92-305.** This section merely gives the state engineer enforcement discretion. Empire Lodge Homeowners' Ass'n v. Moyer, 39 P.3d 1139 (Colo. 2001).

**Applied** in Purgatoire River Water Conservancy Dist. v. Kuiper, 197 Colo. 200, 593 P.2d 333 (1979).

**37-80-121. Water administration fee - cash fund - rules - report - definitions - repeal. (Repealed)**

**Source:** L. 2003: Entire section added, p. 1509, § 1, effective May 1. L. 2004: (1), (2), (3), (5), and (6) repealed, p. 361, § 2, effective April 7; (4) repealed, p. 361, § 1, effective July 1.

## Water Rights - Generally

### ARTICLE 80.5

#### Arkansas River Water Bank Pilot Program

37-80.5-101.	Short title.	37-80.5-104.5.	Water banks within each wa-
37-80.5-102.	Legislative declaration.		ter division - duties of state
37-80.5-103.	Definitions.		engineer - rules.
37-80.5-104.	Water bank - creation - duties	37-80.5-105.	Review of rules.
	of state engineer - rules -	37-80.5-106.	Report.
	repeal. (Repealed)	37-80.5-107.	Repeal of article. (Repealed)

**37-80.5-101. Short title.** This article shall be known and may be cited as the “Arkansas River Pilot Water Banking Act”.

**Source: L. 2001:** Entire article added, p. 1060, § 1, effective June 5.

**37-80.5-102. Legislative declaration.** The general assembly hereby finds, determines, and declares that the purpose of this article is to authorize the creation of water banks within each water division to be operated under strict parameters established by rules approved by the water court. Accordingly, this article provides for the promulgation of rules concerning water banks and requires the water court to approve the rules and the state engineer to report to the general assembly regarding the operation of the banks. The water bank program created by this article is intended to simplify and improve the approval of water leases, loans, and exchanges, including interruptible supply agreements, of stored water within each river basin, reduce the costs associated with such transactions, and increase the availability of water-related information. It is also the purpose of the water banks to assist farmers and ranchers by developing a mechanism to realize the value of their water rights assets without forcing the permanent severance of those water rights from the land. The general assembly affirms the state constitution’s recognition of water rights as a private usufructuary property right, and this article is not intended to restrict the ability of the holder of a water right to sell, lease, or exchange that water right in any other manner that is currently permitted under Colorado law. Further, this article is not intended to be implemented in any way that would cause material injury to the owner of or persons entitled to use water under a vested water right or a decreed conditional water right, nor to repeal or in any manner amend the existing water rights adjudication system except as may be specifically set forth in this article.

**Source: L. 2001:** Entire article added, p. 1060, § 1, effective June 5. **L. 2003:** Entire section amended, p. 2391, § 1, effective June 5.

**37-80.5-103. Definitions.** As used in this article, unless the context otherwise requires:

(1) “Bank” means a water bank operated pursuant to rules promulgated under this article.

(2) “Program” means a water bank program created in this article.

**Source: L. 2001:** Entire article added, p. 1061, § 1, effective June 5. **L. 2003:** Entire section amended, p. 2392, § 2, effective June 5.

**37-80.5-104. Water bank - creation - duties of state engineer - rules - repeal. (Repealed)**

**Source: L. 2001:** Entire article added, p. 1061, § 1, effective June 5. **L. 2003:** (4) added, p. 2392, § 3, effective June 5.



**Editor's note:** (1) Subsection (4) provided for the repeal of this section, effective when the period to file an appeal regarding promulgation of the rules under § 37-80.5-104.5 has expired or, if such an appeal is filed, when the litigation concerning such appeal has been fully resolved. The revisor of statutes was notified November 1, 2010, that the appeal period regarding the promulgation of the rules has expired and no appeal has been filed.

(2) For additional information pertaining to the repeal of this section and the affect on the Arkansas river basin, see § 37-80.5-104.5 (4).

**37-80.5-104.5. Water banks within each water division - duties of state engineer - rules.** (1) (a) Upon request by a water conservancy district or water conservation district, the state engineer shall promulgate program rules necessary or convenient for the operation of a water bank within the division in which such district is located. The state engineer shall hold public meetings and consult with the Colorado water conservation board regarding formulation of the rules. The rules shall be promulgated in accordance with the following:

(I) The rules shall authorize, facilitate, and permit the lease, exchange, or loan of stored water within a water division; except that nothing in this article shall be construed to authorize any lease, exchange, or loan of water that would negatively affect any of Colorado's interstate compacts.

(II) The rules shall not permit the transfer, lease, loan, exchange, or sale of water from the banks to instream flow uses as provided in section 37-92-102 (3) unless such transfer, lease, loan, exchange, or sale is to the Colorado water conservation board.

(III) The banks shall operate within existing requirements of Colorado water law as set forth in the "Water Right Determination and Administration Act of 1969", article 92 of this title, including specifically the requirement that water transferred through the banks be put to a beneficial use, and the "Colorado Ground Water Management Act", article 90 of this title; except that, in compliance with rules promulgated pursuant to this article, leases, loans, and exchanges effectuated through the banks need not require adjudication pursuant to article 92 of this title, and the state engineer shall administer such leases, loans, and exchanges notwithstanding the fact that they may not have been adjudicated.

(IV) The rules shall define the terms "interruptible supply" and "water banking".

(V) The rules shall take into account and address, as appropriate, any necessary or desirable limitations upon the time, place, or type of use of waters made available through the water banks, and the appropriate length of agreements implementing banking transactions.

(b) The rules shall ensure that operation of the banks shall not cause any material injury to the owner of or persons entitled to use water under a vested water right or a decreed conditional water right.

(c) The rules shall establish criteria pursuant to which the state engineer shall:

(I) Accept a deposit of a quantity of water in a bank, including necessary proof of:

(A) Ownership or a lease or contract that includes the right to use and control the disposition of water; and

(B) The legal parameters of the water for use subject to the proposed deposit, whether by decree or by contract;

(II) Credit a withdrawal of a quantity of water from a bank, including the term, location, and type of the proposed use of the withdrawn water;

(III) Publish a summary of each water bank's transactions, including the amounts of water subject to such transactions; and

(IV) Administer the withdrawn water:

(A) Within the priority system if the withdrawn water is subject to prior appropriation;

(B) With or without the need for an adjudication; and

(C) Without causing material injury to the owner of or persons entitled to use water under a vested water right or a decreed conditional water right.

(d) The rules shall delegate administration of a bank to the water conservancy district or water conservation district that submitted the request for the bank. Such district shall be entitled to charge a transaction fee for deposits, withdrawals, or both, sufficient to cover the bank's administration costs. Notwithstanding any restriction on the power of a water conservancy district or a water conservation district to act outside the geographic bound-

aries of such district, a district that has been delegated authority pursuant to this paragraph (d) shall have full authority to administer the bank's operations pursuant to this section, including any power to act outside the geographic boundaries of such district when necessary to administer the bank.

(2) The deposit of credits in a bank is voluntary, and credits may be removed by the owner at any time prior to an actual transaction in which control of a credit is transferred, subject to the terms and conditions of the deposit agreement executed with the operator of the bank.

(3) The state engineer shall seek a waiver or clarification of any federal laws, rules, or regulations that may impede the implementation of the water bank program.

(4) (a) The repeal of section 37-80.5-104 shall not affect the validity of any bank operating in the Arkansas river basin or any such bank's water deposit or withdrawal. After such repeal, such bank shall operate pursuant to the rules promulgated pursuant to this section.

(b) The state engineer shall provide the revisor of statutes with written notification when the period to file an appeal regarding promulgation of the rules under this section has expired or, if such an appeal is filed, when the litigation concerning such appeal has been fully resolved.

**Source: L. 2003:** Entire section added, p. 2392, § 4, effective June 5.

**Editor's note:** Subsection (4)(b) requires the state engineer to provide the revisor of statutes with written notice when the period to file an appeal regarding the promulgation of rules under this section has expired or, if an appeal is filed, when the litigation on the appeal has been resolved. The revisor of statutes was notified November 1, 2010, that the period for filing an appeal has ended and there has been no appeal of the rules.

**37-80.5-105. Review of rules.** Judicial review of all rules promulgated pursuant to this article shall be in accordance with the "State Administrative Procedure Act", article 4 of title 24, C.R.S.; except that venue for such review shall lie exclusively with the appropriate water judge for each water division.

**Source: L. 2001:** Entire article added, p. 1063, § 1, effective June 5. **L. 2003:** Entire section amended, p. 2394, § 5, effective June 5.

**37-80.5-106. Report.** (1) The state engineer shall submit a report to the general assembly and the governor on or before November 1, 2005, regarding:

- (a) The effectiveness of the program;
- (b) Existing statutory, regulatory, or contractual constraints on the successful use of water banking within Colorado;
- (c) Institutional constraints upon the successful use of water banking within Colorado;
- (d) Interstate compact constraints upon the successful use of water banking within Colorado;
- (e) Social or economic constraints upon the successful use of water banking within Colorado; and

(f) Any recommended limitations upon the use of water banks within Colorado, with specific reference to the time, place, or type of use of waters made available under such recommended limitations and the length of agreements implementing the same.

**Source: L. 2001:** Entire article added, p. 1063, § 1, effective June 5. **L. 2003:** (1)(a) amended, p. 2394, § 6, effective June 5.

**37-80.5-107. Repeal of article. (Repealed)**

**Source: L. 2001:** Entire article added, p. 1063, § 1, effective June 5. **L. 2007:** Entire section repealed, p. 422, § 1, effective April 9.



ARTICLE 81

Diversion of Waters from State

**Law reviews:** For article, “Water Export”, see 13 Colo. Law. 1004 (1984); for article, “State Water and State Lines: Commerce in Water Resources”, see 56 U. Colo. L. Rev. 347 (1985); for article “Water Export: Is it Legal Yet?”, see 24 Colo. Law. 817 (1995).

37-81-101.	Diversion of water outside state - application required - special conditions - penalty.	37-81-103.	Effect of apportionment credits upon diversions of water from state.
37-81-102.	Officials charged with enforcement.	37-81-104.	Fee for diversion - fund created.

**37-81-101. Diversion of water outside state - application required - special conditions - penalty.** (1) (a) The general assembly hereby finds and declares that the location and availability of water in this state varies greatly from place to place and that the state as a whole suffers a shortage of water. The general assembly further recognizes that, because of Colorado’s unique location at the headwaters of four of the nation’s major western rivers and because all the major river systems in Colorado flow out of the state, and that, in order to insure the availability of these scarce water resources for the use of citizens of the state of Colorado, compacts have been entered into with the downstream states on all the major rivers originating in Colorado.

(b) It is also recognized that it has been the continuing historical policy of the state of Colorado to conserve and prevent waste of its water resources to provide adequate supplies of water necessary to insure the continued health, welfare, and safety of all of its citizens. Accordingly, the general assembly hereby determines that, for the purpose of conserving the scarce water resources of this state and to thereby insure the continuing health, welfare, and safety of the citizens of this state, it is unlawful for any person, including a corporation, association, or other entity, to divert, carry, or transport by ditches, canals, pipes, conduits, natural streams, watercourses, or any other means any of the water resources found in this state into any other state for use therein without first complying with this section and section 37-81-104.

(2) To effectuate the purposes of subsection (1) of this section and section 37-81-104, no person may divert, carry, or transport any surface or groundwater from this state by ditches, canals, pipes, conduits, natural streams, watercourses, or other means without meeting the requirements for obtaining a permit to construct a well if the source of water is to be groundwater or if a well permit is not required without first obtaining an adjudication from the water court for the right to use water outside the state. In the case of a well for which a permit has been issued for a use of groundwater within Colorado, a change of use for a use outside the state must be approved by the water court or, if it is designated groundwater, the change must be approved by the Colorado ground water commission. A person desiring to divert, carry, or transport any water outside Colorado shall file an appropriate application therefor and comply with the requirements of this section in addition to any other requirements, terms, and conditions provided or authorized by law pertaining to such application.

(3) Prior to approving an application, the state engineer, ground water commission, or water judge, as the case may be, must find that:

(a) The proposed use of water outside this state is expressly authorized by interstate compact or credited as a delivery to another state pursuant to section 37-81-103 or that the proposed use of water does not impair the ability of this state to comply with its obligations under any judicial decree or interstate compact which apportions water between this state and any other state or states;

(b) The proposed use of water is not inconsistent with the reasonable conservation of the water resources of this state; and

(c) The proposed use of water will not deprive the citizens of this state of the beneficial use of waters apportioned to Colorado by interstate compact or judicial decree.

(4) Any diversion of water from this state which is not in compliance with this section shall not be recognized as a beneficial use for purposes of perfecting a water right to the extent of such unlawful diversion or use.

**Source:** L. 17: p. 539, § 1. C.L. § 1618. CSA: C. 90, § 1. CRS 53: § 147-1-1. C.R.S. 1963: § 148-1-1. L. 79: Entire section amended, p. 1364, § 1, effective May 31. L. 83: Entire section R&RE, p. 1410, § 1, effective June 3. L. 85: (1)(b) and (2) amended, p. 287, § 7, effective May 23.

**Cross references:** For water of streams being public property, see § 5 of art. XVI, Colo. Const.

## ANNOTATION

**Law reviews.** For article, "A Missouri Valley Authority — Its Effect Upon Water Appropriation, Use, State Control and Vested Rights", see 18 Rocky Mt. L. Rev. 1 (1945). For article, "Flood Control Projects and River Compacts", see 22 Rocky Mt. L. Rev. 462 (1950). For note, "Water Pollution Control in Colorado", see 36 U. Colo. L. Rev. 413 (1964). For article, "Inter-governmental Relations and Energy Taxation", see 58 Den. L.J. 141 (1980). For article, "The Effect of Water Law on the Development of Oil Shale", see 58 Den. L.J. 751 (1981). For article, "State Prohibitions on the Interstate Exportation of Scarce Water Resources", see 53 U. Colo. L. Rev. 529 (1982). For comment, "Do State Restrictions on Water Use by Slurry Pipelines Violate the Commerce Clause?", see 53 U. Colo. L. Rev. 655 (1982). For article, "Sporhase, El Paso, and the Unilateral Allocation of Water Resources: Some Reflections on International and Interstate Groundwater Law", see 57 U. Colo. L. Rev. 549 (1986).

**The state has the ownership and the right to control its own natural streams, and power and authority to regulate the distribution of their waters,** within its own territory, for beneficial purposes. *Kansas v. Colo.*, 206 U.S. 46, 27 S. Ct. 655, 51 L. Ed. 956 (1907); *Stockman v. Leddy*, 55 Colo. 24, 129 P. 220, (1912)(cases decided prior to earliest source of this section).

**Constitutional provisions, implementing statutes, and decisions of this court, all recognize the great public and private benefits** which emanate from conserving and putting to beneficial use, at the earliest practical time, all of the waters of the natural streams of the state of Colorado. *Metro. Sub. Water Users Ass'n v. Colo. River Water Conservation Dist.*, 148 Colo. 173, 365 P.2d 273 (1961).

**A natural watercourse may be used as a conduit or outlet for the drainage of lands,** at least where the augmented flow will not tax the stream beyond its capacity and cause the flooding of adjacent lands. *Ambrosio v. Perl-Mack Constr. Co.*, 143 Colo. 49, 351 P.2d 803 (1960).

**The owner of the upper or dominant estate has a legal and natural easement or servitude** in the lower or servient estate for the drainage of

surface waters, flowing in its natural course and manner. *Ambrosio v. Perl-Mack Constr. Co.*, 143 Colo. 49, 351 P.2d 803 (1960).

**The city of Denver has a legal as well as a natural easement for servitude on the lands downstream** for drainage or surface water flowing in its natural course. *City & County of Denver v. Stanley Aviation Corp.*, 143 Colo. 182, 352 P.2d 291 (1960).

**Where one purchases his land in the lowest point next to a river, his land is burdened with the easement** of carrying the water which naturally flows from all of the land above it. *Ambrosio v. Perl-Mack Constr. Co.*, 143 Colo. 49, 351 P.2d 803 (1960); *City & County of Denver v. Stanley Aviation Corp.*, 143 Colo. 182, 352 P.2d 291 (1960).

**It is a general doctrine in which the authorities almost universally concur that a city is not bound to protect** from surface waters those who may be so unfortunate as to own property which is below the general level of the street. *City & County of Denver v. Stanley Aviation Corp.*, 143 Colo. 182, 352 P.2d 291 (1960).

**The taking of the water for use in the operation of the hatchery is for a public purpose.** *Farmers Irrigation Co. v. Game & Fish Comm'n*, 149 Colo. 318, 369 P.2d 557 (1962).

**When the game and fish commission diverted water from a creek and channeled it through a hatchery where it was so polluted** as to render it unfit for the purposes to which it had theretofore been applied by plaintiffs, plaintiffs' property rights therein were destroyed or seriously damaged. *Farmers Irrigation Co. v. Game & Fish Comm'n*, 149 Colo. 318, 369 P.2d 557 (1962).

**Notwithstanding a claim of sovereign immunity from a suit for damages resulting from the torts of agents of the state,** upon a showing that the water rights of plaintiffs had been taken or damaged by game and fish commission through pollution of the water, entitled them to relief in the form of "just compensation" for the property so taken or damaged, and to injunctive relief against a continuance thereof. *Farmers Irrigation Co. v. Game & Fish Comm'n*, 149 Colo. 318, 369 P.2d 557 (1962).



**The relationship between this section and a Nebraska statutory provision concerning exportation of water is applied in *Sporhase v.***

*Nebraska*, 458 U.S. 941, 102 S. Ct. 3456, 73 L. Ed.2d 1254 (1982) (decided under former § 37-90-136).

**37-81-102. Officials charged with enforcement.** It is the duty of the state engineer, the division engineers, and the water commissioners of this state to see that the waters of the state are available for the use and benefit of the citizens and inhabitants of the state for its growth, prosperity, and general welfare, and it is the further duty of said officials to prevent the waters thereof from being diverted, carried, conveyed, or transported by ditches, canals, pipes, conduits, natural streams, watercourses, or other means into other states for use therein unless there is specific authorization therefor, as provided in section 37-81-101. Upon its being brought to the knowledge of the state engineer of Colorado that any person, corporation, or association is unlawfully carrying or transporting any of such waters into any other state for use therein, or is intending so to do, it is his duty to immediately call the matter to the attention of the attorney general, in behalf of and in the name of the state, who shall apply to any district court or to the supreme court of the state of Colorado for such restraining orders or injunctions, both preliminary and final, as may be necessary to enforce the provisions of this section and section 37-81-101, and jurisdiction is conferred upon said courts for such purposes.

**Source:** L. 17: p. 539, § 2. C.L. § 1619. CSA: C. 90, § 2. CRS 53: § 147-1-2. C.R.S. 1963: § 148-1-2. L. 79: Entire section amended, p. 1365, § 2, effective May 31. L. 83: Entire section amended, p. 1411, § 2, effective June 3.

**Cross references:** For the appointments and functions of water division engineers, see § 37-92-202.

#### ANNOTATION

**Water officials, charged with the duty of protecting and enforcing the rights of appropriators** guaranteed by the constitution, statutes, and court decrees of Colorado, cannot plead, as excusing the discharge of that duty, a compact between states, which compact invades those rights without questioning the power of the state to grant them originally. *La Plata River & Cherry Creek Ditch Co. v. Hinderlider*, 93 Colo. 128, 25 P.2d 187 (1933).

**The general assembly, in order to protect the rights of the state in our natural streams and their waters**, and the interests which its citizens have acquired thereunder, may make a valid appropriation of money for the purpose of protecting and defending them. *Stockman v. Leddy*, 55 Colo. 24, 129 P. 220 (1912) (case decided prior to earliest source of this section).

**37-81-103. Effect of apportionment credits upon diversions of water from state.** (1) For the purpose of evaluating applications made pursuant to section 37-81-101, no water occurring in any aquifer or being a part of or hydraulically connected to any interstate stream system may be diverted or appropriated in Colorado for a use which contemplates or involves the transportation of such water into or through another state or states through which such interstate stream system flows, for use of such diverted water in such other state or states whether as a vehicle or medium for the transportation of another substance, or for any other use, unless the amount of water so diverted or appropriated and transported through or into such other state or states is credited as a delivery to such other state or states by Colorado, of water to which such other state or states may be or claim to be entitled from such interstate source under an existing interstate compact or otherwise. Water mixed with other substances in the process of forming a slurry for the purpose of transporting any substance as a suspended solid shall not be deemed to have lost its character as water.

(2) The burden shall be upon the claimant or other person seeking to divert or appropriate water or seeking a water right based upon a claimed diversion or appropriation coming within the provisions of subsection (1) of this section to prove that a means exists and is accepted by each state, including Colorado, through which said stream system and

said diverted water flows or will flow by which the credit required in this section will be entered and recognized by each such state.

(3) This article shall not be applicable to water contained in agricultural crops, animal and dairy products, beverages, or processed or manufactured products or to products transported in cans, bottles, packages, kegs, or barrels.

**Source:** L. 77: Entire section added, p. 1694, § 1, effective July 15. L. 83: Entire section R&RE, p. 1412, § 3, effective June 3.

ANNOTATION

**Law reviews.** For comment, “Do State Restrictions on Water Used by Slurry Pipelines Violate the Commerce Clause?”, see 53 U. Colo. L. Rev. 655 (1982). For article, “Water Export”, see 13 Colo. Law. 1004 (1984).

**37-81-104. Fee for diversion - fund created.** (1) (a) To effectuate the purposes of this article, the general assembly hereby authorizes a fee of fifty dollars per acre-foot to be assessed and collected by the state engineer on water diverted, carried, stored, or transported in this state for beneficial use outside this state measured at the point of release from storage or at the point of diversion.

(b) Notwithstanding the amount specified for the fee in paragraph (a) of this subsection (1), the state engineer by rule or as otherwise provided by law may reduce the amount of the fee if necessary pursuant to section 24-75-402 (3), C.R.S., to reduce the uncommitted reserves of the fund to which all or any portion of the fee is credited. After the uncommitted reserves of the fund are sufficiently reduced, the state engineer by rule or as otherwise provided by law may increase the amount of the fee as provided in section 24-75-402 (4), C.R.S.

(2) All moneys collected pursuant to subsection (1) of this section shall be credited to the water diversion fund, which fund is hereby created. The general assembly shall annually appropriate all moneys in said fund for water projects for the state. Said appropriation shall be consistent with part 13 of article 3 of title 2, C.R.S.

**Source:** L. 85: Entire section added, p. 287, § 6, effective May 23. L. 98: (1) amended, p. 1343, § 69, effective June 1.

ARTICLE 82

Appropriation and Use of Water

**Cross references:** For water rights provisions in the state constitution, see §§ 5 to 8 of art. XVI; for water compacts, see articles 61 to 69 of this title; for conservancy and irrigation districts, see articles 41 to 45 of this title; for conveyance of water rights as real property, see § 38-30-102; for exemption from taxation of ditches, canals, and flumes, see § 39-3-104.

37-82-101.	Waters of natural surface streams subject to appropriation.	37-82-104.	Not to impair vested rights.
37-82-102.	Priority of right to spring water.	37-82-105.	Interference with flow - damages.
37-82-103.	Appropriation of natural	37-82-106.	Right to reuse of imported water.

**37-82-101. Waters of natural surface streams subject to appropriation.** (1) The water of every natural stream, as referred to in sections 5 and 6 of article XVI of the state constitution, includes all the water occurring within the state of Colorado which is in or tributary to a natural surface stream but does not include nontributary groundwater as that term is defined in section 37-90-103. All nontributary groundwater shall be subject to such administration and use as the general assembly may provide by law. Such nontributary



waters, when released from the dominion of the user, become a part of the natural surface stream where released, subject to water rights on such stream in the order of their priority.

(2) A stream system which arises as a natural surface stream and, as a natural or man-induced phenomenon, terminates within the state of Colorado through naturally occurring evaporation and transpiration of its waters, together with its underflow and tributary waters, is a natural surface stream subject to appropriation as provided in subsection (1) of this section.

**Source:** L. 69: R&RE, p. 1219, § 2. C.R.S. 1963: § 148-2-1. L. 79: Entire section R&RE, p. 1366, § 1, effective June 22. L. 85: (1) amended, p. 1166, § 4, effective July 1.

## ANNOTATION

- I. General Consideration.
- II. Right of Appropriation.
  - A. In General.
  - B. Necessity for Beneficial Use.
  - C. Nature of Right Acquired.
- III. Appropriation Under Instant Section.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "Principles and Laws of Colorado's Nontributary Ground Water", see 62 Den. U. L. Rev. 809 (1985). For article, "The Constitution, Property Rights and the Future of Water Law", see 61 U. Colo. L. Rev. 257 (1990).

**Annotator's note.** Since § 37-82-101 is similar to repealed § 148-2-1, C.R.S. 1963, § 147-2-1, CRS 53, and laws antecedent to CSA, C. 90, § 5, relevant cases construing these provisions have been included in the annotations to § 37-82-101.

**Subsection (2) is of general and uniform applicability and does not constitute unconstitutional special legislation.** *Am. Water Development, Inc. v. City of Alamosa*, 874 P.2d 352 (Colo. 1994).

**Considering the history of Colorado, the nature of its soil and climate, its constitutional and legislative enactments, as well as the decisions of our courts, we have no hesitation in saying that our legislators used the term "irrigation" according to the common parlance of our people, in its special sense, as denoting the application of water to lands for the raising of agricultural crops and other products of the soil.** *Platte Water Co. v. Northern Colo. Irrigation Co.*, 12 Colo. 525, 21 P. 711 (1889).

**The application of water to the growing of trees upon the streets of a city, or trees, shrubs, grasses, and the like, in public parks, is as much irrigation as the application of water to the growth of crops upon farm lands, and neither the farmer nor the municipality, using or seeking to use water from the same source, has any right superior to the other.** *City & County of Denver v. Brown*, 56 Colo. 216, 138 P. 44 (1914).

**Water diverted and used for the propagation of fish is devoted to a useful purpose and**

may be appropriated therefor. *Faden v. Hubbell*, 93 Colo. 358, 28 P.2d 247 (1933).

**The former statute recognized two classes of appropriations for irrigations**, one for ditches diverting water directly from the stream, and one for the storage of water, to be used subsequently. *Handy Ditch Co. v. Greeley & Loveland Irrigation Co.*, 86 Colo. 197, 280 P. 481 (1929).

**The impounding and piping of waters for the purpose of generating electricity to be sold as a commodity constitute a valid appropriation** of waters under the constitution and laws of the state of Colorado, as they have been construed by the court of last resort of this state. *Cascade Town Co. v. Empire Water & Power Co.*, 181 F. 1011 (D. Colo. 1910).

**A contractual right to make use of water on specific lands is far different from the "water right" acquired by original appropriation, diversion, and application to a beneficial use.** *Green v. Chaffee Ditch Co.*, 150 Colo. 91, 371 P.2d 775 (1962).

### II. RIGHT OF APPROPRIATION.

#### A. In General.

**There are no riparian rights in Colorado as against a valid appropriation of water.** *Cascade Town Co. v. Empire Water & Power Co.*, 181 F. 1011 (D. Colo. 1910).

**The doctrine of appropriation for agriculture is evoked by the imperative necessity for artificial irrigation of the soil.** It would be an ungenerous and inequitable rule that would deprive one of its benefits simply because he has, by large expenditure of time and money, carried the water from one stream over an intervening watershed and cultivated land in the valley of another. *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443 (1882).

**The right to the water in the streams of Colorado, by prior appropriation, antedated any legislation.** It was the common law of the people; and legislation, both national and territorial, was but a recognition declaratory of the right as it had theretofore and then existed.

Neither in any territorial or national legislation do we find any provision or declaration of rights to water by appropriation, or to be acquired in any other manner, for domestic use. It is first found in the constitution of the state. *Armstrong v. Larimer County Ditch Co.*, 1 Colo. App. 49, 27 P. 235 (1891).

**The common-law doctrine in respect of the rights of riparian proprietors in the waters of natural streams never had obtained in Colorado.** From the earliest times in that jurisdiction the local customs, laws, and decisions of courts have united in rejecting that doctrine and in adopting a different one which regards the waters of all natural streams as subject to appropriation and diversion for beneficial uses and treats priority of appropriation and continued beneficial use as giving the prior and superior right. *Yunker v. Nichols*, 1 Colo. 551 (1872); *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443 (1882); *Platte Water Co. v. Northern Colo. Irrigation Co.*, 12 Colo. 525, 21 P. 711 (1889); *Crippen v. White*, 28 Colo. 298, 64 P. 184 (1901); *Snyder v. Colo. Gold Dredging Co.*, 181 F. 62 (8th Cir. 1910).

In so choosing between these two inconsistent doctrines Colorado acted within the limits of her authority, first as a territory and then as a state, and her choice was recognized and sanctioned by congress, so far as the public lands of the United States were concerned. *Cascade Town Co. v. Empire Water & Power Co.*, 181 F. 1011 (D. Colo. 1910).

The constitution has, to a large extent, obliterated the common-law doctrine of riparian rights and substituted in lieu thereof the doctrine of appropriation. *Sieber v. Frink*, 7 Colo. 148, 2 P. 901 (1883); *Fuller v. Swan River Placer Mining Co.*, 12 Colo. 12, 19 P. 836 (1888); *Farmers' High Line Canal & Reservoir Co. v. Southworth*, 13 Colo. 111, 21 P. 1028, 4 L.R.A. 767 (1889); *Strickler v. City of Colo. Springs*, 16 Colo. 61, 26 P. 313 (1891); *Combs v. Agricultural Ditch Co.*, 17 Colo. 146, 28 P. 966 (1892); *Oppenlander v. Left Hand Ditch Co.*, 18 Colo. 142, 31 P. 854 (1892).

This right to water by prior appropriation was recognized by the first general assembly of the territory and such rights continued to be recognized during the entire territorial existence. *Armstrong v. Larimer County Ditch Co.*, 1 Colo. App. 49, 27 P. 235 (1891).

The doctrine of prior appropriation has become thoroughly entrenched in our jurisprudence, through constitutional and statutory provisions, and by a uniform and unbroken line of judicial decisions. *Comstock v. Larimer & Weld Reservoir Co.*, 58 Colo. 186, 145 P. 700, 1916A Ann. Cas. 416 (1914).

It is said of the doctrine in this state that the common-law rule of continuous flow of natural streams is abolished, is so firmly established by the constitution, the statutes of the

territory and the state, and by many decisions of the courts, that the supreme court declines to reopen or reconsider it, however interesting discussion thereof might otherwise be, and notwithstanding its importance. *Cascade Town Co. v. Empire Water & Power Co.*, 181 F. 1011 (D. Colo. 1910).

**The right to appropriate water and put the same to beneficial use at any place in the state is no longer open to question.** *Metro. Sub. Water Users Ass'n v. Colo. River Water Conservation Dist.*, 148 Colo. 173, 365 P.2d 273 (1961).

**An appropriation is the intent to take accompanied by some open physical demonstration of the intent.** *Elk-Rifle Water Co. v. Templeton*, 173 Colo. 438, 484 P.2d 1211 (1971).

**The appropriation is, in legal contemplation, made when the act evidencing the intent is performed.** *Elk-Rifle Water Co. v. Templeton*, 173 Colo. 438, 484 P.2d 1211 (1971).

**When the individual, by some open, physical demonstration, indicates an intent to take, for a valuable or beneficial use, and through such demonstration ultimately succeeds in applying the water to the use designated, there is an appropriation.** *Elk-Rifle Water Co. v. Templeton*, 173 Colo. 438, 484 P.2d 1211 (1971).

**The required "first step" must consist of open work "on the land" in order that notice can be given to others of the intention of the appropriators.** *Elk-Rifle Water Co. v. Templeton*, 173 Colo. 438, 484 P.2d 1211 (1971).

**The requisite intent to appropriate does not have to precede or be contemporaneous with the acts which constitute the work on the land.** What is required is that at some point in time the two requirements, the open physical demonstration and the requisite intent to appropriate, coexist. *Elk-Rifle Water Co. v. Templeton*, 173 Colo. 438, 484 P.2d 1211 (1971).

**In order to make an appropriation, no new facilities need be contracted.** *Metro. Sub. Water Users Ass'n v. Colo. River Water Conservation Dist.*, 148 Colo. 173, 365 P.2d 273 (1961).

**Even if no new ditch is built, a valid appropriation by means of an existing ditch could be made.** *Metro. Sub. Water Users Ass'n v. Colo. River Water Conservation Dist.*, 148 Colo. 173, 365 P.2d 273 (1961).

**Large expenditures indicate a good faith effort to appropriate and put to beneficial use unappropriated waters of the state of Colorado.** *Metro. Sub. Water Users Ass'n v. Colo. River Water Conservation Dist.*, 148 Colo. 173, 365 P.2d 273 (1961).

**River flow is as much affected by intercepting and diverting water, which otherwise**



would flow into it, as by directly withdrawing water from its channel. *Peterson v. Reed*, 149 Colo. 573, 369 P.2d 981 (1962).

**The natural presumption is that all flowing water finds its way to a stream.** *Peterson v. Reed*, 149 Colo. 573, 369 P.2d 981 (1962).

**Drainage and seepage waters tributary to a natural stream cannot be independently appropriated** by intercepting such waters before they commingled with the stream. *Peterson v. Reed*, 149 Colo. 573, 369 P.2d 981 (1962).

**That the parties intercepted the waters of a drainage ditch before they emptied into a stream** is immaterial where these waters were tributary to the stream and were subject to the prior appropriations thereon. *Peterson v. Reed*, 149 Colo. 573, 369 P.2d 981 (1962).

**It is immaterial that waters of a drainage ditch are characterized as "artificially developed"** where the findings of the trial court determined such waters to be tributary to a natural stream, the presumption being that all flowing water finds its way to a stream. *Peterson v. Reed*, 149 Colo. 573, 369 P.2d 981 (1962).

#### B. Necessity for Beneficial Use.

**An appropriation, to be valid, must be manifested by the successful application of the water to the beneficial use designed or accompanied by some open, physical demonstration of intent to take the same for such use.** *Yunker v. Nichols*, 1 Colo. 551 (1872); *Schilling v. Rominger*, 4 Colo. 100 (1878); *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443 (1882); *Thomas v. Guiraud*, 6 Colo. 530 (1883); *Larimer County Reservoir Co. v. People ex rel. Luthe*, 8 Colo. 614, 9 P. 794 (1885); *Platte Water Co. v. Northern Colo. Irrigation Co.*, 12 Colo. 525, 21 P. 711 (1889); *Woods v. Sargent*, 43 Colo. 268, 95 P. 932 (1908); *Comstock v. Larimer & Weld Reservoir Co.*, 58 Colo. 186, 145 P. 700 (1914).

**From the first, the court has recognized and emphasized the idea that a priority could only be legally acquired by the application of the water to some beneficial use.** *Farmers' High Line Canal & Reservoir Co. v. Southworth*, 13 Colo. 111, 21 P. 1028 (1889); *Ft. Morgan Land & Canal Co. v. South Platte Ditch Co.*, 18 Colo. 1, 30 P. 1032 (1892).

**Only by a diversion and beneficial use can a priority of right be acquired.** *Ft. Morgan Land & Canal Co. v. South Platte Ditch Co.*, 18 Colo. 1, 30 P. 1032 (1892).

**In the absence of express statutes to the contrary, the first appropriator of water from a natural stream, for a beneficial purpose, has, with the qualifications contained in the constitution, a prior right thereto, to the extent of such appropriation.** *Schilling v. Rominger*, 4 Colo. 100 (1878); *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443 (1882).

**A diversion unaccompanied by an application gives no right.** *Ft. Morgan Land & Canal Co. v. South Platte Ditch Co.*, 18 Colo. 1, 30 P. 1032 (1892).

**The right to water thus acquired is not in any way dependent upon the locus of its application to the beneficial use designed.** *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443 (1882).

**An appropriator of water is not entitled to have water turned out to him unless he can beneficially use it.** *City & County of Denver v. Brown*, 56 Colo. 216, 138 P. 44 (1914).

**The measure of the appropriation does not depend alone upon the amount diverted and carried, but the amount which is applied to a beneficial use must also be considered.** *Woods v. Sargent*, 43 Colo. 268, 95 P. 932 (1908).

**Where all witnesses agreed that in planning for a reasonable municipal water supply provision should be made for an adequate supply in years of minimum runoff and maximum consumption, and evidence disclosed large expenditures in good faith effort to acquire unappropriated waters of the state for present and anticipated needs, a finding by the trial court of lack of need was erroneous.** *Metro. Sub. Water Users Ass'n v. Colo. River Water Conservation Dist.*, 148 Colo. 173, 365 P.2d 273 (1961).

#### C. Nature of Right Acquired.

**The right to water in this country by priority of appropriation is entitled to protection** as well after patent to a third party of the land over which the natural stream flows, as when such land is part of the public domain; and it is immaterial whether or not it be mentioned in the patent and expressly excluded from the grant. *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443 (1882); *Strickler v. City of Colo. Springs*, 16 Colo. 61, 26 P. 313 (1891); *Armstrong v. Larimer County Ditch Co.*, 1 Colo. App. 49, 27 P. 235 (1891).

**A corporation which under its charter has the exclusive right to divert the waters of a nonnavigable stream, and the exclusive privilege of using and controlling the same for mechanical, agricultural, mining, and city purposes, cannot allow such right to remain in abeyance for a long series of years, and thereafter assert the same to the exclusion of those who have in the meantime acquired rights to the use of such stream by actual appropriation and use, in pursuance of the general laws of the state.** *Platte Water Co. v. Northern Colo. Irrigation Co.*, 12 Colo. 525, 21 P. 711 (1889).

**A priority has been declared a property right, and as such is subject to sale and transfer.** *Ft. Morgan Land & Canal Co. v. South Platte Ditch Co.*, 18 Colo. 1, 30 P. 1032, 36 Am. St. R. 259 (1892).

**Water rights acquired by appropriation for purposes of irrigation in this state cannot be held to be inseparably annexed** to the land in connection with which such rights were acquired. Even though under certain circumstances such rights may be considered appurtenant to the land they may undoubtedly be severed from the land; and may be sold and conveyed separate and apart therefrom; and where such severance, sale and conveyance have taken place, as by the assignment and sale of stock representing water rights in an incorporated ditch company, a subsequent sale and conveyance of the land does not pass the title to such water rights. *Oppenlander v. Left Hand Ditch Co.*, 18 Colo. 142, 31 P. 854 (1892).

**Where a municipal corporation beneficially entitled to an irrigating ditch, and having present occasion** for only part of the volume diverted, leases the excess to other consumers, its rights are preserved, as if it had actually applied the water to beneficial uses. *City & County of Denver v. Brown*, 56 Colo. 216, 138 P. 44 (1914).

**Whether a deed to land conveys a water right in connection therewith depends upon the intention of the grantor** to be gathered from the terms of the deed, or where it is silent on the subject, from the circumstances surrounding the transaction. *Arnett v. Linhart*, 21 Colo. 188, 40 P. 355 (1895); *Gelwicks v. Todd*, 24 Colo. 494, 52 P. 788 (1898); *Travelers' Ins. Co. v. Childs*, 25 Colo. 360, 54 P. 1020 (1898); *Daum v. Conley*, 27 Colo. 56, 59 P. 753 (1899); *King v. Ackroyd*, 28 Colo. 488, 66 P. 906 (1901); *Bessemer Irrigating Ditch Co. v. Woolley*, 32 Colo. 437, 76 P. 1053, (1904); *City & County of Denver v. Brown*, 56 Colo. 216, 138 P. 44 (1914).

**After water has been appropriated and diverted from a natural stream into ditches, canals, or other artificial works**, it becomes personal property and cannot be appropriated from such works. *Tongue Creek Orchard Co. v. Town of Orchard City*, 131 Colo. 177, 280 P.2d 426 (1955).

**The original appropriators have the right, and in fact it is their duty, to prevent, as far as possible**, all waste of the water which they have appropriated, in order that the others who are entitled thereto may receive the benefit thereof. *Tongue Creek Orchard Co. v. Town of Orchard City*, 131 Colo. 177, 280 P.2d 426 (1955).

**Notwithstanding that it has been held that water when reduced to possession is personal property**, a water right is something vastly different and, when perfected by appropriation and beneficial use of water, constitutes realty in the

nature of a possessory right. *Knapp v. Colo. River Water Conservation Dist.*, 131 Colo. 42, 279 P.2d 420 (1955).

**Although a water right has attained to the dignity of real property, it cannot be said that it has attained to the dignity of an estate in fee** or a freehold estate, it is still a possessory right, even after its consummation, and dependent on the continuous use of the water, and a failure to comply with this condition subjects the right to loss by abandonment. *Knapp v. Colo. River Water Conservation Dist.*, 131 Colo. 42, 279 P.2d 420 (1955).

**Beneficial use is the ultimate essential in the establishment of a water right**, so it also is essential in the perpetuation of such right. *Knapp v. Colo. River Water Conservation Dist.* 131 Colo. 42, 279 P.2d 420 (1955).

**An abandonment of property held by possessory title takes place instantly when the occupant deserts it** without an intention of ever reclaiming it for himself, and careless of what thereafter may become of it. *Knapp v. Colo. River Water Conservation Dist.*, 131 Colo. 42, 279 P.2d 420 (1955).

**The law in Colorado on abandonment of water rights has been settled for many years.** *Knapp v. Colo. River Water Conservation Dist.*, 131 Colo. 42, 279 P.2d 420 (1955).

**Where, by clear and convincing evidence, it is shown that for an unreasonable time available water has not been used**, an intention to abandon may be inferred in the absence of proof of some fact or condition excusing such nonuse, the issue of intent in such instance becomes a question of fact for determination by the trial court from all the pertinent facts and surrounding circumstances, and where supported by competent evidence such finding will not be disturbed on review. *Knapp v. Colo. River Water Conservation Dist.*, 131 Colo. 42, 279 P.2d 420 (1955).

**"Abandonment" is a question of intent, nonuse alone being insufficient.** *Knapp v. Colo. River Water Conservation Dist.*, 131 Colo. 42, 279 P.2d 420 (1955).

**In common usage, "to abandon" means to forsake; give up wholly; quit; when applied to a possessory right, such as is a water right**, it means to discontinue, desert, relinquish, surrender, vacate, or give up; its opposite is to occupy, keep, maintain, use, preserve, and protect, and in water and irrigation matters it has no special, mystical, or different meaning than that well and generally recognized in all instances where are involved legal rights, the preservation and continuation of which are dependent upon possession, use, or occupancy. *Knapp v. Colo. River Water Conservation Dist.*, 131 Colo. 42, 279 P.2d 420 (1955).



**That the life of such right terminates and that it goes out of existence upon abandonment is a principle** so well recognized that citation of authority to support it is unnecessary, but in the absence of expressed declaration, the difficult question for determination is whether, at any time following its acquisition, the owner of the right decided to quit, surrender, or give it up. *Knapp v. Colo. River Water Conservation Dist.*, 131 Colo. 42, 279 P.2d 420 (1955).

**Although the intent of the party charged with abandoning a water right, ditch, or other works, is a necessary element to work an actual abandonment upon his part**, the intent to abandon may be implied, and an actual abandonment decreed by the court from the acts of the appropriator or owner, or from his failure to act; and that, too, in the absence of any direct statement by him that he has abandoned the right, even in the face of declarations of the party charged, that he still owns the right and has not abandoned it, without any act of possession or user of the right by him, the court will declare the right to be abandoned, should the facts and circumstances in the case show that there was an actual abandonment. *Knapp v. Colo. River Water Conservation Dist.*, 131 Colo. 42, 279 P.2d 420 (1955).

**Nonuse for an unreasonable period of time raises an implication or presumption of abandonment.** *Knapp v. Colo. River Water Conservation Dist.*, 131 Colo. 42, 279 P.2d 420 (1955).

**To rebut the presumption of abandonment arising from such long period of nonuse, there must be established** not merely expressions of desire or hope or intent, but some fact or condition excusing such long nonuse. *Knapp v. Colo. River Water Conservation Dist.*, 131 Colo. 42, 279 P.2d 420 (1955).

**Mere "expressions of desire or hope or intent" in abandonment cases are insufficient excuse for nonuse of a water right.** *Knapp v. Colo. River Water Conservation Dist.*, 131 Colo. 42, 279 P.2d 420 (1955).

**Nonuse of a water right may not be justified by a showing that the owner intended to sell the property**, or that it was kept listed with real estate brokers. Speculation on the market,

or sale expectancy, is wholly foreign to the principle of keeping life in a proprietary right and is no excuse for failure to perform that which the law requires. *Knapp v. Colo. River Water Conservation Dist.*, 131 Colo. 42, 279 P.2d 420 (1955).

**Oral declarations of ownership, in the absence of showing of reasonable justification for nonuser**, are insufficient to overcome the presumption of intent to abandon. *Knapp v. Colo. River Water Conservation Dist.*, 131 Colo. 42, 279 P.2d 420 (1955).

**Individuals in whom a prior right to the use of water is vested may lose such right by acquiescence in an adverse use thereof** by another continued uninterruptedly for the statutory period. *Greeley & Loveland Irrigation Co. v. McCloughan*, 140 Colo. 173, 342 P.2d 1045 (1959); *Nesbitt v. Jones*, 140 Colo. 412, 344 P.2d 949 (1959).

### III. APPROPRIATION UNDER INSTANT SECTION.

**This section was an express statutory recognition of utilization of lands from natural overflow as one means of appropriation**, as in the flooding of meadows by natural overflow without the use of any artificial means whatever. *Humphreys Tunnel & Mining Co. v. Frank*, 46 Colo. 524, 105 P. 1093 (1909); *Broad Run Inv. Co. v. Deuel & Snyder Imp. Co.*, 47 Colo. 573, 108 P. 755 (1910); *Cascade Town Co. v. Empire Water & Power Co.*, 181 F. 1011 (D. Colo. 1910).

**This section included all lands in the immediate valley of the stream.** *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443 (1882).

**This section did not prohibit the diversion of water to the "detriment" of parties who might at some future period conclude to settle upon the stream**; nor was the general assembly legislating with a view to preserving in such stream sufficient water for the "use" of settlers who might never come, and consequently never have use therefor. *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443 (1882).

**37-82-102. Priority of right to spring water.** All ditches constructed for the purpose of utilizing the waste, seepage, or spring waters of the state shall be governed by the same laws relating to priority of right as those ditches constructed for the purpose of utilizing the water of running streams; but the person upon whose land the seepage or spring waters first arise shall have the prior right to such waters if capable of being used upon his lands.

Source: L. 1889: p. 215, § 1. R.S. 08: § 3177. C.L. § 1637. CSA: C. 90, § 20. CRS 53: § 147-2-2. C.R.S. 1963: § 148-2-2.

## ANNOTATION

- I. General Consideration.
- II. Right to Seepage or Spring Water.
- III. Water Tributary to Natural Streams.

**I. GENERAL CONSIDERATION.**

**Law reviews.** For article, "Foreign Water in Colorado — The City's Right to Recapture and Re-Use Its Transmountain Diversion", see 42 Den. L. Ctr. J. 116 (1965). For article, "A Review of Recent Activity in Colorado Water Law", see 47 Den. L.J. 181 (1970). For note, "A Survey of Colorado Water Law", see 47 Den. L.J. 226 (1970).

**The validity of this section, so far as it relates to water which is in no sense tributary to a stream,** has never been denied by the courts and is not now disputed. *Colo. & Utah Coal Co. v. Walter*, 75 Colo. 489, 226 P. 864 (1924).

**This section does not apply to a ditch built to catch the surface drainage from the irrigation of adjoining lands.** *Burkart v. Meiberg*, 37 Colo. 187, 86 P. 98 (1906).

**Where defendants own and irrigate, from a natural stream, a tract of land, the natural slope of which is towards plaintiff's land, and plaintiff, by constructing a ditch upon her own land parallel with the common boundary line, has for many years intercepted the surface drainage from defendants' land and used it for irrigating her land, but defendants later constructed upon their own land a ditch parallel to plaintiff's ditch to intercept such surface drainage, carry it around plaintiff's land, and irrigate another tract owned by them, it was held, that plaintiff has not made a valid appropriation of such water as against defendants so as to prevent such action upon their part, and this is true although later defendants sell such adjoining tract of land, and continue to use such surface drainage, with the consent of the vendee, upon the tract of land below plaintiff.** *Burkart v. Meiberg*, 37 Colo. 187, 86 P. 98 (1906).

**The declaratory judgment act is applicable to a dispute over the right to the use of spring waters not tributary to any natural stream.** *Colo. & Utah Coal Co. v. Walter*, 75 Colo. 489, 226 P. 864 (1924).

**Applied in** *Archuleta v. Boulder & Weld County Ditch Co.*, 118 Colo. 43, 192 P.2d 891 (1948).

**II. RIGHT TO SEEPAGE OR SPRING WATER.**

**There are no Colorado constitutional or statutory inhibitions against a person on whose lands spring water arises, which water is not tributary to and does not enter a natural stream, from using said water on his lands; on the contrary, this section expressly provides that**

**the person on whose lands spring water first arises has the prior right to the use thereof.** *Cline v. Whitten*, 144 Colo. 126, 355 P.2d 306 (1960).

**The owner of land upon which is located a spring, the water of which he uses for irrigation and stock purposes, has the first and prior right to its use, it not being tributary to, or forming a part of any natural stream.** *Haver v. Matonock*, 79 Colo. 194, 244 P.914 (1926); *Faden v. Hubbell*, 93 Colo. 358, 28 P.2d 247 (1933).

**The rights of senior appropriators cannot be injuriously affected by claims of junior claimants.** In re *Water Dist. No. 11, Water Div. No. 2*, 178 Colo. 160, 496 P.2d 311 (1972).

**Where seepage water, which plaintiff claims to have diverted, if left to itself, would never have reached a natural stream, any appropriation of the water which plaintiff's testator might have made was subject to the superior right of the owner of the land on which the same arose to apply such waters to a beneficial use on his premises.** *Lomas v. Webster*, 109 Colo. 107, 122 P.2d 248 (1942).

**Where all of the water of the stream is capable of being used upon the plaintiff's land and it has been used for irrigating his land and for stock water purposes for more than 20 years before defendants' alleged rights attached, under this section the plaintiff has a first and prior right to use of the water so far as he desires to use the same as against the defendants or other appropriators.** *Haver v. Matonock*, 79 Colo. 194, 244 P. 914 (1926).

**Where plaintiff has expressed a desire to make use of all the waters, the defendants have no right to use the same so long as the plaintiff desires to use them and applies them to a beneficial use.** *Haver v. Matonock*, 79 Colo. 194, 244 P. 914 (1926).

**A plaintiff who has right to water from one creek and defendant who has right to water from another, defendant has right to spring run-off water flowing near headwaters of both creeks which is naturally tributary to creek for which he has water rights.** *Grimes-Brooks Reservoir Co. v. Kayser*, 111 Colo. 180, 502 P.2d 1104 (1972).

**The appropriation thereof is not included in or controlled by a prior adjudication decree in the same district.** *Ironstone Ditch Co. v. Ashenfelter*, 57 Colo. 31, 140 P. 177 (1914).

**Where consumers constructed at their own labor and expense the feeder ditch by which the seepage water around the rim of Ash mesa, doing no one any good, was conveyed a mile up the river and emptied in the stream just above their headgate, this was an independent appropriation from extraneous sources, which they could make under this section.** *Ironstone Ditch*



Co. v. Ashenfelter, 57 Colo. 31, 140 P. 177 (1914).

Since consumers, by their efforts, lawfully contributed water to the stream which otherwise would not have reached it above their headgate, it was theirs, independent of the original adjudication decree, and because by their labor they contributed extraneous water to the normal flow, is no reason why they may not sell their priorities, and irrigate their land with the independent water. Ironstone Ditch Co. v. Ashenfelter, 57 Colo. 31, 140 P. 177 (1914).

A valid appropriation of water may be made from a canon, notwithstanding it is not a running stream and the water comes entirely from the rainfall in the surrounding hills. Denver, T. & F. W. R. R. v. Dotson, 20 Colo. 304, 38 P. 322 (1894).

The evidence established, by adverse possession, plaintiff's right to seepage water as against the owner of the land on which water arose although such water, if left to itself, would not reach or become part of a natural stream. Lomas v. Webster, 109 Colo. 107, 122 P.2d 248 (1942).

Where plaintiffs alleged that spring water arising on their land was nontributary to any natural stream, and that defendants have, and threaten to continue interfering therewith, the complaint asserted a statutory right to the use of such waters, and it was error to dismiss the complaint. Cline v. Whitten, 144 Colo. 126, 355 P.2d 306 (1960).

No one is authorized to interfere with the lawful exercise of a right to the use of spring water under this section. Cline v. Whitten, 144 Colo. 126, 355 P.2d 306 (1960).

An owner of water rights is entitled to injunctive relief against anyone who interferes with and threatens to continue to interfere with the exercise of such rights. Cline v. Whitten, 144 Colo. 126, 355 P.2d 306 (1960).

In an action by a prior appropriator of water from a stream to restrain a subsequent appropriator from diverting the tributary waters of the stream, if the defendant relies upon the defense that he has appropriated only percolating, drainage, and seepage waters which he has acquired a right to under this section, such defense must be presented by answer, and cannot be raised by demurrer. Ogilvy Irrigating & Land Co. v. Insinger, 19 Colo. App. 380, 75 P. 598 (1904).

One who claims a prior right under this section to appropriate water on the ground that it is seepage water diverted from a different stream and drainage and brought into the valley of the stream from which he seeks to appropriate it and first rises on his land has the burden of proof to show that it is such water and the quantity thereof. La Jara Creamery & Live Stock Ass'n v. Hansen, 35 Colo. 105, 83 P. 644 (1905).

**Evidence which fails to show how much of the water claimant collects in the bed of the stream comes from the seepage of water brought into the valley from a different stream and how much comes from other sources, and which fails to show how much of such seepage water first rises on claimant's lands, is insufficient to sustain a claim of priority of right to seepage water under this section. La Jara Creamery & Live Stock Ass'n v. Hansen, 35 Colo. 105, 83 P. 644 (1905).**

**Courts will not take judicial notice that a spring has a certain location and is tributary to a natural stream, in the face of a positive declaration to the contrary in a complaint, which is not denied by the answer. Colo. & Utah Coal Co. v. Walter, 75 Colo. 489, 226 P. 864 (1924).**

**Where evapotranspiration is the only factor impeding the flow of seep and spring waters, such waters shall be considered tributary to the stream into which they flow and rights to such waters are not protected under this section. SRJ I Venture v. Smith Cattle, Inc., 820 P.2d 341 (Colo. 1991).**

### III. WATER TRIBUTARY TO NATURAL STREAMS.

The statute determining the right to use water coming from a spring on a landowner's property applies if, and only if, there first be a determination that the spring water in question is "nontributary" in nature. Ranson v. City of Boulder, 161 Colo. 478, 424 P.2d 122 (1967).

This section is applicable only to appropriations of waste, seepage, and spring waters before they reach the channel or bed of a natural stream, whether by natural surface flow, by percolation or by being artificially turned into the same, but after waste waters reach the stream, unless there is then an intention by the owner to reclaim them, they become part of its volume, and inure to the benefit of the appropriators of its waters, to be enjoyed in accordance with their numerical priorities. La Jara Creamery & Live Stock Ass'n v. Hansen, 35 Colo. 105, 83 P. 644 (1905); Cline v. Whitten, 150 Colo. 179, 372 P.2d 145 (1962).

**There is no difference in principle between waste water thus added to a natural stream and water which, by natural law, so finds its way into such channel by percolation, surface, or subterranean flow. La Jara Creamery & Live Stock Ass'n v. Hansen, 35 Colo. 105, 83 P. 644 (1905).**

**This section does not apply to seepage waters which rise or come to the surface for the first time in the bed or channel of a natural stream. La Jara Creamery & Live Stock Ass'n v. Hansen, 35 Colo. 105, 83 P. 644 (1905).**

**Such waters become part of the volume of such natural stream, inure to the benefit of the appropriators of the water of the stream in**

the numerical order of their appropriations, and the owner of the land through which the stream flows at the point where such waters rise therein has no priority of right thereto. *La Jara Creamery & Live Stock Ass'n v. Hansen*, 35 Colo. 105, 83 P. 644 (1905).

**This section does not apply to the water of a spring which constitutes the source of one of the branches of a natural stream** the water of which had been appropriated prior to the enactment of the law. *Clark v. Ashley*, 34 Colo. 285, 82 P. 588 (1905).

**Where defendants were awarded priorities to the waters of a certain stream, superior to those of the plaintiff's**, and subsequently, by seepage from defendants' ditch, water appeared in a certain gulch tributary to the stream in question, plaintiff's attempted appropriation of these waters conferred no right, the seepage being still part of the waters of the stream. *Durkee Ditch Co. v. Means*, 63 Colo. 6, 164 P. 503 (1917).

**In Colorado, flowing water is presumed to find its way to a stream and therefore to be tributary in nature**, and the burden of proving otherwise rests upon the party claiming that such water is not tributary. *Ranson v. City of Boulder*, 161 Colo. 478, 424 P.2d 122 (1967).

**Seepage and percolation waters belong to the river and since this is true they belong to the people of the state.** *Comstock v. Ramsay*, 55 Colo. 244, 133 P. 1107 (1913); *Durkee Ditch Co. v. Means*, 63 Colo. 6, 164 P. 503 (1917); *Trowell Land & Irrigation Co. v. Bijou Irrigation Dist.*, 65 Colo. 202, 176 P. 292 (1918); *Rio Grande Reservoir & Ditch Co. v. Wagon Wheel Gap Imp. Co.*, 68 Colo. 437, 191 P. 129 (1920); *Ft. Morgan Reservoir & Irrigation Co. v. McCune*, 71 Colo. 256, 206 P. 393 (1922); *Nevius v. Smith*, 86 Colo. 178, 279 P. 44 (1929);

*Cline v. Whitten*, 150 Colo. 179, 372 P.2d 145 (1962).

**This rule is limited strictly to such waters as "belong to the stream".** *Nevius v. Smith*, 86 Colo. 178, 279 P. 44 (1929).

**An appropriator of spring and seepage water has the right to its use superior to that of the owner of the land upon which the water arises**, when such water would ultimately reach, and become a part of, a natural stream. *Nevius v. Smith*, 86 Colo. 178, 279 P. 44 (1929); *Lomas v. Webster* 109 Colo. 107, 122 P.2d 248 (1942).

**Where a party makes a valid appropriation of spring and seepage water arising on the land of another** and which would eventually reach, and become a part of, a natural stream, the owner of the land upon which the water develops cannot deprive him of the acquired right without compensation. *Nevius v. Smith*, 86 Colo. 178, 279 P. 44 (1929).

**Whatever may be the right of the owner of the lands upon which seepage or spring waters first arise**, as against a prior appropriator where such waters are not tributary to a stream, the law is well settled that waters which are tributary to a stream belong to the stream and are subject to appropriation for beneficial use the same as other waters of the stream. *De Haas v. Benesch*, 116 Colo. 344, 181 P.2d 453 (1947).

**Subject to prior appropriations, underground waters supplying a natural stream are open to appropriation like surface waters**, because they belong to the river. *McClellan v. Hurdle*, 3 Colo. App. 430, 33 P. 280 (1893); *Medano Ditch Co. v. Adams*, 29 Colo. 317, 68 P. 431 (1902); *LaJara Creamery & Live Stock Ass'n v. Hansen*, 35 Colo. 105, 83 P. 644 (1905); *Nevius v. Smith*, 86 Colo. 178, 279 P. 44 (1929); *Faden v. Hubbell*, 93 Colo. 358, 28 P.2d 247 (1933).

**37-82-103. Appropriation of natural springs.** The waters of natural flowing springs may be appropriated for all beneficial uses, and the priorities of such appropriations may be determined as provided by law. If it is found that the water of any such springs is not tributary to any natural stream, the determinations shall fix the rights of appropriators from such springs among themselves.

**Source:** L. 17: p. 541, § 1. C.L. § 1638. CSA: C. 90, § 21. CRS 53: § 147-2-3. C.R.S. 1963: § 148-2-3. L. 69: p. 1219, § 3.

## ANNOTATION

**Law reviews.** For article, "Who Has the Better Right to Nontributary Ground Waters In Colorado — Landowner or Appropriator?", see 31 *Dicta* 20 (1954). For article, "Water for Recreation: A Plea for Recognition", see 44 *Den. L.J.* 288 (1967).

**Annotator's note.** A relevant case decided prior to the earliest source of this section has been included in the annotations to this section.

**This and the following section permit the use of water and the securing of rights-of-way**, and they are in no sense prohibitive. *Schneider v. Schneider*, 36 Colo. 518, 86 P. 347 (1906).

**The true test of the appropriation of water is the successful application thereof to the beneficial use designed**, and the method of distributing or carrying the same, or making



such application, is immaterial. *Town of Genoa v. Westfall*, 141 Colo. 533, 349 P.2d 370 (1960).

**These sections have no application to a proceeding to condemn a right-of-way** for a ditch to carry waste and surplus water from the end of a ditch on another's land. *Schneider v. Schneider*, 36 Colo. 518, 86 P. 347 (1906).

**This section confers upon a landowner no right of appropriation for surface drainage waters** arising from the irrigation of adjoining lands. *Lomas v. Webster*, 109 Colo. 107, 122 P.2d 248 (1942).

**37-82-104. Not to impair vested rights.** Nothing in sections 37-82-103 to 37-82-105 shall be construed to amend or repeal section 37-82-102; or impair, diminish, or destroy any valid appropriation of water for any beneficial use which has been made or decreed in accordance with law; or modify, amend, or affect any decree of court or the statutes limiting the time wherein appropriators must appear for determination of priorities of right for diversions from natural streams or the decisions of the courts construing the statutes.

**Source:** L. 17: p. 542, § 2. C.L. § 1639. CSA: C. 90, § 22. CRS 53: § 147-2-4. C.R.S. 1963: § 148-2-4.

#### ANNOTATION

**The rights of senior appropriators cannot be injuriously affected by claims of junior**

**claimants.** In re Water Dist. No. 11, Water Div. No. 2, 178 Colo. 160, 496 P.2d 311 (1972).

**37-82-105. Interference with flow - damages.** Any person, association, or corporation who, without lawful right so to do, causes any diminution of or obstruction or interference with the flow of waters from any such natural springs to the injury of any appropriator of any such waters shall be liable in damages to the injured party to the amount of such injury.

**Source:** L. 17: p. 542, § 3. C.L. § 1640. CSA: C. 90, § 23. CRS 53: § 147-2-5. C.R.S. 1963: § 148-2-5.

#### ANNOTATION

**Law reviews.** For article, "The Emerging Relationship Between Environmental Regula-

tions and Colorado Water Law", see 53 U. Colo. L. Rev. 597 (1982).

**37-82-106. Right to reuse of imported water.** (1) Whenever an appropriator has lawfully introduced foreign water into a stream system from an unconnected stream system, such appropriator may make a succession of uses of such water by exchange or otherwise to the extent that its volume can be distinguished from the volume of the streams into which it is introduced. Nothing in this section shall be construed to impair or diminish any water right which has become vested.

(2) To the extent that there exists a right to make a succession of uses of foreign, nontributary, or other developed water, such right is personal to the developer or his successors, lessees, contractees, or assigns. Such water, when released from the dominion of the user, becomes a part of the natural surface stream where released, subject to water rights on such stream in the order of their priority, but nothing in this subsection (2) shall affect the rights of the developer or his successors or assigns with respect to such foreign, nontributary, or developed water, nor shall dominion over such water be lost to the owner or user thereof by reason of use of a natural watercourse in the process of carrying such water to the place of its use or successive use.

**Source:** L. 1891: p. 402, § 1. R.S. 08: § 3178. C.L. § 1641. CSA: C. 90, § 24. CRS 53: § 147-2-6. L. 69: p. 1223, § 21. C.R.S. 1963: § 148-2-6. L. 79: Entire section amended, p. 1366, § 2, effective June 22.

## ANNOTATION

**Law reviews.** For article, "Appropriations of Water for a Preferred Purpose", see 22 Rocky Mt. L. Rev. 422 (1950). For article, "Foreign Water in Colorado — The City's Right to Recapture and Re-Use Its Transmountain Diversion", see 42 Den. L. Ctr. J. 116 (1965). For article, "The Effect of Water Law on the Development of Oil Shale", see 58 Den. L.J. 751 (1981). For article, "Colorado's Law of 'Underground Water': A Look at the South Platte Basin and Beyond", see 59 U. Colo. L. Rev. 579 (1988). For article, "Water Reuse and Exchange Plans", see 17 Colo. Law. 1083 (1988). For comment, "Colorado's Foreign Water Doctrine: License To Speculate", see 60 U. Colo. L. Rev. 1113 (1990).

**Even without statute, user of imported water has rights of re-use, successive use, and disposition of foreign water,** subject to contrary contractual obligations. *City & County of Denver v. Fulton Irrigating Ditch Co.*, 179 Colo. 47, 506 P.2d 144 (1972).

**In order to minimize amount of water removed from western Colorado, eastern slope importers should,** to maximum extent feasible, reuse and make successive uses of foreign water. *City & County of Denver v. Fulton Irrigating Ditch Co.*, 179 Colo. 47, 506 P.2d 144 (1972).

**"Re-use" means subsequent use of imported water for same purpose as original use.** *City & County of Denver v. Fulton Irrigating Ditch Co.*, 179 Colo. 47, 506 P.2d 144 (1972).

**"Successive use" means subsequent use by water importer for different purpose.** *City & County of Denver v. Fulton Irrigating Ditch Co.*, 179 Colo. 47, 506 P.2d 144 (1972).

**"Right of disposition" means right to sell, lease, exchange or otherwise dispose of effluent containing foreign water** after distribution through importer's water system and collection in its sewer system. *City & County of Denver v. Fulton Irrigating Ditch Co.*, 179 Colo. 47, 506 P.2d 144 (1972).

**Mutual ditch company had right to reuse and successive uses of water** to be imported to one river drainage system from another river drainage system for storage in reservoir pursuant to conditional water right. *Water Supply and Storage Co. v. Curtis*, 733 P.2d 680 (Colo. 1987).

**Importer of water has burden of demonstrating identity of imported water** when establishing rights of re-use, successive use, and disposition. *City & County of Denver v. Fulton Irrigating Ditch Co.*, 179 Colo. 47, 506 P.2d 144 (1972).

**When importer delivers water to customer tap, it does not lose dominion over water later returning to its sewer.** *City & County of Denver v. Fulton Irrigating Ditch Co.*, 179 Colo. 47,

506 P.2d 144 (1972); *Pub. Serv. Co. v. Willows Water Dist.*, 856 P.2d 829 (Colo. 1993).

**Dominion may be maintained when water is delivered to customers' taps for irrigation purposes.** *Pub. Serv. Co. v. Willows Water Dist.*, 856 P.2d 829 (Colo. 1993).

**Sufficient evidence supported the water court's finding that a water district demonstrated that the water it intended to recapture was its nontributary ground water and not water from the natural stream, and thereby proving noninjury to other holders of water rights.** Despite questionable methods used by the water district to measure the water return flows, the challenging public service company did not demonstrate that the water district failed to produce sufficient evidence. *Pub. Serv. Co. v. Willows Water Dist.*, 856 P.2d 829 (Colo. 1993).

**Appropriators on stream have no vested right to continuance of importation of foreign water** which another has brought to watershed. *City & County of Denver v. Fulton Irrigating Ditch Co.*, 179 Colo. 47, 506 P.2d 144 (1972).

**Plan of exchange subject to this section involving foreign water does not fall within definition of a change of water right** and is not subject to retained jurisdiction of water court. *City of Florence v. Bd. of Waterworks*, 793 P.2d 148 (Colo. 1990).

**This section expressly establishes that the rules applicable to foreign water differ from the rules that govern the use of native water.** *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

**An importer of transmountain water** has a right to reuse that does not exist for appropriators of native water. An importer of water into the stream system has the right to reuse, to extinction, the water it imports. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

**A plain reading of this statute suggests that the legal importation of foreign water is the only prerequisite for future reuse and successive use of such water.** *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

**An importer of foreign water is not required to meet the requirements for appropriation, including intent and beneficial use, to acquire a right of reuse.** *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

**The right to reuse foreign water cannot be abandoned, it remains with the importer until the right is transferred by the importer or the importation ceases.** *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

**The importer does not need to maintain physical control over the waters.** When the foreign water can no longer be distinguished volumetrically, it becomes part of the natural stream and cannot be reused by the importer.



However, this requirement attaches for each importation so that a current failure to distinguish the volume of foreign water from the receiving stream does not preclude future distinction and reuse. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

**The right to reuse foreign water is not subject to abandonment by non-use.** *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

## ARTICLE 83

### Exchange of Water

**Cross references:** For the appointments and functions of water division engineers, see § 37-92-202.

- |            |                                      |            |  |
|------------|--------------------------------------|------------|--|
| 37-83-101. | Transfer from one stream to another. | 37-83-105. | Owner may loan agricultural water right - loans to Colorado water conservation board for instream flows. |
| 37-83-102. | Maintenance of measuring devices.    | 37-83-106. | Authority of political subdivisions to lease or exchange water.  |
| 37-83-103. | Division engineer to keep record.    |            |  |
| 37-83-104. | Reservoirs and ditches may exchange. |            |  |

**37-83-101. Transfer from one stream to another.** Whenever any person or company diverts water from one public stream and turns it into another public stream, such person or company may take out the same amount of water again, less a reasonable deduction for seepage and evaporation, to be determined by the state engineer.

**Source:** L. 1897: p. 176, § 1. R.S. 08: § 3222. C.L. § 1702. CSA: C. 90, § 100. CRS 53: § 147-6-1. C.R.S. 1963: § 148-6-1.

## ANNOTATION

**Law reviews.** For article, "Foreign Water in Colorado — The City's Right to Recapture and Re-Use Its Transmountain Diversion", see 42 Den. L. Ctr. J. 116 (1965). For article, "The Emerging Relationship Between Environmental Regulations and Colorado Water Law", see 53 U. Colo. L. Rev. 597 (1982).

**This and the following sections are only remedial.** *Ashenfelter v. Carpenter*, 37 Colo. 534, 87 P. 800 (1906); *Gutshall v. Carpenter*, 37 Colo. 536, 87 P. 801 (1906).

**This section permitting any person or company to divert water from one public stream and turn it into another public stream, and take**

out the same amount of water again, is a solemn declaration that these are public streams. *Hartman v. Tresise*, 36 Colo. 146, 84 P. 685 (1906).

**An appropriator of water may change the point of diversion, provided the rights of others are not injuriously affected thereby,** and the fact that the appropriator has made such change does not settle the question of whether or not other appropriators are thereby injuriously affected, that question cannot be said to be authoritatively settled until judicially determined. *New Cache la Poudre Irrigating Co. v. Arthur Irrigation Co.*, 37 Colo. 530, 87 P. 799 (1906).

**37-83-102. Maintenance of measuring devices.** Any person or company transferring water from one public stream to another is required to construct and maintain, under the direction of the state engineer, measuring flumes or weirs and self-registering devices at the point where the water leaves its natural watershed and is turned into another and also at the point where it is finally diverted for use from the public stream.

**Source:** L. 1897: p. 176, § 2. R.S. 08: § 3223. C.L. § 1703. CSA: C. 90, § 101. CRS 53: § 147-6-2. C.R.S. 1963: § 148-6-2.

**37-83-103. Division engineer to keep record.** It is the duty of the division engineer of the division in which the water is used to keep a record of the amount of water so turned into his division from any other division.

**Source:** L. 1897: p. 176, § 3. R.S. 08: § 3224. C.L. § 1704. CSA: C. 90, § 102. CRS 53: § 147-6-3. C.R.S. 1963: § 148-6-3.

**37-83-104. Reservoirs and ditches may exchange.** When the rights of others are not injured thereby, it is lawful for the owner of a reservoir to deliver stored water into a ditch entitled to water or into the public stream to supply appropriations from said stream and take in exchange therefor from the public stream higher up an equal amount of water, less a reasonable deduction for loss, if any there be, to be determined by the state engineer. The person or company desiring such exchange shall be required to construct and maintain, under the direction of the state engineer, measuring flumes or weirs and self-registering devices at the point where the water is turned into the stream or ditch taking the same or as near such point as is practicable so that the division engineer may readily determine and secure the just and equitable exchange of water.

**Source:** L. 1897: p. 177, § 4. R.S. 08: § 3225. C.L. § 1705. CSA: C. 90, § 103. CRS 53: § 147-6-4. C.R.S. 1963: § 148-6-4.

#### ANNOTATION

“Owe the river” accounting method was insufficient to effectuate an exchange of waters to the extent that Denver took water from the South Platte before notifying either the division or state engineer that a corresponding release would be required and was available. In order for the division and state engineers to

effectively exercise their discretion in administering water rights so as to protect the rights of downstream senior appropriators, the engineers must be notified in advance of a diversion that might affect those rights. *City of Denver v. City of Englewood*, 826 P.2d 1266 (Colo. 1992).

**37-83-105. Owner may loan agricultural water right - loans to Colorado water conservation board for instream flows.** (1) Subject to the limitations of this subsection (1) and pursuant to the procedures set forth in paragraph (b) of subsection (2) of this section, the owner of a water right decreed and used solely for agricultural irrigation purposes may loan all or a portion of the water right to another owner of a decreed water right on the same stream system and that is used solely for agricultural irrigation purposes for no more than one hundred eighty days during any one calendar year if the division engineer approves such loan in advance and the loan does not cause injury to other decreed water rights.

(2) (a) A water right owner may loan water to the Colorado water conservation board for use as instream flows pursuant to a decreed instream flow water right held by the board for a period not to exceed one hundred twenty days, subject to the following:

(I) Prior to accepting the loan, the Colorado water conservation board shall compile a statement about the duration of the loan, a description of the original points of diversion, and other relevant information sufficient for the state engineer to determine that such loan does not injure existing decreed water rights.

(II) Consistent with current law, only the Colorado water conservation board is entitled to hold instream flow water rights and may accept proposed loans in accordance with section 37-92-102 (3).

(III) The loan shall not be accepted unless the state engineer determines that the Colorado water conservation board's temporary instream flow use will not injure existing water rights of others.

(IV) A loan approved pursuant to this paragraph (a) shall not be exercised for more than three years in a ten-year period, for which only a single approval by the state engineer is required. The ten-year period shall begin when the state engineer approves the loan. The state engineer shall not approve a loan pursuant to this paragraph (a) for another ten-year period; except that, if the agreement has not been exercised during the term of the



agreement, an applicant may reapply one time by repeating the application process pursuant to this subsection (2).

(V) A party may file comments concerning potential injury to such party's water rights or decreed conditional water rights due to the operations of the loan of a water right to a decreed instream flow right with the state engineer by January 1 of the year following each year that the loan is exercised. The procedures of paragraph (b) of this subsection (2) regarding notice, opportunity to comment, the state engineer's decision, and an appeal of such decision shall again be followed with regard to such party's comments.

(b) In determining whether injury will occur, the division engineer shall ensure that the following conditions are met:

(I) The proponent has filed a request for approval of the loan with the division engineer, together with a filing fee in the amount of one hundred dollars. Moneys from the fee shall be transmitted to the state treasurer and deposited in the water resources cash fund created in section 37-80-111.7 (1). The request for approval shall include:

(A) Evidence of the proponent's legal right to use the loaned water right;  
(B) A statement of the duration of the proposed loan;  
(C) A description of the original points of diversion, the return flow pattern, the stream reach, and the time, place, and types of use of the loaned water right;

(D) A description of the new proposed points of diversion, the return flow pattern, the stream reach, and the time, place, and types of use of the loaned water right; and

(E) A reasonable estimate of the historic consumptive use of the loaned water right;

(II) The proponent has provided written notice of the request for approval of the loan by first-class mail or electronic mail to all parties on the substitute water supply plan notification list established pursuant to section 37-92-308 (6) for the water division in which the proposed loan is located and proof of such notice is filed with the division engineer;

(III) The proposed use of the loaned water right is for agricultural irrigation purposes or for instream flow purposes by the Colorado water conservation board;

(IV) None of the water rights involved in the loan are adjudicated to or diverted at a well located more than one hundred feet from the bank of the nearest flowing stream;

(V) The division engineer has given the owners of water rights and decreed conditional water rights fifteen days after the date of mailing of notice under subparagraph (II) of this paragraph (b) to file comments on the proposed loan; except that the division engineer may act on the application immediately after the applicant provides evidence that all persons entitled to notice of the application under subparagraph (II) of this paragraph (b) have either consented to or commented on the application. Such comments shall include any claim of injury or any terms and conditions that should be imposed upon the proposed loan to prevent injury to a party's water right and any other information the commenting party wishes the division engineer to consider in reviewing the proposed loan.

(VI) The division engineer, after consideration of any comments received, has determined that the operation and administration of the proposed loan will not cause injury to other decreed water rights and, for loans made pursuant to paragraph (a) of this subsection (2), will not affect Colorado's compact entitlements. The division engineer shall impose such terms and conditions as are necessary to ensure that these standards are met. In making the determinations specified in this subparagraph (VI), the division engineer shall not be required to hold any formal hearings or conduct any other formal proceedings, but may conduct a hearing or formal proceeding if the division engineer finds it necessary to address the issues.

(VII) The division engineer shall approve or deny the proposed loan within twenty days after the date of mailing of notice under subparagraph (II) of this paragraph (b), or within five days after the applicant provides evidence that all persons entitled to notice of the application under subparagraph (II) of this paragraph (b) have either consented to or commented on the application, whichever is earlier.

(VIII) When the division engineer approves or denies a proposed loan, the division engineer shall serve a copy of the decision on all parties to the application by first-class mail or, if such parties have so elected, by electronic mail. Neither the approval nor the denial by the division engineer shall create any presumptions, shift the burden of proof, or serve as a defense in any legal action that may be initiated concerning the loan. Any appeal of a

decision by the division engineer concerning the loan pursuant to this section shall be made to the water judge in the applicable water division within fifteen days after the date on which the decision is served on the parties to the application. The water judge shall hear such appeal on an expedited basis.

(c) All periods of time during which a loaned water right is used by the board for instream flow purposes shall be excluded from any historic consumptive use analysis of the loaned water right required under any water court proceeding.

**Source:** L. 1899: p. 236, § 3. R.S. 08: § 3232. C.L. § 1712. CSA: C. 90, § 110. CRS 53: § 147-6-5. C.R.S. 1963: § 148-6-5. L. 2003: Entire section amended, p. 2396, § 1, effective June 5. L. 2004: (1), IP(2)(b), (2)(b)(III), (2)(b)(VI), and (2)(b)(VII) amended, p. 1014, § 1, effective May 21. L. 2005: IP(2)(a) amended and (2)(a)(IV) and (2)(a)(V) added, p. 82, § 1, effective August 8. L. 2007: (2)(c) added, p. 48, § 1, effective August 3. L. 2012: IP(2)(b)(I) amended, (SB 12-009), ch. 197, p. 792, § 6, effective July 1.

**Editor's note:** Section 13 of chapter 197, Session Laws of Colorado 2012, provides that the act amending the introductory portion to subsection (2)(b)(I) applies to revenues credited on or after July 1, 2012.

### ANNOTATION

**Law reviews.** For article, "The Effect of Water Law on the Development of Oil Shale", see 58 Den. L.J. 751 (1981). For article, "Water Banking: A New Tool For Water Management", see 23 Colo. Law. 595 (1994). For article, "Private Means to Enhance Public Streams", see 33 Colo. Law. 69 (April 2004).

**The parties who are concerned in the exchange, the lender and the borrower, must each and all be the owners of rights to the use of water for irrigation.** Ft. Lyon Canal Co. v. Chew, 33 Colo. 392, 81 P. 37 (1905).

**If this section had purported to create rights which did not theretofore exist, or if it was to be interpreted as permitting exchanges or loans of water without reference to the rights of other appropriators, it could not be upheld as a valid legislative enactment.** Ft. Lyon Canal Co. v. Chew, 33 Colo. 392, 81 P. 37 (1905).

**This section does not apply to a rotational no-call agreement because such an agreement does not loan a water right;** rather, each party to the agreement diverts pursuant to its own decreed priority with the senior water right hold-

ers simply forbearing from asserting their priority. LoPresti v. Brandenburg, 267 P.3d 1211 (Colo. 2011).

**The provisions of this section only permit an exchange or loan of water under conditions which do not injuriously affect the vested rights of other appropriators.** Bowman v. Viridin, 40 Colo. 247, 90 P. 506 (1907).

**Under this section a complaint is fatally defective in an action to restrain defendants from interfering with plaintiff using water loaned to him by other appropriators, which fails to allege that the water so loaned can and will be used by plaintiff without impairing the vested rights of defendants owning later priorities.** Bowman v. Viridin, 40 Colo. 247, 90 P. 506 (1907).

**This section seems to recognize a temporary exchange or loan of water without first obtaining a decree.** Ft. Lyon Canal Co. v. Chew, 33 Colo. 392, 81 P. 37 (1905).

**Such right is subject to the qualification of impairing vested rights.** Ft. Lyon Canal Co. v. Chew, 33 Colo. 392, 81 P. 37 (1905).

**37-83-106. Authority of political subdivisions to lease or exchange water.** Water conservancy districts and water conservation districts which own or hold rights to water may enter into cooperative agreements with other political subdivisions of the state for the lease or exchange of water produced in the exercise of such district's water rights and the construction or use of waterworks within or outside of district boundaries, according to such terms as such district and political subdivision agree upon. Conservation districts, conservancy districts, and other political subdivisions of the state may enter into agreements with each other to provide funds or undertake measures to carry out section 37-45-118 (1) (b) (II), including agreements for the exchange or lease of such water outside the boundaries of the conservation or conservancy district. Such leases and exchanges may cover the time period necessary to amortize, or repay bonds issued for, the cost of constructing the waterworks involved, and may be renewable according to such terms as such district and



political subdivision may agree upon. Any water rights leased or exchanged under this section shall be only for the time certain contained in each such agreement or extension thereof. Any water rights or changes of water rights which are necessary to implement such agreements shall be adjudicated as provided by law. If mutually agreeable, districts and other political subdivisions may submit any contractual disputes arising under this section between them to nonbinding arbitration, as they may determine.

**Source:** L. 89: Entire section added, p. 1420, § 1, effective April 12. L. 2001: Entire section amended, p. 1278, § 50, effective June 5.

ANNOTATION

This section allows water conservancy districts to enter into cooperative agreements with other political subdivisions for the lease or exchange of water outside of district boundaries under regulated conditions. However, it allows extra-district use only in specified situations, and the ultimate authority to approve such transactions rests with the water conservancy district. City of Thornton v. Bijou Irrigation Co., 926 P.2d 1 (Colo. 1996).

The northern Colorado water conservancy district (NCWCD) enacted rules and regula-

tions to implement the limitations placed on the distribution of Colorado-Big Thompson (CBT) water by the Water Conservancy Act and the 1938 repayment contract between the United States and the NCWCD for the construction of the CBT project. The Water Conservancy Act, the repayment contract, and the rules enacted by the NCWCD all prohibited use of CBT water outside the boundaries of the NCWCD boundaries. City of Thornton v. Bijou Irrigation Co., 926 P.2d 1 (Colo. 1996).

ARTICLE 84

Responsibility of User or Owner

**Cross references:** For the appointments and functions of water division engineers, see § 37-92-202.

37-84-101.	Maintenance of embankments and tail ditch.	37-84-112.	Headgates - specifications - failure to maintain - penalty.
37-84-102.	Vested rights not impaired.	37-84-113.	Measuring flumes - construction.
37-84-103.	Bridge when ditch crosses highway.	37-84-114.	Rating of flumes and weirs.
37-84-104.	Ditch must be bridged in three days. (Repealed)	37-84-115.	Gauge rods.
37-84-105.	Proceedings against owner for payment. (Repealed)	37-84-116.	Control of headgates and weirs.
37-84-106.	Bridges over ditch - maintenance.	37-84-117.	Reservoirs in streams.
37-84-107.	Owner of ditch must prevent waste.	37-84-118.	Ditch owners to provide flow - when.
37-84-108.	Running excess of water forbidden.	37-84-119.	Ditches to be kept in repair.
37-84-109.	Penalty for violation of sections.	37-84-120.	Measurement of water.
37-84-110.	Head of ditch to be latticed.	37-84-121.	Penalty for refusal to deliver water.
37-84-111.	Penalty for failure to cover and lattice.	37-84-122.	Division engineer to measure water.
		37-84-123.	Jurisdiction of county court.
		37-84-124.	Amount of water taken.
		37-84-125.	Receipt of too much water.

**37-84-101. Maintenance of embankments and tail ditch.** The owners of any ditch for irrigation or other purposes shall carefully maintain the embankments thereof so that the waters of such ditch may not flood or damage the premises of others, and shall make a tail ditch so as to return the water in such ditch with as little waste as possible into the stream from which it was taken.

**Source:** R.S. p. 364, § 7. L. 1872: p. 144, § 1. G.L. § 1378. G.S. § 1728. R.S. 08: § 3233. C.L. § 1713. CSA: C. 90, § 111. CRS 53: § 147-7-1. C.R.S. 1963: § 148-7-1.

**Cross references:** For requirement of keeping ditch in repair, see § 7-42-108.

## ANNOTATION

**This section imposes a duty upon the owners and every ditch company is required to keep its ditch in such good repair and condition that the water of the same cannot readily and easily escape therefrom to the injury of any property; and especially such owners must not allow or permit the water to escape therefrom to the damage of other property.** Greeley Irrigating Co. v. House, 14 Colo. 549, 24 P. 329 (1890).

**Defendants are liable for any injury to the plaintiff's property caused by overflow of the waters entering the ditch,** resulting either directly or indirectly from the negligence of defendants in keeping the same in good repair, or in the manner of its use while under their control, they are responsible in damages. Greeley Irrigating Co. v. House, 14 Colo. 549, 24 P. 329 (1890).

**Where owners of an irrigating ditch recklessly attempted to convey a volume of water through it far beyond the reasonable capacity of the ditch to safely carry, and in so doing knowingly caused the ditch to overflow its banks, thereby flooding the land of an adjacent proprietor, and destroying his fruit trees and vines growing thereon, they became liable to respond in damages under this section.** Greeley Irrigating Co. v. House, 14 Colo. 549, 24 P. 329 (1890).

**Owner is not absolutely liable for damages.** Platte & Denver Ditch Co. v. Anderson, 8 Colo. 131, 6 P. 515 (1884); City of Boulder v. Fowler, 11 Colo. 396, 18 P. 337 (1888); Denver City Irrigation & Water Co. v. Middaugh, 12 Colo. 434, 21 P. 565 (1889); Greeley Irrigating Co. v. House, 14 Colo. 549, 24 P. 329 (1890); Grand Valley Irrigation Co. v. Pitzer, 14 Colo. App. 123, 59 P. 420 (1899); Middlekamp v. Bessemer Irrigating Co., 46 Colo. 102, 103 P. 280 (1909). Garnet Ditch & Reservoir Co. v. Sampson, 48 Colo. 285, 110 P. 79 (1910); North Sterling Irrigation Dist. v. Dickman, 59 Colo. 169, 149 P. 97 (1915).

**The same rule has been announced in other jurisdictions.** North Sterling Irrigation Dist. v. Dickman, 59 Colo. 169, 149 P. 97 (1915).

**The owner of a ditch is not liable for damages as the result of water seeping therefrom, unless it appears that such seepage was caused by the negligent construction or operation of the ditch.** Platte & Denver Ditch Co. v. Anderson, 8 Colo. 131, 6 P. 515 (1884); City of Boulder v.

Fowler, 11 Colo. 396, 18 P. 337 (1888); Denver City Irrigation & Water Co. v. Middaugh, 12 Colo. 434, 21 P. 565 (1889); Greeley Irrigating Co. v. House, 14 Colo. 549, 24 P. 329 (1890); Middlekamp v. Bessemer Irrigating Co., 46 Colo. 102, 103 P. 280 (1909); Garnet Ditch & Reservoir Co. v. Sampson, 48 Colo. 285, 110 P. 79 (1910); North Sterling Irrigation Dist. v. Dickman, 59 Colo. 169, 149 P. 97 (1915); Bridgeford v. Colo. Fuel & Iron Co., 63 Colo. 372, 167 P. 963 (1917).

**The measure of damage to lands by seepage is the difference between its value, immediately before and immediately after the injury.** North Sterling Irrigation Dist. v. Dickman, 59 Colo. 169, 149 P. 97 (1915).

**The question of such damages is not affected by § 15 of art. II, Colo. Const.** North Sterling Irrigation Dist. v. Dickman, 59 Colo. 169, 149 P. 97 (1915).

**A defense based on unavoidable accident is not available where it already appears that the gross carelessness and negligence of the defendants contributed to the injury complained of.** Greeley Irrigating Co. v. House, 14 Colo. 549, 24 P. 329 (1890).

**In an action under this section and § 37-84-107 for an injury to plaintiff's premises by seepage from defendant's ditch, attributed to negligence in the construction, maintenance and operation thereof, an instruction that defendant was "under duty to keep its ditch in good condition, maintain its embankments in good repair and prevent water wasting therefrom", was approved.** Beaver Creek Sch. Land Ditch Co. v. Elling, 27 Colo. App. 252, 148 P. 273 (1915).

**Where the plaintiffs had sold to defendants a right-of-way through their premises, and afterward brought an action to recover for injuries alleged to have been caused by the negligent and improper manner in which defendants operated the ditch, evidence was admissible to show the extent of the damage to plaintiffs' adjoining land occasioned by defendants' failure to keep the ditch in repair, but not to show the value of the land with and without the ditch.** Old v. Keener, 22 Colo. 6, 43 P. 127 (1895).

**Evidence of damage from seepage held sufficient to sustain a recovery by plaintiff.** Beaver Creek Sch. Land Ditch Co. v. Elling, 27 Colo. App. 252, 148 P. 273 (1915).



**37-84-102. Vested rights not impaired.** Nothing in articles 80 to 92 of this title shall be so construed as to impair the prior vested rights of any mill or ditch owner or other person to use the waters of any such watercourse.

**Source:** R.S. p. 364, § 8. G.L. § 1379. G.S. § 1729. R.S. 08: § 3234. C.L. § 1714. CSA: C. 90, § 112. CRS 53: § 147-7-2. C.R.S. 1963: § 148-7-2.

#### ANNOTATION

**Where the ditch company distributed water to its stockholders in proportion to the number of shares owned** by them respectively, there was nothing indicating that such mode of distribution in any way conflicted with the “bet-

ter right” of prior appropriators. *Combs v. Agricultural Ditch Co.*, 17 Colo. 146, 28 P. 966 (1892); *Oppenlander v. Left Hand Ditch Co.*, 18 Colo. 142, 31 P. 854 (1892).

**37-84-103. Bridge when ditch crosses highway.** (1) Any bridge constructed on a public highway, a public traveled road, a street, or an alley to accommodate the crossing of any ditch, canal, or other waterway shall be constructed in accordance with applicable standards established by the state, county, or municipality having jurisdiction over such public highway, public traveled road, street, or alley.

(2) Any person, partnership, association, or corporation desiring to have such a bridge constructed shall bear the cost of construction and enter into an agreement with the unit of government having such jurisdiction. Payment for such construction shall be made before construction begins.

**Source:** R.S. p. 364, § 10. G.L. § 1381. G.S. § 1730. R.S. 08: § 3235. C.L. § 1715. CSA: C. 90, § 113. CRS 53: § 147-7-3. C.R.S. 1963: § 148-7-3. L. 81: Entire section R&RE, p. 1775, § 1, effective July 1.

#### **37-84-104. Ditch must be bridged in three days. (Repealed)**

**Source:** R.S. p. 364, § 11. G.L. § 1382. G.S. § 1731. R.S. 08: § 3236. C.L. § 1716. CSA: C. 90, § 114. CRS 53: § 147-7-4. C.R.S. 1963: § 148-7-4. L. 81: Entire section repealed, p. 1777, § 5, effective July 1.

#### **37-84-105. Proceedings against owner for payment. (Repealed)**

**Source:** R.S. p. 365, § 12. G.L. § 1383. G.S. § 1732. R.S. 08: § 3237. C.L. § 1717. CSA: C. 90, § 115. CRS 53: § 147-7-5. C.R.S. 1963: § 148-7-5. L. 64: p. 341, § 344. L. 81: Entire section repealed, p. 1777, § 5, effective July 1.

**37-84-106. Bridges over ditch - maintenance.** All bridges constructed over any ditch, race, drain, or flume crossing any public highway, street, or alley, after construction, shall be maintained by and at the expense of the county or municipality in which such ditch, race, drain, or flume may be situated.

**Source:** L. 13: p. 150, § 1. C.L. § 1718. CSA: C. 90, § 116. CRS 53: § 147-7-6. C.R.S. 1963: § 148-7-6.

#### ANNOTATION

**Law reviews.** For article, “Cities and Ditch Companies: Can They Live Together? — Part II”, see 16 Colo. Law. 996 (1987).

**37-84-107. Owner of ditch must prevent waste.** The owner of any irrigating or mill ditch shall carefully maintain and keep the embankments thereof in good repair and prevent the water from wasting.

**Source:** L. 1876: p. 78, § 1. G.L. § 1385. G.S. § 1733. R.S. 08: § 3238. C.L. § 1719. CSA: C. 90, § 117. CRS 53: § 147-7-7. C.R.S. 1963: § 148-7-7.

**Cross references:** For requirement of keeping ditch in repair, see § 7-42-108.

#### ANNOTATION

**Law reviews.** For note, "A Survey of Colorado Water Law", see 47 Den. L.J. 226 (1970). For comment, "Maximum Utilization Collides With Prior Appropriation in A-B Cattle Co. v. United States", see 57 Den. L.J. 103 (1979).

**This section imposes a duty upon owners.** Greeley Irrigating Co. v. House, 14 Colo. 549, 24 P. 329 (1890).

**Under this section defendants are responsible for any damage occasioned to plaintiff's**

**property** by reason of their failure or neglect to keep the ditch in a state of preservation and repair, and to so maintain and manage the ditch as to prevent injury to plaintiff's property while they so use and control the same. Greeley Irrigating Co. v. House, 14 Colo. 549, 24 P. 329 (1890).

**37-84-108. Running excess of water forbidden.** During the summer season it shall not be lawful for any person to run through his irrigating ditch any greater quantity of water than is absolutely necessary for irrigating his land, and for domestic and stock purposes, it being the intent and meaning of this section to prevent the wasting and useless discharge and running away of water.

**Source:** L. 1876: p. 78, § 2. G.L. § 1386. G.S. § 1734. R.S. 08: § 3239. C.L. § 1720. CSA: C. 90, § 118. CRS 53: § 147-7-8. C.R.S. 1963: § 148-7-8.

#### ANNOTATION

**Law reviews.** For note, "A Survey of Colorado Water Law", see 47 Den. L.J. 226 (1970).

**"Waste water" and "water which is being wasted" are entirely different things.** Baumgartner v. Stremel, 178 Colo. 209, 496 P.2d 705 (1972).

**A contract between a ditch company and landowner whereby the company agrees to furnish water to the landowner to irrigate a certain described tract of land, and which restricts the use of the water to the land specified, and limits the amount and time of its use to what**

**is necessary and requisite for the purpose of irrigating the land specified, is not unreasonable and against public policy, but is valid and may be enforced against the landowner.** Wright v. Platte Valley Irrigation Co., 27 Colo. 322, 61 P. 603 (1900).

**Such a contract is intended to prevent the waste of water or a use of the same in excess of the necessities of the particular piece of land specified, and is directly in line with the policy of this section.** Wright v. Platte Valley Irrigation Co., 27 Colo. 322, 61 P. 603 (1900).

**37-84-109. Penalty for violation of sections.** Any person who willfully violates any of the provisions of sections 37-84-107 and 37-84-108, upon conviction thereof, shall be fined not less than one hundred dollars. Suits for penalties under sections 37-84-107 and 37-84-108 shall be brought in the name of the people of the state of Colorado.

**Source:** L. 1876: p. 78, § 3. G.L. § 1387. G.S. § 1735. R.S. 08: § 3240. C.L. § 1721. CSA: C. 90, § 119. CRS 53: § 147-7-9. C.R.S. 1963: § 148-7-9.

**37-84-110. Head of ditch to be latticed.** Every corporation and company, whether created by special act or organized under the general incorporation laws of this state, and every partnership or any persons who own or control any canal or ditch, or any part thereof, being two feet in width or over and carrying water to the depth of twelve inches or over,



which canal or ditch, or any part thereof, is within the corporate limits of any city with a population of seventy thousand or more or any city existing by special charter of a population equal to or exceeding seventy thousand, or any of the additions thereto, at their own expense, shall safely and securely lattice or slat the head of any flume or covering of the canal or ditch with proper materials, so that persons or animals cannot accidentally enter such flume or covering at the head thereof and pass or be carried down the current of the canal or ditch, and they shall thereafter maintain and keep the same in good order and repair at their own cost and expense.

**Source:** L. 1887: p. 66, § 2. R.S. 08: § 3242. C.L. § 1723. CSA: C. 90, § 121. CRS 53: § 147-7-11. C.R.S. 1963: § 148-7-10. L. 72: p. 621, § 166.

#### ANNOTATION

**This section is constitutional.** *Platte & Denver Canal & Milling Co. v. Dowell*, 17 Colo. 376, 30 P. 68 (1892).

**This section is general and applies to all canals of the dimensions specified,** and there is nothing upon its face to indicate that the members of the general assembly thought at the time of its enactment of any particular canal. *Platte & Denver Canal & Milling Co. v. Dowell*, 17 Colo. 376, 30 P. 68 (1892).

**This section does not forbid or attempt to interfere with the use of a canal in carrying on appellant's business,** and it does not undertake to deprive appellant of its property or the enjoyment thereof, because appellant can with-

out injury to the usefulness of the canal so maintain it as not to endanger the safety of life and property; and, as already in effect suggested, it has no constitutional right to perpetuate this danger. *Platte & Denver Canal & Milling Co. v. Dowell*, 17 Colo. 376, 30 P. 68 (1892).

**The failure of appellant to perform its statutory duty was negligence per se,** and no contributory negligence being shown, appellees were entitled to recover. *Platte & Denver Canal & Milling Co. v. Dowell*, 17 Colo. 376, 30 P. 68 (1892).

**Applied** in *Montoya v. Bessemer Irrigating Ditch Co.*, 42 Colo. App. 238, 592 P.2d 24 (1979).

**37-84-111. Penalty for failure to cover and lattice.** If any such corporation, company, partnership, or person fails or refuses to comply with any of the provisions of section 37-84-110, such corporation, company, partnership, or person shall forfeit and pay the sum of fifty dollars for each day such failure or refusal continues, to be recovered by a civil action in the name of the people of the state of Colorado, in any court of competent jurisdiction. Nothing in this section and section 37-84-110 shall be construed to bar an action for special damages by any person who has suffered such damages by reason of any failure to comply with said sections.

**Source:** L. 1887: p. 66, § 3. R.S. 08: § 3243. C.L. § 1724. CSA: C. 90, § 122. CRS 53: § 147-7-12. C.R.S. 1963: § 148-7-11.

**37-84-112. Headgates - specifications - failure to maintain - penalty.** (1) The owners of any irrigation ditch, canal, flume, or reservoir in this state, taking water from any stream, shall erect where necessary and maintain in good repair, at the point of intake of such ditch, canal, flume, or reservoir, a suitable and proper headgate of height and strength and with embankments sufficient to control the water at all ordinary stages and suitable and proper measuring flumes, weirs, and devices and shall also erect and maintain in good repair suitable wastegates where necessary in connection with such ditch, canal, flume, or reservoir intake. The framework of such headgate shall be constructed of timber not less than four inches square, and the bottom, sides, and gate shall be of plank not less than two inches in thickness, or said gate may be made of other material of equal strength and durability or may be made and constructed upon plans and specifications approved by the state engineer. No such headgate shall be deemed complete until provided with suitable locks and fastenings (except when the division engineer deems such locks and fastenings unnecessary therefor) and keys therefor are delivered to the division engineer of the division who has control thereof during the seasons of the distribution of water.

(2) If the owners of any such irrigation ditch, canal, flume, or reservoir fail or neglect

to erect or maintain in good repair said headgate, measuring flume, weir, or devices, in the manner and form provided in this section, then the state engineer or division engineer, upon ten days' previous notice in writing, duly served upon such owners, or upon any agent or employee representing them or controlling such ditch, canal, flume, or reservoir, shall refuse to deliver any water from such stream to such owners, or to such ditch, canal, flume, or reservoir, until such owners erect or repair the headgate, measuring flume, weirs, or devices of such ditch, canal, flume, or reservoir. The owners of all such ditches, canals, flumes, or reservoirs shall be liable for all damages resulting from their neglect or refusal to comply with the provisions of sections 37-84-112 to 37-84-117. Such owners who divert water from any such stream and into any such ditch, canal, flume, or reservoir contrary to the orders of the state engineer or division engineer are guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than five hundred dollars, and each day of violation shall be deemed a separate offense.

**Source:** L. 01: p. 193, § 1. R.S. 08: § 3248. L. 11: p. 463, § 1. C.L. § 1727. CSA: C. 90, § 125. CRS 53: § 147-7-13. C.R.S. 1963: § 148-7-12. L. 69: p. 1220, § 9.

#### ANNOTATION

**Law reviews.** For note, "A Survey of Colorado Water Law", see 47 Den. L.J. 226 (1970).

**This section requires every person diverting water for purposes of irrigation from the public domain,** to erect and maintain a headgate. *Boglino v. Giorgetta*, 20 Colo. App. 338, 78 P. 612 (1904).

**The provisions of this section are imperative.** *Seven Lakes Water Users' Ass'n v. Ft. Lyon Canal Co.*, 89 Colo. 515, 4 P.2d 1112 (1931).

**Under this section an irrigation corporation is obligated to construct and maintain suitable diversion appliances,** and is not relieved from such duty because its original headgate was destroyed by a flood due solely to an act of God. *Seven Lakes Water Users' Ass'n v. Ft. Lyon Canal Co.*, 89 Colo. 515, 4 P.2d 1112 (1931).

**Where a court decree directed the construction and maintenance of proper diversion works for a ditch,** the contention of defendant that the cost thereof would be

prohibitive, was held erroneous, and decree affirmed. *Seven Lakes Water Users' Ass'n v. Ft. Lyon Canal Co.*, 89 Colo. 515, 4 P.2d 1112 (1931).

**This section requires the owners of irrigating ditches taking water from any stream, to erect, maintain and keep in repair at the point of intake, a suitable and proper headgate.** *Boulder & Larimer County Irrigating & Mfg. Ditch & Reservoir Co. v. Culver*, 63 Colo. 32, 164 P. 510 (1917).

**This section gives the water officials power to compel the installation of a headgate,** so that the water commissioner can regulate the flow into the ditch. *Boulder & Larimer County Irrigating & Mfg. Ditch & Reservoir Co. v. Culver*, 63 Colo. 32, 164 P. 510 (1917).

**Although a headgate was present at the point of diversion, it failed to serve its purpose of controlling the water in the ditch.** As such, the owner was required to comply with the order to install a suitable and proper headgate. *Tatum v. People*, 122 P.3d 997 (Colo. 2005).

**37-84-113. Measuring flumes - construction.** The owners of any irrigation ditch, canal, or reservoir, transferring water from one natural stream to another, or from a reservoir, ditch, or flume to a stream in order that said water may be diverted from such stream for irrigation or any other purpose, shall construct suitable and proper measuring flumes or weirs, equipped with self-registering devices if required by the state engineer, for the proper and accurate determination of the amount and flow of water turned into, carried through, and diverted out of said natural stream. If the owners of any such irrigation ditch, canal, or reservoir fail or neglect, upon five days' previous notice in writing duly served upon them or their agent or employee, to erect, maintain, or repair such measuring flume, weir, or device, the state engineer or division engineer shall refuse to allow to be taken or diverted from any stream any water whatever on account of delivery of water to such stream, for such time and until such owners cause to be erected or repaired such flumes, weirs, or devices, at the point of delivery to and taking from said natural streams so used as a conduit.



**Source:** L. 01: p. 194, § 2. R.S. 08: § 3249. L. 11: p. 464, § 2. C.L. § 1728. CSA: C. 90, § 126. CRS 53: § 147-7-14. C.R.S. 1963: § 148-7-13.

#### ANNOTATION

No authority is presented purporting to support the proposition that the defendant should be required to install a measuring device to determine the amount of water which runs in a ditch in which he claims no interest, the statute places this responsibility upon the owners of the ditch. *Georges v. Vahldick*, 161 Colo. 278, 421 P.2d 471 (1966).

While this section implicitly acknowledges that a natural stream may be used as a con-

duit, the statute implies nothing about relief from the legal obligation to adjudicate a change of water right imposed by § 37-92-302, but merely mandates the measurement of any water carried through and diverted out of such a natural stream. *Trail's End Ranch, L.L.C. v. Colo. Div. of Water Res.*, 91 P.3d 1058 (Colo. 2004).

**37-84-114. Rating of flumes and weirs.** The state engineer or division engineer shall rate the measuring flume and weirs referred to in sections 37-84-112 to 37-84-117, and the original notes of such rating, together with a complete table compiled therefrom, shall be filed as a part of the records of the office of the state engineer, and the state engineer shall supply the division engineer of the division in which such measuring flumes or weirs are located with a copy of such rating table, which shall be used by him in measuring water flowing to and from such natural stream.

**Source:** L. 01: p. 194, § 3. R.S. 08: § 3250. L. 11: p. 465, § 3. C.L. § 1729. CSA: C. 90, § 127. CRS 53: § 147-7-15. C.R.S. 1963: § 148-7-14. L. 69: p. 1221, § 10.

**37-84-115. Gauge rods.** A gauge rod, marked in feet and tenths and one-hundredths of a foot, shall be permanently fixed and maintained at the outlets of all reservoirs, under the supervision of the division engineer, and if any owner or possessor of any reservoir fails or refuses to provide, fix, and maintain such gauge rod then the owner or possessor of such reservoir shall not be entitled to impound any water whatever in said reservoirs until the provisions of this section are fully complied with. Notwithstanding the foregoing the division engineer may determine that such rod is not necessary with respect to specific reservoirs. Such determination shall be in writing and may be rescinded in writing at any time.

**Source:** L. 01: p. 194, § 4. R.S. 08: § 3251. L. 11: p. 465, § 4. C.L. § 1730. CSA: C. 90, § 128. CRS 53: § 147-7-16. C.R.S. 1963: § 148-7-15. L. 69: p. 1221, § 11.

**37-84-116. Control of headgates and weirs.** All headgates, measuring weirs, flumes, and devices used in connection with canals, flumes, and ditches or reservoirs for the measuring and delivering of waters therefrom and thereto shall be under the supervision and control at all times of the state engineer and the division engineer of the water division wherein such headgates, measuring weirs, flumes, and devices are located. Nothing in sections 37-84-112 to 37-84-117 shall be construed as prohibiting any water user in the state of Colorado or his appointed agent from reading any gauge, gauge rod, or measuring device or from determining the quantity of water diverted by any canal or impounded in or delivered from any reservoir, and it is here declared the intent and purpose of sections 37-84-112 to 37-84-117 to give any water user of Colorado or his appointed agent the right of ascertaining the quantity of water being diverted by any canal or impounded in or delivered from any reservoir without his being required to assign any reason for making such observations. Noncompliance with the provisions of sections 37-84-112 to 37-84-117 shall, during such noncompliance, forfeit the right to divert water into any canal or to impound water in or deliver water from any reservoir.

**Source:** L. 01: p. 195, § 5. R.S. 08: § 3252. L. 11: p. 466, § 5. L. 15: § 290, § 1. C.L. § 1731. CSA: C. 90, § 129. CRS 53: § 147-7-17. C.R.S. 1963: § 148-7-16. L. 69: p. 1221, § 12.

**37-84-117. Reservoirs in streams.** (1) The owners of any reservoir situate upon or in the bed of any natural stream or through which any natural stream flows, for the purpose of storing or diverting water, at the expense of the owner, shall cause a complete survey of the contour lines of said reservoir to be made, which said survey may be approved by the state engineer, or, in the discretion of the state engineer, shall be made under the supervision of the state engineer or his deputy or the division engineer of the division in which such reservoir is located. Said contour lines shall be ascertained for at least every vertical foot in depth and, in all cases where deemed necessary by the state engineer, for fractions of a foot. There shall be prepared a table to be filed in duplicate with and approved by the state engineer, showing the capacity of said reservoir, in cubic feet, for each foot in depth or fraction thereof, one copy of which said table shall be furnished to the division engineer in whose division such reservoir is situate. All maps, plats, field notes, and the table of such reservoir, survey, and capacity shall be filed with and approved by the state engineer and remain a part of the records of his office.

(2) The owners of such reservoir, at their own expense, under the supervision and with the approval of the state engineer, shall permanently fix and maintain a gauge rod at or near the outlet of such reservoir, marked in feet and tenths and one-hundredths of a foot, and in correspondence with the contour lines, from and by means of which the amount of water stored in, or taken from, said reservoir may be correctly ascertained, and, at the expense of such owners and under the supervision and with the approval of the state engineer, shall construct and permanently maintain a suitable and permanent measuring weir or flume equipped with self-registering devices, according to plans and specifications approved by the state engineer, in the bed and channel of every natural stream or watercourse discharging waters into said reservoir by means of which all of the water flowing into said reservoir from and through each such stream or watercourse, at all times may be definitely ascertained and determined.

(3) Such gauge rods, flumes or weirs, and devices shall be at all times subject and open to inspection by the owner or duly authorized agent or representative of the owners of any appropriation of water from the stream upon or in which such reservoir is constructed or operated. Upon the failure or neglect of the owners of any such reservoir to construct or permanently maintain such gauge rods, measuring flumes, or weirs, equipped as provided in this section or upon the failure or neglect of such owners to cause complete survey of the contour lines of said reservoir to be made, after thirty days' notice in writing, directing such contour survey to be made, duly served upon such owners, or their agent or employee, by the state engineer or division engineer, the state engineer or division engineer shall refuse to allow any water whatsoever to be taken into or diverted from or by means of said reservoir. When suitable weirs, flumes, gauge rods, and measuring devices have been installed and equipped, the state engineer and division engineer may allow water to be stored in any such reservoir after thirty days have expired after the giving of said notice, in the event that the survey of said contour lines is then being prosecuted in good faith.

(4) Upon complaint in any manner made to the state engineer or the division engineer by the owners of any appropriation of water from any stream upon which any such reservoir is located, or any stream of which such stream is a tributary, charging a violation of any of the requirements of this section, the state engineer or division engineer shall thereupon forthwith inquire into the truth of such complaint and, if the charges are found to be true, shall enforce the provisions of this section.

(5) Upon order of the state engineer there shall be released from the water in storage in each stream bed reservoir such quantities of water as, in the determination of the state engineer, are necessary to prevent evaporation from the surface of such reservoir from depleting the natural flow of the stream running through such reservoir which would otherwise be available for use by other appropriators. In determining the quantity of any evaporation release under this section, the state engineer shall compute the surface evaporation from the reservoir and deduct therefrom any accretions to the stream flow



resulting from the existence of the reservoir and any natural depletions to the stream flow which would have resulted if the reservoir were not in existence.

**Source:** L. 01: p. 195, § 6. R.S. 08: § 3253. L. 11: p. 466, § 6. C.L. § 1732. CSA: C. 90, § 130. CRS 53: § 147-7-18. C.R.S. 1963: § 148-7-17. L. 65: p. 1241, § 1. L. 69: p. 1222, § 13.

#### ANNOTATION

**Law reviews.** For article, "Water for Recreation: A Plea for Recognition", see 44 Den. L.J. 288 (1967). For note, "A Survey of Colorado Water Law", see 47 Den. L.J. 226 (1970).

**A plan of augmentation for a tributary aquifer that would be used as a reservoir does not qualify for the exemption from the prohibition against crediting reductions in**

**evapotranspiration**, because the aquifer is not analogous to an on-stream reservoir and exemptions should be narrowly construed. In re Water Rights of Park County Sportsmen's Ranch, 105 P.3d 595 (Colo. 2005).

**Applied** in City & County of Denver v. Full-ton Irrigating Ditch Co., 179 Colo. 47, 506 P.2d 144 (1972).

**37-84-118. Ditch owners to provide flow - when.** Every person or company owning or controlling any canal or ditch used for the purposes of irrigation and carrying water for pay, when demanded by the users from April 1 until November 1 in each year, shall keep a flow of water therein, so far as may be reasonably practicable for the purpose of irrigation, sufficient to meet the requirements of all such persons as are properly entitled to the use of water therefrom, to the extent, if necessary, to which such person may be entitled to water and no more. Whenever the rivers or public streams or sources from which the water is obtained are not sufficiently free from ice, or the volume of water therein is too low and inadequate for that purpose, then such canal or ditch shall be kept with as full a flow of water therein as may be practicable, subject, however, to the rights of priorities from the streams or other sources, as provided by law, and the necessity of cleaning, repairing, and maintaining the same in good condition.

**Source:** L. 1887: p. 304, § 1. L. 1893: p. 299, § 1. R.S. 08: § 3254. C.L. § 1733. CSA: C. 90, § 131. CRS 53: § 147-7-19. C.R.S. 1963: § 148-7-18.

#### ANNOTATION

**Law reviews.** For article, "Revision of Water and Irrigation Statutes", see 31 Dicta 29 (1954).

**This section provides at what time water shall be kept flowing in ditches.** White v. Farmers' Highline Canal & Reservoir Co., 22 Colo. 191, 43 P. 1028 (1896).

**This section provides that the distribution of water for irrigation shall be under the control of the ditch company**, acting through a superintendent, whose duties are prescribed. White v. Farmers' Highline Canal & Reservoir Co., 22 Colo. 191, 43 P.1028 (1896).

**This section does not authorize a company to arbitrarily refuse to deliver water at all.** Downey v. Twin Lakes Land & Water Co., 41 Colo. 385, 92 P. 946 (1907).

**A provision in a water right contract between a ditch company and a consumer, to the**

**effect that if the company should at any time refuse to furnish the water, the consumer might take it himself, is void.** White v. Farmers' Highline Canal & Reservoir Co., 22 Colo. 191, 43 P. 1028 (1896).

**This and the following sections do not affect the right of plaintiff to receive whatever water he may justly be entitled to under his contract but where, as here, there is a controversy as to the amount of such water available for his use, he must bring his action to determine such right, and in no event can he be allowed to ignore the company's superintendent and its reasonable regulations, and in violation of the act enlarge the outlet to his lateral ditch and take water from the company's ditch at will.** White v. Farmers' Highline Canal & Reservoir Co., 22 Colo. 191, 43 P. 1028 (1896).

**37-84-119. Ditches to be kept in repair.** The owners, or persons in control, of any canal or ditch used for irrigating purposes shall maintain the same in good order and repair, ready to receive water by April 1 in each year, so far as can be accomplished by the exercise

of reasonable care and diligence, and shall construct the necessary outlets in the banks of the canal or ditch for a proper delivery of the water to persons having paid-up shares or who have rights to the use of water. A multiplicity of outlets in the canal or ditch shall at all times be avoided, so far as the same shall be reasonably practicable, and the location of the same shall be under the control of and shall be at the most convenient and practicable points consistent with the protection and safety of the ditch for the distribution of water among the various claimants thereof; and such location shall be under the control of a superintendent.

**Source:** L. 1887: p. 305, § 2. R.S. 08: § 3255. C.L. § 1734. CSA: C. 90, § 132. CRS 53: § 147-7-20. C.R.S. 1963: § 148-7-19.

**Cross references:** For requirement of keeping ditch in repair, see § 7-42-108.

#### ANNOTATION

**Law reviews.** For article, "Revision of Water and Irrigation Statutes", see 31 Dicta 29 (1954).

**Under this section it is the duty of the ditch company to furnish headgates** for those having a right to use the water. *Downey v. Twin Lakes Land & Water Co.* 41 Colo. 385, 92 P. 946 (1907).

**Where a person acquired a half of an 80-acre water right, and his land was lying nearer the headgate of the main canal than any of the land which had theretofore been irrigated with water obtained upon this right and could not be irrigated by water taken from the main canal through any existing headgate, it was held, that he was entitled to a headgate over the**

objection that a multiplicity of headgates weakened the canal and increased the expense of maintaining it. *Downey v. Twin Lakes Land & Water Co.*, 41 Colo. 385, 92 P. 946 (1907).

**Where it is practicable for two or more consumers to draw water from a canal for the irrigation of their lands through one headgate, that may be done, but where a water consumer cannot thus obtain water, he is entitled, under this section, to compel a water company to construct a necessary headgate at the expense of the water consumer.** *Downey v. Twin Lakes Land & Water Co.*, 41 Colo. 385, 92 P. 946 (1907).

**37-84-120. Measurement of water.** It is the duty of those owning or controlling such canals or ditches to appoint a superintendent, whose duty it is to measure the water from such canal or ditch through the outlets to those entitled thereto, each according to his pro rata share.

**Source:** L. 1887: p. 305, § 3. R.S. 08: § 3256. C.L. § 1735. CSA: C. 90, § 133. CRS 53: § 147-7-21. C.R.S. 1963: § 148-7-20.

#### ANNOTATION

**Under this section the superintendent of an irrigation ditch is authorized to control the headgates to the laterals therefrom, and decree enjoining interference with him in the exercise of this authority was affirmed.** *Koen v. Ft. Bent Ditch Co.*, 67 Colo. 34, 185 P. 653 (1919).

**Where in a water rights action, although the trial court dissolved the preliminary injunction which restrained defendants from interfering with plaintiffs' headgates, to which**

ruling no error was assigned, nevertheless, defendants assert error as to court's failure to enjoin plaintiffs from interfering with the measurement and delivery of water to plaintiffs by defendants, it was held, under the circumstances there was no merit to defendants' assertion since contract which gave defendants the right to operate the ditch had already expired by its own terms. *Winter v. Tarabino*, 173 Colo. 30, 475 P.2d 331 (1970).

**37-84-121. Penalty for refusal to deliver water.** Any superintendent or any person having charge of said ditch who willfully neglects or refuses to deliver water, as provided in sections 37-84-118 to 37-84-123, or any person who prevents or interferes with the proper delivery of water to the persons having the right thereto is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than ten dollars nor more than one hundred dollars for each offense, or by imprisonment in the county jail for not more than one month, or by both such fine and imprisonment. The money thus collected



shall be paid into the general fund of the county in which the misdemeanor has been committed. The owners of such ditches shall be liable in damages to the persons deprived of the use of the water to which they were entitled as provided in sections 37-84-118 to 37-84-123.

**Source:** L. 1887: p. 305, § 4. R.S. 08: § 3257. C.L. § 1736. CSA: C. 90, § 134. CRS 53: § 147-7-22. C.R.S. 1963: § 148-7-21.

#### ANNOTATION

**Mandamus is the appropriate remedy to compel delivery.** Golden Canal Co. v. Bright, 8 Colo. 144, 6 P. 142 (1884) (case decided prior to earliest source of this section); Wheeler v. Northern Colo. Irrigation Co., 10 Colo. 582, 17 P. 487 (1887); Townsend v. Fulton Irrigating Ditch Co., 17 Colo. 142, 29 P. 453 (1891); Combs v. Agricultural Ditch Co., 17 Colo. 146, 28 P. 966 (1892); People ex rel. Standart v. Farmers' High Line Canal & Reservoir Co., 25 Colo. 202, 54 P. 626 (1898).

**While the right recognized is one conferred by statute, which the relator, upon the performance of certain conditions precedent, is entitled to enjoy, we are unable to perceive any reason why the same right, when conferred by contract, is not equally susceptible of enforce-**

**ment in this manner, when clearly established, and the consequences of its denial are the same.** People ex rel. Standart v. Farmers' High Line Canal & Reservoir Co., 25 Colo. 202, 54 P. 626 (1898).

**It was held that the right acquired (or rather reserved) under a contract, was a perpetual right to have carried by the ditch, and furnished to him, sufficient water to irrigate the lands then owned by him and referred to and described in the schedule, and this right constituted an easement in the ditch, and such a right cannot be lost or abandoned by nonuser alone, short of the period for the limitation of actions to recover real property.** People ex rel. Standart v. Farmers' High Line Canal & Reservoir Co., 25 Colo. 202, 54 P. 626 (1898).

**37-84-122. Division engineer to measure water.** Any division engineer, or his deputy or assistant, who willfully neglects or refuses, after being called upon, to promptly measure water from the stream or other source of supply into the irrigating canals or ditches, in his division, according to their respective priorities, to the extent to which water may be actually necessary for the irrigation of lands under such canals or ditches, is guilty of a misdemeanor and, upon conviction thereof, shall be subject to the same penalty as provided in section 37-84-121.

**Source:** L. 1887: p. 305, § 5. R.S. 08: § 3258. C.L. § 1737. CSA: C. 90, § 135. CRS 53: § 147-7-23. C.R.S. 1963: § 148-7-22. L. 69: p. 1222, § 14.

**37-84-123. Jurisdiction of county court.** In all cases declared misdemeanors by sections 37-84-118 to 37-84-123, the county court of the county in which the offense was committed has jurisdiction.

**Source:** L. 1887: p. 306, § 6. R.S. 08: § 3259. C.L. § 1738. CSA: C. 90, § 136. CRS 53: § 147-7-24. L. 64: p. 341, § 345. C.R.S. 1963: § 148-7-23.

**37-84-124. Amount of water taken.** It is the duty of every person who is entitled to take water for irrigation purposes from any ditch, canal, or reservoir to see that he receives no more water from such ditch, canal, or reservoir through his headgate, or by any ways or means whatsoever, than the amount to which he is entitled. At all times, such person shall take every precaution to prevent more water than the amount to which he is entitled from such ditch, canal, or reservoir from coming upon his land.

**Source:** L. 1887: p. 312, § 1. R.S. 08: § 3260. C.L. § 1739. CSA: C. 90, § 137. CRS 53: § 147-7-25. C.R.S. 1963: § 148-7-24.

## ANNOTATION

**Purpose of provisions.** This section and § 37-84-125 are directed at prevention of diversions which exceed the decreed rate of diversion

and are not intended to prohibit out-of-priority diversions. Southeastern Colo. Water Conservancy Dist. v. Rich, 625 P.2d 977 (Colo. 1981).

**37-84-125. Receipt of too much water.** It is the duty of every such person, taking water from any ditch, canal, or reservoir, to be used for irrigation purposes, on finding that he is receiving more water from such ditch, canal, or reservoir, either through his headgate or by means of leaks, or by any means whatsoever, immediately to take steps to prevent his further receiving more water from such ditch, canal, or reservoir than the amount to which he is entitled. If knowingly he permits such extra water to come upon his land from such ditch, canal, or reservoir, and does not immediately notify the owners of such ditch or take steps to prevent its further flowing upon his land, he shall be liable to any person, company, or corporation who may be injured by such extra appropriation of water, for the actual damage sustained by the party aggrieved. The damages shall be adjudged to be paid, together with the costs of suit, and a reasonable attorney's fee to be fixed by the court and taxed with the costs.

**Source:** L. 1887: p. 312, § 2. R.S. 08: § 3261. C.L. § 1740. CSA: C. 90, § 138. CRS 53: § 147-7-26. C.R.S. 1963: § 148-7-25.

## ANNOTATION

**Purpose of provisions.** Section 37-84-124 and this section are directed at prevention of diversions which exceed the decreed rate of diversion and are not intended to prohibit out-of-priority diversions. Southeastern Colo. Water Conservancy Dist. v. Rich, 625 P.2d 977 (Colo. 1981).

**In an action for damages for being denied use of water in irrigation canal as result of alleged wrongful acts of named defendants,**

and for injunctive relief, wherein during the course of the trial plaintiffs tendered an amended complaint which included a request that attorneys' fees be assessed against defendants in addition to costs for the sole purpose of bringing the action under the provisions of this section, it was held that this section did not apply to the situation. Bicknell v. Vollmuth, 112 Colo. 207, 147 P.2d 478 (1944).

## ARTICLE 85

## Charge for Delivery of Water

**Cross references:** For rates for a corporation furnishing water, see § 7-42-107.

37-85-101.	"Person" defined - liability.	37-85-107.	False swearing.
37-85-102.	Right to continue purchasing water.	37-85-108.	Bonus deemed an extortionate rate.
37-85-103.	County commissioners to hear and consider applications.	37-85-109.	Penalty for collecting excessive rate.
37-85-104.	Commissioners to appoint day for hearing.	37-85-110.	Penalty for refusal to deliver water.
37-85-105.	Order fixing date of hearing.	37-85-111.	Action when corporation refuses to deliver water.
37-85-106.	Hearing - testimony - maximum rates.		

**37-85-101. "Person" defined - liability.** "Person", as used in this article, includes corporations and associations and the plural as well as the singular number. Every officer of a corporation or member of an association or co-ownership and every agent violating any of the provisions of sections 37-85-108 to 37-85-111 shall be liable to restore the unlawful



consideration extorted and be punishable under the penal provisions of sections 37-85-108 to 37-85-111, the same as if the thing done in disobedience to said provisions were done for his own sole benefit and advantage.

**Source:** L. 1887: p. 310, § 5. R.S. 08: § 3275. C.L. § 1751. CSA: C. 90, § 149. CRS 53: § 147-8-11. C.R.S. 1963: § 148-8-11.

#### ANNOTATION

**Constitutional and statutory provisions not applicable to political subdivision.** The language of § 8 of art. XVI, Colo. Const., and of this article, is not applicable to a political subdivision of the state of Colorado. *Matthews v. Tri-County Water Conservancy Dist.*, 200 Colo. 202, 613 P.2d 889 (1980).

**Provisions applicable to private parties.** The framers intended, and the general assembly understood, that § 8 of art. XVI, Colo. Const., was applicable only to private persons or corporations engaged in the business of storage, carriage, and sale of water for irrigation, mining,

milling, manufacturing, or domestic purposes. *Matthews v. Tri-County Water Conservancy Dist.*, 200 Colo. 202, 613 P.2d 889 (1980).

**Water conservancy districts not subject to county commissioners' jurisdiction.** Water conservancy districts, when fixing rates for sale of water, are not subject to the jurisdiction of the boards of county commissioners. *Matthews v. Tri-County Water Conservancy Dist.*, 200 Colo. 202, 613 P.2d 889 (1980).

**Applied** in *Talbott Farms, Inc. v. Bd. of County Comm'rs*, 43 Colo. App. 131, 602 P.2d 886 (1979).

**37-85-102. Right to continue purchasing water.** Any persons, acting jointly or severally, who have purchased and used water for irrigation for lands occupied by them from any ditch or reservoir, and have not ceased to do so for the purpose or with intent to procure water from some other source of supply, have the right to continue to purchase water to the same amount for their lands, on paying or tendering the price thereof fixed by the board of county commissioners as provided in sections 37-85-103 to 37-85-106 or, if no price has been fixed by them, the price at which the owners of such ditch or reservoir may be then selling water or did sell water during the then last preceding year. This section shall not apply to the case of those who may have taken water as stockholders or shareholders after they have sold or forfeited their shares or stock, unless they have retained a right to procure such water by contract, agreement, or understanding and use between themselves and the owners of such ditch and not then to the injury of other purchasers of water from or shareholders in the same ditch.

**Source:** L. 1879: p. 96, § 3. G.S. § 1740. R.S. 08: § 3264. C.L. § 1741. CSA: C. 90, § 139. CRS 53: § 147-8-1. C.R.S. 1963: § 148-8-1.

#### ANNOTATION

- I. General Consideration.
- II. The Consumer.
- III. The Carrier.
- IV. Measure of Damages.

#### I. GENERAL CONSIDERATION.

**Law reviews.** For note, "A Survey of Colorado Water Law", see 47 Den. L.J. 226 (1970).

**State owns water diverted from natural stream.** *Wheeler v. Northern Colo. Irrigating Co.*, 10 Colo. 582, 17 P. 487 (1887); *Northern Colo. Irrigating Co. v. Bd. of Comm'rs*, 95 Colo. 555, 38 P.2d 889 (1934).

**Neither the carrier nor the landowner owns the water diverted from a natural stream in Colorado;** they have only the use

thereof under regulations prescribed by the state, which owns the water. *Northern Colo. Irrigating Co. v. Bd. of Comm'rs*, 95 Colo. 555, 38 P.2d 889 (1934).

**To constitute a valid appropriation, the water diverted must, within a reasonable time, be applied to some beneficial use.** *Wheeler v. Northern Colo. Irrigating Co.*, 10 Colo. 582, 17 P. 487 (1887).

**The priority of an appropriation may date from the commencement of the ditch, proper diligence having been exercised.** *Wheeler v. Northern Colo. Irrigating Co.*, 10 Colo. 582, 17 P. 487 (1887).

**Section does not apply to a proceeding between individuals in which no ditch company is a party,** as where the question to be deter-

mined is whether a sheriff's deed includes a water right. *Cooper v. Shannon*, 36 Colo. 98, 85 P. 175 (1906).

## II. THE CONSUMER.

**Where an original appropriator conveyed his water right to a ditch company which in turn contracted to furnish water for irrigation to the appropriator's land** without charge, such appropriator was no longer owner of water right but a consumer whose rights were determined by contract, and his successors in interest acquired his rights thereunder. *Green v. Chaffee Ditch Co.*, 150 Colo. 91, 371 P.2d 775 (1962).

**A contractual right to make use of water on specific lands is far different from the "water right"** acquired by original appropriation, diversion and application to a beneficial use. *Green v. Chaffee Ditch Co.*, 150 Colo. 91, 371 P.2d 775 (1962).

**A user having contracted for and beneficially used for irrigation purposes a specific volume of water for any particular year**, without any valid limitation as to future use, would be entitled to the same volume each year succeeding, when needed for the purposes of irrigation, upon tender, annually, without intermission, of the rate which the company could lawfully exact, and compliance with its rules and regulations, so far as reasonable. *Northern Colo. Irrigation Co. v. Richards*, 22 Colo. 450, 45 P. 423 (1896); *City & County of Denver v. Brown*, 56 Colo. 216, 138 P. 44 (1914).

**Where nothing in a contract specifically required the grantor to continue for any definite time in the exercise of his right**, nor was there in the conveyance under which plaintiff held the lands, any condition or requirement that he should observe or perform any of the conditions of the contract under which water had been obtained, it was held that a provision of his contract that upon failure of the grantor to pay the annual rental, he should surrender all right or interest thereby created, did not necessarily involve a surrender of the statutory right to continue to purchase water for the same land, and that, notwithstanding plaintiff's repudiation of the contract, his right under the statute was undeniably. *Northern Colo. Irrigation Co. v. Pouppirt*, 22 Colo. App. 563, 127 P. 125 (1912).

**A corresponding duty to deliver devolves upon the carrier.** *Northern Colo. Irrigation Co. v. Pouppirt*, 22 Colo. App. 563, 127 P. 125 (1912).

**If, by collusion with the employees of the irrigating company, he receives a volume in excess of what is specified in the contract**, making no payment for such excess, he acquires no right to such excessive volume in subsequent years. *City & County of Denver v. Brown*, 56 Colo. 216, 138 P. 44 (1914).

**The consumer's rights may be waived**, and a voluntary contract as to these matters may be binding upon him. *Wheeler v. Northern Colo. Irrigating Co.*, 10 Colo. 582, 17 P. 487 (1887).

**Where a consumer, by the annual use of the water in a particular volume, has acquired the right** to continue in the enjoyment of the same volume, a condition limiting his right, imposed upon him without his consent, and against his protest, is invalid; e.g., where a municipal corporation having acquired the control of the works of an irrigation company, requires even those who are entitled to be supplied therefrom, by reason of such former user, to enter into contracts "subject to the needs and requirements of the city" such contracts, executed under protest, are without effect to limit the right of the consumer to the volume of water before rightfully enjoyed; otherwise as to any volume in excess thereof. *City & County of Denver v. Brown*, 56 Colo. 216, 138 P. 44 (1914).

**When, however, his contract expires by limitation, and is not renewed**, and he does not take the necessary steps to preserve the status growing out of his contractual relation with the carrier, his rights to a future use of water from the ditch cannot be based upon past use, in other words, his contract with the carrier is for carriage, and his rights are limited by its terms, so far as valid, to the volume of water for the period mentioned in his contract. *City & County of Denver v. Brown*, 56 Colo. 216, 138 P. 44 (1904).

**A consumer supplied with water by contract from a ditch owned and operated by a carrier company** in a sense is an appropriator from the stream supplying the ditch, but does not occupy the exact status of an independent appropriator directly from the stream, as his rights are limited by the terms of his contract, so far as valid, with the ditch company, as well as other limitations which the law, from the nature of the relation between the carrier company and a contract consumer from its ditch, imposes. *City & County of Denver v. Brown*, 56 Colo. 216, 138 P. 44 (1914).

**All consumers, generally speaking, have the right to be supplied from all the priorities decreed the ditch through which they are supplied**, whose rights by virtue of prior use aggregate the volume of such priorities, and in such circumstances stand upon an equal plane. *City & County of Denver v. Brown*, 56 Colo. 216, 138 P. 44 (1914).

**Where the first appropriation decreed a ditch was designed for some particular purpose or enterprise**, and later priorities awarded were to supply a different class or group of consumers from the first, then the later priorities would be as distinct as if used through separate canals, and the rights of the different classes of consumers would attach only to the respective



priorities awarded for their respective use. City & County of Denver v. Brown, 56 Colo. 216, 138 P. 44 (1914).

**A provision in a contract between the consumer and carrier limiting the volume of water** which the consumer is entitled to have delivered is valid. City & County of Denver v. Brown, 56 Colo. 216, 138 P. 44 (1914).

**Upon tender of the rate fixed and compliance with reasonable regulations established,** if the carrier has water undisposed of, the consumer is entitled to its use, and mandamus lies where his demand is refused. Wheeler v. Northern Colo. Irrigating Co., 10 Colo. 582, 17 P. 487 (1887).

**A prior purchaser is entitled to continue to purchase, although he may be able to obtain water from some other source.** Golden Canal Co. v. Bright, 8 Colo. 144, 6 P. 142 (1884).

### III. THE CARRIER.

**The carrier cannot acquire the rate-making power although in its contracts for the sale of water** it may attempt to reserve the right, and such contracts are subject to constitutional and statutory provisions which should be read into them. Northern Colo. Irrigation Co. v. Bd. of Comm'rs, 95 Colo. 555, 38 P.2d 889 (1934).

**If the carrier assumes and exercises the rate-making power, its acts** are subject to review and change by the county commissioners upon a proper showing. This, in effect, was decided in Montezuma Water & Land Co. v. McCracken, 62 Colo. 394, 163 P. 286 (1917). Northern Colo. Irrigation Co. v. Bd. of Comm'rs, 95 Colo. 555, 38 P.2d 889 (1934).

**An irrigation canal company, carrying water for hire, is not the proprietor of the water** which it is entitled to divert, but must be regarded as an intermediate agency existing for the purpose of aiding consumers in the exercise of their rights to appropriate water, as well as a private enterprise prosecuted for its benefit. City & County of Denver v. Brown, 56 Colo. 216, 138 P. 44 (1914).

**It is a quasi-public servant, charged with certain duties, and subject to a reasonable control,** and it has, in general, a monopoly of the business, and, at common law, could not coerce compliance with unreasonable regulations or charges. Wheeler v. Northern Colo. Irrigating Co., 10 Colo. 582, 17 P. 487 (1887).

**The carrier is entitled to compensation for carriage, but it cannot charge for the right to use water from its canal, nor can it exact in**

advance a part or all of its transportation charge, for the remaining years of its corporate life, as a condition precedent to use for the current irrigating season. Wheeler v. Northern Colo. Irrigating Co., 10 Colo. 582, 17 P. 487 (1888).

**A ditch owner may make reasonable rules to be observed by both himself and the consumer** in the sale and distribution of water from his ditch, but a prior purchaser who has complied with the provisions of this section cannot be required, as a condition precedent to the exercise of his right to purchase water, to acknowledge the equity of all the rules adopted by the ditch owner. Golden Canal Co. v. Bright, 8 Colo. 144, 6 P. 142 (1884).

**Since this section declares that, upon doing certain things a consumer shall have the right to purchase water** of respondent, it would be an impotent construction to admit that a clear legal obligation binding the latter to sell is not also created, and the consumer is entitled, upon performance of the condition precedent, to admission to the use and enjoyment of a certain quantity of water from the carrier's ditch, to say that the latter is not burdened with the duty of admitting the former to such use and enjoyment is to deny the right and nullify the statute. Golden Canal Co. v. Bright, 8 Colo. 144, 6 P. 142 (1884).

### IV. MEASURE OF DAMAGES.

**The rental value of the land is not to be taken as the measure of damages for a failure to furnish water** for irrigation, except when the consequent loss of crops was entire. Northern Colo. Irrigation Co. v. Richards, 22 Colo. 450, 45 P. 423 (1896).

**In an action against a ditch company for damages for failure to furnish water for irrigation,** the rental value of the land is adopted as a basis for estimating damages, the jury should be instructed to deduct from the rental value the necessary outlay which the plaintiff would have been required to make in the cultivation of the lands. Northern Colo. Irrigation Co. v. Richards, 22 Colo. 450, 45 P. 423 (1896).

**While the loss of trees, seed and labor, occasioned by a failure to furnish water for irrigation,** may constitute a proper element of damage in an action for such failure, compensation for permanent improvements or for depreciation in the value of live stock and farm implements cannot be recovered. Northern Colo. Irrigation Co. v. Richards, 22 Colo. 450, 45 P. 423 (1896).

**37-85-103. County commissioners to hear and consider applications.** The board of county commissioners of each county, at its regular sessions in each year, and at such other sessions as it in its discretion may deem proper, in view of the irrigation and harvesting season, and the convenience of all parties interested, shall hear and consider all applications which may be made to it by any party interested, either in furnishing and delivering for

compensation in any manner, or in procuring for such compensation, water for irrigation, mining, milling, manufacturing, or domestic purposes, from any ditch, canal, conduit, or reservoir, the whole or any part of which lies in such county. The application shall be supported by such affidavits as the applicant may present, showing reasonable cause for such board of county commissioners to proceed to fix a reasonable maximum rate of compensation for water to be thereafter delivered from such ditch, canal, conduit, or reservoir, within such county.

**Source:** L. 1887: p. 291, § 1. R.S. 08: § 3265. C.L. § 1742. CSA: C. 90, § 140. CRS 53: § 147-8-2. C.R.S. 1963: § 148-8-2.

## ANNOTATION

**Law reviews.** For comment, "Water: State-wide or Local Concern? City of Thornton v. Farmers Reservoir & Irrigation Co.", see 56 Den. L.J. 625 (1979).

The county commissioners have been invested with the power to set rates by the Colorado constitution. *Farmers Water Dev. Co. v. Barrett*, 151 Colo. 140, 376 P.2d 693 (1962).

Pursuant to § 8 of art. XVI, Colo. Const., the general assembly has provided statutory procedures under this and the following sections whereby those furnishing water carriage can have the county commissioners establish reasonable maximum rates. *Farmers Water Dev. Co. v. Barrett*, 151 Colo. 140, 376 P.2d 693 (1962).

**Constitutional and statutory provisions not applicable to political subdivision.** The language of § 8 of art. XVI, Colo. Const., and of this article is not applicable to a political subdivision of the state of Colorado. *Matthews v. Tri-County Water Conservancy Dist.*, 200 Colo. 202, 613 P.2d 889 (1980).

**Provisions only applicable to private parties.** The framers intended, and the general assembly understood, that § 8 of art. XVI, Colo. Const., was applicable only to private persons or corporations engaged in the business of storage, carriage, and sale of water for irrigation, mining, milling, manufacturing, or domestic purposes. *Matthews v. Tri-County Water Conservancy Dist.*, 200 Colo. 202, 613 P.2d 889 (1980).

**The rate-making power cannot be delegated to others.** *Farmers Water Dev. Co. v. Barrett*, 151 Colo. 140, 376 P.2d 693 (1962).

**Therefore, a carrier is not vested with power to prescribe the rate which it shall receive for its services.** *Farmers Water Dev. Co. v. Barrett*, 151 Colo. 140, 376 P.2d 693 (1962).

**A contract between the carrier and the consumer, whereby the carrier attempts to fix and collect the rate for carrying and delivering water to the consumer, is not binding on the latter because the Colorado constitution and this section upon the subject, have conferred upon and vested in the county commissioners of the respective counties the exclusive power to fix the rate for such service.** *Farmers Water Dev.*

*Co. v. Barrett*, 151 Colo. 140, 376 P.2d 693 (1962).

**The only time the courts can interfere with rate making is after the board of county commissioners either acts or fails to act, and then only to determine whether what was done or not done was unreasonable, arbitrary, or an abuse of discretion.** *Farmers Water Dev. Co. v. Barrett*, 151 Colo. 140, 376 P.2d 693 (1962).

**An assessment provided for by a court decree directing a ditch company to assess and plaintiff to pay a reasonable rate for carrying extra water for plaintiff is not a rate to be charged for use of water to be determined by the county commissioners, and the court's decree does not usurp the rate power of the county commissioners.** *Zoller v. Mail Creek Ditch Co.*, 31 Colo. App. 99, 498 P.2d 1169 (1972).

**A mutual water company has been defined as a private corporation organized for the express purpose of furnishing water only to shareholders thereof and not for profit or for hire.** *Farmers Water Dev. Co. v. Barrett*, 151 Colo. 140, 376 P.2d 693 (1962).

**Where a party is entitled to run water through a ditch as co-owner, in the absence of a contract concerning compensation to the ditch company therefor, he must pay his pro rata share of the upkeep of the ditch, and the amount fixed by the county commissioners as to such share is prima facie proof thereof.** *Farmers Water Dev. Co. v. Barrett*, 151 Colo. 140, 376 P.2d 693 (1962).

**No stipulation of the parties and no decree of the trial court can have any validity as to the rates to be charged by a ditch company to users who are neither stockholders nor co-owners of such ditch company, the authority to set reasonable rates for the carriage and delivery of such water being in the board of county commissioners.** *Farmers Water Dev. Co. v. Barrett*, 151 Colo. 140, 376 P.2d 693 (1962).

**Water conservancy districts not subject to county commissioners' jurisdiction.** Water conservancy districts, when fixing rates for sale of water, are not subject to the jurisdiction of the boards of county commissioners. *Matthews v. Tri-County Water Conservancy Dist.*, 200 Colo. 202, 613 P.2d 889 (1980).



**37-85-104. Commissioners to appoint day for hearing.** Every board of county commissioners, upon examination of such affidavit, or from the oaths of witnesses in addition thereto, if it finds that the facts sworn to show the application to be in good faith, and that there are reasonable grounds to believe that unjust rates of compensation are or are likely to be charged or demanded for water from such ditch, canal, conduit, or reservoir, shall enter an order fixing a day not sooner than twenty days thereafter nor later than the third day of the next regular session of the board, when they will hear all parties interested in such ditch, or other waterworks, or parties interested in procuring water therefrom for any of the said uses, as well as all documentary or oral evidence or depositions, taken according to law, touching the said ditch or other work and the cost of furnishing water therefrom.

**Source:** L. 1887: p. 292, § 2. R.S. 08: § 3266. C.L. § 1743. CSA: C. 90, § 141. CRS 53: § 147-8-3. C.R.S. 1963: § 148-8-3.

**Cross references:** For the taking of depositions, see C.R.C.P. 26 to 37.

**37-85-105. Order fixing date of hearing.** (1) At the time so fixed, all persons interested, on either side of the controversy, in lands which may be irrigated from such ditch, or other work, may appear by themselves, their agents, or their attorneys, and said board of county commissioners shall then proceed to take action in the matter of fixing such rates of compensation for the delivery of water; but the applicant, if the application is made by a party desirous of procuring water, within ten days from the time of entering the said order fixing the hearing, shall cause a copy of such order, duly certified, to be delivered to the owner of such ditch, canal, conduit, or reservoir, or to the president, secretary, or treasurer of the company, if it is owned by a corporation or association having such officers. If such owner cannot be found, a copy shall be left at his usual place of abode, with some person residing there over twelve years of age; and, if such officer of any corporation or association cannot be found, such copy shall be left at the usual place of business of the company of which he is such officer or at his residence if such company has no place of business; and, if such ditch or other work is owned by several owners not being an incorporated company, it shall be sufficient to serve notice by delivering copies to a majority of them.

(2) If the applicant is the owner or party controlling such ditch, canal, conduit, or reservoir, such notice shall be given by causing printed copies of such order in handbill form, in conspicuous type, to be posted securely in ten or more public places throughout the district watered from such ditch, or other work, if the water is used for irrigation, and one copy shall be posted for every mile in length of such ditch; but, if such ditch, or other work, is for the supply of water for milling or mining, it shall be sufficient to serve such copy on the parties then taking water therefrom. The person making such service or posting such printed copies shall make affidavit of the manner in which the same has been done, which affidavit shall be filed with the said board of county commissioners.

(3) Depositions mentioned in section 37-85-104, to be used before the board of county commissioners, shall be taken before any officer in the state authorized by law to take depositions, upon reasonable notice being given to the opposite party of the time and place of taking the same.

**Source:** L. 1887: p. 292, § 3. R.S. 08: § 3267. C.L. § 1744. CSA: C. 90, § 142. CRS 53: § 147-8-4. C.R.S. 1963: § 148-8-4.

#### ANNOTATION

**Applied** in *McCracken v. Montezuma Water & Land Co.*, 25 Colo. App. 280, 137 P. 903 (1914).

**37-85-106. Hearing - testimony - maximum rates.** (1) The board of county commissioners may adjourn or postpone any hearing from time to time as may be found necessary or for the convenience of parties or of public business. It shall hear and examine all legal testimony or proofs offered by any party interested concerning the original cost and present value of works and structure of such ditch, canal, conduit, or reservoir, the cost and expense of maintaining and operating the same, and all matters which may affect the establishing of a reasonable maximum rate of compensation for water to be furnished and delivered therefrom. It may issue subpoenas for witnesses, which subpoenas shall be served by the sheriff of the county, who shall receive the lawful fees for all such service; and said board may also issue a subpoena for the production of all books and papers required for evidence before it.

(2) Upon hearing and considering all the evidence and facts and matters involved in the case, said board of county commissioners shall enter an order describing the ditch, canal, conduit, reservoir, or other work in question with sufficient certainty and fixing a just and reasonable maximum rate of compensation for water to be thereafter delivered from such ditch or other work within the county in which such board of county commissioners acts, and such rate shall not be changed within two years from the time when it is so fixed, unless upon good cause shown. The district court of the proper county in case of refusal to obey the subpoena of the board of county commissioners may compel obedience thereto or punish for refusal to obey, after hearing, as in cases of attachment, for contempt of such district court.

**Source:** L. 1887: p. 293, § 4. R.S. 08: § 3268. C.L. § 1745. CSA: C. 90, § 143. CRS 53: § 147-8-5. C.R.S. 1963: § 148-8-5.

#### ANNOTATION

In conformity with § 8 of art. XVI, Colo. Const., the general assembly enacted this and the three preceding sections, and herein provided a full procedure for establishing a reasonable maximum water rate by the board of commissioners. *McCracken v. Montezuma Water & Land Co.*, 25 Colo. App. 280, 137 P. 903 (1914).

This and the three preceding sections contain provisions which specifically confer upon the county commissioners the power to fix the maximum rate of compensation for the carriage of water to be used for irrigating agricultural lands. *Northern Colo. Irrigation Co. v. Bd. of Comm'rs*, 95 Colo. 555, 38 P.2d 889 (1934).

Under these sections the important duty of fixing a maximum rate is vested exclusively in the boards of county commissioners of the several counties. *McCracken v. Montezuma Water & Land Co.*, 25 Colo. App. 280, 137 P. 903 (1914).

The landowner is protected from exorbitant charges for carriage by the provisions of this section authorizing the board of county commissioners to fix reasonable rates for carriage, and the company is protected from having its investments confiscated by its right to have the courts enjoin the enforcement of a rate that will not yield an income at least sufficient to meet operation and maintenance costs and an additional income such as will provide a return on its investment which is reasonable in view of the nature, character and extent of the benefits, if any, that accrue to the users. *Bd. of County*

*Comm'rs v. Rocky Mt. Water Co.*, 102 Colo. 351, 79 P.2d 373 (1938).

On the question of what is a reasonable rate for the carriage of water, profitable use to the landowner is immaterial in determining the rate base, but the extent to which it has been profitable is a factor to be considered in fixing what is a reasonable return on the rate base to which the carrier is entitled. *Bd. of County Comm'rs v. Rocky Mt. Water Co.*, 102 Colo. 351, 79 P.2d 373 (1938).

It will be presumed, the contrary not appearing, that in prescribing a rate the board acted solely upon the evidence produced before it, without any mixture of improper motive, and that the evidence was sufficient to support the order. *McCracken v. Montezuma Water & Land Co.*, 25 Colo. App. 280, 137 P. 903 (1914).

Where a judgment had been entered declaring a rate of charge prescribed by the county commissioners unreasonable and confiscatory, and a little more than three months thereafter, the board, upon a second hearing, established the same rate, the court declined to indulge in presumptions in support of the second order. *Montezuma Water & Land Co. v. McCracken*, 62 Colo. 394, 163 P. 286 (1917).

The maximum reasonable rates fixed by the board of county commissioners are subject to judicial control. *Montezuma Water & Land Co. v. McCracken*, 62 Colo. 394, 163 P. 286 (1917).

A decree of the district court vacated an order of the county commissioners prescribing



**ing a rate of charge**, and enjoined the board from enforcing or attempting to enforce the rate so prescribed. *McCracken v. Montezuma Water & Land Co.*, 25 Colo. App. 280, 137 P.903 (1914).

**Where the county commissioners fixed a rate, and on the application of a water company refused to change the same**, and, while in session, each member of the board stated that he would not consider another petition for a modification thereof, the water company is not precluded from bringing an action to restrain the enforcement of the rate fixed and to obtain the fixing of a different rate, on the ground that it had not, previous to bringing the action and after the expiration of two years from the date of fixing the rate, petitioned the board for a new rate. *Bd. of Comm'rs v. Montezuma Water & Land Co.*, 39 Colo. 166, 89 P. 794 (1931).

**Where the rate fixed by the board of county commissioners for the use of water** is such that the owner of the ditch can make no profit therefrom, its enforcement may properly be enjoined, since the term "reasonable compensation", as used in this section implies that something must be given for the service. *Bd. of Comm'rs v. Montezuma Water & Land Co.*, 39 Colo. 166, 89 P. 794 (1931).

**Although the county commissioners have the power to fix a reasonable maximum rate of compensation for water** to be delivered from irrigating ditches, this does not give to them the authority to confiscate the property of the ditch owner, neither does it give them the authority to compel the ditch owner to carry the water without compensation. *Bd. of Comm'rs v. Montezuma Water & Land Co.*, 39 Colo. 166, 89 P. 794 (1931).

**Where, upon a second petition, and due notice given to all concerned, the county commissioners**, after full hearing, prescribed the same rate set down in the previous order so vacated, it was held that the second order of the

board was not to be regarded as a violation of the injunction, and, not being assailed by any direct proceeding, and no lack of jurisdiction or excess of authority being shown, the rate prescribed thereby became the lawful maximum rate binding all concerned. *McCracken v. Montezuma Water & Land Co.*, 25 Colo. App. 280, 137 P. 903 (1914).

**Where a rate of charge fixed by the board has been judicially declared unreasonable and confiscatory**, the board will not be permitted to evade the effect of such judgment by declaring and establishing the same rate of charge, upon the same evidence. *Montezuma Water & Land Co. v. McCracken*, 62 Colo. 394, 163 P. 286 (1917).

**Where the only thing enjoined in water company's suit was the enforcement of an admittedly erroneous rate**, and where such items as value of structures, equipment, and operating expense, are or may be variable, and since the board may at any time readjust this rate, the supreme court found nothing to review. *Bd. of Comm'rs v. Rocky Mt. Water Co.*, 106 Colo. 276, 103 P.2d 686 (1940).

**The board is not charged with the duty of seeing that the prescribed rate is observed** by the carriers of water. *McCracken v. Montezuma Water & Land Co.*, 25 Colo. App. 280, 137 P. 903 (1914).

**The board can act only on the petition of an interested party**. *McCracken v. Montezuma Water & Land Co.*, 25 Colo. App. 280, 137 P. 903 (1914).

**No appeal has been provided from the board's decision in fixing such maximum rate**, and for that reason we think, when such rate is once fixed by the board in accordance with this act, the general assembly intended it should be observed and obeyed by all persons or corporations affected by it until annulled by some proper court. *McCracken v. Montezuma Water & Land Co.*, 25 Colo. App. 280, 137 P. 903 (1914).

**37-85-107. False swearing.** Every person who swears or affirms falsely in any matter is guilty of perjury in the second degree. Every person who testifies falsely after being duly sworn or having affirmed as a witness in any proceeding provided for in sections 37-85-103 to 37-85-106 is guilty of perjury in the first degree and, upon conviction thereof, shall be punished accordingly.

**Source:** L. 1887: p. 294, § 5. R.S. 08: § 3269. C.L. § 1746. CSA: C. 90, § 144. CRS 53: § 147-8-6. C.R.S. 1963: § 148-8-6. L. 72: p. 574, § 66.

**Cross references:** For perjury in the first and second degree, see §§ 18-8-502 and 18-8-503; for the punishment therefor, see §§ 18-1.3-401 and 18-1.3-501.

**37-85-108. Bonus deemed an extortionate rate.** (1) It shall not be lawful for any person owning or controlling, or claiming to own or control, any ditch, canal, or reservoir carrying or storing, or designed for the carrying or storing of, any water taken from any natural stream or lake within this state, to be furnished or delivered for compensation for irrigation, mining, milling, or domestic purposes, to persons not interested in such owner-

ship or control, to demand, bargain for, accept, or receive from any person who may apply for water for any of the aforesaid purposes any money or other valuable thing whatsoever, or any promise or agreement therefor, directly or indirectly, as royalty, bonus, or premium prerequisite or condition precedent to the right or privilege of applying, or bargaining for, or procuring such water. Such water shall be furnished, carried, and delivered upon payment or tender of the charges fixed by the board of county commissioners of the proper county, as is provided by law.

(2) Any moneys, and every valuable thing, or consideration of whatsoever kind, which is so demanded, charged, bargained for, accepted, received, or retained, contrary to the provisions of this section, shall be deemed an additional and corrupt rate, charge, or consideration for the water intended to be furnished and delivered therefor, or because thereof, and wholly extortionate and illegal; and, when paid, delivered, or surrendered may be recovered by the party paying, delivering, or surrendering the same from the party to whom, or for whose use, the same has been paid, delivered, or surrendered, together with costs of suit, including reasonable fees of attorneys of plaintiff, by proper action in any court having jurisdiction.

**Source:** L. 1887: p. 308, § 1. R.S. 08: § 3271. C.L. § 1747. CSA: C. 90, § 145. CRS 53: § 147-8-7. C.R.S. 1963: § 148-8-7.

#### ANNOTATION

**The evident purpose of this section was to protect against extortion** persons who owned or were in possession of lands lying under such ditches, or who were lawfully entitled to receive water therefrom upon tender or payment of a fixed compensation, and to whom the ditch company is under a reciprocal obligation to furnish it. *Schneider v. People*, 30 Colo. 493, 71 P. 369 (1903).

**This and the following section are purely penal and make it an offense** punishable by fine and imprisonment for any person or corporation to demand or accept any royalty, bonus or premium as a condition precedent to the right to procure water. *Northern Colo. Irrigation Co. v. Richards*, 22 Colo. 450, 45 P. 423 (1896).

**The words of this section designating the persons, or class of persons,** entitled to demand and receive water, are comprehensive enough to include all persons whomsoever, whether they own or are in possession of land lying under and susceptible of being irrigated from the ditch, or have any right to the use of water carried by it, or whether the lands are so remote or so situate with reference to the ditch as not be to suscep-

tible of irrigation by that method. *Schneider v. People*, 30 Colo. 493, 71 P. 369 (1903).

**In order to bring a case within this section it is necessary that, inter alia, the information should show** that the applicant for the water is of the class of persons entitled to invoke the protection of the section; that is, to demand of the ditch owner and receive from him the water upon compliance by him with the terms of the statute. *Schneider v. People*, 30 Colo. 493, 71 P. 369 (1903).

**In a prosecution under this section of the owner or person in control of a ditch, for refusing to supply water** to a person entitled to the same, an information which charges the offense in the language of the statute is insufficient. *Schneider v. People*, 30 Colo. 493, 71 P. 369 (1903).

**It is also necessary that the pleading should designate the land for which the water was demanded** as being so situate that the duty of the ditch to furnish water for its irrigation is made to appear and that the company might ascertain its location so as to deliver the water. *Schneider v. People*, 30 Colo. 493, 71 P. 369 (1903).

**37-85-109. Penalty for collecting excessive rate.** Every person owning or controlling, or claiming to own or control, any ditch, canal, or reservoir, who, after demand in writing made upon him for the supply or delivery of water for irrigation, mining, milling, or domestic purposes, to be delivered from the canal, ditch, or reservoir, owned, possessed, or controlled by him, and after tender of the lawful rate of compensation therefor in lawful money, shall demand, require, bargain for, accept, receive, or retain from the party making such application any money or other thing of value, or any promise or contract, or any valuable consideration whatever, as such royalty, bonus, or premium prerequisite or condition precedent, as is prohibited by section 37-85-108, is guilty of a misdemeanor and,



upon conviction thereof, shall be punished by a fine of not less than one hundred dollars nor more than five thousand dollars, or by imprisonment in the county jail for not less than three months nor more than one year, or by both such fine and imprisonment.

**Source:** L. 1887: p. 309, § 2. R.S. 08: § 3272. C.L. § 1748. CSA: C. 90, § 146. CRS 53: § 147-8-8. C.R.S. 1963: § 148-8-8.

#### ANNOTATION

**The carrier cannot charge a bonus for performing its duty.** Northern Colo. Irrigation Co. v. Poupirt, 22 Colo. App. 563, 127 P. 125 (1912).

**37-85-110. Penalty for refusal to deliver water.** Every person owning or controlling, or claiming to own or control, any ditch, canal, or reservoir, such as is mentioned in section 37-85-108, who, after demand in writing made upon him for the supply or delivery of water for irrigation, mining, milling, or domestic purposes, to be delivered from the canal, ditch, or reservoir, owned, possessed, or controlled by him, and after tender of the lawful rate of compensation therefor in lawful money, refuses to furnish or carry and deliver from such ditch, canal, or reservoir any water so applied for, which water may be by use of reasonable diligence in that behalf and, within the carrying or storage capacity of such ditch, canal, or reservoir, be lawfully furnished and delivered without infringement of prior rights, is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars nor more than five thousand dollars, or by imprisonment in the county jail for not less than three months nor more than one year, or by both such fine and imprisonment.

**Source:** L. 1887: p. 309, § 3. R.S. 08: § 3273. C.L. § 1749. CSA: C. 90, § 147. CRS 53: § 147-8-9. C.R.S. 1963: § 148-8-9.

#### ANNOTATION

**When a ditch company has water subject to its control, bona fide applicants are entitled to its use** for irrigation purposes upon tender of the lawful rate for carriage and compliance with the reasonable rules of the carrier. Combs v. Agricultural Ditch Co., 17 Colo. 146, 28 P. 966 (1892); City & County of Denver v. Brown, 56 Colo. 216, 138 P. 44 (1914).

**37-85-111. Action when corporation refuses to deliver water.** When any corporation, in defiance or by attempted evasion of the provisions of sections 37-85-101 and 37-85-108 to 37-85-111, after tender of the compensation, refuses to deliver water, such as is mentioned in section 37-85-110, to any person lawfully entitled to apply therefor, it is the duty of the attorney general, upon request of the board of county commissioners of the proper county or upon his otherwise receiving due notice thereof, to institute and prosecute to judgment and final determination proceedings in the nature of quo warranto for the forfeiture of the corporate rights, privileges, and franchises of any such corporation so offending or by mandamus or other proper proceedings to compel it to do its duty in that behalf.

**Source:** L. 1887: p. 310, § 4. R.S. 08: § 3274. C.L. § 1750. CSA: C. 90, § 148. CRS 53: § 147-8-10. C.R.S. 1963: § 148-8-10.

### ARTICLE 85.5

#### Resource Mitigation Banking Act

#### 37-85.5-101 to 37-85.5-111. (Repealed)

**Editor's note:** (1) This article was added in 1991 and was not amended prior to its repeal in 1997. For the text of this article prior to 1997, consult the Colorado statutory research explanatory note and

the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

(2) Section 37-85.5-111 provided for the repeal of this article, effective July 1, 1997. (See L. 91, p. 2013.)

## Reservoirs and Waterways

### ARTICLE 86

#### Rights-of-way and Ditches

**Law reviews:** For article, "Cities and Ditch Companies: Can They Live Together? — Parts I and II", see 16 Colo. Law. 815 and 996 (1987).

37-86-101.	Sections liberally construed.	37-86-108.	Incorporation of lateral ditch owners.
37-86-102.	Right-of-way through other lands.	37-86-109.	Consideration of incorporation benefits.
37-86-103.	Extent of right-of-way.	37-86-110.	Payment of damages.
37-86-104.	Condemnation of right-of-way.	37-86-111.	Head of ditch may be extended upstream.
37-86-105.	No land burdened with more than one ditch.	37-86-112.	Water to be prorated among consumers.
37-86-106.	Shortest route must be taken.	37-86-113.	Irrigation of meadows.
37-86-107.	Owner of ditch must permit enlargement.		

**37-86-101. Sections liberally construed.** This section and sections 37-86-108 to 37-86-110 are passed in the exercise of the police power of the state, and their provisions shall be liberally construed for the purpose of effectuating their object.

**Source:** L. 19: p. 506, § 4. C.L. § 1632. CSA: C. 90, § 15. CRS 53: § 147-3-10. C.R.S. 1963: § 148-3-10.

**37-86-102. Right-of-way through other lands.** Any person owning a water right or conditional water right shall be entitled to a right-of-way through the lands which lie between the point of diversion and point of use or proposed use for the purpose of transporting water for beneficial use in accordance with said water right or conditional water right.

**Source:** R.S. p. 363, § 2. G.L. § 1373. G.S. § 1712. R.S. 08: § 3167. C.L. § 1623. CSA: C. 90, § 6. CRS 53: § 147-3-1. C.R.S. 1963: § 148-3-1. L. 69: p. 1219, § 4.

#### ANNOTATION

**Law reviews.** For article, "A Review of Recent Activity in Colorado Water Law", see 47 Den. L.J. 181 (1970). For comment, "Bubb v. Christensen: The Rights of the Private Landowner Yield to the Rights of the Water Appropriator Under the Colorado Doctrine", see 58 Den. L.J. 825 (1981). For article, "Unilateral Ditch Modification", see 38 Colo. Law. 37 (February 2009).

**Ultimate sources of the right of condemnation** are § 14 of art. II, and § 7 of art. XVI, Colo. Const. Bubb v. Christensen, 200 Colo. 21, 610 P.2d 1343 (1980).

**It is established in this state that where a ditch owner is permitted, without interfer-**

**ence, to construct an irrigating ditch over the land of another,** and the ditch is put in use, a right-of-way is thereby acquired, and the necessity for condemning, to obtain possession, is obviated. Leonard v. Buerger, 130 Colo. 497, 276 P.2d 986 (1954).

**This section was enacted by the first legislative assembly.** Yunker v. Nichols, 1 Colo. 551 (1872).

**It gives a private person the right to invoke the power of eminent domain for a private use.** Ortiz v. Hansen, 35 Colo. 100, 83 P. 964 (1905).

**Under this section, if any person who owns farming land which has not sufficient length**



**of area exposed to a stream** to obtain a sufficient fall of water to irrigate it, or where his land is too far removed from the stream to build a ditch directly therefrom to the lands wholly upon the same, take and condemn lands belonging to others for a right-of-way for a ditch to divert and carry water from the stream to irrigate his own lands. *Ortiz v. Hansen*, 35 Colo. 100, 83 P. 964 (1905).

**Owner of conditional water right may condemn rights-of-way over the lands of others** for the purpose of transporting water for beneficial use. *Bubb v. Christensen*, 200 Colo. 21, 610 P.2d 1343 (1980).

**Condemnation right not dependent on supply source.** The right of condemnation for purposes of obtaining a right-of-way to the point of diversion of the water right is not dependent upon whether the source of supply is characterized as a well or a spring. *Bubb v. Christensen*, 200 Colo. 21, 610 P.2d 1343 (1980).

**A purely private party may have a right-of-way condemned for a ditch through the lands of another** to convey water to his lands for domestic, agricultural or mining purposes. *Downing v. More*, 12 Colo. 316, 20 P. 766 (1888).

**A right to convey water over the land of another for the purpose of irrigating one's land** may be acquired under this section and such right needs not a grant from the owner of the servient estate to support it. *Yunker v. Nichols*, 1 Colo. 551 (1872).

**Right extends to bed of ditch and sufficient ground on either side.** The right of an owner with respect to a ditch excavated over the private land of another extends to the bed of the ditch and sufficient ground on either side. *Shrull v. Rapasardi*, 33 Colo. App. 148, 517 P.2d 860 (1973).

**Such lands were formerly held in subordination to the dominant rights of others, who must necessarily pass over them** to obtain a supply of water to irrigate their own lands, but since the adoption of the constitution, the taking of private property for private use (which this amounts to) is prohibited unless compensation be made, and the general assembly has provided proceedings for this purpose. *Yunker v. Nichols*, 1 Colo. 551 (1872); *Schilling v. Rominger*, 4 Colo. 100 (1878); *Branagan v. Dulaney*, 8 Colo. 408, 8 P. 669 (1885); *Stewart v. Stevens*, 10 Colo. 440, 15 P. 786 (1887).

**When water transportation facility constructed without acquiring easement, landowner limited to temporary relief.** When a facility for the transportation of water is constructed or utilized by one having the right of eminent domain, without prior acquisition of an easement, the remedy of the landowner is limited to temporary relief, pending conduct of the eminent domain proceedings by the owners of

the water right. *Bubb v. Christensen*, 200 Colo. 21, 610 P.2d 1343 (1980).

**This right may also be acquired by contract between the parties, or by the gratuitous license of the landowner**, and in either case, after entry and expenditure of money, the right is irrevocable, because after entry under a license and construction of the ditch, the license operates as an irrevocable grant. *De Graffenried v. Savage*, 9 Colo. App. 131, 47 P. 902 (1897); *Bogolino v. Giorgetta*, 20 Colo. App. 338, 78 P. 612 (1904).

**There is no law which forbids one to grant permission to his neighbor to dig an irrigation ditch across his land without first purchasing a right-of-way** and getting a deed to it, and when, under such circumstances, the ditch actually is excavated and put into use without objection, or by approval, the owner of land traversed thereby may not thereafter withdraw his consent, deny the right of maintenance, or destroy the ditch, and such consent need not even be in writing, and where the ditch has been in existence for any appreciable time, consent to its original construction is presumed. *Leonard v. Buerger*, 130 Colo. 497, 276 P.2d 986 (1954); *Shrull v. Rapasardi*, 33 Colo. App. 148, 517 P.2d 860 (1973).

**This section applies only to such ditches as have been constructed through lands for the benefit of adjoining proprietors**, and not to those constructed by the owner of land to water his own land exclusively. *Downing v. More*, 12 Colo. 316, 20 P. 766 (1888).

**This section and the following section have no application to a proceeding to condemn a right-of-way for a ditch to carry waste and surplus water from the end of a ditch on another's land.** *Schneider v. Schneider*, 36 Colo. 518, 86 P. 347 (1906).

**Right to spill waste water is part of right to transport water** where essential to the maintenance of the ditch. *Hitti v. Montezuma Valley Irrigation Co.*, 42 Colo. App. 194, 599 P.2d 918 (1979).

**It does not confer the rights given upon persons other than those described in the statute**, or to enable them to exercise the right under conditions other than those mentioned. *Junction Creek & N. D. D. & I. Ditch Co. v. City of Durango*, 21 Colo. 194, 40 P. 356 (1895).

**The right of one person to conduct water over the land of another is an interest in real estate**, which must be conveyed by deed in compliance with the terms of the statute of frauds, and in countries where the humidity of the climate is sufficient to supply moisture to plants, there can be no reason for distinguishing this from other easements in the soil, and therefore the law of England, and of most of our states on this point will be found in the general rules relating to real property. *Yunker v. Nichols*, 1 Colo. 551 (1872).

**It is clear under all the authorities that appellant could not resort to the summary remedy of obstructing or destroying the ditch**

or preventing the parties from entering upon the line of the ditch to operate it. *De Graffenried v. Savage*, 9 Colo. App. 131, 47 P. 902 (1897).

**37-86-103. Extent of right-of-way.** Such right-of-way shall extend only to a ditch, dike, cutting, pipeline, or other structure sufficient for the purpose required.

**Source:** R.S. p. 363, § 3. G.L. § 1374. G.S. § 1713. R.S. 08: § 3168. C.L. § 1624. CSA: C. 90, § 7. CRS 53: § 147-3-2. C.R.S. 1963: § 148-3-2. L. 69: p. 1219, § 5.

#### ANNOTATION

**Law reviews.** For note, "A Survey of Colorado Water Law", see 47 Den. L.J. 226 (1970). For comment, "Bubb v. Christensen: The Rights of the Private Landowner Yield to the Rights of the Water Appropriator Under the Colorado Doctrine", see 58 Den. L.J. 825 (1981).

**Ultimate sources of the right of condemnation** are § 14 of art. II, and § 7 of art. XVI, Colo. Const. *Bubb v. Christensen*, 200 Colo. 21, 610 P.2d 1343 (1980).

**Condemnation right not dependent on supply source.** The right of condemnation for purposes of obtaining a right-of-way to the point of diversion of the water right is not dependent upon whether the source of supply is characterized as a well or a spring. *Bubb v. Christensen*, 200 Colo. 21, 610 P.2d 1343 (1980).

**The owner of the carrying ditch in making the diversion from the natural stream acts solely as the agent or trustee** for him who applies the water to a beneficial use, gets no title

in or right to the use of the water and has no property in it subject to disposal, and he who applies the water thus diverted to beneficial use acquires a property right in the use of the water applied which he, and he only, can sell, dispose of, and convey by deed separate and apart from the land to which it has been applied or with the land to which it has been applied. *Pioneer Irrigation Co. v. Bd. of County Comm'rs*, 236 F. 790 (D. Colo. 1916).

**When water transportation facility constructed without acquiring easement, landowner limited to temporary relief.** When a facility for the transportation of water is constructed or utilized by one having the right of eminent domain, without prior acquisition of an easement, the remedy of the landowner is limited to temporary relief, pending conduct of the eminent domain proceedings by the owners of the water right. *Bubb v. Christensen*, 200 Colo. 21, 610 P.2d 1343 (1980).

**37-86-104. Condemnation of right-of-way.** (1) Upon the refusal of owners of tracts of land through which said right-of-way is proposed to run, to allow passage through their property, the person desiring such right-of-way may proceed to condemn and take same under the provisions of articles 1 to 7 of title 38, C.R.S., concerning eminent domain.

(2) State agencies shall, to the maximum extent practicable, cooperate with persons desiring a right-of-way for water conveyance structures.

**Source:** G.L. § 1376. G.S. § 1715. R.S. 08: § 3169. C.L. § 1625. CSA: C. 90, § 8. CRS 53: § 147-3-3. C.R.S. 1963: § 148-3-3. L. 69: p. 1220, § 6. L. 2003: Entire section amended, p. 1367, § 2, effective April 25.

#### ANNOTATION

**Law reviews.** For article on eminent domain proceedings, see 21 Dicta 6 (1944). For article, "Revision of Water and Irrigation Statutes", see 31 Dicta 29 (1954). For comment, "Water: Statewide or Local Concern? City of Thornton v. Farmers Reservoir & Irrigation Co.", see 56 Den. L.J. 625 (1979). For comment, "Bubb v. Christensen: The Rights of the Private Landowner Yield to the Rights of the Water Appropriator Under the Colorado Doctrine", see 58 Den. L.J. 825 (1981).

**Ultimate sources of the right of condemnation** are § 14 of art. II, and § 7 of art. XVI, Colo. Const. *Bubb v. Christensen*, 200 Colo. 21, 610 P.2d 1343 (1980).

**The prosperity of the country required that the greatest possible use of the waters should be made**, and that no restrictions should exist to its appropriation, transportation and use, and the right-of-way for conveying it across the land of another was regarded as a general servitude attaching to such land ex necessitate, regardless



of contract. *De Graffenried v. Savage*, 9 Colo. App. 131, 47 P. 902 (1897).

**It will thus be seen that at an early date the court found it necessary to override and disregard technical rules of law** pertaining to riparian rights in other countries, and apply our own laws, made with reference to the climate, the arid and desert character of the land without water, and its prolific fruitfulness by the application of water. *De Graffenried v. Savage*, 9 Colo. App. 131, 47 P. 902 (1897).

**Condemnation right not dependent on supply source.** The right of condemnation for purposes of obtaining a right-of-way to the point of diversion of the water right is not dependent upon whether the source of supply is characterized as a well or a spring. *Bubb v. Christensen*, 200 Colo. 21, 610 P.2d 1343 (1980).

**The purpose for which land is condemned under this section is a public purpose.** *United States v. O'Neill*, 198 F. 677 (D. Colo. 1912).

**It is not incumbent upon the petitioner to show an absolute necessity for the taking.** *Sand Creek Lateral Irrigation Co. v. Davis*, 17 Colo. 326, 29 P. 742 (1892).

**The use of an abandoned river bed on the public land for the purpose of turning water into it from a ditch** to relieve the ditch of an excessive flow therein, which excessive flow might have been prevented by constructing and maintaining a suitable headgate at the proper place, or for the purpose of watering the appropriator's livestock when his own land furnished ample facilities for watering such stock, are not such necessary uses as would give the user a right-of-way through the abandoned river bed for conveying water as against a subsequent patentee of the land including the river bed. *Boglino v. Giorgetta*, 20 Colo. App. 338, 78 P. 612 (1904).

**This section expressly provides that a proceeding to condemn shall be pursued under the statute of eminent domain.** *Mulford v. Farmers' Reservoir & Irrigation Co.*, 62 Colo. 167, 161 P. 301 (1916).

**This section grants and limits the right to enter upon and use the property of another for the very purpose** for which the power of eminent domain may be exercised, and such exercise under the general provisions of the statutes relating to that subject affords the appropriate and only way for securing the rights granted by this section. *Broadmoor Land Co. v. Curr*, 133 F. 37 (8th Cir. 1904).

**When water transportation facility constructed without acquiring easement, landowner limited to temporary relief.** When a facility for the transportation of water is constructed or utilized by one having the right of eminent domain, without prior acquisition of an easement, the remedy of the landowner is limited to temporary relief, pending conduct of the eminent domain proceedings by the owners of the water right. *Bubb v. Christensen*, 200 Colo. 21, 610 P.2d 1343 (1980).

**The mere fact that parties constructing an irrigating ditch have become incorporated** does not entitle the ditch to exemption from the operation of this section. *Sand Creek Lateral Irrigation Co. v. Davis*, 17 Colo. 326, 29 P. 742 (1892).

**Where it was contended that because the contemplated canal of the petitioner was parallel for many miles with the canal of the defendant company, and therefore greatly damaged it, that the right to proceedings under this section did not exist, this contention is without support in law or reason, because no authorities are presented which intimate that the construction of one canal is sufficient reason to prohibit the construction of another because it runs parallel with the first, and if the rule would obtain it would result in the creation and continuation of a monopoly against which the constitution of our state and the statutes are directly aimed.** *San Luis Land Canal & Imp. Co. v. Kenilworth Canal Co.*, 3 Colo. App. 244, 32 P. 860 (1893).

**Applied in** *Thompson v. De Weise-Dye Ditch & Reservoir Co.*, 25 Colo. 243, 53 P. 507 (1898); *Tegeler v. Schneider*, 49 Colo. 574, 114 P. 288 (1911).

**37-86-105. No land burdened with more than one ditch.** No tract or parcel of improved or occupied land, without the written consent of the owner thereof, shall be subjected to the burden of two or more ditches or other structures constructed for the purpose of conveying water through said land when the same object can feasibly and practicably be attained by uniting and conveying all the water necessary to be conveyed through such property through one ditch or other structure.

**Source:** L. 1881: p. 164, § 1. G.S. § 1716. R.S. 08: § 3170. C.L. § 1626. CSA: C. 90, § 9. CRS 53: § 147-3-4. C.R.S. 1963: § 148-3-4. L. 69: p. 1220, § 7.

## ANNOTATION

- I. General Consideration.
- II. Burdening Servient Estate.
- III. Priorities.

### I. GENERAL CONSIDERATION.

**Ditches subject to enlargement and joint use under the provisions of this section are strictly private ditches.** *Junction Creek & N. D. D. & I. Ditch Co. v. City of Durango*, 21 Colo. 194, 40 P. 356 (1895).

**The provisions of this section are for the benefit of the landowner**, and cannot be invoked by rival ditch companies. *San Luis Land, Canal & Imp. Co. v. Kenilworth Canal Co.*, 3 Colo. App. 244, 32 P. 860 (1893).

**Under this section and the next section, the owner of lands over which another has acquired an easement to maintain a lateral ditch**, for the irrigation of his lands, is not, merely by his property in the servient tenement, entitled to divert water from such lateral, to the prejudice of the owner of the dominant tenement. *Sebold v. Rieger*, 26 Colo. App. 209, 142 P. 201 (1914).

**This section does not conflict with the constitutional provisions granting a right-of-way for the construction of ditches**, but, while recognizing the privilege, it simply undertakes to regulate the exercise thereof so as to inflict the least possible inconvenience and injury upon the owner of the servient estate. *Trippe v. Overacker*, 7 Colo. 72, 1 P. 695 (1883).

**The provisions of this section are not applicable where there is no ditch presently on a defendant's property** "constructed for the purpose of conveying water through said property" and where a defendant's head ditch and laterals therefrom lie wholly on defendant's own property, or where it is undisputed that a defendant uses his head ditch to carry waters in a northerly and southerly direction from an irrigation system on his property, and plaintiffs' only requirement for a ditch across defendant's property is to carry their irrigation water both from the irrigation canal and the well in a northerly direction across the westerly portion of a defendant's property. *Mott v. Coleman*, 132 Colo. 306, 287 P.2d 655 (1955).

**The provisions of this section are not applicable** where the ditches in question already exist and the rights of the parties in such ditches are already vested. *Campbell v. Kelsall*, 717 P.2d 1019 (Colo. App. 1986).

### II. BURDENING SERVIENT ESTATE.

**This section is designed to avoid the burdening of improved or occupied lands with unnecessary irrigating ditches**, and to this end, it provides that under certain circumstances such

lands shall not be subjected to the burden of two or more irrigating ditches, when the same object can feasibly and practicably be attained by uniting and conveying all the water necessary through such lands in one ditch. *Sand Creek Lateral Irrigation Co. v. Davis*, 17 Colo. 326, 29 P. 742 (1892).

**This section is intended to prevent improved lands from being needlessly cut up by many ditches** to lead water to lands of other owners. *Broadmoor Land Co. v. Curr*, 133 F. 37 (8th Cir. 1904).

**Under this section as it existed prior to the law of 1881 any number of farmers cultivating separate tracts of land** below, whenever it became necessary for them to bring water through the lands of another lying above, in order to obtain a sufficient fall for the purpose of irrigation, might each condemn a right-of-way for the construction of a separate ditch through such lands, thus burdening the servient estate with one ditch after another until its value would be greatly reduced, or perhaps totally destroyed, with no authority in the proprietor to prevent the same. *Downing v. More*, 12 Colo. 316, 20 P. 766 (1888).

**This and the following section clearly and in unmistakable language apply** to the right of the owner of the lands to assert that his property shall not be burdened with more than one irrigating ditch, provided that one ditch be of sufficient capacity to carry water for the purposes contemplated by the act. *San Luis Land, Canal & Imp. Co. v. Kenilworth Canal Co.*, 3 Colo. App. 244, 32 P. 860 (1893).

**Two or more outside parties cannot burden the servient estate with two or more ditches and two or more easements without the owner's consent**, when it is practicable to accomplish the same object by imposing but one burden. *Downing v. More*, 12 Colo. 316, 20 P. 766 (1888).

**Upon a proper verdict a court may authorize a petitioner to enlarge, improve, and use a ditch** in common with the original owner. *Sand Creek Lateral Irrigation Co. v. Davis*, 17 Colo. 326, 29 P. 742 (1892).

**A court cannot require such owner to perform work or make expenditures for the purpose of adapting the ditch to petitioner's use.** *Sand Creek Lateral Irrigation Co. v. Davis*, 17 Colo. 326, 29 P. 742 (1892).

**Construction of section in relation to federal reclamation statute.** *United States v. O'Neill*, 198 F. 677 (D. Colo. 1912).

### III. PRIORITIES.

**This section indicates the general policy of the irrigation laws as to priorities**, and even without such a statute, persons voluntarily



uniting their irrigating ditches would not necessarily forfeit any priorities which they might have theretofore respectively acquired. *Nichols v. McIntosh*, 19 Colo. 22, 34 P. 278 (1893).

**The same irrigating ditch may have two or more priorities belonging to the same or different parties,** and two or more persons may divert water through the same headgate for the irrigation of their several farms without any surrender, joinder, or merger of their respective priorities. *Nichols v. McIntosh*, 19 Colo. 22, 34 P. 278 (1893).

**Where petitioner and others arranged to divert water for the irrigation of their several farms** through a single headgate, and so carried the water for a certain distance through a ditch constructed and used by them in common, these facts, without other pertinent evidence, do not justify the conclusion that petitioner agreed to surrender his separate priority; nor is the inference to be indulged that he intended so to do. *Nichols v. McIntosh*, 19 Colo. 22, 34 P. 278 (1893).

**37-86-106. Shortest route must be taken.** Whenever any persons find it necessary to convey water through the lands of others, they shall select for the line of such conveyance the shortest and most direct route practicable upon which said ditch can be constructed with uniform or nearly uniform grade.

**Source:** L. 1881: p. 164, § 2. G.S. § 1717. R.S. 08: § 3171. C.L. § 1627. CSA: C. 90, § 10. CRS 53: § 147-3-5. C.R.S. 1963: § 148-3-5. L. 69: p. 1220, § 8.

#### ANNOTATION

**Law reviews.** For article, "Revision of Water and Irrigation Statutes", see 31 *Dicta* 29 (1954). For note, "A Survey of Colorado Water Law", see 47 *Den. L.J.* 226 (1970).

**A plaintiff is under an obligation to "select for the line of ditch through a defendant's property the shortest and most direct route practicable,** upon which a ditch can be constructed with uniform or nearly uniform grade". *Mott v. Coleman*, 132 Colo. 306, 287 P.2d 655 (1955).

**This section is no part of the eminent domain statute.** *Mulford v. Farmers' Reservoir & Irrigation Co.*, 62 Colo. 167, 161 P. 301 (1916).

**The provisions of this section are not jurisdictional in proceedings to condemn a ditch right-of-way.** *Mulford v. Farmers' Reservoir & Irrigation Co.*, 62 Colo. 167, 161 P. 301 (1916).

**The ditches under contemplation are such as only convey water to be used upon the land**

**It is not reasonable to suppose that priority of right to water, where water is scarce,** or likely to become so, will be lightly sacrificed or surrendered by its owner, nor should the owner of such a right be held to have surrendered it or merged it, except upon reasonably clear and satisfactory evidence. *Nichols v. McIntosh*, 19 Colo. 22, 34 P. 278 (1893).

**Where it is a matter of mutual convenience to convey the water for the use of respective farms** for a certain distance through the same irrigating ditch, in so doing the parties are entitled to have their respective rights protected the same as if the water had been conveyed through separate ditches, or through ditches having separate and independent headgates. *Trippe v. Overacker*, 7 Colo. 72, 1 P. 695 (1883); *Rominger v. Squires*, 9 Colo. 327, 12 P. 213 (1886); *Downing v. More*, 12 Colo. 316, 20 P. 766 (1888); *Sand Creek Lateral Irrigation Co. v. Davis*, 17 Colo. 326, 29 P. 742 (1892); *Nichols v. McIntosh*, 19 Colo. 22, 34 P. 278 (1893).

**of the person constructing the ditch.** *Junction Creek & N. D. D. & I. Ditch Co. v. City of Durango*, 21 Colo. 194, 40 P. 356 (1895).

**The necessity contemplated in this section does not mean an absolute one,** but only a reasonable necessity. *United States v. O'Neill*, 198 F. 677 (D. Colo. 1912).

**The necessity intended is to convey water through the lands of another, not the necessity for taking a particular route.** *Sand Creek Lateral Irrigation Co. v. Davis*, 17 Colo. 326, 29 P. 742 (1892); *Mulford v. Farmers' Reservoir & Irrigation Co.*, 62 Colo. 167, 161 P. 301 (1916).

**If the way sought for an irrigating ditch is not the shortest and most direct route practicable,** the respondent should present the question in limine. *Mulford v. Farmers' Reservoir & Irrigation Co.*, 62 Colo. 167, 161 P. 301 (1916).

**37-86-107. Owner of ditch must permit enlargement.** No persons having constructed a private ditch for the purposes and in the manner provided in section 37-86-106 shall prohibit or prevent any other person from enlarging or using any ditch by them constructed in common with them, upon payment to them of a reasonable proportion of the cost of construction of said ditch.

**Source:** L. 1881: p. 164, § 3. G.S. § 1718. R.S. 08: § 3172. C.L. § 1628. CSA: C. 90, § 11. CRS 53: § 147-3-6. C.R.S. 1963: § 148-3-6.

## ANNOTATION

**Law reviews.** For article, "Revision of Water and Irrigation Statutes", see 31 Dicta 29 (1954).

**This section is, in most respects, a complement of § 37-86-105.** *Trippe v. Overacker*, 7 Colo. 72, 1 P. 695 (1883).

**This section is unconstitutional insofar as it attempts to limit or direct the compensation to be paid for the property.** *Trippe v. Overacker*, 7 Colo. 72, 1 P. 695 (1883).

**In an action to condemn a right-of-way for an irrigating ditch to convey the waste and surplus water from the end of a ditch on defendant's land, this section providing for enlarging ditches has no application.** *Schneider v. Schneider*, 36 Colo. 518, 86 P. 347 (1906).

**A ditch which is used for the carriage of water for hire to the people generally is quasi-public, and a city cannot, by condemnation proceedings, acquire a right to enlarge and use it in conjunction with the ditch company.** *Junction Creek & N. D. D. & I. Ditch Co. v. City of Durango*, 21 Colo. 194, 40 P. 356 (1895).

**The ditches subject to enlargement and joint use under this section are strictly private ditches, and such as are used to convey water across the land of another to irrigate the adjoining land of the person or corporation owning the ditch, and this is clearly manifest by the language of the act, and also from its object and purpose.** *Junction Creek & N. D. D. & I. Ditch Co. v. City of Durango*, 21 Colo. 194, 40 P. 356 (1895).

**The whole act of 1881 must be considered in determining the meaning of the term "private ditch", as used in this section.** *Sand Creek Lateral Irrigation Co. v. Davis*, 17 Colo. 326, 29 P. 742 (1892).

**Prior to its enactment, the right to condemn the right-of-way for separate ditches through the land of another for the purpose of irrigating the land below and adjoining, by persons owning the same, was practically unlimited; and to limit this right and protect the servient estate from the burden of unnecessary ditches, the act in question was passed.** *Junction Creek & N. D. D. & I. Ditch Co. v. City of Durango*, 21 Colo. 194, 40 P. 356 (1895).

**The statutory right to enlarge applies only to such ditches as have been constructed through lands for the benefit of adjoining proprietors, and not to those constructed by the owner of land to water his own land exclusively.** *Downing v. More*, 12 Colo. 316, 20 P. 766 (1888) (modifying *Trippe v. Overacker*, 7 Colo. 72, 1 P. 695 (1883)).

**There are good reasons for requiring others to enlarge a ditch constructed upon such**

**a route whenever practicable, if it afterwards becomes necessary for them to convey water through the same lands; but a farmer in distributing water upon his own lands may have but little regard to the grade of his small ditches or laterals, and this section does not contemplate the enlargement by others of such ditches, and thus not only burdening his lands with an easement, but compelling him against his will to accept such parties as cotenants with him.** *Downing v. More*, 12 Colo. 316, 20 P. 766 (1888).

**The right to enlarge and use the ditch of another already constructed will be enforced in the same manner, and under the same law, as the right to take or damage any other kind of private property.** *Trippe v. Overacker*, 7 Colo. 72, 1 P. 695 (1883); *Downing v. More*, 12 Colo. 316, 20 P. 766 (1888).

**If a company can make arrangement with the owner of a canal whereby it may put in the canal a headgate and use the canal itself as a conduit for carrying the water directly from the stream to such headgate and thence by its own feeder carry the water of the stream to its reservoir for storage purposes is a matter of contract between the two, and such a right might be acquired by condemnation in a proper case under this section and by contract.** *Water Supply & Storage Co. v. Larimer & Weld Irrigation Co.*, 24 Colo. 322, 51 P. 496 (1897).

**Where the El Moro company consented that the Chicosa company should enlarge the ditch, should share in its cost and maintenance as thus enlarged, waived any right to other compensation, and agreed that the Chicosa company should enjoy so much of the El Moro ditch as was necessary for these purposes, their right under these circumstances is clearly an easement, and as we must conclude according to our present advices, not an easement revocable at the option of the El Moro company, but a continuing one, of which the Chicosa company could enforce the quiet enjoyment.** *Chicosa Irrigating Ditch Co. v. El Moro Ditch Co.*, 10 Colo. App. 276, 50 P. 731 (1897).

**A ditch owned by an incorporated company is not exempt from this section.** *Sand Creek Lateral Irrigation Co. v. Davis*, 17 Colo. 326, 29 P. 742 (1892).

**This section is wholly inapplicable where both plaintiffs and defendants take the position that a defendant's head ditch cannot be used for carrying waters to defendant's lands.** *Mott v. Coleman*, 132 Colo. 306, 287 P.2d 655 (1955).



**37-86-108. Incorporation of lateral ditch owners.** Whenever the owners of sixty percent or more of the area of lands served by any one lateral ditch used for the delivery of water for irrigation from a common source organizes a corporation having for its object the taking over and owning of all of the interests of the incorporators in said lateral, said incorporators to receive shares of stock in said corporation for their holdings, the corporation as organized has power, under the eminent domain laws of the state of Colorado, to condemn the interest in said lateral belonging to the owners of the remaining forty percent or less of the lands so served by the lateral.

**Source:** L. 19: p. 505, § 1. C.L. § 1629. CSA: C. 90, § 12. CRS 53: § 147-3-7. C.R.S. 1963: § 148-3-7.

#### ANNOTATION

**A lateral ditch is a branch ditch which has its headgate in the main ditch** and not in a natural watercourse. *New Multa Trina Ditch Co. v. Patch*, 123 Colo. 444, 230 P.2d 597 (1951).

**Where the headgate of the ditch in question was located on the bank of a creek, not in a ditch bank, and a water right had been adju-**

**dicated to the ditch and a priority number of appropriation assigned thereto, the ditch was not a lateral ditch as the term is employed in irrigation usage and in this section.** *New Multa Trina Ditch Co. v. Patch*, 123 Colo. 444, 230 P.2d 597 (1951).

**37-86-109. Consideration of incorporation benefits.** In such condemnation proceedings, the court, jury, or commissioners having authority in the premises shall consider, as one of the elements of benefit accruing to the owners of the property so being condemned, the advantages accruing to said owner by reason of the organization of said corporation.

**Source:** L. 19: p. 505, § 2. C.L. § 1630. CSA: C. 90, § 13. CRS 53: § 147-3-8. C.R.S. 1963: § 148-3-8.

**37-86-110. Payment of damages.** It is lawful for such corporation to pay the damages, if any, assessed on account of the taking in such condemnation proceedings, in its own corporate stock at the same price per share paid therefor by the original incorporators, and the court, jury, or commissioners having authority in the premises, in arriving at the damage to be awarded, shall take into consideration the amount of stock which the original incorporators have received for their holdings.

**Source:** L. 19: p. 505, § 3. C.L. § 1631. CSA: C. 90, § 14. CRS 53: § 147-3-9. C.R.S. 1963: § 148-3-9.

**37-86-111. Head of ditch may be extended upstream.** In case the channel of any natural stream becomes so cut out, lowered, turned aside, or otherwise changed from any cause, as to prevent any ditch, canal, or feeder of any reservoir from receiving the proper inflow of water to which it may be entitled from such natural stream, the owners of such ditch, canal, or feeder have the right to extend the head of such ditch, canal, or feeder to such distance up the stream which supplies the same as may be necessary for securing a sufficient flow of water into the same. For that purpose they have the same right to maintain proceedings for condemnation of right-of-way for such extension as in case of constructing a new ditch. The priority of right to take water from such stream through such ditch, canal, or feeder as to any such ditch, canal, or feeder shall remain unaffected in any respect by reason of such extension; but no such extension shall interfere with the complete use or enjoyment of any ditch, canal, or feeder.

**Source:** L. 1881: p. 161, § 1. G.S. § 1719. R.S. 08: § 3173. C.L. § 1633. CSA: C. 90, § 16. CRS 53: § 147-3-11. C.R.S. 1963: § 148-3-11.

## ANNOTATION

**Rights to the use of water which depend for their existence upon a compliance with the requirements of the so-called map and statement statute**, which has been held unconstitutional, cannot be enforced as against superior rights, notwithstanding the original appropriators of water relied upon the validity of the statute, and the rights of other appropriators of water in the same district have been adjudicated upon the assumption that the statute was valid. *Great Plains Water Co. v. Lamar Canal Co.*, 31 Colo. 96, 71 P. 1119 (1903).

**Change of point of diversion must be without harm to others.** Although the point of diversion may be changed in some instances, the statute provides an exclusive remedy, and the

change must be accomplished without harm to other appropriators. *Harvey v. Davis*, 655 P.2d 418 (Colo. 1982).

**It is just as accurate to say of the extension of the right-of-way for a ditch that it has been made or enlarged**, as to say that a ditch has been made or enlarged; for, as will be seen from this section, extending the right-of-way for a ditch by carrying the headgate farther up the stream necessarily involves the making of a ditch or other conduit for carrying water, that is, the extension is made by making a ditch, etc., and such extension may subsequently involve the enlarging of its capacity. *Lamar Canal Co. v. Amity Land & Irrigation Co.*, 26 Colo. 370, 58 P. 600 (1899).

**37-86-112. Water to be prorated among consumers.** If at any time any ditch or reservoir from which water is drawn for irrigation shall not be entitled to a full supply of water from the natural stream which supplies the same, the water actually received into and carried by such ditch, or held in such reservoir, shall be divided among all the consumers of water from such ditch or reservoir, as well as the owners, shareholders, or stockholders thereof, as the parties purchasing water therefrom and parties taking water partly under and by virtue of holding shares and partly by purchasing the same to each his share pro rata, according to the amount he is then entitled, so that all owners and purchasers shall suffer from the deficiency arising from the cause aforesaid each in proportion to the amount of water which he should have received in case no such deficiency of water had occurred.

**Source:** L. 1879: p. 97, § 4. G.S. § 1722. R.S. 08: § 3175. C.L. § 1635. CSA: C. 90, § 18. CRS 53: § 147-3-13. C.R.S. 1963: § 148-3-13.

## ANNOTATION

This section provides for prorating the water actually received into and carried by any irrigating ditch, canal, or reservoir among all the consumers therefrom in time of scarcity, so that all such consumers shall suffer proportionately from the deficiency of water. *Farmers' High Line Canal & Reservoir Co. v. Southworth*, 13 Colo. 111, 21 P. 1028 (1889); *Larimer & Weld Irrigation Co. v. Wyatt*, 23 Colo. 480, 48 P. 528 (1897).

**This section does not take away the consumer's right to water; it simply regulates the use of this right.** *Farmers' High Line Canal & Reservoir Co. v. Southworth*, 13 Colo. 111, 21 P. 1028 (1889).

**The consumer is allowed only his percentage of such proportion of the priority as is available.** *Johnston v. Wanamaker Ditch Co.*, 95 Colo. 551, 38 P.2d 907 (1934).

Although in times of shortage these water owners may be best served by resorting to rotation and sectionizing, but when necessity demands a resort to these expedients they are as applicable to him as to others. *Johnston v. Wanamaker Ditch Co.*, 95 Colo. 551, 38 P.2d 907 (1934).

**The consumer is presumed to know that in times of scarcity his use may be subjected to two interruptions**, viz.: First, that canals and ditches holding priorities antedating the diversion of his carrier may demand all the water in the natural stream, so that there will be none for him or any of his co-consumers; and second, that if there is water, but not the full quantity appropriated, he will be obliged to prorate with such co-consumers, and under these circumstances the consumer is hardly in position to resist the enforcement of the prorating statute or to assert that it operates harshly and unjustly upon him. *Farmers' High Line Canal & Reservoir Co. v. Southworth*, 13 Colo. 111, 21 P. 1028 (1889).

**It cannot be so construed as to interfere with the constitutional rights of prior appropriators.** *Larimer & Weld Irrigation Co. v. Wyatt*, 23 Colo. 480, 48 P. 528 (1897).

**Giving this section a literal and unqualified interpretation, it manifestly conflicts with the constitution.** *Farmers' High Line Canal & Reservoir Co. v. Southworth*, 13 Colo. 111, 21 P. 1028 (1889).



For those consumers using the water of natural streams for the same beneficial purpose, priority of use gives superiority of right, irrespective of the mode of diversion; and this rule is applicable to individual consumers, as between themselves, when they receive the water through the agency of an artificial stream as well as when they receive the same direct from the natural stream, and this section must be limited accordingly. *Farmers' High Line Canal & Reservoir Co. v. Southworth*, 13 Colo. 111, 21 P. 1028 (1889); *Nichols v. McIntosh*, 19 Colo. 22, 34 P. 278 (1893).

There is nothing in the assertion that this section, the prorating statute, insofar, at least, as it applies to cases like the one at bar, is class legislation, and for that reason void. It is in this respect purely remedial, and it was not intended, nor does it operate, to inflict burdens; its intent and its operation was and is to distribute them. It reaches all consumers having secured priorities through diversion by carriers alike; it makes no distinction among them; each and all are equally within its purview. *Farmers' High Line Canal & Reservoir Co. v. Southworth*, 13 Colo. 111, 21 P. 1028 (1889).

The provision may be properly carried into effect when the rights of all the consumers are equal in the matter of their respective appropriations, as when a ditch has been constructed as a common enterprise by and for the mutual and equal benefit of all the consumers there-

from, or when, by reason of contractual relations, waiver, or other circumstances, certain consumers stand on a footing of substantial and practical equality, having no priority of appropriation one over another. *Farmers' High Line Canal & Reservoir Co. v. Southworth*, 13 Colo. 111, 21 P. 1028 (1889).

Consumers taking water from the same carrier within a reasonable time after the carrier's diversion have the same constitutional priority dating from such diversion, and as to such consumers the prorating statute is constitutional. *Farmers' High Line Canal & Reservoir Co. v. Southworth*, 13 Colo. 111, 21 P. 1028 (1889).

The consumer who first uses may be compelled to prorate with another whose use is subsequent in date, but each consumer has a perfect right to go to the natural stream for the water he needs, and there is no law forcing him to deal with the carrier, and it is no answer to say that the overpowering law of necessity takes away his volition to choose, for he in fact makes his election when he purchases land so far from the natural stream as to compel reliance upon the carrier. *Farmers' High Line Canal & Reservoir Co. v. Southworth*, 13 Colo. 111, 21 P. 1028 (1889).

Evidence held insufficient to provide basis for apportionment. *Grimes-Brooks Reservoir Co. v. Kayser*, 180 Colo. 111, 502 P.2d 1104 (1972).

**37-86-113. Irrigation of meadows.** All persons who have enjoyed the use of the water in any natural stream for the irrigation of any meadow land by the natural overflow or operation of the water of such stream, in case the diminishing of the water supplied by such stream, from any cause, prevents such irrigation therefrom in as ample a manner as formerly, shall have right to construct a ditch for the irrigation of such meadow and to take water from such stream therefor. Their right to water through such ditch shall have the same priority as though such ditch had been constructed at the time they first occupied and used such land as meadow ground.

**Source:** L. 1879: p. 106, § 37. G.S. § 1723. R.S. 08: § 3176. C.L. § 1636. CSA: C. 90, § 19. CRS 53: § 147-3-14. C.R.S. 1963: § 148-3-14.

## ANNOTATION

**Law reviews.** For article, "Water for Recreation: A Plea for Recognition", see 44 Den. L.J. 288 (1967). For comment, "Colorado River Water Conservation Dist. v. Colorado Water Conservation Bd.: Diversion as an Element of Appropriation", see 57 Den. L.J. 661 (1980).

Under this section plaintiff acquired valid rights to the overflow of the stream for his meadow lands, and these rights were vested before defendant began the construction or operation of its mill. *Humphreys Tunnel & Mining Co. v. Frank*, 46 Colo. 524, 105 P. 1093 (1909).

Plaintiff's rights paramount to any rights defendant has in the waters of the stream.

*Humphreys Tunnel & Mining Co. v. Frank*, 46 Colo. 524, 105 P. 1093 (1909).

Plaintiff's rights were subject only to the rights acquired by prior appropriators of the water for some useful purpose and his right, as well as theirs, as against defendant, is to have the natural waters and all accretions come down the natural channel undiminished in quality as well as quantity. *Humphreys Tunnel & Mining Co. v. Frank*, 46 Colo. 524, 105 P. 1093 (1909).

Though other appropriations, to the full capacity of the stream during its ordinary flow, were made before plaintiff's rights accrued, this does not prevent him from building a

ditch and diverting and using its waters whenever his seniors do not need it. *Humphreys Tunnel & Mining Co. v. Frank*, 46 Colo. 524, 105 P. 1093 (1909).

**When the demands of the senior upon the stream cease the rights of the junior attach**, and, as against a wrong-doer like the defendant, the junior is entitled to protect the stream from pollution, the same as if he were the senior and only appropriator, and if the acts of defendant interfere with such rights of plaintiff, as they have, defendant must be held responsible for the resulting injury. *Humphreys Tunnel & Mining Co. v. Frank*, 46 Colo. 524, 105 P. 1093 (1909).

**In a class action for declaratory judgment by the United States to adjudicate the rights of the affected parties to the use of water of the Colorado river** arising out of a federally financed water diversion project where intervenors had vested rights under this section in the overflow of the Colorado river for the natural irrigation of their meadow lands, those rights cannot be taken for public purposes, such as this project, without imposing upon the government the constitutional duty to pay just compensation therefor. *United States v. Martin*, 267 F.2d 764 (10th Cir. 1959).

**One who has acquired an appropriation for his meadow lands, as the result of the natural overflow of the waters of the stream**, may not, when the same has become diminished

in quantity, and whenever thereafter it suits his convenience, construct a ditch and have a priority awarded to date back by way of relation to his meadow appropriation, where such priority antedates the priorities fixed by a previous statutory decree. *Broad Run Inv. Co. v. Deuel & Snyder Imp. Co.*, 47 Colo. 573, 108 P. 755 (1910).

**On appeal from a statutory proceeding adjudicating priorities of water rights under this section**, a contention that the same priorities of right adjudicated and determined by the decree appealed from were adjudicated and determined by a former decree in the same water district, will not be considered where neither the decree appealed from, nor the former decree, nor the proceedings in which it was pronounced appear in the abstract of the record. *Means v. Gotthelf*, 31 Colo. 168, 71 P. 1117 (1903).

**Where no exception was taken to the decree by bill of exceptions, and the transcript does not contain a bill of exceptions** and there is no certificate under the hand and seal of the judge that the transcript contains all the evidence, the question as to whether the decree is supported by the evidence cannot be considered. *Means v. Stow*, 31 Colo. 282, 73 P. 48 (1903); *Means v. Gotthelf*, 31 Colo. 168, 71 P. 1117 (1903).

**Applied** in Colo. River Water Conservation Dist. v. Colo. Water Conservation Bd., 197 Colo. 469, 594 P.2d 570 (1979).

## ARTICLE 87

### Reservoirs

**Editor's note:** Pursuant to § 35-49-104, the provisions of §§ 37-87-101 to 37-87-108 and §§ 37-87-114 to 37-87-115 do not apply to reservoirs constructed as livestock water tanks as defined in § 35-49-103.

37-87-101.	Storage of water.	37-87-110.	Engineer may use force.
37-87-102.	Definitions - natural streams and use thereof by reservoir owners.	37-87-111.	Expense of examination.
37-87-103.	Notice of release of stored waters.	37-87-112.	Review of action of state engineer.
37-87-104.	Liability of owners for damage.	37-87-113.	Breakage of reservoir - damages. (Repealed)
37-87-104.5.	Notification of ownership of dam - when person in control deemed owner.	37-87-114.	Penalty - disposition of fines.
37-87-105.	Approval of plans for reservoir - notice of modification.	37-87-114.4.	Annual report.
37-87-106.	Cost of inspections and observation. (Repealed)	37-87-114.5.	Applicability of provisions - exemptions.
37-87-107.	Safety inspections - amount of water to be stored.	37-87-115.	Damages.
37-87-108.	Withdrawal of excess water.	37-87-116.	Tax reduction where reservoirs located. (Repealed)
37-87-108.5.	Emergency actions.	37-87-117.	Landowner to submit plans. (Repealed)
37-87-109.	Complaint that reservoir is unsafe.	37-87-118.	State engineer's authority over construction. (Repealed)
		37-87-119.	Completion of dam. (Repealed)
		37-87-120.	Reduction in valuation for assessment. (Repealed)



37-87-121.	Application to existing dams. (Repealed)	37-87-124.	Restriction of facilities within reservoirs.
37-87-122.	Erosion control dams.	37-87-125.	Notice of intent to construct impoundment structure.
37-87-123.	Dam and reservoir information. (Repealed)		

**37-87-101. Storage of water.** (1) (a) The right to store water of a natural stream for later application to beneficial use is recognized as a right of appropriation in order of priority under the Colorado constitution. No water storage facility may be operated in such a manner as to cause material injury to the senior appropriative rights of others. Acquisition of those interests in real property reasonably necessary for the construction, maintenance, or operation of any water storage reservoir, together with inlet, outlet, or spillway structures or other facilities necessary to make such reservoir effective to accomplish the beneficial use or uses of water stored or to be stored therein, may be secured under the laws of eminent domain.

(b) State agencies shall, to the maximum extent practicable, cooperate with persons desiring to acquire real property for water storage structures.

(2) Underground aquifers are not reservoirs within the meaning of this section except to the extent such aquifers are filled by other than natural means with water to which the person filling such aquifer has a conditional or decreed right.

**Source:** L. 1879: p. 106, § 38. G.S. § 1724. R.S. 08: § 3202. C.L. § 1682. L. 35: p. 661, § 1. CSA: C. 90, § 79. CRS 53: § 147-5-1. C.R.S. 1963: § 148-5-1. L. 79: Entire section amended, p. 1367, § 3, effective June 22. L. 84: (1) R&RE, p. 961, § 1, effective April 30. L. 86: (1) R&RE, p. 1087, § 1, effective July 1. L. 2003: (1) amended, p. 1368, § 3, effective April 25.

**Cross references:** For proceedings and procedures for taking private property for public use, see § 15 of art. II, Colo. Const., and article 1 of title 38; for condemnation of property and water rights by cities and towns, see article 6 of title 38.

## ANNOTATION

- I. General Consideration.
- II. Immediate Use of Water.
- III. Cooperation by State Agencies.

### I. GENERAL CONSIDERATION.

**Law reviews.** For comment on *People ex rel. Park Reservoir Co. v. Hinderlider*, 98 Colo. 505, 57 P.2d 894 (1936), appearing below, see 9 Rocky Mt. L. Rev. 91 (1936). For article, "Revision of Water and Irrigation Statutes", see 31 Dicta 29 (1954). For article, "Water for Oil Shale Development", see 43 Den. L.J. 72 (1966). For note, "A Survey of Colorado Water Law", see 47 Den. L.J. 226 (1970).

As this section stands it is a grant, and the court is not at liberty to write into it, by way of interpretation, the word "only", so as to read "Persons desirous to construct and maintain reservoirs, for the purpose of storing water, shall have the right to take...(only) any unappropriated water...for irrigating purposes." To do this would make this section a prohibition. *People ex rel. Park Reservoir Co. v. Hinderlider*, 98 Colo. 505, 57 P.2d 894 (1936).

The court said it assumed without deciding, that this section was in force, and that the

general assembly was not prohibited by the constitution from passing it with the word "thereafter" inserted, so as to read "Persons desirous to construct and maintain reservoirs, for the purpose of storing water, shall have the right to take from any of the natural streams of the state and store away any unappropriated water not (thereafter) needed for immediate use for...irrigating purposes" and that such is its proper interpretation. *People ex rel. Park Reservoir Co. v. Hinderlider*, 98 Colo. 505, 57 P.2d 894 (1936).

Where a corporation constructed the embankment of a reservoir in the bed of a stream, but applied the water to no beneficial use, and it afterwards conveyed the reservoir site to another, reserving any appropriation of priority which it had acquired by reason of construction, it was held, that having never applied the water to any beneficial use, it had nothing to reserve, and the reservation accomplished nothing. *Windsor Reservoir & Canal Co. v. Lake Supply Ditch Co.*, 44 Colo. 214, 98 P. 729 (1908).

Where plaintiff claiming to be entitled to the waters of a certain stream, for storage, between certain dates, brought an action to re-

strain the officials of the water service from enforcing an order of the division engineer which required the water commissioner of the district to cease the storing of water, during the same period, it was held that the appropriators for direct irrigation in other districts of the division would, of necessity, be affected by the decree and were indispensable parties. *Comstock v. Larimer & Weld Reservoir Co.*, 58 Colo. 186, 145 P. 700 (1914).

**Where one claiming the right to water for storage seeks to restrain its application to direct irrigation**, it is not sufficient to aver merely an appropriation for storage and a decree establishing the right because the complaint must go further and show that the plaintiff's right is relatively prior to that asserted by those against whom the relief is sought. *Comstock v. Larimer & Weld Reservoir Co.*, 58 Colo. 186, 145 P. 700 (1914).

**When water has escaped from a reservoir and become a part of the underground waters**, its identification as reservoir water is impracticable, if not impossible, and the rule to be applied in such a case must take account of the rights of others, and be of general and practicable application. *Ft. Morgan Reservoir & Irrigation Co. v. McCune*, 71 Colo. 256, 206 P. 393 (1922).

**Water escaping from a reservoir or a ditch, underground, and becoming percolating water** which will naturally reach a public stream, must be regarded as a part of the stream, and it belongs to the appropriators in the order of their priorities when needed, and cannot be made the subject of a direct appropriation. *Ft. Morgan Reservoir & Irrigation Co. v. McCune*, 71 Colo. 256, 206 P. 393 (1922).

**There was no need to exercise a private right of eminent domain** or any trespass where an aquifer recharge and water storage rights application did not involve the construction of any project facilities on land owned by a third party. *Bd. of County Comm'rs v. Park County Sportsmen's Ranch*, 45 P.3d 693 (Colo. 2002).

**The justice of allowing reservoir companies to control the water which they have diverted** is not to be questioned; but it should be borne in mind that they do not own the water, but have only a right to its use; which use must be consistent with the rights of other appropriators. *Ft. Morgan Reservoir & Irrigation Co. v. McCune*, 71 Colo. 256, 206 P. 393 (1922).

**In addition, the water so diverted and stored must be beneficially applied**; that is, in this instance, it must have been applied to lands for the purposes of irrigation. *Thomas v. Guiraud*, 6 Colo. 530 (1883); *Sieber v. Frink*, 7 Colo. 148, 2 P. 901 (1883); *Wheeler v. Northern Colo. Irrigation Co.*, 10 Colo. 582, 17 P. 487 (1887); *Farmers' High Line Canal & Reservoir Co. v. Southworth*, 13 Colo. 111, 21 P. 1028 (1889); *Ft. Morgan Land & Canal Co. v. South*

*Platte Ditch Co.*, 18 Colo. 1, 30 P. 1032 (1892); *Woods v. Sargent*, 43 Colo. 268, 95 P. 932 (1908); *Highland Ditch Co. v. Union Reservoir Co.*, 53 Colo. 483, 127 P. 1025 (1912).

**A decree awarding a priority to a reservoir providing that sufficient water should be permitted to flow from the source of supply into the reservoir to satisfy the volume of the priority** when "not needed for immediate use for domestic or irrigation purposes", is presumably in part based upon this section. *Highland Ditch Co. v. Union Reservoir Co.*, 53 Colo. 483, 127 P. 1025 (1912).

**In an eminent domain proceeding to condemn land for a reservoir site, a report of commissioners based upon undisputed evidence but not supported by any findings, is not binding on the court**, and where the question of the necessity of taking such site was not raised in either the pleadings or the evidence, a finding by the commissioners that the land proposed to be condemned was not necessary for the reservoir site was without force or effect. *Mortensen v. Mortensen*, 135 Colo. 167, 309 P.2d 197 (1957).

## II. IMMEDIATE USE OF WATER.

**This section confers the only authority for filling reservoirs.** *Water Supply & Storage Co. v. Tenney*, 24 Colo. 344, 51 P. 505 (1897).

**Water for storage in reservoirs can be used only when not needed for immediate domestic and irrigating use.** *Water Supply & Storage Co. v. Tenney*, 24 Colo. 344, 51 P. 505 (1897).

**It is scarcely conceivable that a district court would deliberately enter a decree giving to a reservoir owner any priority** to fill his reservoir which would conflict with any right of a ditch owner to use water for irrigation, even though the priority of the latter was junior in time to the construction of the reservoir. *Water Supply & Storage Co. v. Tenney*, 24 Colo. 344, 51 P. 505 (1897).

**Where the defendant asked the court to charge the jury, which the court refused to do**, that when needed for immediate use in irrigating lands by others having such right, one might not divert water from a natural stream for storage purposes in a reservoir, the court held that if the facts of the case called for an instruction on the law of defense of property, then this instruction should also have been given, for there was evidence that plaintiff was storing water in a fish pond when defendant needed it for immediate use in watering his crops. *Newby v. People*, 28 Colo. 16, 62 P. 1035 (1900).

**Where there were senior appropriators of all the available flow of a natural stream who needed it for immediate use** for domestic and irrigating purposes during the irrigation season from about June 1 to November 1, of each calendar year, this section does not allow water



to be diverted for storage in reservoirs during such period of time, hence the storage system of the plaintiff could be operated only during the nonirrigating season from November 1 of each year until June 1 of the next succeeding year, by reason of which the work of rebuilding plaintiff's ditch must be done, if at all, during that irrigating season. *Aetna Cas. & Sur. Co. v. North Sterling Irrigation Dist.*, 75 Colo. 185, 225 P. 261 (1924).

**The construction of an irrigation ditch and the appropriation of water thereby to the irrigation of lands** during the irrigation season, and a decree of priority for that purpose, give the appropriator no priority of right to water during the nonirrigating season for the purpose of storage for future use in a reservoir subsequently constructed. *New Loveland & Greeley Irrigation & Land Co. v. Consolidated Home Supply Ditch & Reservoir Co.*, 27 Colo. 525, 62 P. 366 (1900).

**The fact that at the time of commencing the construction of an irrigation ditch it was the intention of the appropriator** to also use it as a feeder to a reservoir to be constructed sometime in the future, in which to store the water during the nonirrigating season for future use, would give the appropriator no prior right to water for storage during the nonirrigating season to date from the commencement of the ditch, unless the construction of the reservoir was so closely connected with the construction of the ditch as to show them to be one system, and the work thereon was prosecuted to completion and water thereby appropriated to a beneficial use with reasonable diligence. *New Loveland & Greeley Irrigation & Land Co. v. Consolidated Home Supply Ditch & Reservoir Co.*, 27 Colo. 525, 62 P. 366 (1900).

**The priority to the use of water for storage during the nonirrigating season depends upon the time of appropriation for that purpose**, and an appropriator who first constructed his reservoir and appropriated water for that purpose is entitled to priority over a subsequent appropriator notwithstanding the subsequent storage appropriator was a prior appropriator for irrigation and supplied his reservoir through a

ditch with prior rights for irrigation purposes. *New Loveland & Greeley Irrigation & Land Co. v. Consolidated Home Supply Ditch & Reservoir Co.*, 27 Colo. 525, 62 P. 366 (1900).

**It is not unreasonable to suppose that the provisions of this section intended that an owner of a reservoir for irrigation purposes** shall have the right to take and store unappropriated waters, and also waters that already have been appropriated by others but that are not at the time needed by such prior appropriators for immediate use for domestic or irrigation purposes, because such storage would save the water from going to waste, a most desirable object in this "dry and thirsty land", where every drop of water is sorely needed, and such a construction would save this section from coming into conflict with the constitution. *People ex rel. Park Reservoir Co. v. Hinderlider*, 98 Colo. 505, 57 P.2d 894 (1936) (concurring opinion).

### III. COOPERATION BY STATE AGENCIES.

**Where a third party held a 99-year lease on three reservoir sites that left the lessor, the state board of land commissioners, with no meaningful discretion to refuse to grant the third party a right of way for the reservoirs**, it was impracticable for the state board of land commissioners to cooperate with an applicant for reservoir sites that significantly overlapped the third party's reservoirs. Even though the third party's lease was nonexclusive, the lessee had the right to control the stored water, which precluded the state board of land commissioners from granting the applicant a lease for the storage sites because doing so would unreasonably interfere with the lessee's rights. Although the lease allowed for the relocation of the reservoir sites, that right did not apply to a relocation for the benefit of a third party, nor for water development that did not benefit the particular parcel of land on which the reservoirs were located. In any event, it is not practicable to relocate an existing dam and reservoir. *City of Aurora v. ACJ P'ship*, 209 P.3d 1076 (Colo. 2009).

### 37-87-102. Definitions - natural streams and use thereof by reservoir owners.

(1) As used in this article, unless the context otherwise requires:

(a) "Mean annual flood" means a flood which has a magnitude (peak discharge) which is expected to be equaled or exceeded on the average once every 2.33 years and has a forty-three percent chance of being equaled or exceeded (0.43 exceedance probability) during any year, by application of the criteria defined in subsection (2) of this section.

(b) "Natural stream" means a place on the surface of the earth where water naturally flows regularly or intermittently with a perceptible current between observable banks, although the location of such banks may vary under different conditions.

(c) "One-hundred-year flood" means a flood which has a magnitude (peak discharge) which is expected to be equaled or exceeded on the average once during any one-hundred-year period (recurrence interval) and has a one percent chance of being equaled or exceeded

during any year (0.01 exceedance probability). The terms "one-hundred-year flood", "one percent chance flood", and "intermediate regional flood" are synonymous.

(d) "One-hundred-year floodplain" means that area in and adjacent to a natural stream which is subject to flooding as a result of the occurrence of a one-hundred-year flood.

(e) "Ordinary high watermark" of any stream means the visible channel of a natural watercourse within which water flows with sufficient frequency so as to preclude the erection or maintenance of man-made improvements without special provision for protection against flows of water in such channel or the channel defined by the mean annual flood, whichever is greater.

(2) Whenever the records basic to a determination of probable future water flows, either with respect to this section or by other requirements of law, extend for a period of one hundred or more years, the calculation based upon those results shall be deemed conclusive. If such records do not extend for a period of one hundred or more years the determination shall be made by interpolation and correlation to a full one hundred years of records by relating them to known records of water basins as similar as reasonably possible to the basin under consideration or by other acceptable methods.

(3) (a) In any case in which a determination of probable future surface water flows at any place in the state is required, the calculation shall be based upon past surface water runoff at the place in question supplemented as provided in this section. Such probable flows shall be determined by reference to the records of reliable stream gauging stations. A stream gauging station record shall be deemed reliable if made by the state of Colorado or the United States as part of a regular program of either of those entities, except as to any part of such records which the state engineer shall have designated as being unreliable, on the basis of facts so showing. Whenever a designation of probable future runoff is required at a place other than the location of a reliable stream gauging station, the determination of probable runoff at such other place shall be made by relating the probable future runoff at that place to the recorded runoff at a comparable gauging station or gauging stations by the interpolation of reasonable hydrologic, geologic, and natural vegetative factors supplemented as provided in this section. Unless clearly unrelated, the factors of the comparison shall include, but not be limited to, the following elements or characteristics:

(I) The water basin contributing to the probable future flow at the place where probable future runoff is to be determined, considering:

- (A) The size;
- (B) The altitude or altitudes;
- (C) The various soil permeabilities;
- (D) The various vegetative covers;

(II) The known runoff as determined by reliable stream gauging stations using interpolations when necessary from comparable gauging stations and relating interpolations to the characteristics of the basin measured by the comparable gauging stations as related to the basin of runoff being determined;

(III) The slope or slopes of the terrain whose surface runoff contributes to the surface water flows at the place at which a determination of probable future surface water flows is required.

(b) The state engineer shall promulgate rules pursuant to section 24-4-103, C.R.S., which include other factors for consideration in any area or situation in which calculations based on the criteria in paragraph (a) of this subsection (3) will probably be made more accurate by use of other or additional criteria. Whenever conditions are such that records of past precipitation are an appropriate factor, he may designate any portion of official precipitation records of agencies of the United States or of the state of Colorado which are appropriate in evaluating probable future water flows. He may approve use of factors referred to in this paragraph (b) with respect to particular areas or design of specific structures when requested to do so.

(c) No dam safety requirement shall be imposed to meet a potential hazard of a flood whose magnitude is such that the hazard would probably exist whether or not the dam failed.

(3.5) Whenever a determination of probable future surface water flows, or the probability of frequency of their recurrence, at any place in Colorado is required by relation to



a longer period of flow than that for which there is a reliable record of flow as defined in subsection (3) of this section, the determination shall be made by interpolation and correlation of known records to the longer period by relating known records of water basins as similar as reasonably possible to the place of determination or basin under consideration, or by use of geologic determinations, or by use of other methods reasonably calculated to formulate an accurate estimate of probable future flows or the probability of frequency of their recurrence at the place of determination of such flows.

(3.7) Calculations of probable flows or frequency of recurrence based upon application of the principles set forth in subsections (3) and (3.5) of this section shall relieve anyone acting in accordance with such principles of any liability respecting an occurrence different than that predicted. This exemption from liability shall apply to the state and its public officials or employees when acting in performance of their public duties.

(4) The owners of any reservoir may conduct the waters legally stored therein into and along any of the natural streams of the state, but not so as to raise the waters thereof above ordinary high watermark, and may take the same out again at any point desired if no material injury results to the prior or subsequent rights of others to other waters in said natural streams. Due allowance shall be made for evaporation and other losses from natural causes for the protection of all rights to the waters flowing in said streams, such losses to be determined by the state engineer.

**Source:** L. 1879: p. 107, § 39. G.S. § 1725. R.S. 08: § 3203. C.L. § 1683. L. 35: p. 638, § 1. CSA: C. 90, § 80. CRS 53: § 147-5-2. C.R.S. 1963: § 148-5-2. L. 84: Entire section amended, p. 961, § 2, effective April 30. L. 86: (2) and (3) R&RE and (3.5) and (3.7) added, pp. 1088, 1089, §§ 1, 2, effective April 4.

#### ANNOTATION

**Law reviews.** For article, "Foreign Water in Colorado — The City's Right to Recapture and Re-Use Its Transmountain Diversion", see 42 Den. L. Ctr. J. 116 (1965).

This section providing that the owners of reservoirs may conduct the water from the reservoirs into and along any of the natural streams of the state, emphasizes the doctrine that these are public streams. *Hartman v. Tresise*, 36 Colo. 146, 84 P. 685 (1906).

In some circumstances, dams, ditches, canals, and tunnels, taken together, may be con-

sidered as a reservoir within the meaning of this section. *Twin Lakes Reservoir & Canal Co. v. Sill*, 104 Colo. 215, 89 P.2d 1012 (1939).

**This section should be so construed as to include inlets to, as well as outlets from, reservoirs** in connection with natural streams, whereby the latter are used to carry abnormal amounts due to delivery therein of privately owned water. *Twin Lakes Reservoir & Canal Co. v. Sill*, 104 Colo. 215, 89 P.2d 1012 (1939).

**37-87-103. Notice of release of stored waters.** The owners of reservoirs who avail themselves of the provisions of this section and section 37-87-102 shall give reasonable prior notice to the irrigation division engineer of the irrigation division in which the reservoir is located or to the chief administrative water official of such irrigation division of the date on which they desire to release stored waters into any natural streams, together with the quantity thereof in cubic feet per second of time, the length of period to be covered by such releases, and the name of the ditch, canal, pipeline, or reservoir to which the water so released from storage is to be delivered, to the end that the water officials in responsible charge of any stream into which such stored water is released shall have ample time in which to make the necessary observations measurements of flow and storage and records thereof and to provide for a proper patrol of the said stream, for the protection of the reservoir owner and also all other appropriators along the stream whose interests might be affected as a result of such reservoir release. Such notice may be given to the division engineer when the reservoir from which the water is to be released and the point where the water is to be taken from the stream or again stored are in the same water district.

**Source:** L. 35: p. 639, § 2. CSA: C. 90, § 81. CRS 53: § 147-5-3. C.R.S. 1963: § 148-5-3.

**Cross references:** For the appointments and functions of water division engineers, see § 37-92-202.

#### ANNOTATION

**Where a mining company created large bodies of liquid tailings on its land and failed to contain those harmful and obnoxious materials,** which contaminated a stream and were discharged by a flood on the land of another as the result of the failure of a wall surrounding the tailing ponds, the correct measure of damage was recognized as the difference between the

value of the land immediately before the alleged injury and after the injury. The reasonable cost to clear the land of debris was not the measure, but it is nevertheless recognized that evidence of cost of repair can be considered in arriving at this difference in market value. *Freel v. Ozark-Mahoning Co.*, 208 F. Supp. 93 (D. Colo. 1962).

**37-87-104. Liability of owners for damage.** (1) Any provision of law to the contrary notwithstanding, no entity or person who owns, controls, or operates a water storage reservoir shall be held liable for any personal injury or property damage resulting from water escaping from that reservoir by overflow or as a result of the failure or partial failure of the structure or structures forming that reservoir unless such failure or partial failure has been proximately caused by the negligence of that entity or person. No entity or person shall be required to pay punitive or exemplary damages for such negligence in excess of that provided by law. Any previous rule of law imposing absolute or strict liability on such an entity or person is hereby repealed.

(2) No such entity or person shall be liable for allowing the inflow to such reservoir to pass through it into the natural stream below such reservoir.

(3) (a) No stockholder, officer, or member of a board of directors of an owner of a reservoir shall be liable for any personal injury or property damage resulting from water escaping from such reservoir or as a result of the failure or partial failure of the structure or structures forming such reservoir for which the owner shall have been found liable if a valid liability insurance policy, or adequate substitute as provided in paragraph (b) of this subsection (3), has been purchased by the owner of the reservoir and is in effect at the time such damage occurs. Such insurance policy shall insure against such damages and provide coverage in an amount of not less than fifty thousand dollars for each claim and in an aggregate amount of not less than five hundred thousand dollars for all claims which arise out of any one incident. The policy may provide that it does not apply to any act or omission of a stockholder, officer, or member of a board of directors of an owner if such act or omission is dishonest, fraudulent, malicious, or criminal. The policy may also contain other reasonable provisions with respect to policy periods, territory, claims, conditions, and other matters common to such policies of insurance. The limitation of liability pursuant to this paragraph (a) shall not apply to any criminal, fraudulent, or malicious act or omission by a member of the board of directors of the owner, an officer of the owner, or a stockholder of the owner, nor shall it apply to any ultra vires act of the owner or of a member of the board of directors, an officer, or a stockholder of such owner. The provisions of this paragraph (a) shall not be deemed to impose any liability upon a member of the board of directors, an officer, or a stockholder of the owner of a reservoir beyond that provided in section 7-42-118, C.R.S.

(b) An adequate substitute for such insurance may be in the form of:

(I) A good and sufficient bond, in an amount equal to such recovery limitations duly executed by a qualified corporate surety approved by the commissioner of insurance, conditioned upon the payment by the entity or person who owns, controls, or operates a water storage reservoir of any valid and final judgment for damages imposed within the judgment limitations established in this subsection (3);

(II) A good and sufficient escrow of acceptable securities, as defined in section 24-91-102, C.R.S., or an annual irrevocable letter or annual letters of credit issued by any national or state bank or any bank for cooperatives as chartered under Title III of the federal "Farm Credit Act of 1971", as amended, and deposited with an escrow agent pursuant to an escrow contract or agreement requiring the escrow agent to pay from the escrow account



amounts necessary to discharge a valid and final judgment for damages within the limits established in this subsection (3). Such escrow contract or agreement shall provide that it cannot be revoked or amended until after any claims for damage against such entity or person have been discharged or until applicable statutes of limitations pertaining thereto have expired.

(III) A combination of insurance and any of the substitutes described in this paragraph (b).

**Source:** L. 1879: p. 107, § 40. G.S. § 1726. R.S. 08: § 3204. C.L. § 1684. CSA: C. 90, § 82. CRS 53: § 147-5-4. C.R.S. 1963: § 148-5-4. L. 81: Entire section R&RE, p. 1778, § 1, effective May 27. L. 84: (1) and (2) amended and (2.5) added, p. 963, § 3, effective April 30. L. 85: (2) amended, p. 1157, § 1, effective June 6. L. 86: Entire section R&RE, p. 1091, § 1, effective May 16.

**Cross references:** For the federal "Farm Credit Act of 1971", as amended, see 12 U.S.C. 2001 et seq.

## ANNOTATION

- I. General Consideration.
- II. Extent of Owner's Liability.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "Water for Oil Shale Development", see 43 Den. L.J. 72 (1966). For comment on *Barr v. Game, Fish & Parks Comm'n*, see 50 Den. L.J. 381 (1973). For article, "1986 Colorado Tort Reform Legislation", see 15 Colo. Law. 1363 (1986). For article, "The New Dam Safety and Dam Construction Regulations", see 18 Colo. Law. 1097 (1989).

This section is simply an affirmation of a common-law principle, which was enacted in this state as part of an act with reference to irrigation, and in this act the right is given for the construction of reservoirs for certain purposes, and the context indicates, we think, that the paragraph relied upon was inserted as a precautionary measure, under the apprehension that without it, it would be possible to place such a construction upon the act as would relieve owners of reservoirs from liability for leakage and overflow. *Sylvester v. Jerome*, 19 Colo. 128, 34 P. 760 (1893).

The common-law principle referred to as being affirmed by this section is as follows: "The person who, for his own purposes, brings on his own land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his own peril; and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape, but he can excuse himself by showing that the escape was owing to the plaintiff's default; or, perhaps, that the escape was the consequence of vis major, or the act of God". *Garnet Ditch & Reservoir Co. v. Sampson*, 48 Colo. 285, 110 P. 79 (1910).

The purpose of this section and § 37-87-113 is to protect persons owning property below the reservoir from having their situation impaired, not from having it improved. *Ireland v. Henrylyn Irrigation Dist.*, 113 Colo. 555, 160 P.2d 364 (1945).

The statute does not deprive a court of equity of jurisdiction to restrain the filling of a reservoir, when the remedy at law given by the section is not adequate to a particular exigency. *Sylvester v. Jerome*, 19 Colo. 128, 34 P. 760 (1893).

A writ commanding the defendants to refrain from diverting water did not forbid the repairing or changing the reservoir so as to prevent the injury complained of, and when ever it was so changed they were at liberty to apply to the court for a modification or dissolution of the injunction. *Sylvester v. Jerome*, 19 Colo. 128, 34 P. 760 (1893).

The natural hillside or mesa, against which the embankment is constructed, and which aids in impounding the water, is part of the reservoir, within this section, and the owner is liable for injuries occasioned by its giving way, though the artificial embankment remains. *Garnet Ditch & Reservoir Co. v. Sampson*, 48 Colo. 285, 110 P. 79 (1910).

The general assembly did not intend that one who appropriates a natural bank as part of his reservoir should be exempt from liability in the event of its washing out, but did intend the word "embankment" should include not only an artificial barrier, but a natural one as well, if used as a part of the reservoir, to prevent the escape of water. *Garnet Ditch & Reservoir Co. v. Sampson*, 48 Colo. 285, 110 P. 79 (1910).

It is true that the ditch owners have been held to the exercise of ordinary care only, for the statute does not hold them to an absolute liability, but there is a very good reason for the legislative distinction, a ditch carrying water

can, by the exercise of ordinary care, be rendered harmless, and the carrying of water through ditches is not a dangerous or menacing vocation; the water is not restrained, and the pressure is but slight, while in a reservoir the water is restrained, and the pressure is very great, so great that the exercise of the greatest amount of care and skill may not prevent the water from effecting its escape. *Garnet Ditch & Reservoir Co. v. Sampson*, 48 Colo. 285, 110 P. 79 (1910); *Beaver Water & Irrigation Co. v. Emerson*, 75 Colo. 513, 227 P. 54 (1927).

**A recovery for past, present and prospective damages is a bar to an action for subsequent damages.** *Fort v. Bietsch*, 85 Colo. 176, 274 P. 812 (1929).

**Although a judgment in an action for damages may have been void or voidable**, the successful party by accepting and retaining its fruits, is estopped from again suing for the same thing. *Fort v. Bietsch*, 85 Colo. 176, 274 P. 812 (1929).

**The owner of a reservoir acquires no vested right to have spillways of reservoirs on the stream above his storage basin maintained at the same size and elevation as constructed at the time he acquired his storage rights.** *Ireland v. Henrylyn Irrigation Dist.*, 113 Colo. 555, 160 P.2d 364 (1945).

**The defendant dam owner, enlarging spillway, held not liable for injury to reservoirs by flood waters.** *Ireland v. Henrylyn Irrigation Dist.*, 113 Colo. 555, 160 P.2d 364 (1945).

**Public entities are not subject to the strict liability imposed by this section**, and are therefore also exempt from common law strict liability because the legislature intended to repeal existing common law that might make public entities strictly liable. *Kane v. Town of Estes Park*, 786 P.2d 412 (Colo. 1990).

## II. EXTENT OF OWNER'S LIABILITY.

**Under this section, owners of reservoirs are made liable for all damages arising from leakage or overflow of the waters therefrom or by floods caused by breaking of their embankments.** *Ryan Gulch Reservoir Co. v. Swartz*, 77 Colo. 60, 234 P. 1059 (1925).

**No skill, care, or diligence, in construction or maintenance relieves owners at reservoirs made liable.** *Garnet Ditch & Reservoir Co. v. Sampson*, 48 Colo. 285, 110 P. 79 (1910).

**The owner is liable whether he is negligent or not and whether the breaking of his dam was caused by the negligence of a third person or not.** *Beaver Water & Irrigation Co. v. Emerson*, 75 Colo. 513, 227 P. 547 (1924).

**The true rule of law is, that the person who, for his own purposes, brings on his own land and collects or keeps there anything likely to do mischief if it escapes, must keep it at his own peril; and if he does not do so, is**

**prima facie answerable for all the damage which is the natural consequence of its escape.** *Cass Company-Contractors v. Colton*, 130 Colo. 593, 279 P.2d 415 (1955).

**Colorado cases have followed the doctrine of absolute liability for certain dangerous enterprises, such as the impounding of waters**, and this was based on the common law which later became embodied in this section. *Cass Company-Contractors v. Colton*, 130 Colo. 593, 279 P.2d 415 (1955).

**An act of God or the public enemy is a good defense in an action under this section**, even though the liability imposed thereby is fixed by statute, without regard to negligence of the defendants. *Ryan Gulch Reservoir Co. v. Swartz*, 77 Colo. 60, 234 P. 1059 (1925); *Barr v. Game, Fish & Parks Comm'n*, 30 Colo. App. 482, 497 P.2d 340 (1972).

**In order for a flood to come within the term, "act of God", and therefore be a good defense under this statute**, it must have been so unusual and extraordinary a manifestation of nature as could not under normal conditions have been reasonably anticipated or expected, and an "act of God" does not necessarily mean an operation of natural forces so violent and unexpected that no human foresight or skill could possibly have prevented its effect, it is enough that the flooding should be such as human foresight could not be reasonably expected to anticipate and whether it comes within this description is ordinarily a question of fact. *Barr v. Game, Fish & Parks Comm'n*, 30 Colo. App. 482, 497 P.2d 340 (1972).

**Where the court found that with modern meteorological techniques, a maximum probable storm is predictable and a maximum probable flood is foreseeable**, and the storm and flood which occurred were less than maximum, the defense of "act of God" is not available. *Barr v. Game, Fish & Parks Comm'n*, 30 Colo. App. 482, 497 P.2d 340 (1972).

**An owner is defined in law to be, "He who had dominion over a thing which he may use as he pleases except as restrained by the law or by an agreement", and "includes any person having a claim or interest in real property, though less than an absolute fee".** *Larimer County Ditch Co. v. Zimmerman*, 4 Colo. App. 78, 34 P. 1111 (1893).

**The intention of the general assembly was to hold responsible the parties whose duty it was to construct and maintain**, and to construe the statute otherwise would defeat the legislative intent, and might in any instance prevent redress to the injured party. *Larimer County Ditch Co. v. Zimmerman*, 4 Colo. App. 78, 34 P. 1111 (1893).

**The responsibility is laid only upon the owners of reservoirs which store water for irrigation.** This right of storage includes surface or flood waters, as well as waters diverted from



a natural watercourse. Canon City & C. C. R. R. v. Oxtoby, 45 Colo. 214, 100 P. 1127 (1909).

**A prima facie case is made when the damage and cause, by the breaking, are established.** Larimer County Ditch Co. v. Zimmerman, 4 Colo. App. 78, 34 P. 1111 (1893).

**It is not necessary to allege and prove negligence.** Larimer County Ditch Co. v. Zimmerman, 4 Colo. App. 78, 34 P. 1111 (1893); Garnet Ditch & Reservoir Co. v. Sampson, 48 Colo. 285, 110 P. 79 (1910).

**Where defendants created large bodies of liquid tailings upon their land and thus were statutorily obligated to prevent the escape of these materials and their failure to contain these harmful and obnoxious materials results in their being liable for the resultant damages, regardless of fault on their part, because liability for damage which directly results from floods is fixed by this section.** Freel v. Ozark-Mahoning Co., 208 F. Supp. 93 (D. Colo. 1962).

**37-87-104.5. Notification of ownership of dam - when person in control deemed owner.** The person or persons actually in control of the physical structure of any dam shall be deemed, for determining liability arising from ownership of a dam and with respect to operation thereof, to be the owners thereof unless notice of the name and address of the true owner thereof, together with reasonable evidence of such ownership, has been filed in the office of the state engineer by January 1, 1985. Any change in ownership shall be immediately filed in the office of the state engineer.

**Source: L. 84:** Entire section added, p. 968, § 12, effective April 30.

**37-87-105. Approval of plans for reservoir - notice of modification.** (1) No dam shall be constructed in this state to impound water above the elevation of the natural surface of the ground for the purpose of creating a reservoir with a capacity of more than one hundred acre-feet of water or with a surface area at the high water line in excess of twenty acres or if the height of the dam will exceed ten feet measured vertically from the elevation of the lowest point of the natural surface of the ground, where that point occurs along the longitudinal centerline of the dam, up to the flowline crest of the spillway of the dam before plans and specifications for that dam have been filed in the office of the state engineer and approved by him in accordance with regulations established by the state engineer governing such structures.

(2) Repealed.

(3) In making his determination for approval, the state engineer shall be guided by dam, spillway, and construction regulations established pursuant to this article. Such regulations may include less stringent requirements than those dictated by consideration of probable maximum precipitation. The state engineer shall issue his written decision regarding the approval of plans and specifications within one hundred eighty days of submittal to him. The state engineer shall have authority to require the material used and the work of construction to be accomplished in accordance with regulations which the state engineer may establish. No work shall be deemed complete until the state engineer furnishes to the owners of such structures a written statement of acceptance, which statement shall specify the dimensions of such dam and capacity of such reservoir. The state engineer shall render his written decision regarding acceptance within sixty days of written notification by the owner that construction has been completed.

(4) No alteration, modification, repair, or enlargement of a reservoir or dam which will affect the safety of the structure shall be made without prior written notice and approval in accordance with this section to the state engineer. General maintenance, ordinary repairs, or emergency actions not impairing safety shall be excluded from the terms of this subsection (4).

**Source: L. 1899:** p. 314, § 1. **R.S. 08:** § 3205. **C.L. § 1685.** **L. 25:** p. 330, § 1. **CSA:** C. 90, § 83. **CRS 53:** § 147-5-5. **C.R.S. 1963:** § 148-5-5. **L. 77:** Entire section amended, p. 1696, § 1, effective July 23. **L. 79:** Entire section amended, p. 1370, § 1, effective May 24. **L. 83:** Entire section amended, p. 1405, § 2, effective June 1. **L. 84:** (1), (3), and (4) amended and (2) repealed, pp. 964, 969, §§ 4, 13, effective April 30.

## ANNOTATION

**Law reviews.** For note, "One Year Review of Civil Procedure", see 41 Den. L. Ctr. J. 67 (1964). For article, "Water for Oil Shale Development", see 43 Den. L.J. 72 (1966). For article, "Synthetic Fuels — Policy and Regulation", see 51 U. Colo. L. Rev. 465 (1980). For article, "The Emerging Relationship Between Environmental Regulations and Colorado Water Law", see 53 U. Colo. L. Rev. 597 (1982). For article, "The New Dam Safety and Dam Construction Regulations", see 18 Colo. Law. 1097 (1989).

**Knowing the imminent danger attendant upon the storage of water,** and to avoid, as far as it was possible for human agency to avoid, damages to the lower proprietors, the general assembly provided the scheme of protection found in this and the following sections. Garnet Ditch & Reservoir Co. v. Sampson, 48 Colo. 285, 110 P. 79 (1910).

**It only applies to reservoirs having certain capacity** or dams having certain dimensions. Garnet Ditch & Reservoir Co. v. Sampson, 48 Colo. 285, 110 P. 79 (1910).

**The enactment of this section and the following sections did not repeal § 37-87-104.** Garnet Ditch & Reservoir Co. v. Sampson, 48 Colo. 285, 110 P. 79 (1910).

**By this section, dams of the dimensions mentioned are required to be under the supervision of the state engineer,** and it becomes his duty to supervise the construction of reservoirs, and exercise a general supervision of them at all times, to the end that they may not overflow and that breakage or seepage may not occur. Garnet Ditch & Reservoir Co. v. Sampson, 48 Colo. 285, 110 P. 79 (1910).

**The state has such an interest in the construction of reservoirs** as to justify the statutory provisions declaring what shall constitute proper construction, and when such a structure

is deemed complete. Riverside Reservoir & Land Co. v. Green City Irrigation Dist., 59 Colo. 514, 151 P. 443 (1915).

**The provisions of this section are to be read into every contract for the construction or enlargement of a reservoir.** Riverside Reservoir & Land Co. v. Green City Irrigation Dist., 59 Colo. 514, 151 P. 443 (1915).

**Doubtless, contracts may be entered into and enforced for the construction of a reservoir of such proportions,** in such manner and of such materials as may be desired, but these must be limited by the provisions of this section, that where the reservoir is of or above specified dimensions, the plans and specifications must be first approved by the state engineer; that such public official shall be the consulting engineer during the construction; that he shall have authority to require the material used and the work of construction done to his satisfaction, and the reservoir may be regarded as completed only when he has accepted the same and has so certified to the owners. Riverside Reservoir & Land Co. v. Green City Irrigation Dist., 59 Colo. 514, 151 P. 443 (1915).

**One agreeing to take shares in a reservoir company, in consideration of the company's agreement to enlarge** and complete its reservoir to a certain capacity, cannot be required to accept the shares, until it is made to appear that this section has been complied with. Riverside Reservoir & Land Co. v. Green City Irrigation Dist., 59 Colo. 514, 151 P. 443 (1915).

**In an action to recover for labor and materials, where the parties contracted for construction of reservoir,** and neither party made an issue of the height or lawfulness of the dam, the trial court's finding that the dam was constructed without authorization in violation of this section was wholly voluntary, gratuitous, and immaterial, requiring reversal. Rippey v. Cowieson, 151 Colo. 504, 379 P.2d 396 (1963).

### 37-87-106. Cost of inspections and observation. (Repealed)

**Source: L. 1899:** p. 314, § 2. **R.S. 08:** § 3206. **C.L. § 1686.** **L. 25:** p. 331, § 1. **CSA:** C. 90, § 84. **CRS 53:** § 147-5-6. **C.R.S. 1963:** § 148-5-6. **L. 71:** p. 1307, § 1. **L. 83:** Entire section R&RE, p. 1406, § 3, effective June 1. **L. 84:** Entire section amended, p. 965, § 5, effective April 30. **L. 90:** Entire section repealed, p. 1617, § 5, effective July 1.

**37-87-107. Safety inspections - amount of water to be stored.** Dam safety inspections shall be made on all dams within the state by qualified, experienced personnel as often as the state engineer deems necessary or appropriate for the protection of public health and safety so that a determination of the amount of water which is safe to impound in the reservoir can be made by the state engineer. The dam safety inspections shall include, but shall not be limited to, review of previous inspections, reports and drawings, site inspection of the dam, spillways, outlet facilities, seepage control and measurement system, and permanent monument or monitoring installations, if any. Based upon inspection reports and other information affecting the safety of each dam, the state engineer shall determine the



amount of water which is safe to impound in the reservoir. It is unlawful for the owners of any reservoir to store in said reservoir water in excess of the amount so determined by the state engineer to be safe.

**Source:** L. 1899: p. 315, §3. R.S. 08: § 3207. C.L. § 1687. CSA: C. 90, § 85. CRS 53: § 147-5-7. C.R.S. 1963: § 148-5-7. L. 84: Entire section amended, p. 965, § 6, effective April 30.

**37-87-108. Withdrawal of excess water.** If the owners of any such reservoir impound water therein to a depth greater than that determined by the state engineer to be safe, it is the duty of the division engineer of the district wherein such reservoir is located to forthwith proceed to withdraw from said reservoir so much of the water as shall be in excess of the amount so determined by the state engineer to be safe, and the division engineer shall close the inlets to the same to prevent said reservoir from being refilled to an amount beyond what said state engineer has designated as being safe. If the owners of said reservoir, or any other persons, interfere with the division engineer in the discharge of said duty, the said division engineer shall call to his aid such persons as he deems necessary and employ such force as the circumstances demand to enable him to comply with the requirements of this section. Any costs incurred by the state engineer in rectifying a failure of compliance by the owner may be recovered in a suit for civil damages.

**Source:** L. 1899 p. 315, § 4. R.S. 08: § 3208. C.L. § 1688. CSA: C. 90, § 86. CRS 53: § 147-5-8. C.R.S. 1963: § 148-5-8. L. 84: Entire section amended, p. 966, § 7, effective April 30.

**Cross references:** For the appointments and functions of water division engineers, see § 37-92-202.

#### ANNOTATION

**This section requires the division engineer of a district to draw off the excess water from reservoirs.** Bd. of Comm'rs v. Hider, 47 Colo. 443, 107 P. 1068 (1910).

**37-87-108.5. Emergency actions.** (1) If, in the opinion of the state engineer, conditions of any dam or reservoir are so dangerous to the health and safety of life or property as not to permit time for issuance and enforcement of an order relative to construction, modification, maintenance, or restriction of storage, or the dam is threatened by any large flood, the state engineer may immediately employ remedial measures necessary to protect such life and property.

(2) (a) The state engineer shall maintain complete control of any such dam or reservoir which, pursuant to subsection (1) of this section, has been determined to be dangerous to life or property until such dam or reservoir is deemed safe, or until any emergency conditions which precipitated the state engineer taking control of any such dam or reservoir, pursuant to subsection (1) of this section, have abated. The state engineer is hereby empowered to determine the proper time at which to relinquish control of any such dam or reservoir.

(b) For purposes of this paragraph (b), measures taken by the state engineer pursuant to subsection (1) of this section shall be deemed final action by the state engineer for purposes of judicial review. The owner or operator of any dam upon which the state engineer has employed remedial measures pursuant to subsection (1) of this section may seek judicial review of the propriety of such measures by filing an action in the state district court for the district in which such dam is located.

(3) (a) Any necessary and reasonable costs and expenses incurred by the state engineer in fulfilling the duties mandated by subsections (1) and (2) of this section in connection with a remedial or emergency action shall be recoverable by the state engineer from the owner of any such dangerous or threatened dam.

(b) Any owner failing or refusing, after written notice has been given, to pay the reasonable costs and expenses incurred by the state engineer pursuant to paragraph (a) of this subsection (3) shall be, upon complaint by the state engineer to the attorney general, subject to reasonable attorney fees incurred in the recovery of such costs and expenses.

(4) (a) All moneys collected by the state engineer pursuant to subsection (3) of this section shall be credited to the emergency dam repair cash fund created in section 37-60-122.5, to the extent necessary to replenish the account. Moneys collected in excess of such amount shall be credited to the Colorado water conservation board construction fund.

(b) The general assembly shall make annual appropriations from the emergency dam repair cash fund created in section 37-60-122.5, for the direct and indirect costs incurred by the state engineer in the performance of those duties authorized to be carried out by the state engineer in this section.

**Source:** L. 92: Entire section added, p. 2308, § 11, effective June 3. L. 2001: (4) amended, p. 696, § 35, effective May 30.

**37-87-109. Complaint that reservoir is unsafe.** Upon complaint being made to the state engineer by one or more persons residing or having property in such a location that their homes or property would be in danger of destruction or damage in the event of a flood occurring on account of the breaking of the embankment of any reservoir within the state, that said reservoir is in an unsafe condition, or that it is being filled with water to such an extent as to render it unsafe, it is the duty of the state engineer to forthwith examine said reservoir and determine the amount of water it is safe to impound therein. If, upon such examination, the state engineer finds that said reservoir is unsafe, or is being filled with water to such an extent as to render it unsafe, it is his duty to immediately cause said water to be drawn from said reservoir to such an extent as will, in his judgment, render the same safe. If water is then flowing into said reservoir, he shall cause it to be discontinued.

**Source:** L. 1899: p. 315, § 5. R.S. 08: § 3209. C.L. § 1689. CSA: C. 90, § 87. CRS 53: § 147-5-9. C.R.S. 1963: § 148-5-9. L. 71: p. 1307, § 2.

#### ANNOTATION

Whenever in the judgment of the state engineer, any of the structures become unsafe, it becomes his duty and the duty of the owners under his direction to draw off sufficient water

or to otherwise prevent, if possible, overflow or breakage. Garnet Ditch & Reservoir Co. v. Sampson, 48 Colo. 285, 110 P. 79 (1910).

**37-87-110. Engineer may use force.** The state engineer is authorized to use such force as is necessary to perform the duties required of him in section 37-87-109 and to have and exercise all of the powers conferred upon the division engineer by section 37-87-108. If, after any of such reservoirs have been examined by said state engineer, the owners thereof, or any other person, fills or attempts to fill them, or any of them, to a point in excess of the amount the state engineer has determined to be safe, then it is the duty of the division engineer of the district wherein such reservoir is located to proceed as directed by section 37-87-108. All direct, actual, and necessary expenses incurred in performing any action authorized by this section shall be recoverable by the state engineer from the owner of the affected reservoir and if not reimbursed may be collected by action brought by the state engineer in the district court of the county in which the reservoir, or part thereof, is located.

**Source:** L. 1899: p. 316, § 6. R.S. 08: § 3210. C.L. § 1690. CSA: C. 90, § 88. CRS 53: § 147-5-10. C.R.S. 1963: § 148-5-10. L. 84: Entire section amended, p. 966, § 8, effective April 30.

**Cross references:** For the appointments and functions of water division engineers, see § 37-92-202.



**37-87-111. Expense of examination.** The person calling upon the state engineer to perform the duty required of him by section 37-87-109, if the request is frivolous or made in bad faith, shall pay him any invoiced expenses and mileage at the rate prevailing for state officers and employees under section 24-9-104, C.R.S., for each mile actually and necessarily traveled in going to and from said reservoir, and, should the state engineer find upon examination that such reservoir is in an unsafe condition, the owners thereof shall be liable for all expenses incurred in such examination.

**Source:** L. 1899: p. 316, § 7. R.S. 08: § 3211. C.L. § 1691. CSA: C. 90, § 89. CRS 53: § 147-5-11. C.R.S. 1963: § 148-5-11. L. 71: p. 1308, § 3. L. 84: Entire section amended, p. 966, § 9, effective April 30. L. 90: Entire section amended, p. 1616, § 3, effective July 1.

**37-87-112. Review of action of state engineer.** Any action of the state engineer under section 37-87-110 shall be subject to review in a de novo proceeding commenced by complaint of the owner in the district court in and for the county where the affected structure is located. When the state engineer has directed that certain measures shall be taken immediately for the protection of the public safety, any such judicial proceeding shall be accelerated on the court's calendar and determined immediately upon the conclusion of such proceeding. The judgment and action of the state engineer shall control until judicial determination of the cause.

**Source:** L. 1899: p. 316, § 8. R.S. 08: § 3212. C.L. § 1692. CSA: C. 90, § 90. CRS 53: § 147-5-12. C.R.S. 1963: § 148-5-12. L. 64: p. 341, § 343. L. 84: Entire section R&RE, p. 967, § 10, effective April 30.

**37-87-113. Breakage of reservoir - damages. (Repealed)**

**Source:** L. 1899: p. 316, § 9. R.S. 08: § 3213. C.L. § 1693. CSA: C. 90, § 91. CRS 53: § 147-5-13. C.R.S. 1963: § 148-5-13. L. 81: Entire section amended, p. 1779, § 2, effective May 27. L. 86: Entire section repealed, p. 1093, § 4, effective May 16.

**37-87-114. Penalty - disposition of fines.** (1) Any reservoir owner or operator failing or refusing, after notice in writing has been given, to obey the reasonable directions of the state engineer as to the construction or safe operation of any reservoir shall be subject to a fine of not less than five hundred dollars for each offense, and each day's continuance after time of notice has expired shall be considered a separate offense. Such fines shall be recovered by civil action in the name of the people by the district attorney, upon the complaint of the state engineer, in the district court of the county where the injury complained of occurred. The proceeds of all fines, after payment of costs and charges of the proceedings, shall be paid into the county treasury for the use of the general fund of the county.

(2) Upon the complaint of the state engineer, the attorney general is authorized to commence proceedings against any reservoir owner or operator for refusing, after notice in writing has been given, to obey the directions of the state engineer as to the construction or safe operation of any reservoir to secure compliance with any such reasonable direction necessary for public safety in the district court of the county wherein any portion of such reservoir is located, pursuant to the Colorado rules of civil procedure; except that, if it appears to the court that the public safety is in jeopardy as the result of a failure to obey the directions of the state engineer, the court shall expedite the proceedings so that determinations may be made with respect to the directions of the state engineer commencing not later than twenty days from the service of the complaint on the owner or operator of a reservoir.

**Source:** L. 1899: p. 317, § 10. R.S. 08: § 3214. C.L. § 1694. CSA: C. 90, § 92. CRS 53: § 147-5-14. C.R.S. 1963: § 148-5-14. L. 71: p. 1308, § 4. L. 84: Entire section amended, p. 967, § 11, effective April 30. L. 85: (2) amended, p. 1159, § 1, effective April 12.

**37-87-114.4. Annual report.** The state engineer shall submit an annual report to the general assembly by November 1 of each year concerning the activities of the state engineer and the division of water resources relating to sections 37-87-105 to 37-87-114 for the preceding fiscal year. In addition to the copies required to be filed as provided in section 24-1-136 (9), C.R.S., a copy of such report shall be provided to each of the following: The governor and the chairmen of the committees of reference of the senate and the house of representatives dealing with agriculture and natural resources. Such report shall include but not be limited to information on the following: Approvals of plans and specifications for construction of dams and reservoirs and for alterations, modifications, repairs, and enlargements; number of safety inspections made and the results thereof; use of appropriated funds; receipts generated for inspections of dams and reservoirs; rules and regulations adopted or amended; enforcement orders and proceedings; dam failures and reasons therefor; and other available data regarding the effectiveness of the state's dam and reservoir safety program.

**Source:** L. 84: Entire section added, p. 968, § 12, effective April 30. L. 85: Entire section amended, p. 1366, § 38, effective June 28. L. 2002: Entire section amended, p. 880, § 16, effective August 7.

**37-87-114.5. Applicability of provisions - exemptions.** (1) The provisions of sections 37-87-105 to 37-87-114 shall not apply to:

- (a) Structures not designed or operated for the purpose of storing water;
- (b) Mill tailings impoundment structures permitted under article 32 or 33 of title 34, C.R.S.;
- (c) Uranium mill tailings and liquid impoundment structures permitted under article 11 of title 25, C.R.S.; except that the state engineer shall render such consultation as necessary for the permitting of such structures;
- (d) Siltation structures permitted under article 33 of title 34, C.R.S.; or
- (e) Structures which store water only below the elevation of the natural surface of the ground.

**Source:** L. 84: Entire section added, p. 968, § 12, effective April 30.

**37-87-115. Damages.** The provisions of this article are undertaken by the state of Colorado in the discretionary exercise of its governmental authority; therefore, neither the state of Colorado nor the state engineer, any member of his staff, or any person appointed by him shall be liable in damages for any act done by him or for his failure to act in pursuance of the provisions of this article. In addition, the state engineer, any member of his staff, and any person appointed by him shall have the same immunity from liability as other public employees pursuant to the provisions of article 10 of title 24, C.R.S.

**Source:** L. 03: p. 264, § 7. R.S. 08: § 3221. C.L. § 1701. CSA: C. 90, § 99. CRS 53: § 147-5-21. C.R.S. 1963: § 148-5-21. L. 71: p. 1308, § 5. L. 86: Entire section amended, p. 1094, § 1, effective May 3.

#### ANNOTATION

**Law reviews.** For article, "1986 Colorado Tort Reform Legislation", see 15 Colo. Law. 1363 (1986). For article, "The New Dam Safety

and Dam Construction Regulations", see 18 Colo. Law. 1097 (1989).



**37-87-116. Tax reduction where reservoirs located. (Repealed)**

**Source:** L. 37: p. 787, § 1. CSA: C. 90, § 99(1). CRS 53: § 147-5-22. C.R.S. 1963: § 148-5-22. L. 71: p. 1308, § 6. L. 87: Entire section repealed, p. 1304, § 1, effective May 20.

**37-87-117. Landowner to submit plans. (Repealed)**

**Source:** L. 37: p. 788, § 2. CSA: C. 90, § 99(2). CRS 53: § 147-5-23. C.R.S. 1963: § 148-5-23. L. 71: p. 1309, § 7. L. 77: Entire section amended, p. 1696, § 2, effective July 23. L. 83: Entire section amended, p. 1406, § 4, effective June 1. L. 87: Entire section repealed, p. 1304, § 1, effective May 20.

**37-87-118. State engineer's authority over construction. (Repealed)**

**Source:** L. 37: p. 788, § 3. CSA: C. 90, § 99(3). CRS 53: § 147-5-24. C.R.S. 1963: § 148-5-24. L. 71: p. 1309, § 8. L. 83: Entire section amended, p. 1407, § 5, effective June 1. L. 87: Entire section repealed, p. 1304, § 1, effective May 20.

**37-87-119. Completion of dam. (Repealed)**

**Source:** L. 37: p. 789, § 4. CSA: C. 90, § 99(4). CRS 53: § 147-5-25. C.R.S. 1963: § 148-5-25. L. 71: p. 1309, § 9. L. 87: Entire section repealed, p. 1304, § 1, effective May 20.

**37-87-120. Reduction in valuation for assessment. (Repealed)**

**Source:** L. 37: p. 789, § 5. CSA: C. 90, § 99(5). L. 39: p. 444, § 1. CRS 53: § 147-5-26. C.R.S. 1963: § 148-5-26. L. 71: p. 1310, § 10. L. 87: Entire section repealed, p. 1304, § 1, effective May 20.

**37-87-121. Application to existing dams. (Repealed)**

**Source:** L. 37: p. 790, § 6. CSA: C. 90, § 99(6). CRS 53: § 147-5-27. C.R.S. 1963: § 148-5-27. L. 71: p. 1310, § 11. L. 87: Entire section repealed, p. 1304, § 1, effective May 20.

**37-87-122. Erosion control dams.** (1) The provisions of sections 37-87-101 to 37-87-108 shall not apply to erosion control dams of the character defined in this section, unless such dams also come within the specification requirements of said sections.

(2) Erosion control dams for reservoirs may be constructed on watercourses, the channels of which have been determined by the state engineer to be normally dry, having a vertical height not exceeding fifteen feet from the bottom of the channel to the bottom of the spillway, and having a capacity not exceeding ten acre-feet at the emergency spillway level, upon approval of an application for such erosion control dam by the state engineer, which application shall be accompanied by a fee of fifteen dollars. The approval by the state engineer of an erosion control dam shall be chronologically numbered in order of approval and in concert with any livestock water tanks approved pursuant to section 35-49-109, C.R.S. When such reservoirs are to be constructed with such height exceeding fifteen feet and such capacity exceeding ten acre-feet, they shall be constructed in accordance with section 37-87-105.

(3) Such reservoirs may be constructed with a capacity in excess of two acre-feet if, at or below the two acre-feet level, an ungated outlet tube is installed, with twelve inches minimum diameter and large enough to assure adequate capacity to drain within thirty-six hours any impoundment in excess of two acre-feet.

(4) The state engineer shall prepare and keep on file at the office of the state engineer standard specifications for erosion control dams which shall be subject to revision by the state engineer and shall in general be used as a guide by persons proposing to construct such dams.

(5) The fees collected pursuant to subsection (2) of this section shall be deposited by the state engineer with the state treasurer, who shall credit all such fees to the general fund of the state.

**Source:** L. 73: p. 1518, § 1. C.R.S. 1963: § 148-5-30. L. 87: (1) amended, p. 1304, § 2, effective May 20. L. 90: (2) amended and (5) added, p. 1617, § 4, effective July 1. L. 92: (2) and (4) amended, p. 2309, § 12, effective June 3.

### **37-87-123. Dam and reservoir information. (Repealed)**

**Source:** L. 83: Entire section added, p. 1407, § 6, effective June 1. L. 84: Entire section repealed, p. 969, § 13, effective April 30.

**37-87-124. Restriction of facilities within reservoirs.** (1) The general assembly hereby declares that the prevention of seasonal flooding which causes destruction of property and crops, loss of livestock, and risk or loss of human life is manifestly of greater concern and benefit to this state than the availability of recreational facilities and other facilities, not functionally related to the operation of the reservoir, constructed below the high water level of a reservoir.

(2) In order to achieve the purposes of subsection (1) of this section, no person, including any state or federal agency, quasi-municipal corporation, or political subdivision, shall construct any permanent recreational structure within a reservoir below the elevation at the crest of the spillway of the reservoir unless such facility is constructed in such a manner as to withstand partial or complete inundation and sustain minimal or no damage thereby or unless such facility is necessary to the operation of the reservoir. Said facility should be capable of being restored to full recreational use with a minimum amount of cleaning or expense. This subsection (2) and subsection (3) of this section shall not apply to facilities completed before July 1, 1984, but shall apply to any enlargement or remodeling of such facilities.

(3) The state engineer shall order the removal of any facilities constructed, enlarged, or remodeled in violation of this section. Such order may be appealed by the affected person or enforced by the state engineer pursuant to article 4 of title 24, C.R.S.

**Source:** L. 84: Entire section added, p. 970, § 1, effective April 2.

**37-87-125. Notice of intent to construct impoundment structure.** Any person proposing to construct a reservoir for the purpose of storing water, other than a reservoir specified in section 37-87-105 (1) or a livestock water tank as described in section 35-49-103, C.R.S., shall submit notice thereof to the state engineer prior to the beginning of any construction. Such notice shall include the location of such proposed reservoir with reference to section, township, and range and the dimensions of the reservoir, the dam, and the spillway. If any reservoir is constructed without the notice required by this section, the state engineer may prohibit the storage of water in such reservoir or direct the withdrawal of water from such reservoir. The provisions of this section shall not apply to structures listed in section 37-87-114.5.

**Source:** L. 84: Entire section added, p. 968, § 12, effective April 30.



## ARTICLE 88

### State Canals and Reservoirs

37-88-101.	Authority to locate and construct.	37-88-107.	Penalty for damaging state reservoirs.
37-88-102.	State engineer shall survey, lay out, and locate.	37-88-108.	Control of Boss lake reservoir.
37-88-103.	Rights and powers given.	37-88-109.	County control of reservoirs.
37-88-104.	Title shall vest in state.	37-88-110.	Monument lake dam and reservoir - transfer of title - ownership and control.
37-88-105.	Contract for and lease of water rights.		
37-88-106.	Aiding in the construction.		

**37-88-101. Authority to locate and construct.** For the purpose of reclaiming, by irrigation, state and other lands and for the purpose of furnishing work for inmates, the department of corrections is authorized to locate, acquire, and construct, in the name of and for the use of the state of Colorado, ditches, canals, reservoirs, and feeders, for irrigating and domestic purposes, and for that purpose may use the labor of persons in the custody of the department of corrections.

**Source:** L. 1889: p. 285, § 1. R.S. 08: § 3499. C.L. § 1933. CSA: C. 90, § 350. CRS 53: § 147-17-1. C.R.S. 1963: § 148-17-1. L. 77: Entire section amended, p. 954, § 32, effective August 1. L. 79: Entire section amended, p. 704, § 85, effective July 1.

### ANNOTATION

Canals and reservoirs within the state are internal improvements within the meaning of the act of congress, but the internal improvement fund can be made available in the construction thereof only by an express appropriation. In re Priority of Legislative Appropriations, 19 Colo. 63, 34 P. 274 (1893).

The act relating to State Canal No. I, providing that the expenses of construction are

to be met in part by certificates of indebtedness, payable only out of funds received for carriage of water, or in payment of lands, and providing against any indebtedness being incurred against the state, is not in conflict with the constitutional provisions fixing a limitation upon state indebtedness. In re Priority of Legislative Appropriations, 19 Colo. 63, 34 P. 274 (1893).

**37-88-102. State engineer shall survey, lay out, and locate.** The state engineer, under the direction of the department of corrections, shall survey, lay out, and locate a ditch or canal upon the most feasible route on either side of the Arkansas river, which said ditch or canal shall be of sufficient capacity to cover at least thirty thousand acres of good arable land between Canon City and Pueblo; but work shall only be commenced and performed upon one main ditch, canal, reservoir, or feeder at a time, and a second shall not be commenced until the completion of the first.

**Source:** L. 1889: p. 285, § 2. R.S. 08: § 3500. C.L. § 1934. CSA: C. 90, § 351. CRS 53: § 147-17-2. C.R.S. 1963: § 148-17-2. L. 77: Entire section amended, p. 954, § 33, effective August 1.

**37-88-103. Rights and powers given.** The department of corrections is given all the rights and powers that an individual or corporation now has under the laws of the state, or of the United States, to acquire the rights-of-way over, upon, and to any lands necessary for it to use or occupy in the construction and maintenance of said ditches, canals, reservoirs, or feeders.

**Source:** L. 1889: p. 286, § 3. R.S. 08: § 3501. C.L. § 1935. CSA: C. 90, § 352. CRS 53: § 14. 7-17-3. C.R.S. 1963: § 148-17-3. L. 77: Entire section amended, p. 954, § 34, effective August 1.

**37-88-104. Title shall vest in state.** The title to all ditches, canals, reservoirs, or feeders, so constructed, shall vest and remain in the state of Colorado, and the proceeds thereof shall be paid into the state treasury.

**Source:** L. 1889: p. 286, § 4. R.S. 08: § 3502. C.L. § 1936. CSA: C. 90, § 353. CRS 53: § 147-17-4. C.R.S. 1963: § 148-17-4.

#### ANNOTATION

**Law reviews.** For article "Revision of Water and Irrigation Statutes", see 31 Dicta 29 (1954).

**37-88-105. Contract for and lease of water rights.** When any part of any ditch, canal, reservoir, or feeder is constructed, said department of corrections may contract for and may lease water rights upon such terms and under such rules and regulations as may be adopted by said department and approved by the governor of the state, to such individuals or corporations as may desire to lease the same.

**Source:** L. 1889: p. 286, § 5. R.S. 08: § 3503. C.L. § 1937. CSA: C. 90, § 354. CRS 53: § 147-17-5. C.R.S. 1963: § 148-17-5. L. 77: Entire section amended, p. 955, § 35, effective August 1.

#### ANNOTATION

**Law reviews.** For article, "Revision of Water and Irrigation Statutes", see 31 Dicta 29 (1954).

**37-88-106. Aiding in the construction.** For the purpose of aiding in the construction of said ditches, canals, reservoirs, and feeders, the department of corrections is authorized to receive subscriptions and advancements of money from persons owning land along the line of said proposed ditches, canals, reservoirs, and feeders, or persons desiring the construction of the same, and to issue receipts or certificates to such persons so advancing money for the amount thereof, which receipt or certificate shall draw interest at the rate of seven percent per annum, and both principal and interest shall be payable in water to be taken from said ditches, canals, reservoirs, or feeders, under such rules and regulations as may be adopted by said department and the state engineer and approved by the governor of the state.

**Source:** L. 1889: p. 286, § 6. R.S. 08: § 3504. C.L. § 1938. CSA: C. 90, § 355. CRS 53: § 147-17-6. C.R.S. 1963: § 148-17-6. L. 77: Entire section amended, p. 955, § 36, effective August 1.

**37-88-107. Penalty for damaging state reservoirs.** Any person interfering with or damaging any state reservoir, or parts or appurtenances thereof, is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than one thousand dollars or by imprisonment in the county jail for not more than one year.

**Source:** L. 1891: p. 351, § 9. R.S. 08: § 3545. C.L. § 1950. CSA: C. 90, § 367. CRS 53: § 147-17-8. C.R.S. 1963: § 148-17-8. L. 73: p. 1419, § 110.

**37-88-108. Control of Boss lake reservoir.** (1) The board of county commissioners of Chaffee county has charge and control of that certain state reservoir situated in said county and commonly known as the Boss lake reservoir and, without expense to the state of Colorado, other than expenses payable from the Colorado water conservation board construction fund and such financial assistance or other aid as may be available to nonstate-owned reservoirs, shall maintain and keep said reservoir in good condition and



provide for the storage of water as contemplated in the law providing for the construction of said reservoir and also for the distribution of said water under the direction of the division engineer for the district in which said reservoir is situated, at such times as the scarcity of water in the stream known as the South Arkansas demands that the waters in said stream should be replenished; except that said waters shall be distributed by the said division engineer pro rata without reference to the dates of priorities of water rights and further except that the county of Chaffee shall assume and shall be held responsible for any damages resulting from breakage of the dam or water discharges therefrom unless the responsibility for damages has been assumed by the upper Arkansas water conservancy district as part of the agreement pursuant to subsection (2) of this section.

(2) The board of county commissioners of Chaffee county may agree with the upper Arkansas water conservancy district in which the Boss lake reservoir is located for said district's assumption of the duty to control, maintain, and keep the reservoir in good condition. The agreement may further provide for the upper Arkansas water conservancy district to assume and be held responsible for any damages resulting from breakage of the dam or water discharges therefrom.

**Source:** L. 1897: p. 119, § 1. R.S. 08: § 3560. C.L. § 1957. CSA: C. 90, § 374. CRS 53: § 147-17-15. C.R.S. 1963: § 148-17-15. L. 81: Entire section amended, p. 1780, § 1, effective June 19.

**Cross references:** For the appointments and functions of water division engineers, see § 37-92-202.

**37-88-109. County control of reservoirs.** (1) The board of county commissioners of any county wherein is situated any state reservoir shall have charge and control of such reservoir and, without expense to the state of Colorado, other than expenses payable from the Colorado water conservation board construction fund and such financial assistance or other aid as may be available to nonstate-owned reservoirs, shall maintain and keep said reservoir in good condition and provide for the storage of water as contemplated in the law providing for the construction of said reservoir and also for the distribution of said water under the direction of the division engineer for the district in which said reservoir is situated, at such times as the scarcity of water in the stream which such reservoir is intended to reinforce demands that the water in said stream should be replenished for agricultural purposes; except that said waters shall be distributed by said division engineer pro rata without reference to priority of water rights and also except that the counties in which said reservoirs are situated shall assume and shall be held responsible for any damages resulting from breakage of the dams or water discharges therefrom. The provisions of this section shall not apply to any state reservoir constructed primarily for the purpose of irrigating state lands, but any such reservoir shall remain in the control of the state board of land commissioners.

(2) In the case of reservoirs owned by the division of parks and wildlife, the state engineer or the division engineer in the district in which such reservoirs are located shall have the authority to cause the release of water stored therein for domestic and municipal purposes in time of scarcity. All expenses occasioned by the release of such waters for said purposes shall be borne by the counties or the beneficiaries of such releases, and said reservoirs, when refilled in priority, shall be restocked at the expense of the county or the beneficiary of said release.

**Source:** L. 1899: p. 350, § 1. R.S. 08: § 3562. C.L. § 1959. CSA: C. 90, § 376. CRS 53: § 147-17-16. C.R.S. 1963: § 148-17-16. L. 81: Entire section amended, p. 1781, § 2, effective June 19.

**Cross references:** For the appointments and functions of water division engineers, see § 37-92-202.

**37-88-110. Monument lake dam and reservoir - transfer of title - ownership and control.** (1) Upon completion of the repair described in subsection (2) of this section, the

governor is hereby authorized to execute a deed of conveyance to the town of Monument of all the right, title, and interest of the state of Colorado in and to the structure known as Monument lake dam located in El Paso county.

(2) The transfer of title to Monument lake dam pursuant to subsection (1) of this section shall not occur until such time as the dam is repaired to the satisfaction of the state engineer's office and other governmental entities with applicable jurisdiction. The town of Monument and El Paso county are jointly responsible for financing the repair of Monument lake dam and are authorized to apply for financial assistance from the Colorado water resources and power development authority established in article 95 of this title, the Colorado water conservation board established in article 60 of this title, and from any other appropriate state, federal, or private source.

(3) As there are no adjudicated water rights to Monument lake reservoir, upon the transfer of title to Monument lake dam pursuant to subsection (1) of this section, the town of Monument may acquire and assume the duties and responsibilities relating to the storage of water in Monument lake reservoir.

(4) Upon the transfer of title to Monument lake dam pursuant to subsection (1) of this section, the town of Monument shall assume all liability and responsibility relating to the control, management, and maintenance of Monument lake dam and reservoir, and at such time the board of county commissioners of El Paso county shall be relieved from all responsibilities relating to Monument lake reservoir pursuant to section 37-88-109.

**Source:** L. 2000: Entire section added, p. 680, § 1, effective May 23.

**ARTICLE 89**

**Offenses**

37-89-101.	Penalty for cutting or breaking gate, bank, flume.	37-89-103.	Penalty for interfering with adjusted headgates.
37-89-102.	Jurisdiction of county court.	37-89-104.	Jurisdiction of county court.

**37-89-101. Penalty for cutting or breaking gate, bank, flume.** Any person who knowingly and willfully cuts, digs, breaks down, or opens any gate, bank, embankment, or side of any ditch, canal, flume, feeder, or reservoir, or who knowingly and willfully breaks, cuts, checks, or otherwise interferes with the flow of water in any drainage ditch, box drain, or tile drain, or any manhole, or other opening in any box drain or tile drain, in which such person may be a joint owner, or which may be the property of another, or in the lawful possession of another and used for the purpose of drainage, irrigation, manufacturing, mining, or domestic purposes, with intent to injure any person, association, or corporation, or for personal gain, unlawfully, with intent of stealing, taking, or causing to run or pour out of or into such ditch, canal, reservoir, feeder, flume, drainage ditch, box drain, or tile drain any water for personal profit, benefit, or advantage, or with intent to check or change the flow in any such ditch, canal, feeder, flume, drainage ditch, box drain, or tile drain, to the injury of any other person, association, or corporation, lawfully in the use of such water or of such ditch, canal, reservoir, feeder, flume, drainage ditch, box drain, or tile drain, is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than fifty dollars nor more than seven hundred fifty dollars or by imprisonment in the county jail for not more than ninety days. The court shall further order that such person make full restitution to the victim of his or her conduct for the actual damages that were sustained. The amount of such restitution shall be equal to the actual pecuniary damages sustained by the victim. The court shall fix the manner and time in which such restitution shall be made.

**Source:** L. 1881: p. 163, § 1. G.S. § 1759. R.S. 08: § 3495. L. 21: p. 476, § 1. C.L. § 1929. CSA: C. 90, § 346. CRS 53: § 147-16-1. C.R.S. 1963: § 148-16-1. L. 2001: Entire section amended, p. 988, § 1, effective August 8.

**Cross references:** For the penalty of damaging a ditch or flume, see § 7-42-109; for trespass, tampering, and criminal mischief, see part 5 of article 4 of title 18.



**37-89-102. Jurisdiction of county court.** The county court has jurisdiction of all offenses under the provisions of section 37-89-101.

**Source:** L. 1881: p. 163, § 2. G.S. § 1761. R.S. 08: § 3496. C.L. § 1930. CSA: C. 90, § 347. CRS 53: § 147-16-2. C.R.S. 1963: § 148-16-2. L. 64: p. 342, § 346.

**37-89-103. Penalty for interfering with adjusted headgates.** (1) Every person who willfully and without authority opens, closes, changes, or interferes with any headgate of any ditch, or any water box or measuring device of any ditch for the receiving or delivery of water, after the headgate of the ditch has been adjusted by and is in the control of the division engineer, or after such water box or measuring device has been adopted by the ditch officer in charge, is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than three hundred dollars, or by imprisonment in the county jail for not more than sixty days, or by both such fine and imprisonment.

(2) Any person who is found using water taken through any such headgate, water box, or measuring device so unlawfully interfered with shall prima facie be deemed guilty of a violation of this section.

**Source:** L. 1879: p. 108, § 44. G.S. § 1755. L. 01: p. 196, § 1. R.S. 08: § 3497. C.L. § 1931. CSA: C. 90, § 348. CRS 53: § 147-16-3. C.R.S. 1963: § 148-16-3.

**Cross references:** For the appointments and functions of water division engineers, see § 37-92-202.

#### ANNOTATION

The county court has general jurisdiction in cases of misdemeanor including the offense of interference with a headgate. *Lambert v. People*, 78 Colo. 313, 241 P. 533 (1925).

In a prosecution for changing a headgate, the fact that some other person had previously interfered with it, gave defendant no

right to interfere, unless possibly to restore it to the official setting. *Lambert v. People*, 78 Colo. 313, 241 P. 533 (1925).

The decrees of water priorities cannot be attacked in a criminal prosecution for interfering with headgates. *Lambert v. People*, 78 Colo. 313, 241 P. 533 (1925).

**37-89-104. Jurisdiction of county court.** The county court has jurisdiction to hear, try, and determine actions brought for violations of section 37-89-103.

**Source:** L. 01: p. 197, § 2. R.S. 08: § 3498. C.L. § 1932. CSA: C. 90, § 349. CRS 53: § 147-16-4. C.R.S. 1963: § 148-16-4. L. 64: § 342, § 347.

#### ANNOTATION

Prior to being amended, this section did not give exclusive jurisdiction to the justice of

the peace. *Lambert v. People*, 78 Colo. 313, 241 P. 533 (1925).

### Underground Water

#### ARTICLE 90

### Underground Water

**Editor's note:** This article was numbered as article 18 of chapter 148, C.R.S. 1963. The provisions of this article were repealed and reenacted in 1965, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this article prior to 1965, consult the Colorado statutory research explanatory note beginning on page vii in the front of this volume.

**Law reviews:** For article, "Representing a Developer Purchaser of Water and Water Rights", see 13 Colo. Law. 627 (1984); for article, "Plans and Studies: The Recent Quest for Utopia in the

Utilization of Colorado's Water Resources", see 55 U. Colo. L. Rev. 391 (1984); for casenote, "Nontributary, Nondesignated Ground Water: The Huston Decision", see 56 U. Colo. L. Rev. 135 (1984); for article, "Principles and Law of Colorado's Nontributary Ground Water", see 62 Den. U. L. Rev. 809 (1985); for article, "Use of Colorado Water Rights In Secured Transactions", see 18 Colo. Law. 2307 (1989); for article, "The Constitution, Property Rights and the Future of Water Law", see 61 U. Colo. L. Rev. 257 (1990).

37-90-101.	Short title.				ing - objections - change of boundaries.
37-90-102.	Legislative declaration.				
37-90-103.	Definitions - repeal.		37-90-124.		Election on organization.
37-90-104.	Commission - organization - expenses.		37-90-125.		Filing decree.
37-90-105.	Small capacity wells.		37-90-126.		Management district - directors - qualifications - oath - bond - vacancies.
37-90-106.	Determination of designated groundwater basins - exception - legislative declaration - repeal.		37-90-127.		Management district - directors - election - term of office.
37-90-107.	Application for use of ground water - publication of notice - conditional permit - hearing on objections - well permits.		37-90-128.		Management district - directors - no compensation - expenses.
37-90-107.5.	Replacement plans.		37-90-129.		Management district - officers - election.
37-90-108.	Final permit - evidence of well construction and beneficial use - limitations.		37-90-130.		Management districts - board of directors.
37-90-109.	Priority - discontinuance orders - grounds.		37-90-131.		Management district - board of directors - control measures - hearing - notice - publication - order.
37-90-110.	Powers of the state engineer.		37-90-132.		Management district - board of directors - taxes - levy - limitation.
37-90-111.	Powers of the ground water commission - limitations.		37-90-133.		Management district - claims - warrants - payment.
37-90-111.5.	Well enforcement - injunction - fines.		37-90-134.		Management district - issuance of bonds - indebtedness - submission to electors.
37-90-112.	Notice - publication.		37-90-135.		Management district - dissolution - procedure - funds - disposition.
37-90-113.	Hearings.		37-90-136.		Unlawful to divert water for application outside of state. (Repealed)
37-90-114.	Other administrative hearings.		37-90-137.		Permits to construct wells outside designated basins - fees - permit no ground water right - evidence - time limitation - well permits - rules - repeal.
37-90-115.	Judicial review of actions of the ground water commission or the state engineer.		37-90-137.5.		Special water committee - creation - study - repeal. (Repealed)
37-90-116.	Fees.		37-90-138.		Waste - violations - permits.
37-90-117.	Water conservation board - duties.		37-90-139.		Existing beneficial uses not recorded - fee.
37-90-118.	Ground water management districts - formation.		37-90-140.		Inclusion of lands.
37-90-119.	Creation of districts - proposal - submission - changes - proposed boundaries.		37-90-141.		Exclusion of lands.
37-90-120.	Management districts - petition - signatures required - filing.		37-90-142.		State engineer - action upon permit.
37-90-121.	Management districts - petition - contents - minor defects - amendment.		37-90-143.		Owners of well permits - update for name and address.
37-90-122.	Management district - petition - certification of signatures - hearing - notice - publication.				
37-90-123.	Management districts - hear-				



**37-90-101. Short title.** This article shall be known and may be cited as the “Colorado Ground Water Management Act”.

**Source:** L. 65: R&RE, p. 1268, § 1. C.R.S. 1963: § 148-18-38.

#### ANNOTATION

**Law reviews.** For article “The Law of Underground Water”, see 13 Rocky Mt. L. Rev. 1 (1940). For comment, “Water: Statewide or Local Concern? City of Thornton v. Farmers Reservoir & Irrigation Co.”, see 56 Den. L.J. 625 (1979). For article, “Cumulative Impact Assessment of Western Energy Development: Will it Happen”? see 51 U. Colo. L. Rev. 551 (1980). For article, “The Effect of Water Law on the Development of Oil Shale”, see 58 Den. L.J. 751 (1981). For article, “Ground Water Mining Law and Policy”, see 53 U. Colo. L. Rev. 505 (1982). For article, “The Emerging Relationship Between Environmental Regulations and Colorado Water Law”, see 53 U. Colo. L. Rev. 597 (1982). For article, “Water Rights — How to Avoid Getting in Over Your Head”, see 11 Colo. Law. 2143 (1982). For article, “Management of

Groundwater Through Mandatory Conservation”, see 61 Den. L.J. 1 (1983). For article, “Nontributary Groundwater: The Continuing Saga”, see 13 Colo. Law. 68 (1984).

**This article and article 92 deal with separate waters.** The Ground Water Management Act and the Water Right Determination and Administration Act of 1969, article 92 of this title, deal with separate and mutually exclusive waters. *Broyles v. Fort Lyon Canal Co.*, 638 P.2d 244 (Colo. 1981).

**Differences explained** between determination and administration of water rights under this article and under article 92. *E. Cherry Creek Water & Sanitation Dist. v. Rangeview Metro. Dist.*, 109 P.3d 154 (Colo. 2005).

**Applied** in District 10 Water Users Ass’n v. Barnett, 198 Colo. 291, 599 P.2d 894 (1979).

**37-90-102. Legislative declaration.** (1) It is declared that the traditional policy of the state of Colorado, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the designated ground waters of this state, as said waters are defined in section 37-90-103 (6). While the doctrine of prior appropriation is recognized, such doctrine should be modified to permit the full economic development of designated ground water resources. Prior appropriations of ground water should be protected and reasonable ground water pumping levels maintained, but not to include the maintenance of historical water levels. All designated ground waters in this state are therefore declared to be subject to appropriation in the manner defined in this article.

(2) The general assembly finds and declares that the allocation of nontributary ground water pursuant to statute is based upon the best available evidence at this time. The general assembly recognizes the unique, finite nature of nontributary ground water resources outside of designated ground water basins and declares that such nontributary ground water shall be devoted to beneficial use in amounts based upon conservation of the resource and protection of vested water rights. Economic development of this resource shall allow for the reduction of hydrostatic pressure levels and aquifer water levels consistent with the protection of appropriative rights in the natural stream system. The doctrine of prior appropriation shall not apply to nontributary ground water. To continue the development of nontributary ground water resources consonant with conservation shall be the policy of this state. Such water shall be allocated as provided in this article upon the basis of ownership of the overlying land. This policy is a reasonable exercise of the general assembly’s plenary power over this resource.

(3) Repealed.

**Source:** L. 65: R&RE, p. 1246, § 1. C.R.S. 1963: § 148-18-1. L. 85: Entire section amended, p. 1160, § 1, effective July 1. L. 98: (3) added, p. 852, § 1, effective May 26. L. 2001: (3) amended, p. 158, § 1, effective March 28. L. 2003: (3) amended, p. 1596, § 2, effective May 2.

**Editor’s note:** Subsection (3)(b) provided for the repeal of subsection (3), effective July 1, 2004. (See L. 1998, p. 852.)

## ANNOTATION

**Law reviews.** For article, "Ground Water Legislation", see 30 Rocky Mt. L. Rev. 416 (1958). For article, "Colorado Ground Water Act of 1957 — Is Ground Water Property of the Public?" see 31 Rocky Mt. L. Rev. 165 (1959). For note on payment for replacement of diversion work made obsolete when subsequent uses lower the water level, see 37 U. Colo. L. Rev. 402 (1965). For article, "Colorado's New Ground Water Laws", see 38 U. Colo. L. Rev. 295 (1966). For article, "Water for Recreation: A Plea for Recognition", see 44 Den. L.J. 288 (1967). For note, "A Survey of Colorado Water Law", see 47 Den. L.J. 226 (1970). For article, "The Groundwater-Surface Water Conflict and Recent Colorado Water Legislation", see 43, U. Colo. L. Rev. 1 (1971). For article, "Ground Water Mining Law and Policy", see 53 U. Colo. L. Rev. 505 (1982). For article, "The Continuing Groundwater Saga — Part I: Senate Bill 5", see 15 Colo. Law. 422 (1985). For article, "The Continuing Groundwater Saga — Part II: The Denver Basin Rules", see 15 Colo. Law. 667 (1986). For article, "The Physical Solution in Western Water Law", see 57 U. Colo. L. Rev. 445 (1986).

**Article not unconstitutional in violation of §§ 5 and 6 of art. XVI, Colo. Const.,** insofar as said act applies to tributary ground water. *Kuiper v. Lundvall*, 187 Colo. 40, 529 P.2d 1328 (1974), cert. denied, 421 U.S. 996, 95 S. Ct. 2391, 44 L.Ed.2d 663 (1975).

**Article is not unconstitutional on theory that it delegates judicial functions to an administrative agency of the executive branch** of the government. *Kuiper v. Lundvall*, 187 Colo. 40, 529 P.2d 1328 (1974), cert. denied, 421 U.S. 996, 95 S. Ct. 2391, 44 L.Ed.2d 663 (1975).

This article is not unconstitutional on theory that it bestows powers upon the state engineer and the Colorado ground water commission to grant or refuse a permit to drill a well thereby giving them, in effect, the authority to adjudicate a water right. *Kuiper v. Lundvall*, 187 Colo. 40, 529 P.2d 1328 (1974), cert. denied, 421 U.S. 996, 95 S. Ct. 2391, 44 L. Ed.2d 663 (1975).

**If a plaintiff were permitted to proceed on a theory of "unappropriated water" under § 6 of art. XVI, Colo. Const.,** and pump water from his proposed well until such time as it was no longer economically feasible to withdraw water from the aquifer, then no subsequent regulation of his pumping could protect senior appropriators, and all pumping from the basin within the area of influence of the plaintiff's well would have to cease until a reasonable pumping level was restored through the slow process of recharge, and this is not the concept of appropriation contained in this section, and not the one the supreme court will follow.

*Fundingsland v. Colo. Ground Water Comm'n*, 171 Colo. 487, 468 P.2d 835 (1970).

**This act is an attempt to permit the full development of ground water sources** and alleviate the growing friction between surface water appropriators and well owners. *North Kiowa-Bijou Mgt. Dist. v. Ground Water Comm'n*, 180 Colo. 314, 505 P.2d 377 (1973).

Prior appropriation rules for surface water are primarily designed and developed to protect the relative rights of senior and junior appropriators, in order to maximize the beneficial use of the surface water. *Danielson v. Kerbs AG., Inc.*, 646 P.2d 363 (Colo. 1982).

**This act creates in the owner of overlying land an inchoate right** to control and use a specified amount of nontributary ground water. The right may vest upon construction of a well in accordance with a permit from the state engineer or by adjudication in the water court. *E. Cherry Creek Water & Sanitation Dist. v. Rangeview Metro. Dist.*, 109 P.3d 154 (Colo. 2005).

**In view of the clearly expressed legislative intent to permit adjudication for future uses without a corresponding obligation to develop them, anti-speculation doctrine does not apply** to a judicial determination of available nontributary ground water, because a structure to withdraw nontributary ground water may not be constructed without satisfying the state engineer of a non-speculative, beneficial use to which the water will be put. *E. Cherry Creek Water & Sanitation Dist. v. Rangeview Metro. Dist.*, 109 P.3d 154 (Colo. 2005).

**Designated ground water treated differently.** Although designated ground water in the Denver basin aquifers is allocated on the basis of overlying land ownership, in the manner of nontributary ground water, it is regulated by the state ground water commission, which has the dual responsibility of determining availability and issuing permits for its withdrawal. *E. Cherry Creek Water & Sanitation Dist. v. Rangeview Metro. Dist.*, 109 P.3d 154 (Colo. 2005).

**The general assembly chose a modified system of prior appropriation for the establishment and administration of rights to use designated ground water** in order to: (1) Permit full economic development of designated ground water resources; (2) protect prior appropriations of designated ground water; and (3) protect and maintain reasonable ground water pumping levels. *Upper Black Squirrel Creek v. Goss*, 993 P.2d 1177 (Colo. 2000).

**The court and the Colorado ground water commission derive their authority to pass on an application to drill a well** on certain property from this section (formerly Senate Bill 367), which deals with captive ground water.



*Fundingsland v. Colo. Ground Water Comm'n*, 171 Colo. 487, 468 P.2d 835 (1970).

This act separates certain water termed "designated ground water" from the system of appropriation for surface water systems, and it creates a permit system for the allocation and use of ground waters within designated ground water basins. *North Kiowa-Bijou Mgt. Dist. v. Ground Water Comm'n*, 180 Colo. 314, 505 P.2d 377 (1973).

Provisions create conceptual framework for appropriation and administration of ground and tributary water. The Colorado Ground Water Management Act, §§ 37-90-101 et seq., and the Water Right Determination and Administration Act of 1969, §§ 37-92-101 et seq., create a conceptual framework which provide for the appropriation and administration of designated ground water under the management act, and the appropriation and administration of all tributary water, except that which may be included in the definition of "designated ground water", under the 1969 act. *State ex rel. Danielson v. Vickroy*, 627 P.2d 752 (Colo. 1981).

Ground water existing in designated underground water basins is made subject to the doctrine of prior appropriation. *Fundingsland v. Colo. Ground Water Comm'n*, 171 Colo. 487, 468 P.2d 835 (1970).

Because one's right to water is determined by priority of appropriation which is based on a beneficial use of the water, plaintiff's claim that she is entitled to ownership of the water rights by virtue of her co-tenancy in the overlying land fails. *Farmer v. Farmer*, 720 P.2d 174 (Colo. App. 1986).

Priority of claims for appropriating ground water determined by modified prior appropriation doctrine. The priority of claims for the appropriation of designated ground water is to be determined by the doctrine of prior appropriation, as modified to permit full economic development of the designated ground water resources. *State ex rel. Danielson v. Vickroy*, 627 P.2d 752 (Colo. 1981).

Vickroy decision not retrospectively applied. *State ex rel. Danielson v. Vickroy* (627 P.2d 752 (Colo. 1981)) should not be retrospectively applied to those decrees involving well permits in designated ground water basins issued prior to the Vickroy decision. *Ground Water Comm'n v. Shanks*, 658 P.2d 847 (Colo. 1983).

The general assembly has plenary power over the allocation and use of nontributary water and may subject the vesting of use rights in such water to whatever requirements it may design. A deed purporting to transfer nontributary water rights may not negate the application of legislative choices to an inchoate right. *Chatfield East Well Co. v.*

*Chatfield East Prop. Owners Ass'n*, 956 P.2d 1260 (Colo. 1998).

Appropriators of the "designated ground waters" are required to obtain a permit for their appropriations and the act establish a system of prior appropriation, similar in operation to the system regulating surface water rights, to regulate the water rights of the ground water users. *Jackson v. Colo.* 294 F. Supp. 1065 (D. Colo. 1968).

Relief involving taking ground water sought first under ground water provisions. It is appropriate, as a matter of policy, and is consistent with legislative intent, to require that any relief sought which involves the taking of ground water in a designated ground water basin must be sought first through the administrative and judicial channels, as appropriate, prescribed for resolution of questions arising under this article. *State ex rel. Danielson v. Vickroy*, 627 P.2d 752 (Colo. 1981).

Underground water basins require management that is different from the management of surface streams and underground waters tributary to such streams. *Fundingsland v. Colo. Ground Water Comm'n*, 171 Colo. 487, 468 P.2d 835 (1970).

General assembly has provided means to obtain maximum utilization of water resources. *Kuiper v. Lundvall*, 187 Colo. 40, 529 P.2d 1328 (1974), cert. denied, 421 U.S. 996, 95 S. Ct. 2391, 44 L.Ed.2d 663 (1975).

The underground water dealt with by this section is not subject to the same ready replenishment enjoyed by surface streams and tributary ground water. *Fundingsland v. Colo. Ground Water Comm'n*, 171 Colo. 487, 468 P.2d 835 (1970).

While protecting against depletion of underground aquifer. Colorado's permit system for regulation of the appropriation of water in designated ground water basins under this article permits the full development of ground water sources while protecting against depletion of the underground aquifer, which is not subject to the same ready recharge enjoyed by surface streams and tributary ground water. *Danielson v. Kerbs AG., Inc.*, 646 P.2d 363 (Colo. 1982).

This section is designed to protect prior appropriations of ground water while, at the same time, insuring that reasonable ground water pumping levels are maintained. *Danielson v. Kerbs AG., Inc.*, 646 P.2d 363 (Colo. 1982).

The principles underlying the doctrine of prior appropriation are applicable to a designated ground water basin, modified only by the policy against any unreasonable depletion of the aquifer in the basin. *Danielson v. Kerbs AG., Inc.*, 646 P.2d 363 (Colo. 1982).

The policies of protecting senior appropriators and maintaining reasonable ground water pumping levels set forth by the underground water act require management which

takes into account the long-range effects of intermittent pumping in the aquifer. *Fundingsland v. Colo. Ground Water Comm'n*, 171 Colo. 487, 468 P.2d 835 (1970).

**Duties of commission.** The ground water commission must protect senior appropriators against unreasonable injury, foster the full economic development of designated ground water resources, and conserve designated ground water resources. *Thompson v. Colo. Ground Water Comm'n*, 194 Colo. 489, 575 P.2d 372 (1978); *Colo. Ground Water Comm'n v. Dreiling*, 198 Colo. 560, 606 P.2d 836 (1979).

**In the case of surface streams and underground waters tributary to such streams, seasonal regulation of diversion by junior appropriators** can effectively protect the interests of more senior appropriators and no long-range harm can come of overappropriations since the streams are subject to seasonal recharge. *Fundingsland v. Colo. Ground Water Comm'n*, 171 Colo. 487, 468 P.2d 835 (1970).

**When water is being mined from the ground water basin, and a proposed appro-**

**priation would result in unreasonable harm to senior appropriators**, then a determination that there is no water available for appropriation is justified. *Fundingsland v. Colo. Ground Water Comm'n*, 171 Colo. 487, 468 P.2d 835 (1970).

**Review provisions in ground water management act apply only to review by commission of promulgation and adoption by local management districts** of proposed regulations and control measures generally applicable rather than individual actions taken by districts concerning interpretation, and district court in county in which wells were located, rather than commission, had jurisdiction. *North Kiowa-Bijou Mgt. Dist. v. Ground Water Comm'n*, 180 Colo. 314, 505 P.2d 377 (1973).

**For case construing the former 1957 Colorado ground water act**, see *Whitten v. Coit*, 153 Colo. 157, 385 P.2d 131 (1963).

**Applied** in *State Dept. of Natural Res. v. Southwestern Colo. Water Conservation Dist.*, 671 P.2d 1294 (Colo. 1983), cert. denied, 466 U.S. 944, 104 S. Ct. 1929, 80 L.Ed.2d 474 (1984).

**37-90-103. Definitions - repeal.** As used in this article, unless the context otherwise requires:

(1) "Alternate point of diversion well" means any well drilled and used, in addition to an original well or other diversion, for the purpose of obtaining the present appropriation of that original well, from more than one point of diversion.

(2) "Aquifer" means a formation, group of formations, or part of a formation containing sufficient saturated permeable material that could yield a sufficient quantity of water that may be extracted and applied to a beneficial use.

(3) "Artesian well" means a well tapping an aquifer in which the static water level in the well rises above where it was first encountered in the aquifer, due to hydrostatic pressure.

(4) "Board" or "board of directors" means the board of directors of a ground water management district as organized under section 37-90-124.

(5) "Colorado water conservation board" refers to the board created in section 37-60-102.

(6) (a) "Designated ground water" means that ground water which in its natural course would not be available to and required for the fulfillment of decreed surface rights, or ground water in areas not adjacent to a continuously flowing natural stream wherein ground water withdrawals have constituted the principal water usage for at least fifteen years preceding the date of the first hearing on the proposed designation of the basin, and which in both cases is within the geographic boundaries of a designated ground water basin. "Designated ground water" shall not include any ground water within the Dawson-Arkose, Denver, Arapahoe, or Laramie-Fox Hills formation located outside the boundaries of any designated ground water basin that was in existence on January 1, 1983.

(b) (I) However, "designated ground water" may include any ground water in the Crow Creek drainage area in Weld county, upstream from the confluence of Crow Creek and Little Crow Creek, within the Laramie-Fox Hills formation located outside such boundaries when the Laramie-Fox Hills formation is not overlaid by the Dawson-Arkose, Denver, or Arapahoe formations.

(II) If, upon receipt by the state engineer of the findings of the Laramie-Fox Hills study, as authorized by Senate Bill 250, 1985 legislative session, that the upper Crow Creek drainage area in Weld county, upstream from the confluence of Crow Creek and Little Crow Creek, within the Laramie-Fox Hills formation when the Laramie-Fox Hills formation is not overlaid by the Dawson-Arkose, Denver, or Arapahoe formations should not be a designated ground water basin, this paragraph (b) is repealed.



(7) "Designated ground water basin" means that area established by the ground water commission in accordance with section 37-90-106.

(8) "Ground water commission" or "commission" refers to the ground water commission created and provided for in section 37-90-104 to facilitate the functioning of this article.

(9) "Ground water management district" or "district" means any district organized under the provisions of this article.

(10) "Historical water level" means the average elevation of the ground water level in any area before being lowered by the activities of man, as nearly as can be determined from scientific investigation and available facts.

(10.5) "Nontributary ground water" means that ground water, located outside the boundaries of any designated ground water basins in existence on January 1, 1985, the withdrawal of which will not, within one hundred years of continuous withdrawal, deplete the flow of a natural stream, including a natural stream as defined in sections 37-82-101 (2) and 37-92-102 (1) (b), at an annual rate greater than one-tenth of one percent of the annual rate of withdrawal. The determination of whether ground water is nontributary shall be based on aquifer conditions existing at the time of permit application; except that, in recognition of the de minimis amount of water discharging from the Dawson, Denver, Arapahoe, and Laramie-Fox Hills aquifers into surface streams due to artesian pressure, when compared with the great economic importance of the ground water in those aquifers, and the feasibility and requirement of full augmentation by wells located in the tributary portions of those aquifers, it is specifically found and declared that, in determining whether ground water of the Dawson, Denver, Arapahoe, and Laramie-Fox Hills aquifers is nontributary, it shall be assumed that the hydrostatic pressure level in each such aquifer has been lowered at least to the top of that aquifer throughout that aquifer; except that not nontributary ground water, as defined in subsection (10.7) of this section, in the Denver basin shall not become nontributary ground water as a result of the aquifer's hydrostatic pressure level dropping below the alluvium of an adjacent stream due to Denver basin well pumping activity. Nothing in this subsection (10.5) shall preclude the designation of any aquifer or basin, or any portion thereof, which is otherwise eligible for designation under the standard set forth in subsection (6) of this section relating to ground water in areas not adjacent to a continuously flowing natural stream wherein ground water withdrawals have constituted the principal water usage for at least fifteen years preceding the date of the first hearing on the proposed designation of a basin.

(10.7) "Not nontributary ground water" means ground water located within those portions of the Dawson, Denver, Arapahoe, and Laramie-Fox Hills aquifers that are outside the boundaries of any designated ground water basin in existence on January 1, 1985, the withdrawal of which will, within one hundred years, deplete the flow of a natural stream, including a natural stream as defined in sections 37-82-101 (2) and 37-92-102 (1) (b), at an annual rate of greater than one-tenth of one percent of the annual rate of withdrawal.

(10.9) "Oil and gas well" means a well permitted by the Colorado oil and gas conservation commission or a well authorized by a federal or tribal entity for the primary purpose of mining, including exploration or production, of petroleum products.

(11) "Person" means any individual, partnership, association, or corporation authorized to do business in the state of Colorado, or any political subdivision or public agency thereof, or any agency of the United States, making a beneficial use, or taking steps, or doing work preliminary to making a beneficial use of designated underground waters of Colorado.

(12) "Private driller" means any individual, corporation, partnership, association, political subdivision, or public agency which operates as lessee or owner its own well drilling rig and equipment and which digs, drills, re-drills, cases, recases, deepens, or excavates a well upon the property of such entity.

(12.5) "Quarter-quarter" means a fourth of a fourth of a section of land and is equal to approximately forty acres.

(12.7) "Replacement plan" means a detailed program to increase the supply of water available for beneficial use in a designated ground water basin or portion thereof for the purpose of preventing material injury to other water rights by the development of new

points of diversion, by pooling of water resources, by water exchange projects, by providing substitute supplies of water, by the development of new sources of water, or by any other appropriate means consistent with the rules adopted by the commission. "Replacement plan" does not include the salvage of designated ground water by the eradication of phreatophytes, nor does it include the use of precipitation water collected from land surfaces that have been made impermeable, thereby increasing the runoff, but not adding to the existing supply of water.

(13) "Replacement well" means a new well which replaces an existing well and which shall be limited to the yield of the original well and shall take the date of priority of the original well, which shall be abandoned upon completion of the new well.

(14) "Resident agriculturist" means a bona fide farmer or rancher residing in the designated ground water basin whose major source of income is derived from the production and sale of agricultural products.

(15) "State engineer" means the state engineer of Colorado or any person deputized by him in writing to perform a duty or exercise a right granted in this article.

(16) "Subdivision" means an area within a ground water basin.

(17) "Supplemental well" means any well drilled and used, in addition to an original well or other diversion, for the purpose of obtaining the quantity of the original appropriation of the original well, which quantity can no longer be obtained from the original well.

(18) "Taxpaying elector" means a person qualified to vote at general elections in Colorado, who owns real or personal property within the district and has paid ad valorem taxes thereon in the twenty months immediately preceding a designated time or event, which property is subject to taxation at the time of any election held under the provisions of this article or at any other time in reference to which the term "taxpaying elector" is used. A person who is obligated to pay taxes under a contract to purchase real property in the district shall be considered an owner. The ownership of any property subject to the payment of a specific ownership tax on a motor vehicle or trailer or of any other excise or property tax other than general ad valorem property taxes shall not constitute the ownership of property subject to taxation as provided in this article.

(19) "Underground water" and "ground water" are used interchangeably in this article and mean any water not visible on the surface of the ground under natural conditions.

(20) "Waste" means causing, suffering, or permitting any well to discharge water unnecessarily above or below the surface of the ground.

(21) (a) "Well" means any structure or device used for the purpose or with the effect of obtaining ground water for beneficial use from an aquifer. Well includes an augmentation well that diverts ground water tributary to the South Platte river and delivers it to a surface stream, ditch, canal, reservoir, or recharge facility to replace out-of-priority stream depletions, or to meet South Platte river compact obligations, either directly or by recharge accretions, as part of a plan for augmentation approved by the water judge for water division 1 or a substitute water supply plan approved pursuant to section 37-92-308.

(b) "Well" does not include a naturally flowing spring or springs where the natural spring discharge is captured or concentrated by installation of a near-surface structure or device less than ten feet in depth located at or within fifty feet of the spring or springs' natural discharge point and the water is conveyed directly by gravity flow or into a separate sump or storage, if the owner obtains a water right for such structure or device as a spring pursuant to article 92 of this title.

(22) "Well driller" means any individual, corporation, partnership, association, political subdivision, or public agency which digs, drills, cases, recases, deepens, or excavates a well either by contract or for hire or for any consideration whatsoever.

**Source:** L. 65: R&RE, p. 1246, § 1. C.R.S. 1963: § 148-18-2. L. 67: p. 275, §§ 1, 2. L. 71: p. 1311, § 1. L. 83: (6) amended, p. 1414, § 1, effective May 23. L. 85: (6) amended, p. 1170, § 1, effective July 1; (10.5) added, p. 1161, § 2, effective July 1. L. 92: (12.5) added and (13) amended, p. 2297, § 1, effective March 19. L. 95: (21) amended, p. 139, § 1, effective April 7. L. 96: (10.5) amended and (10.7) added, p. 1360, § 1, effective



June 1. **L. 98:** (12.7) added, p. 1212, § 2, effective August 5. **L. 2003:** (21)(a) amended, p. 1453, § 2, effective April 30. **L. 2009:** (10.5) amended and (10.9) added, (HB 09-1303), ch. 390, p. 2107, § 1, effective June 2.

**Cross references:** For the authorization by Senate Bill 85-250 as specified in subsection (6)(b)(II) of this section, see p. 1452 and footnote 70 on p. 1487 of the 1985 general appropriation act, chapter 344, Session Laws of Colorado 1985.

## ANNOTATION

**Law reviews.** For note, "Appropriation and Colorado's Ground Water: A Continuing Dilemma?" see 40 U. Colo. L. Rev. 133 (1967). For article, "Recent Developments in Colorado Groundwater Law", see 58 Den. L.J. 801 (1981). For article, "Water Rights — How to Avoid Getting in Over Your Head", see 11 Colo. Law. 2143 (1982). For article, "Water for Mining and Milling Operations — Part I", see 13 Colo. Law. 240 (1984). For article, "Principles and Law of Colorado's Nontributary Ground Water", see 62 Den. U. L. Rev. 809 (1985). For article, "The Continuing Groundwater Saga — Part I: Senate Bill 5", see 15 Colo. Law. 422 (1986).

**Commission to categorize ground water as "underground water" or "designated ground water".** The general assembly left categorization of ground water as "underground water" or as "designated ground water" as a factual matter to be resolved by the ground water commission when it established designated ground water basins. *Pioneer Irrigation Dists. v. Danielson*, 658 P.2d 842 (Colo. 1983).

**Tributary character of water held to meet definition of "designated ground water".** *Kuiper v. Lundvall*, 187 Colo. 40, 529 P.2d 1328 (1974), cert. denied, 421 U.S. 996, 95 S. Ct. 2391, 44 L. Ed.2d 663 (1975).

**Applications for appropriating designated ground water committed to commission's jurisdiction.** Applications for the appropriation of designated ground water to a beneficial use are committed to the jurisdiction of the ground water commission. *State ex rel. Danielson v. Vickroy*, 627 P.2d 752 (Colo. 1981).

**Vickroy decision not retrospectively applied.** *State ex rel. Danielson v. Vickroy* (627 P.2d 752 (Colo. 1981)) should not be retrospectively applied to those decrees involving well permits in designated ground water basins issued prior to the Vickroy decision. *Ground Water Comm'n v. Shanks*, 658 P.2d 847 (Colo. 1983).

**Under the definition of nontributary groundwater under subsection (10.5),** whether groundwater is nontributary is not dependent upon the quantitative effect that a well has on a stream but rather upon the annual withdrawal rate and a measure of the relationship between that rate and the resulting stream depletions. *State Eng'r v. Castle Meadows, Inc.*, 856 P.2d 496 (Colo. 1993).

**Subsection (10.5) is not a useful tool for evaluating the significance of the effect that stream depletions will have on vested rights** and does not determine the injurious nature of a withdrawal. *State Eng'r v. Castle Meadows, Inc.*, 856 P.2d 496 (Colo. 1993).

**The 1996 amendments to the definition of nontributary groundwater were specifically tailored to address issues raised in previous court cases,** thus demonstrating clear legislative intent that the amended definition should apply to pending decrees and permit applications. *Chatfield East Well Co. v. Chatfield East Prop. Owners Ass'n*, 956 P.2d 1260 (Colo. 1998).

**Unconfined aquifer found to be part of a natural surface stream within the meaning of subsection (10.5).** *Am. Water Development, Inc. v. City of Alamosa*, 874 P.2d 352 (Colo. 1994).

**Amount of surface stream depletion alone does not determine whether water is nontributary under the meaning of subsection (10.5).** The underflow and tributary waters of streams described in the natural stream legislation are included as part of the natural streams and the effect on such underflow and tributary waters must be considered in determining whether ground water to be withdrawn is nontributary. *Am. Water Development, Inc. v. City of Alamosa*, 874 P.2d 352 (Colo. 1994).

**Not nontributary ground water is limited to aquifers in the Denver basin,** and the Laramie-Fox aquifer located in Park county therefore cannot be not nontributary ground water. *Water Rights of Park County Sportsmen's Ranch LLP v. Bargas*, 986 P.2d 262 (Colo. 1999).

**Gravel pits which will be reclaimed by being filled with ground water obtained from an aquifer are "wells"** under the statutory definition of the term. *Three Bells Ranch v. Cache La Poudre*, 758 P.2d 164 (Colo. 1988); *Zigan Sand & Gravel v. Cache Le Poudre*, 758 P.2d 175 (Colo. 1988).

**A permit is required for the extraction of methane from coal beds** because such an oil and gas well has the effect of obtaining ground water for beneficial use, and is therefore a "well" as defined in this article notwithstanding the Colorado oil and gas commission's exclusive jurisdiction over oil and gas operations. *Vance v. Wolfe*, 205 P.3d 1165 (Colo. 2009).

**Replaced wells must be abandoned.** The statutory definition of "replacement well" imposes the obligation to abandon replaced wells upon completion of replacement wells. *Broyles v. Fort Lyon Canal Co.*, 638 P.2d 244 (Colo. 1981).

**Because no prior supreme court decision mandates that a well owner's replaced wells be plugged according to administrative regulations,** the water court must exercise its own

discretion, as limited by statutes, supreme court decisions, and particular facts of the case, to determine whether to require the well owner to plug his replaced wells. *Broyles v. Fort Lyon Canal Co.*, 695 P.2d 1136 (Colo. 1985).

**Judgment upheld designating area as ground water basin.** *Hayes v. State*, 178 Colo. 447, 498 P.2d 1119 (1972).

**Applied in** Colo. Ground Water Comm'n v. Dreiling, 198 Colo. 560, 606 P.2d 836 (1979).

**37-90-104. Commission - organization - expenses.** (1) There is created a ground water commission to consist of twelve members, nine of whom shall be appointed by the governor and confirmed by the senate.

(2) The appointed members of the commission holding office as of July 1, 1971, shall continue in office for the term of their appointment and until their successors are appointed.

(3) (a) All appointments to the commission shall be for four-year terms, except those made to fill vacancies, which shall be for the remainder of the term vacated.

(b) Appointments made after July 1, 1971, as terms expire or are vacated, shall be made so that the commission includes six members who are resident agriculturists of designated ground water basins, with no more than two resident agriculturists from the same ground water basin to be members of the commission at the same time; one member who shall be a resident agriculturist and who shall be appointed from water division 3; and two residents of the state who shall represent municipal or industrial water users of the state, one of whom shall be appointed from the area west of the continental divide.

(4) In addition to the appointed members, the executive director of the department of natural resources shall be a voting member, and the state engineer, and the director of the Colorado water conservation board shall be nonvoting members of the commission. Six voting members shall constitute a quorum at any regularly or specially called meeting of the commission, and a majority vote of those present shall rule. The commission shall establish and maintain a schedule of at least four general meetings each year. The chairman, at his discretion, or two members may call special meetings of the commission to dispose of accumulated business.

(5) Members of the commission shall be paid no compensation but shall be paid actual necessary expenses incurred by them in the performance of their duties as members thereof and a per diem of fifty dollars per day while performing official duties, not to exceed two thousand four hundred dollars in any year.

(6) The commission shall biennially select a chair and vice-chair from among the appointed members. The state engineer shall be ex officio the executive director of the commission and shall carry out and enforce the decisions, orders, and policies of the commission. The commission may delegate to the executive director the authority to perform any of the functions of the commission as set forth in this article except the determination of a designated ground water basin as set forth in section 37-90-106 and the creation of ground water management districts. If any person is dissatisfied with any action of the executive director under the exercise of the powers delegated by the commission, the person may appeal said action to the commission, which shall hear the person's appeals as specified in sections 37-90-113 and 37-90-114.

(7) The provisions of section 24-6-402 (3) (a) (II), C.R.S., concerning imminent court action, as applied to the ground water commission and to any member, employee, contractor, agent, servant, attorney, or consultant thereof, shall not include any actions within the scope of sections 37-90-106 to 37-90-109 and section 37-90-111.

**Source:** L. 65: R&RE, p. 1248, § 1. C.R.S. 1963: § 148-18-3. L. 67: p. 52, § 1. L. 69: p. 1198, §§ 1, 2. L. 71: pp. 1312, 1319, 1320, §§ 3, 1-3. L. 83: (4) amended and (7) added, p. 1416, § 1, effective June 10. L. 98: (5) amended, p. 1074, § 1, effective June 1; (5) and (6) amended, p. 1212, § 3, effective August 5. L. 2001: (7) amended, p. 1279, § 51, effective June 5.



**Editor's note:** Subsection (5) was amended in Senate Bill 98-15. Those amendments were superseded by the amendment of subsection (5) in House Bill 98-1151.

### ANNOTATION

**Applied** in *Danielson v. Kerbs AG., Inc.*, 646 P.2d 363 (Colo. 1982); *Pioneer Irrigation Dists. v. Danielson*, 658 P.2d 842 (Colo. 1983).

**37-90-105. Small capacity wells.** (1) The state engineer has the authority to approve permits for the following types of wells and to allow the following types of rooftop precipitation collection systems in designated ground water basins without regard to any other provisions of this article:

(a) Wells not exceeding fifty gallons per minute and used for no more than three single-family dwellings, including the normal operations associated with such dwellings but not including the irrigation of more than one acre of land;

(b) Wells not exceeding fifty gallons per minute and used for watering of livestock on range and pasture;

(c) (I) One well not exceeding fifty gallons per minute and used in one commercial business.

(II) To qualify as a "commercial business" under this paragraph (c), the business shall be:

(A) A business that will be operated by the well owner and that will have its own books, bank accounts, checking accounts, and separate tax returns;

(B) A business that will use water solely on the land indicated in the permit for the well and for the purposes stated in such permit;

(C) A business that will maintain its individual assets and will own or lease the property on which the well is to be located or where the business is operated;

(D) A business that will have its own contractual agreements for operation of the business;

(E) A business that agrees not to transfer a permit issued under this paragraph (c) to another entity that also holds a small capacity commercial well permit under this paragraph (c); and

(F) A business that agrees to notify any potential buyer that such buyer shall notify the state engineer of any change in ownership of such business within sixty days after any such change in ownership.

(d) Wells to be used exclusively for monitoring and observation purposes if said wells are capped and locked and used only to monitor water levels or for water quality sampling;

(e) Wells to be used exclusively for fire-fighting purposes if said wells are capped and locked and available for use only in fighting fires; or

(f) (I) Any system or method of collecting precipitation from the roof of a building that is used primarily as a residence and is not served by, whether or not connected to, a domestic water system that serves more than three single-family dwellings, but only if the use of the water so collected is limited to one or more of the following:

(A) Ordinary household purposes;

(B) Fire protection;

(C) The watering of poultry, domestic animals, and livestock on farms and ranches; or

(D) The irrigation of not more than one acre of gardens and lawns.

(II) On and after July 1, 2009, any person wishing to use a system or method of rooftop precipitation capture that meets the requirements of subparagraph (I) of this paragraph (f) shall comply with one of the following provisions:

(A) A person who has a well permit issued or recorded pursuant to this section and who intends to use a system or method of rooftop precipitation capture that qualifies under subparagraph (I) of this paragraph (f) shall file, on a form prescribed by the state engineer and consistent with this section, a notice and description of the system or method of rooftop precipitation capture to be used in conjunction with the well. No fee shall be charged for the filing of this form.

(B) A person who applies for a new well permit pursuant to paragraph (a) of this subsection (1) and who intends to use a system or method of rooftop precipitation capture that qualifies under subparagraph (I) of this paragraph (f) shall include on the well permit application a description of the system or method of rooftop precipitation capture to be used in conjunction with the well. An applicant under this sub-subparagraph (B) shall pay the well permit application fee pursuant to sub-subparagraph (C) of subparagraph (I) of paragraph (a) of subsection (3) of this section; however, such applicant shall not be required to pay any additional application fee for the rooftop precipitation collection system.

(C) A person who does not intend to construct and use a well, but would otherwise be entitled to the issuance of a well permit pursuant to paragraph (a) of this subsection (1), shall submit an application in the form and manner designated by the state engineer for a permit to install and use a system or method of rooftop precipitation capture and pay a fee in an amount to be determined by the state engineer. If the state engineer determines that the proposed system or method of rooftop precipitation capture meets the requirements of this paragraph (f), the state engineer shall issue a permit for the system or method, but not otherwise. The state engineer shall enforce the provisions of the permit in the same manner as the enforcement of any well permit issued pursuant to paragraph (a) of this subsection (1).

(III) A person using or legally entitled to use a well pursuant to paragraph (a) of this subsection (1) shall be allowed to collect rooftop precipitation pursuant to this paragraph (f) only for use by the same dwellings that are or would be served by the well and subject to all of the limitations on use contained in the well permit or, in the absence of a well permit, the well permit to which the person would be legally entitled, as determined by the state engineer or as otherwise limited by the board of a ground water management district pursuant to subsection (7) of this section.

(2) The state engineer has the authority to adopt rules in accordance with section 24-4-103, C.R.S., to carry out the provisions of this section. Any party adversely affected or aggrieved by a rule adopted by the state engineer may seek judicial review of such action pursuant to section 24-4-106, C.R.S.

(3) (a) (I) (A) and (B) Repealed.

(C) Effective July 1, 2006, wells of the type described in this section may be constructed only upon the issuance of a permit in accordance with the provisions of this section. A fee of one hundred dollars shall accompany any application for a new well permit under this section. A fee of sixty dollars shall accompany any application for a replacement well of the type described in subsection (1) of this section.

(II) Notwithstanding the amount specified for any fee in subparagraph (I) of this paragraph (a), the commission by rule or as otherwise provided by law may reduce the amount of one or more of the fees if necessary pursuant to section 24-75-402 (3), C.R.S., to reduce the uncommitted reserves of the fund to which all or any portion of one or more of the fees is credited. After the uncommitted reserves of the fund are sufficiently reduced, the commission by rule or as otherwise provided by law may increase the amount of one or more of the fees as provided in section 24-75-402 (4), C.R.S.

(b) Beginning on August 5, 1998, the state engineer shall not approve a permit for a small capacity well with an annual volume of use in excess of five acre-feet, unless the well is located in a ground water management district that has adopted rules that allow an annual volume in excess of five acre-feet. This limitation shall not apply to a replacement permit for a well where the original permit allows an annual volume of use in excess of five acre-feet or to a permit for a well covered by the provisions of subsection (4) of this section where the actual annual volume of use was in excess of five acre-feet.

(c) If the application is made pursuant to this section for a well that will be located in a subdivision, as defined in section 30-28-101 (10), C.R.S., and approved on or after June 1, 1972, pursuant to article 28 of title 30, C.R.S., for which the water supply plan has not been recommended for approval by the state engineer, the cumulative effect of all such wells in the subdivision shall be considered in determining material injury, and the state engineer shall deny the application if it is determined that the proposed well will cause material injury to existing water rights.



(d) (I) If any person wishes to replace an existing well of the type described in subsection (1) of this section, such person shall file an application pursuant to this subsection (3) for the construction of a well and shall state in such application such person's intent to abandon the existing well that is to be replaced.

(II) If such a replacement well will not change the amount or type of use of water that can lawfully be made by means of the existing well, a permit to construct and use the replacement well shall be issued, and the existing well shall be abandoned within ninety days after the completion of the replacement well.

(e) (I) Repealed.

(II) Effective July 1, 2006, wells for which permits have been granted or may be granted shall be constructed within two years after the permit is issued, which time may be extended for successive years at the discretion of the state engineer for good cause shown.

(4) (a) (I) Repealed.

(II) Effective July 1, 2006, any wells of the type described by this section that were put to beneficial use prior to May 8, 1972, and any wells that were used exclusively for monitoring and observation purposes prior to August 1, 1988, not of record in the office of the state engineer, may be recorded in that office upon written application, payment of a processing fee of one hundred dollars, and permit approval. The record shall include the date the water is claimed to have been first put to beneficial use.

(b) Any owner of an existing well that was constructed prior to May 8, 1972, or has a well permit issued prior to January 1, 1996, under the provisions of this section, and that was put to beneficial use for watering livestock in a confined animal-feeding operation prior to January 1, 1996, and has been used for that purpose, may apply by December 31, 1999, to obtain a new permit for that well up to the extent of its beneficial use prior to January 1, 1996, for watering livestock in that commercial business pursuant to paragraph (c) of subsection (1) of this section. Such well shall be in addition to the one commercial business well allowed in paragraph (c) of subsection (1) of this section. Such an application shall include a sixty dollar filing fee and shall provide documentation of the annual volume of water put to beneficial use from the well. The state engineer shall have the authority to determine the adequacy of the submitted information for the purpose of approving completely, approving in part, or denying the application. Permits issued after January 1, 1996, up to August 5, 1998, shall remain valid thereafter according to the terms and conditions of those permits.

(5) The state engineer shall act upon an application filed under this section within forty-five days after such filing and shall support the ruling with a written statement of the basis therefor.

(6) (a) Any person aggrieved by a decision of the state engineer granting or denying an application under this section may request a hearing before the state engineer pursuant to section 24-4-104, C.R.S. The state engineer may, in the state engineer's discretion, have such hearings conducted before such agent as it may designate for a ruling in the matter. Any party who seeks to reverse or modify the ruling of the agent of the state engineer may file an appeal to the state engineer pursuant to section 24-4-105, C.R.S.

(b) Any party aggrieved by a final decision of the state engineer granting or denying an application filed under this section may within thirty days after such decision file a petition for review with the district court in the county in which the well is located. Upon receipt of such petition, the designated ground water judge for the basin in which the well is located shall conduct such hearings, pursuant to section 24-4-106, C.R.S., as necessary to determine whether or not the decision of the state engineer shall be upheld. In any case in which the state engineer's decision is reversed, the judge shall order the state engineer to grant or deny the application, as such reversal may require, and may specify such terms and conditions as are appropriate.

(7) The board of any ground water management district has the authority to adopt rules that further restrict the issuance of small capacity well permits and use of rooftop precipitation collection systems. In addition, the board of any ground water management district has the authority to adopt rules that expand the acre-foot limitations for small capacity wells set forth in this section. However, in no event shall an annual volume of more than eighty acre-feet be allowed for any small capacity well. Rules adopted by the board

may be instituted only after a public hearing. Notice of such hearing shall be published. Such notice shall state the time and place of the hearing and describe, in general terms, the rules proposed. Within sixty days after such hearing, the board shall announce the rules adopted and shall cause notice of such action to be published. In addition, the board shall mail, within five days after the adoption of the rules, a copy of the rules to the state engineer. Any party adversely affected or aggrieved by such a rule may, not later than thirty days after the last date of publication, initiate judicial review in accordance with the provisions of section 24-4-106, C.R.S.; except that venue for such judicial review shall be in the district court for the county in which the office of the ground water management district is located.

**Source:** L. 65: R&RE, p. 1249, § 1. C.R.S. 1963: § 148-18-4. L. 67: p. 276, § 3. L. 71: R&RE, p. 1312, § 2. L. 85: (1)(c) amended, p. 1172, § 1, effective May 31. L. 87: (2) amended and (3) added, p. 1301, § 3, effective July 2. L. 92: (1)(b) and (1)(c) amended and (1)(d) added, p. 2297, § 2, effective March 19. L. 98: (3)(a) amended, p. 1343, § 70, effective June 1; entire section amended, p. 1213, § 4, effective August 5. L. 2003: (3)(a)(I), (3)(e), and (4)(a) amended, p. 43, § 3, effective March 1; (3)(a)(I)(A), (3)(a)(I)(C), (4)(a)(I)(A), and (4)(a)(II) amended, p. 1683, § 14, effective May 14. L. 2009: IP(1), (1)(d), (1)(e), and (7) amended and (1)(f) added, (SB 09-080), ch. 179, p. 789, § 2, effective July 1.

**Editor's note:** (1) Senate Bill 98-194 was harmonized with House Bill 98-1151 resulting in the renumbering of subsection (2) in Senate Bill 98-194 to subsection (3)(a).

(2) Section 10 of chapter 7, Session Laws of Colorado 2003, provides for an effective date of March 1, 2003; however, the Governor did not sign the act until March 5, 2003.

(3) Subsection (3)(a)(I)(B) provided for the repeal of subsections (3)(a)(I)(A) and (3)(a)(I)(B), subsection (3)(e)(I)(B) provided for the repeal of subsection (3)(e)(I), and subsection (4)(a)(I)(B) provided for the repeal of subsection (4)(a)(I), effective July 1, 2006. (See L. 2003, p. 43.)

**Cross references:** For the legislative declaration contained in the 2003 act amending subsections (3)(a)(I), (3)(e), and (4)(a), see section 1 of chapter 7, Session Laws of Colorado 2003.

## ANNOTATION

The "quantity of existing claims" which must be considered by the ground water commission is the sum of all water rights which have been appropriated and those water rights which are in the process of being appropriated under conditional permits. *Thompson v. Colo. Ground*

*Water Comm'n*, 194 Colo. 489, 575 P.2d 372 (1978).

**Judgment upheld designating area as ground water basin.** *Hayes v. State*, 178 Colo. 447, 498 P.2d 1119 (1972).

**37-90-106. Determination of designated groundwater basins - exception - legislative declaration - repeal.** (1) (a) The commission shall, from time to time as adequate factual data become available, determine designated groundwater basins and subdivisions thereof by geographic description. If factual data obtained after the designation of a groundwater basin justify, the commission may alter the boundaries or description of that designated groundwater basin by adding lands to the basin. After a determination of a designated groundwater basin becomes final, the commission may alter the boundaries to exclude lands from that basin only if factual data justify the alteration and the alteration would not exclude from the designated groundwater basin any well for which a conditional or final permit to use designated groundwater has been issued. The general assembly hereby finds, determines, and declares that allowing alterations to exclude lands from a designated groundwater basin only under such circumstances as set forth in this paragraph (a) reaffirms, rather than alters, the general assembly's original intent that there be a cut-off date beyond which the legal status of groundwater included in a designated groundwater basin cannot be challenged, and that such cut-off date was intended to be the date of finality for the original designation of the basin. After this cut-off date has passed, any request to exclude wells that are permitted to use designated groundwater from an existing groundwater basin shall constitute an impermissible collateral attack on the original decision to designate the basin.



(a.5) Nothing in Senate Bill 10-052, enacted in 2010, shall affect litigation brought under this section that is pending on January 1, 2010.

(b) In making such determinations the commission shall make the following findings:

(I) The name of the aquifer within the proposed designated basin;

(II) The boundaries of each aquifer being considered;

(III) The estimated quantity of water stored in each aquifer;

(IV) The estimated annual rate of recharge;

(V) The estimated use of the ground water in the area.

(2) If the source is an area of use exceeding fifteen years as defined in section 37-90-103 (6), the commission shall list those users who have been withdrawing water during the fifteen-year period, the use made of the water, the average annual quantity of water withdrawn, and the year in which the user began to withdraw water.

(3) Before determining or altering the boundaries of a designated ground water basin or subdivisions thereof, the state engineer shall prepare and file in his office a map clearly showing all lands included therein, together with a written description thereof sufficient to apprise interested parties of the boundaries of the proposed basin or subdivisions thereof. The commission shall publish the same and hold a hearing thereon. Following such hearing, the commission shall enter an order to either create the proposed designated ground water basin, to include modification of the proposed boundaries, if any, or dismiss the original proposal, according to the factual information presented or available.

(4) (a) The commission shall not, after May 23, 1983, determine as part of any designated ground water basin any ground water within the Dawson-Arkose, Denver, Arapahoe, or Laramie-Fox Hills formations which was located outside the boundaries of any designated ground water basin that was in existence on January 1, 1983.

(b) (I) However, the commission may determine as a part of any designated ground water basin any ground water in the Crow Creek drainage area in Weld county, upstream from the confluence of Crow Creek and Little Crow Creek, within the Laramie-Fox Hills formation when the Laramie-Fox Hills formation is not overlaid by the Dawson-Arkose, Denver, or Arapahoe formations.

(II) If, upon receipt by the state engineer of the findings of the Laramie-Fox Hills study, as authorized by Senate Bill 250, 1985 legislative session, that the upper Crow Creek drainage area in Weld county, upstream from the confluence of Crow Creek and Little Crow Creek, within the Laramie-Fox Hills formation when the Laramie-Fox Hills formation is not overlaid by the Dawson-Arkose, Denver, or Arapahoe formations should not be a designated ground water basin, this paragraph (b) is repealed.

**Source:** L. 65: R&RE, p. 1249, § 1. C.R.S. 1963: § 148-18-5. L. 71: pp. 1312, 1318, §§ 4, 17. L. 83: (3) added, p. 1414, § 2, effective May 23. L. 85: (3) amended, p. 1171, § 2, effective July 1. L. 2010: (1)(a) amended and (1)(a.5) added, (SB 10-052), ch. 63, p. 223, § 1, effective August 11.

**Editor's note:** This section was renumbered on revision in preparation of the C.R.S. 1973 and again in preparation of the 1990 replacement volume to conform to standard C.R.S. numbering format, resulting in the renumbering of subsection (3), as enacted in House Bill 83-1399 and as amended in House bill 85-1173, to subsection (4).

**Cross references:** For the authorization by Senate Bill 85-250 as specified in subsection (4)(b)(II) of this section, see p. 1452 and footnote 70 on p. 1487 of the 1985 general appropriation act, chapter 344, Session Laws of Colorado 1985.

## ANNOTATION

**Law reviews.** For article, "Ground Water Mining Law and Policy", see 53 U. Colo. L. Rev. 505 (1982).

**By terms of the act, administration and enforcement are placed in the ground water commission, the state engineer, and locally**

**formed ground water management districts; the ground water commission, composed of twelve voting members, possesses the authority to create "designated ground water basins".** North Kiowa-Bijou Mgt. Dist. v. Ground Water Comm'n, 180 Colo. 314, 505 P.2d 377 (1973).

**Commission to categorize ground water as “underground water” or “designated ground water”.** The general assembly left categorization of ground water as “underground water” or as “designated ground water” as a factual matter to be resolved by the ground water commission when it established designated ground water basins. *Pioneer Irrigation Dists. v. Danielson*, 658 P.2d 842 (Colo. 1983).

**Commission is appropriate forum.** The ground water commission is the appropriate forum for determining whether disputed ground water is designated ground water located in a designated ground water basin. *Pioneer Irrigation Dists. v. Danielson*, 658 P.2d 842 (Colo. 1983).

**Not all water in basin conclusively ground water.** The creation of a designated ground water basin does not establish conclusively that all ground water in the basin is designated ground water. *State ex rel. Danielson v. Vickroy*, 627 P.2d 752 (Colo. 1981).

**The burden of proving water not ground water upon proponent.** After the creation of a designated ground water basin, the proponent of the proposition that certain ground water within the basin is not designated ground water has the burden of proving that proposition. *State ex rel. Danielson v. Vickroy*, 627 P.2d 752 (Colo. 1981).

**The ground water commission’s jurisdiction over surface water rights is limited to altering a designated ground water basin’s boundaries to exclude any ground water hydrologically connected to the surface water rights that the commission improperly included in the designated ground water basin.** The commission must so alter the boundaries upon a showing that pumping the ground water has more than a de minimis impact on the surface rights and is injuring the rights. The state engineer and the water courts then have jurisdiction over the ground water. *Gallegos v. Colo. Ground Water Comm’n*, 147 P.3d 20 (Colo. 2006).

**37-90-107. Application for use of ground water - publication of notice - conditional permit - hearing on objections - well permits.** (1) Any person desiring to appropriate ground water for a beneficial use in a designated ground water basin shall make application to the commission in a form to be prescribed by the commission. The applicant shall specify the particular designated ground water basin or subdivision thereof from which water is proposed to be appropriated, the beneficial use to which it is proposed to apply such water, the location of the proposed well, the name of the owner of the land on which such well will be located, the estimated average annual amount of water applied for in acre-feet, the estimated maximum pumping rate in gallons per minute, and, if the proposed use is irrigation, the description of the land to be irrigated and the name of the owner thereof, together with such other reasonable information as the commission may designate on the form prescribed. The amount of water applied for shall only be utilized on the land designated on the application. The place of use shall not be changed without first obtaining authorization from the ground water commission.

(2) Upon the filing of such application, a preliminary evaluation shall be made to determine if the application may be granted. If the application can be given favorable consideration by the ground water commission under existing policies, then, within thirty days, the application shall be published.

(3) After the expiration of the time for filing objections, if no such objections have been filed, the commission shall, if it finds that the proposed appropriation will not unreasonably impair existing water rights from the same source and will not create unreasonable waste, grant the said application, and the state engineer shall issue a conditional permit to the applicant within forty-five days after the expiration of the time for filing objections or within forty-five days after the hearing provided for in subsection (4) of this section to appropriate all or a part of the waters applied for, subject to such reasonable conditions and limitations as the commission may specify.

(4) If objections have been filed within the time in said notice specified, the commission shall set a date for a hearing on the application and the objections thereto and shall notify the applicants and the objectors of the time and place. Such hearing shall be held in the designated ground water basin and within the district, if one exists, in which the proposed well will be located or at such other place as may be designated by the commission for the convenience of, and as agreed to by, the parties involved. If after such hearing it appears that there are no unappropriated waters in the designated source or that the proposed appropriation would unreasonably impair existing water rights from such source or would create unreasonable waste, the application shall be denied; otherwise, it shall be granted in accordance with subsection (3) of this section. The commission shall consider all evidence



presented at the hearing and all other matters set forth in this section in determining whether the application should be denied or granted.

(5) In ascertaining whether a proposed use will create unreasonable waste or unreasonably affect the rights of other appropriators, the commission shall take into consideration the area and geologic conditions, the average annual yield and recharge rate of the appropriate water supply, the priority and quantity of existing claims of all persons to use the water, the proposed method of use, and all other matters appropriate to such questions. With regard to whether a proposed use will impair uses under existing water rights, impairment shall include the unreasonable lowering of the water level, or the unreasonable deterioration of water quality, beyond reasonable economic limits of withdrawal or use. If an application for a well permit cannot otherwise be granted pursuant to this section, a well permit may be issued upon approval by the ground water commission of a replacement plan that meets the requirements of this article and the rules adopted by the commission. A replacement plan shall not be used as a vehicle for avoiding limitations on existing wells, including but not limited to restrictions on change of well location. Therefore, before approving any replacement plan that includes existing wells, the commission shall require independent compliance with all rules governing those existing wells in addition to compliance with any guidelines or rules governing replacement plans.

(6) (a) (I) No person shall, in connection with the extraction of sand and gravel by open mining as defined in section 34-32-103 (9), C.R.S., expose designated ground water to the atmosphere unless said person has obtained a well permit from the ground water commission. If an application for such a well permit cannot otherwise be granted pursuant to this section, a well permit shall be issued upon approval by the ground water commission of a replacement plan which meets the requirements of this article, pursuant to the guidelines or rules and regulations adopted by the commission.

(II) Any person who extracted sand and gravel by open mining and exposed ground water to the atmosphere after December 31, 1980, shall apply for a well permit pursuant to this section and, if applicable, shall submit a replacement plan prior to July 15, 1990.

(b) If any designated ground water was exposed to the atmosphere in connection with the extraction of sand and gravel by open mining as defined in section 34-32-103 (9), C.R.S., prior to January 1, 1981, no such well permit or replacement plan shall be required to replace depletions from evaporation; except that the burden of proving that such designated ground water was exposed prior to January 1, 1981, shall be upon the party claiming the benefit of this exception.

(c) Any person who has reactivated or reactivates open mining operations which exposed designated ground water to the atmosphere but which ceased activity prior to January 1, 1981, shall obtain a well permit and shall apply for approval of a replacement plan or a plan of substitute supply pursuant to paragraph (a) of this subsection (6).

(d) In addition to the well permit filing fee required by section 37-90-116, the commission shall collect the following fees for exposing ground water to the atmosphere for the extraction of sand and gravel by open mining:

(I) For persons who exposed ground water to the atmosphere on or after January 1, 1981, but prior to July 15, 1989, one thousand five hundred ninety-three dollars; except that, if such plan is filed prior to July 15, 1990, as required by subparagraph (II) of paragraph (a) of this subsection (6), the filing fee shall be seventy dollars if such plan includes ten acres or less of exposed ground water surface area or three hundred fifty dollars if such plan includes more than ten acres of exposed ground water surface area;

(II) For persons who expose ground water to the atmosphere on or after July 15, 1989, one thousand five hundred ninety-three dollars regardless of the number of acres exposed. In the case of new mining operations, such fee shall cover two years of operation of the plan.

(III) For persons who reactivated or who reactivate mining operations that ceased activity prior to January 1, 1981, and who enlarge the surface area of any gravel pit lake beyond the area it covered before the cessation of activity, one thousand five hundred ninety-three dollars;

(IV) For persons who request renewal of an approved substitute water supply plan prior to the expiration date of the plan, two hundred fifty-seven dollars regardless of the number of acres exposed;

(V) For persons whose approved substitute water supply plan has expired and who submit a subsequent plan, one thousand five hundred ninety-three dollars regardless of the number of acres exposed. An approved plan shall be considered expired if the applicant has not applied for renewal before the expiration date of the plan. The state engineer shall notify the applicant in writing if the plan is considered expired.

(VI) For persons whose proposed substitute water supply plan was disapproved and who submit a subsequent plan, one thousand five hundred ninety-three dollars regardless of the number of acres exposed. The state engineer shall notify the applicant in writing of disapproval of a plan.

(e) Excluding the well permit filing fee required by section 37-90-116 (2), the state treasurer shall credit all fees collected with a replacement plan to the water resources cash fund created in section 37-80-111.7 (1).

(f) A person who has obtained a reclamation permit pursuant to section 34-32-112, C.R.S., shall be allowed to apply for a single well permit and to submit a single replacement plan for the entire acreage covered by the reclamation plan without regard to the number of gravel pit lakes located within such acreage.

(g) Notwithstanding the amount specified for any fee in paragraph (d) of this subsection (6), the commission by rule or as otherwise provided by law may reduce the amount of one or more of the fees if necessary pursuant to section 24-75-402 (3), C.R.S., to reduce the uncommitted reserves of the fund to which all or any portion of one or more of the fees is credited. After the uncommitted reserves of the fund are sufficiently reduced, the commission by rule or as otherwise provided by law may increase the amount of one or more of the fees as provided in section 24-75-402 (4), C.R.S.

(7) (a) The commission shall allocate, upon the basis of the ownership of the overlying land, any designated ground water contained in the Dawson, Denver, Arapahoe, or Laramie-Fox Hills aquifers. Permits issued pursuant to this subsection (7) shall allow withdrawals on the basis of an aquifer life of one hundred years. The commission shall adopt the necessary rules to carry out the provisions of this subsection (7).

(b) Any right to the use of ground water entitling its owner or user to construct a well, which right was initiated prior to November 19, 1973, as evidenced by a current decree, well registration statement, or an unexpired well permit issued prior to November 19, 1973, shall not be subject to the provisions of paragraph (a) of this subsection (7).

(c) (I) (A) and (B) Repealed.

(C) Effective July 1, 2006, rights to designated ground water in the Dawson, Denver, Arapahoe, or Laramie-Fox Hills aquifers to be allocated pursuant to paragraph (a) of this subsection (7) may be determined in accordance with the provisions of this section. Any person desiring to obtain such a determination shall make application to the commission in a form to be prescribed by the commission. A fee of sixty dollars shall be submitted with the application for each aquifer, which sum shall not be refunded. The application may also include a request for approval of a replacement plan if one is required under commission rules to replace any depletions to alluvial aquifers caused due to withdrawal of ground water from the Dawson, Denver, Arapahoe, or Laramie-Fox Hills aquifers.

(II) The publication and hearing requirements of this section shall also apply to an application for determination of water rights pursuant to this subsection (7).

(III) Any such commission approved determination shall be considered a final determination of the amount of ground water so determined; except that the commission shall retain jurisdiction for subsequent adjustment of such amount to conform to the actual local aquifer characteristics from adequate information obtained from well drilling or test holes.

(d) (I) (A) and (B) Repealed.

(C) Effective July 1, 2006, any person desiring a permit for a well to withdraw ground water for a beneficial use from the Dawson, Denver, Arapahoe, or Laramie-Fox Hills aquifers shall make application to the commission on a form to be prescribed by the commission. A fee of one hundred dollars shall be submitted with the application, which sum shall not be refunded.

(II) A well permit shall not be granted unless a determination of ground water to be withdrawn by the well has been made pursuant to paragraph (c) of this subsection (7).



(III) The application for a well permit shall also include a replacement plan if one is required under commission rules to replace any depletions to alluvial aquifers caused due to withdrawal of ground water from the Dawson, Denver, Arapahoe, or Laramie-Fox Hills aquifers and the required plan has not been approved pursuant to paragraph (c) of this subsection (7). The publication and hearing requirements of this section shall apply to an application for such a replacement plan.

(IV) The annual amount of withdrawal allowed in any well permits issued under this subsection (7) shall be less than or equal to the amount determined pursuant to paragraph (c) of this subsection (7) and may, if so provided by any such determination, provide for the subsequent adjustment of such amount to conform to the actual aquifer characteristics encountered upon drilling of the well or test holes.

(8) The commission shall have the exclusive authority to issue or deny well permits under this section. The commission shall consider any recommendation by ground water management districts concerning well permit applications under this section.

**Source:** L. 65: R&RE, p. 1250, § 1. C.R.S. 1963: § 148-18-6. L. 71: p. 1313, § 5. L. 79: (4) amended, p. 1371, § 1, effective June 7. L. 87: (3) amended, p. 1301, § 4, effective July 2. L. 89: (6) added, p. 1424, § 3, effective July 15. L. 93: (6)(c) and (6)(d) amended, p. 1832, § 2, effective June 6. L. 98: (6)(g) added, p. 1343, § 71, effective June 1; (5) amended and (7) and (8) added, p. 1216, § 5, effective August 5. L. 2003: (7)(c)(I) and (7)(d)(I) amended, p. 44, § 4, effective March 1; (7)(d)(I)(A) and (7)(d)(I)(C) amended, p. 1683, § 15, effective May 14. L. 2006: (6)(d) amended, p. 1270, § 1, effective July 1. L. 2012: (6)(e) amended, (SB 12-009), ch. 197, p. 792, § 7, effective July 1.

**Editor's note:** (1) Section 10 of chapter 7, Session Laws of Colorado 2003, provides for an effective date of March 1, 2003; however, the Governor did not sign the act until March 5, 2003.

(2) Subsection (7)(c)(I)(B) provided for the repeal of subsections (7)(c)(I)(A) and (7)(c)(I)(B) and subsection (7)(d)(I)(B) provided for the repeal of subsections (7)(d)(I)(A) and (7)(d)(I)(B), effective July 1, 2006. (See L. 2003, p. 44.)

(3) Section 13 of chapter 197, Session Laws of Colorado 2012, provides that the act amending subsection (6)(e) applies to revenues credited on or after July 1, 2012.

**Cross references:** For the legislative declaration contained in the 2003 act amending subsections (7)(c)(I) and (7)(d)(I), see section 1 of chapter 7, Session Laws of Colorado 2003.

## ANNOTATION

**Law reviews.** For comment on determining the priority of federal reserved rights relative to the water rights of state appropriators, see 48 U. Colo. L. Rev. 547 (1977). For article, "The Effect of Water Law on the Development of Oil Shale", see 58 Den. L.J. 751 (1981). For article, "Ground Water Mining Law and Policy", see 53 U. Colo. L. Rev. 505 (1982). For article, "The Physical Solution in Western Water Law", see 57 U. Colo. L. Rev. 445 (1986). For article, "Use of Colorado Water Rights In Secured Transactions", see 18 Colo. Law 2307 (1989).

**Subsection (7) does not violate article XVI, sections 5 and 6, of the Colorado Constitution** because the doctrine of prior appropriation does not apply to the allocation and administration of designated ground water located within the Denver basin aquifers. Colo. Ground Water Comm'n v. N. Kiowa-Bijou Groundwater Mgmt. Dist., 77 P.3d 62 (Colo. 2003).

**The statute establishes a ground water commission, which in turn establishes boundaries of ground water basins.** Larrick v. District Court, 177 Colo. 237, 493 P.2d 647 (1972).

**Applications for appropriating designated ground water committed to commission's jurisdiction.** Applications for the appropriation of designated ground water to a beneficial use are committed to the jurisdiction of the ground water commission. State ex rel. Danielson v. Vickroy, 627 P.2d 752 (Colo. 1981).

Although designated ground water in the Denver basin aquifers is allocated on the basis of overlying land ownership, in the manner of nontributary ground water, it is regulated by the state ground water commission, which has the dual responsibility of determining availability and issuing permits for its withdrawal. E. Cherry Creek Water & Sanitation Dist. v. Rangeview Metro. Dist., 109 P.3d 154 (Colo. 2005).

**Water not within definition of "designated ground water".** An application for an initial appropriation of ground water, even if not within the definition of "designated ground water", in a designated ground water basin must be addressed to the ground water commission. State ex rel. Danielson v. Vickroy, 627 P.2d 752 (Colo. 1981).

**Holders of permits may not claim the maximum and beneficially use only a portion.** Holders of conditional permits may not claim the maximum amount permitted under their permits and yet place only a portion of the claimed water to beneficial use. *Peterson v. Ground Water Comm'n*, 195 Colo. 508, 579 P.2d 629 (1978).

**A threshold showing of a non-speculative, beneficial use is required for designated ground water.** This showing is prior even to a determination of availability by the commission. *E. Cherry Creek Water & Sanitation Dist. v. Rangeview Metro. Dist.*, 109 P.3d 154 (Colo. 2005).

**Ground water commission must consider appropriative intent** among the evidence and all other matters which it must consider in acting upon an application for appropriating designated ground water. *Jaeger v. Colo. Ground Water Comm'n*, 746 P.2d 515 (Colo. 1987).

**Under this section the commission is empowered to deny an application if it finds that the proposed appropriation will unreasonably impair existing water rights from the same source, or will create unreasonable waste.** *Fundingsland v. Colo. Ground Water Comm'n*, 171 Colo. 487, 468 P.2d 835 (1970).

**Appropriators of the designated ground waters are required to obtain a permit for their appropriations** and the act establishes a system of prior appropriation, similar in operation to the system regulating surface water rights, to regulate the water rights of the ground water users. *North Kiowa-Bijou Mgt. Dist. v. Ground Water Comm'n*, 180 Colo. 314, 505 P.2d 377 (1973).

**Priority of claims for appropriating ground water determined by modified prior appropriation doctrine.** The priority of claims for the appropriation of designated ground water is to be determined by the doctrine of prior appropriation, as modified to permit full economic development of the designated ground water resources. *State ex rel. Danielson v. Vickroy*, 627 P.2d 752 (Colo. 1981).

**Under the circumstances of this case, a so-called three-mile test provided a reasonable basis for assessing the effect of a proposed use on other users in the district.** *Fundingsland v. Colo. Ground Water Comm'n*, 171 Colo. 487, 468 P.2d 835 (1970).

**The three-mile test was developed for use in the northern high plains;** it is partly based on policy and partly based on fact and theory, and when using that test, a circle with a three-mile radius is drawn around the proposed well site, a rate of pumping is determined which would result in a 40 percent depletion of the available ground water in that area over a period of 25 years, and if that rate of pumping is being exceeded by the existing wells within the circle, then the application for a permit to drill a new

well may be denied. *Fundingsland v. Colo. Ground Water Comm'n*, 171 Colo. 487, 468 P.2d 835 (1970).

**The three-mile test takes into account the factors specified by this section.** *Fundingsland v. Colo. Ground Water Comm'n*, 171 Colo. 487, 468 P.2d 835 (1970).

**Amount of water applied for shall only be utilized on land designated on application** and, the place of use shall not be changed without first obtaining authorization from the ground water commission. *W-Y Ground Water Mgt. Dist. v. Goeglein*, 196 Colo. 230, 585 P.2d 910 (1978).

**No change in diversion point or place of use to detriment of others.** An appropriator cannot change the point of diversion or the place of use if the change increases the amount of water or the historical use to the detriment of other appropriators. *Danielson v. Kerbs AG., Inc.*, 646 P.2d 363 (Colo. 1982).

A change in the place of use of a water right may be allowed only when the change will not cause unreasonable harm to a prior appropriator. *Danielson v. Kerbs AG., Inc.*, 646 P.2d 363 (Colo. 1982).

An appropriation made for the irrigation of a particular tract of land cannot be used to irrigate additional lands if the expanded use will injure the rights of other appropriators. *Danielson v. Kerbs AG., Inc.*, 646 P.2d 363 (Colo. 1982).

**No change in amount.** Consumptive use of water may not be increased to the injury of other appropriators. *Danielson v. Kerbs AG., Inc.*, 646 P.2d 363 (Colo. 1982).

**Burden of proof on applicant to show non-injury.** The burden of proof to establish that a change of use will not injure the rights of other users from the same source rests upon the person seeking the change. *Danielson v. Kerbs AG., Inc.*, 646 P.2d 363 (Colo. 1982).

Where expansion of use is the injury asserted, establishment of no increase in historical use is the burden of the applicant, and the use of water on increased acreage is evidence of increased use either in volume or time. *Danielson v. Kerbs AG., Inc.*, 646 P.2d 363 (Colo. 1982).

**Grant of change of place of use discretionary.** This section vests the ground water commission with discretion to grant, but does not mandate, a change of place of use. *W-Y Ground Water Mgt. Dist. v. Goeglein*, 196 Colo. 230, 585 P.2d 910 (1978).

**Relief involving taking ground water sought first under ground water provisions.** It is appropriate, as a matter of policy, and is consistent with legislative intent, to require that any relief sought which involves the taking of ground water in a designated ground water basin must be sought first through the administrative and judicial channels, as appropriate, prescribed for resolution of questions arising under this



article. State ex rel. Danielson v. Vickroy, 627 P.2d 752 (Colo. 1981).

**Vickroy decision not retrospectively applied.** State ex rel. Danielson v. Vickroy (627 P.2d 752 (Colo. 1981)) should not be retrospectively applied to those decrees involving well permits in designated ground water basins issued prior to the Vickroy decision. Ground Water Comm'n v. Shanks, 658 P.2d 847 (Colo. 1983).

With respect to issuing permits and promulgating regulations, the act makes available to affected water users the procedures providing for notice, hearing, and review of the commission and the management district measures. Jackson v. Colo., 294 F. Supp. 1065 (D. Colo. 1968).

**Subsection (7) vests the Colorado ground water commission with the authority to determine a use of right for the withdrawal of Denver basin designated ground water** by overlying landowners, or those acting with landowner consent, whose land lies within the boundaries of a designated ground water basin that is located in the Denver basin. Colo. Ground Water Comm'n v. N. Kiowa-Bijou Groundwater Mgmt. Dist., 77 P.3d 62 (Colo. 2003).

**The ground water management districts do not possess statutory authority to determine**

**an applicant's water use right under subsection (7).** The district's regulatory authority begins once a permit has been issued, therefore, an applicant seeking the Colorado ground water commission's determination of its use right need not initially submit its application to the water district for approval. Colo. Ground Water Comm'n v. N. Kiowa-Bijou Groundwater Mgmt. Dist., 77 P.3d 62 (Colo. 2003).

**The anti-speculation doctrine applies to the Colorado ground water commission's determination of an applicant's right to use designated ground water in the Denver basin,** therefore, an applicant must establish a threshold showing that there exists a beneficial, non-speculative use for the amount of allocated designated Denver basin ground water that will not create unreasonable waste. Colo. Ground Water Comm'n v. N. Kiowa-Bijou Groundwater Mgmt. Dist., 77 P.3d 62 (Colo. 2003).

**Applied in** Thompson v. Colo. Ground Water Comm'n, 194 Colo. 489, 575 P.2d 372 (1978); Cherokee Water Dist. v. State, Ground Water Comm'n, 196 Colo. 192, 585 P.2d 586 (1978); Pioneer Irrigation Dists. v. Danielson, 658 P.2d 842 (Colo. 1983); State Dept. of Natural Res. v. Southwestern Colo. Water Conservation Dist., 671 P.2d 1294 (Colo. 1983), cert. denied, 466 U.S. 944, 104 S. Ct. 1929, 80 L. Ed.2d 474 (1984).

**37-90-107.5. Replacement plans.** Any person desiring to obtain an approval of a replacement plan within the boundaries of a designated ground water basin pursuant to the provisions of this article shall make an application to the commission in a form prescribed by the commission. The applicant shall also submit a summary of the application to the commission for publication. If the commission determines the application to be complete, it shall be published pursuant to section 37-90-112 within sixty days after the filing of such an application. If an objection is filed, a hearing shall be held pursuant to section 37-90-113. The commission shall approve the replacement plan if the commission determines that the replacement plan meets the requirements of this article and rules adopted by the commission. A replacement plan shall not be used as a vehicle for avoiding limitations on existing wells, including but not limited to restrictions on change of well location. Therefore, before approving any replacement plan that includes existing wells, the commission shall require independent compliance with all rules governing those existing wells in addition to compliance with any guidelines or rules governing replacement plans.

**Source:** L. 98: Entire section added, p. 1218, § 6, effective August 5.

**37-90-108. Final permit - evidence of well construction and beneficial use - limitations.** (1) (a) After having received a conditional permit to appropriate designated ground water, the applicant, within one year from the date of the issuance of said permit, shall construct the well or other works necessary to apply the water to a beneficial use.

(b) The applicant, upon completion of the well, shall furnish information to the commission, in the form prescribed by the commission, as to the depth of the well, the water-bearing formations intercepted by the well, and the maximum sustained pumping rate in gallons per minute.

(c) If the well described in the conditional permit is not constructed within one year from the date of the issuance of the conditional permit as provided in this subsection (1), the conditional permit shall expire and be of no force or effect; except that, upon a showing

of good cause, the commission may grant one extension of time only for a period not to exceed one year. If the well has been constructed timely but the completion information required by this subsection (1) has not been furnished to the commission, the procedures specified in subsection (6) of this section shall apply.

(2) (a) If the well or wells described in a conditional permit have been constructed in compliance with subsection (1) of this section, the applicant, within three years after the date of the issuance of said permit, shall furnish by sworn affidavit, in the form prescribed by the commission, evidence that water from such well or wells has been put to beneficial use; except that the requirements of this paragraph (a) shall not apply to a well described in a conditional permit issued on or after July 1, 1991, to withdraw designated ground water from the Dawson, Denver, Arapahoe, or Laramie-Fox Hills aquifers.

(b) Such affidavit shall be prima facie evidence of the matters contained therein but shall be subject to objection by others, including ground water management districts, claiming to be injured thereby and to such verification and inquiry as the commission shall consider appropriate in each particular case.

(c) If such required affidavit is not furnished to the commission within the time and as provided in this subsection (2), the conditional permit shall expire and be of no force or effect except as provided in subsection (4) of this section.

(d) If the well described in a conditional permit issued on or after July 1, 1991, to withdraw designated ground water from the Dawson, Denver, Arapahoe, or Laramie-Fox Hills aquifers has been constructed in compliance with subsection (1) of this section, the applicant shall file a notice with the commission of commencement of beneficial use on a form prescribed by the commission within thirty days after the first beneficial use of any water withdrawn from such well.

(3) (a) (I) To the extent that the commission finds that water has been put to a beneficial use and that the other terms of the conditional permit have been complied with and after publication of the information required in the final permit, as provided in section 37-90-112, the commission shall order the state engineer to issue a final permit to use designated ground water, containing such limitations and conditions as the commission deems necessary to prevent waste and to protect the rights of other appropriators. In determining the extent of beneficial use for the purpose of issuing final permits, the commission may use the same criteria for determining the amount of water used on each acre that has been irrigated that is used in evaluating the amount of water available for appropriation under section 37-90-107. The provisions of this subparagraph (I) shall not apply to a well described in a conditional permit issued on or after July 1, 1991, to withdraw designated ground water from the Dawson, Denver, Arapahoe, or Laramie-Fox Hills aquifers.

(II) A final permit is not required to be issued for a well described in a conditional permit issued on or after July 1, 1991, to withdraw designated ground water from the Dawson, Denver, Arapahoe, or Laramie-Fox Hills aquifers. For such a well, a conditional permit, subject to the conditions of issuance of such a permit, shall be considered a final determination of a well's water right if the well is in compliance with all other applicable requirements of this article.

(b) In determining the extent of beneficial use prior to the issuance of a final permit, the commission may either increase or decrease the quantity of water and the amount of irrigated acreage, if any, according to the evidence presented to the commission, but no increase shall be permitted which will increase the quantity of water beyond that authorized by the original decree, conditional permit, registration statement, or other well permit issued prior to basin designation or which otherwise will unreasonably affect the rights of other appropriators.

(c) Any owner of an existing valid conditional permit issued before July 1, 1978, may file with the commission an amended statement of beneficial use, in the form prescribed by the commission, on or before December 31, 1979, and not thereafter, if any such change occurred and was approved on or before August 5, 1977.

(4) The procedural requirement that a statement of beneficial use shall be filed shall apply to all permits wherein the water was put to beneficial use since May 17, 1965. If information pertaining to completion of the well as required in subsection (1) of this section



has been received but evidence that water has been placed to beneficial use has not been received as of three years after the date of issuance of the conditional permit, the commission shall so notify the applicant by certified mail. The notice shall give the applicant the opportunity to submit proof that the water was put to beneficial use prior to three years after the date of issuance of the conditional permit. The proof must be received by the commission within twenty days after receipt of the notice by the applicant, and, if the conditional permit was issued on or after July 14, 1975, the proof must be accompanied by a filing fee of thirty dollars. If the commission finds the proof to be satisfactory, the conditional permit shall remain in force and effect. The commission shall consider any records of the commission and any evidence provided to the commission and all other matters set forth in this section in determining whether the conditional permit should remain in force and effect.

(5) All final permits shall set forth the following information as a minimum:

- (a) The priority date;
- (b) The name of the claimant;
- (c) The quarter-quarter in which the well is located;
- (d) The maximum annual volume of the appropriation in acre-feet per year;
- (e) The maximum pumping rate in gallons per minute; and
- (f) The maximum number of acres which have been irrigated, if used for irrigation.

(6) The procedural requirement that the well completion information required by subsection (1) of this section be furnished to the commission shall apply to all permits issued after May 17, 1965. If the well has been constructed within twenty-four months after the date of issuance of the permit where the permit was issued before June 7, 1979, or within twelve months after the date of issuance of the permit where the permit was issued on or after June 7, 1979, or by the expiration date of the permit, including any extension, but the completion information has not been furnished to the commission within six months after said allowable time for the well completion, the commission shall so notify the applicant by certified mail. The notice shall give the applicant the opportunity to submit proof that the well was completed within the time specified above or by the expiration date of the permit and to submit the information required by subsection (1) of this section and a showing that, due to excusable neglect, inadvertence, or mistake, the applicant failed to submit the evidence and information on time. The proof and information must be received by the commission within twenty days after receipt of the notice by the applicant and must be accompanied by a filing fee of thirty dollars. If the commission finds the proof to be satisfactory, the permit shall remain in force and effect. The commission shall consider any records of the commission and any evidence provided to the commission and all other matters set forth in this section in determining whether the permit should remain in force and effect.

(7) Notwithstanding the amount specified for any fee in this section, the commission by rule or as otherwise provided by law may reduce the amount of one or more of the fees if necessary pursuant to section 24-75-402 (3), C.R.S., to reduce the uncommitted reserves of the fund to which all or any portion of one or more of the fees is credited. After the uncommitted reserves of the fund are sufficiently reduced, the commission by rule or as otherwise provided by law may increase the amount of one or more of the fees as provided in section 24-75-402 (4), C.R.S.

**Source:** L. 65: R&RE, p. 1251, § 1. C.R.S. 1963: § 148-18-7. L. 71: p. 1314, § 6. L. 75: (3) amended and (4) added, p. 1394, § 1, effective July 14. L. 79: (1) to (3) R&RE, p. 1371, § 2, effective June 7. L. 85: (1)(c), (3)(a), (3)(b), and (4) amended and (5) and (6) added, p. 1172, § 2, effective May 31. L. 86: (6) amended, p. 1221, § 34, effective May 30. L. 92: (4), (5)(c), and (6) amended, p. 2298, § 3, effective March 19. L. 94: (1)(c) and (2)(a) amended and (2)(d) added, p. 1746, § 1, effective July 1. L. 98: (7) added, p. 1344, § 72, effective June 1; (2)(a), (2)(d), (3)(a), (4), and (6) amended, p. 1218, § 7, effective August 5.

## ANNOTATION

**Law reviews.** For article, "Oil Shale and Water Quality: The Colorado Prospectus Under Federal, State, and International Law", see 58 Den. L.J. 715 (1981).

**Annotator's note.** The following annotations include cases decided under former provision similar to this section.

**The general assembly intended that the extent of beneficial use would limit the ground water appropriator** by providing for the issuance of final permits based upon proof of beneficial use. *Thompson v. Colo. Ground Water Comm'n*, 194 Colo. 489, 575 P.2d 372 (1978).

Regardless of the quantity specified in a decree, the amount of water actually applied to beneficial use defines the full extent of the water right. *Thompson v. Colo. Ground Water Comm'n*, 194 Colo. 489, 575 P.2d 372 (1978).

**The general assembly intended that the commission engage in a confirmatory investigation** and that the issuance of final permits be a meaningful action. *Thompson v. Colo. Ground Water Comm'n*, 194 Colo. 489, 575 P.2d 372 (1978).

**Where the commission fails to undertake an independent investigation** to determine if the amount of water claimed is put to beneficial use prior to issuing a final permit, the commission procedure is not in compliance with statutory scheme. *Thompson v. Colo. Ground Water Comm'n*, 194 Colo. 489, 575 P.2d 372 (1978).

**Commission must implement legislative scheme.** The commission cannot rely upon conditional permits as though they are enforceable "existing claims" without implementing the legislative scheme which includes the issuance of final permits. *Thompson v. Colo. Ground Water Comm'n*, 194 Colo. 489, 575 P.2d 372 (1978).

**The final permit is essential to the legislative scheme** for the administration of ground water rights. *Thompson v. Colo. Ground Water Comm'n*, 194 Colo. 489, 575 P.2d 372 (1978).

**Vested right in water not acquired after conditional permit expires.** This article does not contemplate that appropriators may acquire a vested right in water put to beneficial use after their conditional permits have expired. *Berens v. Ground Water Comm'n*, 200 Colo. 170, 614 P.2d 352 (1980).

**Conditional permits do not permit their holders to sleep on water rights** and later expand their use to the full extent of their permits. *Thompson v. Colo. Ground Water Comm'n*, 194 Colo. 489, 575 P.2d 372 (1978); *Peterson v. Ground Water Comm'n*, 195 Colo. 508, 579 P.2d 629 (1978).

**Conditional permit to last one year.** Conditional permits expire and are of no effect one

year after their issuance unless the statutory requirements necessary for the issuance of a final permit have been satisfied, or the commission has extended a conditional permit for a time certain for good cause shown, or the appropriator has submitted well completion data, but has failed to submit proof of beneficial use, where upon the appropriator is entitled to notice and 20 days to provide the missing information. *Peterson v. Ground Water Comm'n*, 195 Colo. 508, 579 P.2d 629 (1978).

Subsection (3) reflects a legislative determination that most designated ground water appropriations can be completed within one year, but also permits the commission to grant extensions upon good cause shown to avoid unjust results. *Kuiper v. Warren*, 195 Colo. 541, 580 P.2d 32, cert. denied, 439 U.S. 984, 99 S. Ct. 575, 58 L. Ed.2d 56 (1978).

**Extension procedure and due diligence doctrine protect conditional ground water appropriators.** The statutory extension procedure of this section and the doctrine of due diligence afford ground water appropriators, who are reasonably proceeding to complete appropriations under conditional rights, protection against loss of their rights. *Kuiper v. Warren*, 195 Colo. 541, 580 P.2d 32, cert. denied, 439 U.S. 984, 99 S. Ct. 575, 58 L. Ed.2d 56 (1978).

**Beneficial uses.** Land reclamation and dust control are proper beneficial uses for appropriations of tributary and nontributary water. *State Dept. of Natural Res. v. Southwestern Colo. Water Conservation Dist.*, 671 P.2d 1294 (Colo. 1983), cert. denied, 466 U.S. 944, 104 S. Ct. 1929, 80 L. Ed.2d 474 (1984).

**Intent to put water to beneficial use must not be speculative.** Anti-speculative doctrine of *Colo. River Water Conservation Dist. v. Vidler Tunnel Water Co.* (197 Colo. 413, 594 P.2d 566 (1979)) requiring more than mere future plans to beneficially use water, applies to appropriations of groundwater in designated ground water basins. *Jaeger v. Colo. Ground Water Comm'n*, 746 P.2d 515 (Colo. 1987).

**When extent of beneficial use is fixed.** Normally, the extent of beneficial use and the measure of the water right is fixed at the time a final decree is entered. *Thompson v. Colo. Ground Water Comm'n*, 194 Colo. 489, 575 P.2d 372 (1978).

**The procedure set out in this section places the burden on the appropriator** to prove that he has made a valid appropriation consistent with Colorado law. *Thompson v. Colo. Ground Water Comm'n*, 194 Colo. 489, 575 P.2d 372 (1978).

**Applied in** *Danielson v. Kerbs AG., Inc.*, 646 P.2d 363 (Colo. 1982).



**37-90-109. Priority - discontinuance orders - grounds.** (1) Priority of claims for the appropriation of designated ground water shall be determined by the doctrine of prior appropriation. All claims based on actual taking of designated ground water for beneficial use prior to May 17, 1965, shall be determined by the doctrine of prior appropriation and shall relate back to the date of placing designated ground water to beneficial use. All claims for the beneficial use of designated ground water initiated after May 17, 1965, shall relate back to the date of filing of an application with the commission, unless such application is rejected.

(2) In order to establish priority of a claim to appropriate designated ground water which has existed prior to May 17, 1965, a priority date shall be awarded to each well based upon the time the water was first applied to a beneficial use. The date shown in the records now filed in the state engineer's office shall be prima facie evidence of the date the water was first applied to beneficial use. All wells constructed as replacements for or as supplements to original wells for the same beneficial use shall be considered as a unit and awarded a priority date of the earliest well.

(3) As soon as practical after the establishment of a designated ground water basin, the commission shall establish tentative priority dates for the respective wells within such designated ground water basin, or subdivisions thereof, in accordance with the information contained in its files. The commission may require such additional information from the well claimant as will permit it to make a proper determination of the priority date and may request such other information as is required to be set forth in a final permit pursuant to section 37-90-108 (5). If the claimant fails or refuses to furnish the requested information within a period of thirty days, the commission may proceed to make a determination from the records available.

(4) After establishing the proposed priority date and after receiving the information required by section 37-90-108 (5) for the final permit on claims for the beneficial use of designated ground water, the commission shall order the state engineer to issue a final permit to appropriate designated ground water in the manner and pursuant to the standards set forth in section 37-90-108 for final permits; except that a final permit is not required to be issued for a well described in a conditional permit issued on or after July 1, 1991, to withdraw designated ground water from the Dawson, Denver, Arapahoe, or Laramie-Fox Hills aquifers and except that this section shall not apply to any final priority lists established by the commission prior to January 1, 1985, and any final permits issued pursuant to said lists.

(5) and (6) Repealed.

**Source:** L. 65: R&RE, p. 1252, § 1. C.R.S. 1963: § 148-18-8. L. 71: p. 1314, § 7. L. 79: (4) R&RE, p. 1373, § 3, effective June 7. L. 85: (2) and (3) amended, (4) R&RE, and (5) and (6) repealed, pp. 1174, 1175, 1178, §§ 3, 4, 14, effective May 31. L. 98: (4) amended, p. 1220, § 8, effective August 5.

#### ANNOTATION

**Law reviews.** For comment on determining the priority of federal reserved rights relative to the water rights of state appropriators, see 48 U. Colo. L. Rev. 547 (1977).

**Authorizing commission to establish priority of claims not unconstitutional.** By authorizing the commission to establish the priority of claims for the appropriation of designated ground water, the ground water management act does not violate the doctrine of separation of powers nor constitute an unlawful delegation of judicial powers under art. III, Colo. Const., and § 1 of art. VI, Colo. Const. In re Water Rights in Irrigation Div. No. 1, 181 Colo. 395, 510 P.2d 323 (1973).

**Prior to the 1965 ground water management act,** a person could obtain a prior right to "developed" water. Sweetwater Dev. Corp. v. Schubert Ranches, Inc., 188 Colo. 379, 535 P.2d 215 (1975).

**Determining quantity and priority of existing claims.** For purposes of this section, the quantity of existing claims and the priority of those claims can only be rightfully determined if the commission complies with all of the procedural requirements of § 37-90-108. Thompson v. Colo. Ground Water Comm'n, 194 Colo. 489, 575 P.2d 372 (1978).

**The act protects the priorities of those appropriating such ground water prior to its**

**effective date**, and the commission, upon application, grants or denies permits for new appropriations of such water. *Larrick v. District Court*, 177 Colo. 237, 493 P.2d 647 (1972).

**Applied** in *Peterson v. Ground Water Comm'n*, 195 Colo. 508, 579 P.2d 629 (1978);

*Kuiper v. Warren*, 195 Colo. 541, 580 P.2d 32 (1978); *Colo. Ground Water Comm'n v. Dreiling*, 198 Colo. 560, 606 P.2d 836 (1979); *Danielson v. Kerbs AG., Inc.*, 646 P.2d 363 (Colo. 1982).

**37-90-110. Powers of the state engineer.** (1) In the administration and enforcement of this article and in the effectuation of the policy of this state to conserve its ground water resources and for the protection of vested rights, the state engineer, either in the state engineer's own capacity or as the executive director of the commission, is empowered:

(a) To require all flowing wells to be equipped with valves so that the flow of water can be controlled;

(b) To require both flowing and nonflowing wells to be so constructed and maintained as to prevent the waste of ground waters through leaky wells, casings, pipes, fittings, valves, or pumps, either above or below the land surface;

(c) To go upon all lands, both public and private, for the purpose of inspecting wells, pumps, casings, pipes, fittings, and measuring devices, including wells used or claimed to be used for domestic or stock purposes;

(d) To order the cessation of the use of a well pending the correction of any defect that the state engineer has ordered corrected;

(e) To commence actions to enjoin the illegal opening or excavation of wells or withdrawal or use of water therefrom and to appear and become a party to any action or proceeding pending in any court or administrative agency when it appears that the determination of such action or proceeding might result in depletion of the ground water resources of the state contrary to the public policy expressed in this article or might injure vested rights of other appropriators;

(f) To take such action as may be required to enforce compliance with any regulation, control, or order promulgated pursuant to the provisions of this article;

(g) To issue to the owners or users of wells pumping designated ground water in the state such orders as are necessary to implement the provisions of this section and section 37-90-111. In addition to any other method of giving notice, the mailing of the order in a certified letter to the well owner or operator, together with the posting of a written order, in plain sight, at the well head, shall be considered sufficient notice of the order of the state engineer, and, when so posted, the order shall be effective from the time of posting.

(h) To administer the movement of water involved in any commission-issued replacement plan or plan for augmentation involving designated ground water. In such administration, the state engineer shall issue such orders as are necessary and appropriate.

(i) To order any person supplying energy used to pump designated ground water to provide, at reasonable times, records of energy used to pump ground water. The state engineer may exercise this authority only in connection with an alleged violation of this article. Suppliers of energy used to pump ground water shall not be required to maintain records of energy used to pump ground water more than five years after the year in which the energy is consumed. Suppliers of energy used to pump ground water shall be held harmless from any and all civil or criminal liability with respect to the transfer of records pursuant to this section. Nothing contained in this paragraph (i) shall affect any reporting requirements of the public utilities commission pursuant to section 40-3-110, C.R.S. This paragraph (i) shall not apply to any person diverting by means of a well described in section 37-90-105 (1) (a).

**Source:** L. 65: R&RE, p. 1253, § 1. C.R.S. 1963: § 148-18-9. L. 71: p. 1318, § 17. L. 94: IP(1) and (1)(f) amended, p. 1747, § 2, effective July 1. L. 2004: IP(1) amended and (1)(g), (1)(h), and (1)(i) added, p. 1164, § 1, effective May 27.

**Cross references:** For general duties of the state engineer, see § 37-80-102.



## ANNOTATION

**Both the commission and state engineer have enforcement authority of the regulations established under the act** and are the real and substantial parties in interest in an action to enjoin enforcement of water control measures, and consequently the suit is not against the state and therefore not barred by the federal constitution, and a decree could be entered in favor of or against the plaintiff without increasing or decreasing the decreed surface water rights or injuring the well owner's constitutional rights to

appropriate water and apply it to a beneficial use; therefore, a decision for or against the plaintiff might indirectly affect the interests of all water users, but could not alter vested legal rights so as to raise the water users to the status of indispensable parties, and hence, the practical considerations and the absence of legal prejudice preclude a finding that all water users are indispensable parties. *Jackson v. Colo.*, 294 F. Supp. 1065 (D. Colo. 1968).

**37-90-111. Powers of the ground water commission - limitations.** (1) In the administration and enforcement of this article and in the effectuation of the policy of this state to conserve its designated ground water resources and for the protection of vested rights and except to the extent that similar authority is vested in ground water management districts pursuant to section 37-90-130 (2), the ground water commission is empowered:

(a) To supervise and control the exercise and administration of all rights acquired to the use of designated ground water. In the exercise of this power it may, by summary order, prohibit or limit withdrawal of water from any well during any period that it determines that such withdrawal of water from said well would cause unreasonable injury to prior appropriators; except that nothing in this article shall be construed as entitling any prior designated ground water appropriator to the maintenance of the historic water level or any other level below which water still can be economically extracted when the total economic pattern of the particular designated ground water basin is considered; and further except that no such order shall take effect until six months after its entry.

(b) To establish a reasonable ground water pumping level in an area having a common designated ground water supply. Water in wells shall not be deemed available to fill the water right therefor if withdrawal therefrom of the amount called for by such right would, contrary to the declared policy of this article, unreasonably affect any prior water right or result in withdrawing the ground water supply at a rate materially in excess of the reasonably anticipated average rate of future recharge.

(c) To issue permits for the construction of replacement wells. Any permits issued shall set forth the conditions under which a well may be modified by a change of the well itself or the pumping equipment therefor, by the drilling of a replacement well, or otherwise, in order to make it possible for the owner of a well to obtain the water to which such owner may be entitled by virtue of his original appropriation.

(d) In the exercise of any of the powers or duties conferred by this section, to confer and consult with the board of directors of the ground water management district board in the affected area, if any such board exists, before promulgating any orders or regulations which would affect the district in general;

(e) To order the total or partial discontinuance of any diversion within a ground water basin to the extent the water being diverted is not necessary for application to a beneficial use;

(f) In any area where a ground water management district has not been formed, to prescribe satisfactory and economical measuring methods for the measurement of water levels in and the amount of water withdrawn from wells and to require reports to be made at the end of each pumping season showing the date and water level at the beginning of the pumping season, the date and water level at the end of the pumping season, and showing any period of more than thirty days' cessation of pumping during such pumping season;

(g) Upon application therefor by any permit holder, to authorize a change in acreage served, volume of appropriation, place, time, or type of use of and by any water right, or of any well location, either conditional or final, granted under the authority of the commission but only upon such terms and conditions as will not cause material injury to the vested rights of other appropriators. No such change that increases the volume of appropriation beyond that authorized by the original decree, conditional permit, registration

statement, or other well permit issued prior to basin designation shall be authorized, and no such change shall be approved until after publication of such application as provided in section 37-90-112; except that publication shall not be required to approve a temporary change pursuant to the rules adopted by the commission and except that publication shall not be required for replacement wells that are relocated no further than the maximum distance allowed by district rules and regulations without prior board approval or by commission policy where no district exists or where no district rule has been adopted.

(h) To adopt rules necessary to carry out the provisions of this article.

(2) No supplemental wells or alternate point of diversion wells shall be allowed in any area of any designated ground water basin in which the proposed well or wells combined would deplete the aquifer in excess of the rate of depletion prescribed by the ground water commission or by the ground water management district rules and regulations.

(3) In the exercise of any of the powers or duties conferred by this section, the commission shall confer and consult with the board of directors of the ground water management district board in the affected areas, if any such board exists, before promulgating any orders or regulations which would affect the district in general, and shall request written recommendations from the board of any existing district within which the conditional or final permit has been issued, before taking final action on any request or application made pursuant to this section.

(4) In any area within a designated ground water basin which has not been included within the boundaries of a ground water management district, the commission has the authority to exercise any power given by this article to the board of directors of a ground water management district, but, before instituting control measures pursuant to section 37-90-130, the commission shall follow the procedures set out in section 37-90-131.

(5) Notwithstanding any other provision of this article, the commission shall allocate, upon the basis of ownership of the overlying land, any designated ground water contained in the Dawson, Denver, Arapahoe, or Laramie-Fox Hills aquifers. Permits issued pursuant to this subsection (5) shall allow withdrawals on the basis of an aquifer life of one hundred years.

**Source:** L. 65: R&RE, p. 1254, § 1. C.R.S. 1963: § 148-18-10. L. 67: p. 276, § 4. L. 71: p. 1314, § 8. L. 79: IP(1) amended and (1)(g), (3), and (4) added, pp. 1373, 1374, §§ 4, 5, effective June 7. L. 85: (1)(g) and (3) amended, p. 1175, § 5, effective May 31. L. 88: (5) added, p. 1238, § 1, effective July 1. L. 92: (1)(c) amended, p. 2299, § 4, effective March 19. L. 94: (1)(h) added, p. 1747, § 3, effective July 1. L. 98: (1)(g) amended, p. 1220, § 9, effective August 5.

#### ANNOTATION

**Law reviews.** For article, "Principles and Law of Colorado's Nontributary Ground Water", see 62 Den. U. L. Rev. 809 (1985).

**The administration and enforcement of the act is placed in the hands of an administrative commission, the state engineer and locally formed ground water management districts, and the commission is empowered to designate the ground water basins and to supervise and control the administration of all ground water so designated, it also grants or denies petitions for the formation of management districts within each ground water basin.** Jackson v. Colo., 294 F. Supp. 1065 (D. Colo. 1968).

**General assembly not prevented from placing water adjudication jurisdiction in commission.** Although in Colorado jurisdiction for water adjudication has traditionally been in the courts, there is nothing in the state constitution

— and particularly nothing in § 6 of art. XVI — to prevent the general assembly from placing such jurisdiction in a different agency, such as the ground water commission in the case of designated ground water, considering that such determinations are appealable to the courts. In re Water Rights in Irrigation Div. No. 1, 181 Colo. 395, 510 P.2d 323 (1973).

**Commission is proper agency to determine whether place of use of water can be changed without injury to others** and, if so, the conditions to be imposed to prevent injury. In re Water Rights in Irrigation Div. No. 1, Irrigation Dist. No. 1, 181 Colo. 395, 510 P.2d 323 (1973).

**The ground water commission is charged with establishing priority dates for wells within designated ground water basins and is empowered, in the absence of a management district, to supervise and control the exercise and**



administration of all rights acquired for the use of designated ground water, including limiting or prohibiting the withdrawal of water from wells when necessary to protect prior appropriators from unreasonable injury. *Upper Black Squirrel Creek v. Goss*, 993 P.2d 1177 (Colo. 2000).

However, where a management district exists, the management district has authority to administer designated ground water priorities within its boundaries. *Upper Black Squirrel Creek v. Goss*, 993 P.2d 1177 (Colo. 2000).

The Ground Water Management Act empowers the ground water commission, or a water management district where one exists, to issue well withdrawal curtailment orders in the administration of priorities, but does not impose a non-discretionary duty to do so. *Upper Black Squirrel Creek v. Goss*, 993 P.2d 1177 (Colo. 2000).

And, the management district's rules, its control and conservation measures, and its well spacing criteria, apply to the ground water commissions's injury analysis in the permitting phase, as they do when the management district addresses questions of administration and enforcement. *Upper Black Squirrel Creek v. Goss*, 993 P.2d 1177 (Colo. 2000).

Commission may permit use change beyond designated ground water basin. In the absence of a ground water management district, the ground water commission has the authority to permit a change in type of use and a change of place of use to an area beyond the boundaries of a designated ground water basin. *Cherokee Water Dist. v. State, Ground Water Comm'n*, 196 Colo. 192, 585 P.2d 586 (1978).

**Determination as to whether disputed ground water is "designated ground water".** The ground water commission is the appropriate forum for determining whether disputed ground water is designated ground water located in a designated ground water basin. *Pioneer Irrigation Dists. v. Danielson*, 658 P.2d 842 (Colo. 1983).

Since both the commission and state engineer have enforcement authority of the regulations established under the act and are the real and substantial parties in interest in an action to enjoin enforcement of water control measures, and consequently the suit is not against the state and therefore not barred by the federal constitution, and a decree could be entered in favor of or against the plaintiff without increasing or decreasing the decreed surface water rights or injuring the well owner's constitutional rights to appropriate water and apply it to a beneficial use, therefore, a decision for or against the plaintiff might indirectly affect the interests of all water users, but could not alter vested legal rights so as to raise the water users to the status of indispensable parties, and hence, the practical considerations and the absence of legal prejudice preclude a finding that all water users are indispensable parties. *Jackson v. Colo.*, 294 F. Supp. 1065 (D. Colo. 1968).

**Change in place of use allowed only without unreasonable harm to prior appropriator.** A change in the place of use of a water right may be allowed only when the change will not cause unreasonable harm to a prior appropriator. *Danielson v. Kerbs AG., Inc.*, 646 P.2d 363 (Colo. 1982).

**Applied in Colo. Ground Water Comm'n v. Dreiling**, 198 Colo. 560, 606 P.2d 836 (1979).

**37-90-111.5. Well enforcement - injunction - fines.** (1) (a) If an order of the commission or the state engineer issued pursuant to section 37-90-105, 37-90-107, 37-90-108, 37-90-110 in relation to designated ground water, or 37-90-111 is not complied with, the commission or the state engineer in the name of the people of the state of Colorado, through the attorney general, shall apply to the district court in the county in which the water right or well is situated:

(I) For an injunction enjoining the person to whom such order was directed from continuing to violate the order. The term "injunction" includes a temporary restraining order and mandatory relief.

(II) To recover the civil penalties specified in paragraph (a) of subsection (5) of this section.

(b) In the proceeding, the prevailing party shall be entitled to the costs of the proceeding and reasonable attorney fees.

(2) In the case of an order with respect to the withdrawal of designated ground water, the designated ground water judge in ruling upon such injunction shall consider, depending on the basis for the order, whether the designated ground water is being applied to a beneficial use, whether the withdrawal is causing or will cause injury to persons or entities owning or entitled to use water under vested water rights, and whether the withdrawal of designated ground water is in violation of the statute, the rules adopted by the commission or state engineer, or the well permit's terms and conditions.

(3) Any person who has an interest in the subject matter of such proceedings may intervene, if such intervention is timely and will not cause undue delay.

(4) In the case of a violation of an injunction issued under this section, the designated ground water judge shall try and punish the offender for contempt of court. Such proceedings shall be in addition to, and not in lieu of, any other penalties and remedies, public or private, provided by law.

(5) (a) (I) Any person who diverts designated ground water contrary to a valid order of the commission or state engineer issued pursuant to section 37-90-105, 37-90-107, 37-90-108, 37-90-110, or 37-90-111, or in violation of rules adopted by the commission or state engineer shall forfeit and pay a sum not to exceed five hundred dollars for each day such violation continues.

(II) Any person who, when required to do so by rules adopted by the commission or state engineer, fails to submit data as to the amounts of designated ground water pumped from a well, makes a false or fictitious report of the amounts of designated ground water pumped from a well, falsifies any data as to amounts pumped from a well, makes a false or fictitious report of a power coefficient for a well, or falsifies any power coefficient test shall forfeit and pay a sum not to exceed five hundred dollars for each violation; except that this subparagraph (II) shall not apply to an order issued pursuant to section 37-90-110 (1) (i) or 37-90-130 (4) (c).

(III) It is unlawful for any person not authorized by the well owner, commission, or state engineer to willfully interfere with any power meter, totalizing flow meter, or other device used to measure designated ground water diversions. Any person who willfully damages a power meter, totalizing flow meter, or other device used to measure designated ground water diversions or who tampers with or falsifies any record made or being made by any such power meter, totalizing flow meter, or other device shall forfeit and pay a sum not to exceed five hundred dollars for each violation.

(IV) This paragraph (a) shall not apply to any person diverting by means of a well described in section 37-90-105 (1) (a).

(b) The state engineer shall transmit all fines collected for violations of paragraph (a) of this subsection (5) to the state treasurer, who shall deposit them in the water resources cash fund created in section 37-80-111.7 (1).

(6) Any person required by a valid order of the commission or the state engineer, or by existing rules of the commission or state engineer, to cease diversions of designated ground water or replace depletions caused by diversions of designated ground water, and whose failure to adhere to such order or rule results in the violation of an interstate compact, shall be liable for all direct, actual, and necessary expenses incurred by the state of Colorado in performing any action, including the purchase of water or payment of damages, necessary for the state of Colorado to remedy the violation of such compact. The commission or state engineer in the name of the people of the state of Colorado, through the attorney general, shall apply to the district court in the county in which the water right or well is situated to recover such expenses. If the commission or the state engineer prevails, the court shall also award the costs of the proceeding and reasonable attorney fees.

**Source:** L. 2004: Entire section added, p. 1165, § 2, effective May 27. L. 2012: (5)(b) amended, (SB 12-009), ch. 197, p. 792, § 5, effective July 1.

**Editor's note:** Section 13 of chapter 197, Session Laws of Colorado 2012, provides that the act amending subsection (5)(b) applies to revenues credited on or after July 1, 2012.

**37-90-112. Notice - publication.** (1) When any notice is required to be published under any section of this article, including notice of elections, it shall be deemed to mean a publication in a newspaper of general circulation in each of the counties concerned. Publication of all notices shall be once each week for two successive weeks. The notice shall state the hour and date of the commencement of hearings on the subject matter of the notice; the place at which the hearings will be held; the place where written objections may be filed; and the final date by which written objections will be received; or, if for an election, the date, hours, and polling places.

(2) All objections, either to the published notice or any matter contained therein, shall be in writing and shall briefly state the nature of the objection and shall be filed within the time and at the place designated in the notice.



(3) The time for filing any written objections to notices described in this article shall extend to thirty days following the last publication of the notice.

**Source:** L. 65: R&RE, p. 1255, § 1. C.R.S. 1963: § 148-18-11. L. 71: p. 1315, § 9.

**Cross references:** For publication of legal notices, see part 1 of article 70 of title 24.

**37-90-113. Hearings.** (1) Hearings on all matters to be heard by the commission shall be held within the boundaries of the designated ground water basin and within the ground water management district, if one exists, in which the water rights directly involved are situated or at such other place as may be designated by the commission for the convenience of, and as agreed to by, the parties involved. The hearings shall be conducted before the commission under reasonable rules and regulations of procedure prescribed by it. All parties to the hearing, including the commission, have the right to subpoena witnesses, who shall be sworn by the chairman or acting chairman of the commission to testify under oath at the hearing. All parties to the hearing shall be entitled to be heard either in person or by attorney.

(2) In any hearings required to be conducted by the commission, it may, in its discretion, have such hearings conducted before such agent as it may designate, either alone or in conjunction with the appearance of the commission if the agent is technically qualified to conduct or assist in such hearings. Unless agreed otherwise by all parties to a hearing or unless ordered otherwise by the commission due to extenuating circumstances, a hearing pursuant to this section shall be held within one hundred eighty days after the filing of a request for such a hearing. Appeals of rulings of the agent designated by the commission shall be reviewed at any regular or special commission meeting at the location chosen by the commission for that meeting.

(3) At any hearing or proceedings conducted or authorized by the commission affecting any water rights, either existing or potential, within any ground water management district, the commission shall receive and fully consider the testimony and recommendations of the board of directors or authorized agents of said district, if such testimony and recommendations are offered on behalf of the affected district.

**Source:** L. 65: R&RE, p. 1255, § 1. C.R.S. 1963: § 148-18-12. L. 71: p. 1315, § 10. L. 79: (1) amended and (3) added, p. 1374, § 6, effective June 7. L. 98: (2) amended, p. 1221, § 10, effective August 5.

**37-90-114. Other administrative hearings.** Any person claiming to be injured within the boundaries of a designated ground water basin by any act of the state engineer or commission under the provisions of this article, or the failure of the state engineer or commission to take any action under the provisions of this article, except as provided for the small capacity wells in section 37-90-105, shall file a written petition with the commission stating the basis of the alleged injury. Thereafter, only upon request by a petitioner and upon thirty-five days' written notice to any adverse party, the commission shall conduct a hearing upon the petition in the manner provided in section 37-90-113. If notice of any such act has been published pursuant to section 37-90-112 and no hearing has been requested pursuant to such notice, this section shall not be construed to create a subsequent or additional right to request a hearing concerning such act.

**Source:** L. 65: R&RE, p. 1256, § 1. C.R.S. 1963: § 148-18-13. L. 71: p. 1316, § 11. L. 85: Entire section amended, p. 1176, § 6, effective May 31. L. 98: Entire section amended, p. 1221, § 11, effective August 5. L. 2012: Entire section amended, (SB 12-175), ch. 208, p. 883, § 152, effective July 1.

**Editor's note:** Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending this section applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

## ANNOTATION

**Applied** in *State Dept. of Natural Res. v. Southwestern Colo. Water Conservation Dist.*, 671 P.2d 1294 (Colo. 1983), cert. denied, 466 U.S. 944, 104 S. Ct. 1929, 80 L. Ed.2d 474 (1984).

**37-90-115. Judicial review of actions of the ground water commission or the state engineer.** (1) (a) Any party, including a ground water management district, adversely affected or aggrieved by any decision or act of the ground water commission, except for the adoption of rules, under the provisions of this article or by a decision or act of the state engineer under section 37-90-110 may take an appeal to the district court in the county wherein the water rights or wells involved are situated.

(b) (I) The notice of such appeal shall be served by the appellant upon the state engineer or the commission and all interested parties within thirty-five days after the notice of such decision or act and, unless such appeal is taken within said time, the action of the state engineer or the commission shall be final and conclusive. For purposes of service only, "all interested parties" shall be limited to those parties which appeared at, and were granted party status in, any administrative hearing held by the commission or state engineer concerning the decision or act from which the appeal is taken. If no administrative hearing has been held, notice of such appeal shall be given by publication pursuant to section 37-90-112.

(II) Notice of such appeal, proof of service, and docketing of the appeal in the district court shall be accomplished in the same manner as any other civil suit originally commenced in the district courts of this state. Costs shall be charged to the appellant as in any other civil suit.

(III) Proceedings upon appeal shall be de novo; except that evidence taken in any administrative proceeding appealed from may be considered as original evidence, subject to legal objection, as if said evidence were originally offered in such district court.

(IV) It is the duty of the commission or the state engineer, upon being served with a notice of appeal pursuant to this section, to transmit to the district court to which the appeal is taken the papers, maps, plats, field notes, orders, decisions, and other available data affecting the matter in controversy or certified copies thereof, which certified copies shall be admitted in evidence as of equal validity with the originals.

(V) For the purpose of maximizing continuity in the disposition of designated ground water cases, on or before January 10 of each year, the supreme court shall designate or redesignate a designated ground water judge for each designated ground water basin, who shall be selected from a judicial district within which some part of that designated ground water basin lies, and any vacancy that occurs during such year shall be filled by designation of the supreme court. The services of each designated ground water judge shall be in addition to such judge's regular duties as a district judge but shall take priority over such regular duties, and the schedules of the district judges in each such judicial district shall be arranged and adjusted so that the designated ground water judge shall be free to hear designated ground water cases. All cases relating to designated ground water which are filed in each judicial district shall be assigned to the designated ground water judge, and all proceedings regarding said cases shall be heard by the designated ground water judge. If it becomes necessary during any year for the proper handling of designated ground water cases in any judicial district, the supreme court shall designate one or more additional designated ground water judges from that judicial district or may make temporary assignments of other judges to hear such cases.

(2) Any party adversely affected or aggrieved by a rule adopted by the ground water commission may take an appeal pursuant to section 24-4-106, C.R.S.

**Source:** L. 65: R&RE, p. 1256, § 1. C.R.S. 1963: § 148-18-14. L. 79: Entire section R&RE, p. 1374, § 7, effective June 7. L. 83: Entire section R&RE, p. 1416, § 2, effective June 10. L. 85: (2) amended and (6) added, p. 1176, § 7, effective May 31. L. 94: Entire section amended, p. 1747, § 4, effective July 1. L. 2012: (1)(b)(I) amended, (SB 12-175), ch. 208, p. 883, § 153, effective July 1.



**Editor's note:** Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (1)(b)(I) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

## ANNOTATION

**Law reviews.** For article, "Nontributary Groundwater: The Continuing Saga", see 13 Colo. Law. 68 (1984).

**General assembly not prevented from placing water adjudication jurisdiction in commission.** Although in Colorado jurisdiction for water adjudication has traditionally been in the courts, there is nothing in the state constitution — and particularly nothing in § 6 of art. XVI — to prevent the general assembly from placing such jurisdiction in a different agency, such as the ground water commission in the case of designated ground water, considering that such determinations are appealable to the courts. In re Water Rights in Irrigation Div. No. 1, 181 Colo. 395, 510 P.2d 323 (1973) (decided under former law).

**Where the water involved is designated ground water, jurisdiction over which was given to the ground water commission, and the location of the land and water is in a county, the district court of that county has jurisdiction of the action.** Larick v. District Court, 177 Colo. 237, 493 P.2d 647 (1972).

**Collateral attack on commission decision impermissible.** Where ground water users failed to object to or appeal from the formation of a ground water district, their collateral attack on the decision of the commission to include their land within the boundaries of the district was impermissible. In re Water Rights in Irrigation Div. No. 1, 181 Colo. 395, 510 P.2d 323 (1973) (decided under former law).

**Any person dissatisfied with any decision of the commission may take an appeal to the appropriate district court and those proceedings shall be de novo.** Should a person take a timely appeal even after the commission's review and approval of a management district's proposed corrective measure, the measure would remain inoperative and without legal effect until the court should approve it; therefore, by this elaborate reviewing scheme, the general assembly intended to allow for the full development of issues and interests and their cautious scrutiny by both the agency and state judiciary before a decision or regulation would become operative upon persons having such a vital interest affected as the use and appropriation of water. Jackson v. Colo., 294 F. Supp. 1065 (D. Colo. 1968).

**Appeals from actions of the water commission should be taken to the court of the county wherein the water rights or wells are situated.** North Kiowa-Bijou Mgt. Dist. v. Ground Water Comm'n, 180 Colo. 314, 505 P.2d 377 (1973).

**Subject matter jurisdiction for appeal of denial of application is invoked by the filing of a timely notice of appeal in the district court.** While service of notice of the appeal requires personal service on all interested parties, accomplishing personal service within 30 days is a procedural requirement the violation of which does not mandate, but may justify, dismissal of the appeal. Thus, district court's dismissal of appeal for lack of subject matter jurisdiction is reversed and remanded for a hearing to determine whether the failure to timely serve all interested parties is sufficient cause for dismissal of the appeal. Eagle Peaks Farm v. Ground Wtr. Mgmt. Dist., 7 P.3d 1006 (Colo. App. 1999).

**Review of state engineer's actions on well permit applications.** The modified doctrine of prior appropriation provided for in the Colorado ground water management act applies to nontributary ground water, and rights to such water in designated ground water basins must be obtained through the procedures established in that act. Rights to nontributary ground water not located in a designated basin may be obtained only through application for a well permit from the state engineer under § 37-90-137. Review of the state engineer's action on well permit applications may be obtained under § 24-4-106, as prescribed by this section, for appeals taken before the 1983 revision of this section became applicable. State Dept. of Natural Res. v. Southwestern Colo. Water Conservation Dist., 671 P.2d 1294 (Colo. 1983), cert. denied, 466 U.S. 944, 104 S. Ct. 1929, 80 L. Ed.2d 474 (1984).

**The "acts" and "decisions" of the commission referenced in this section are non-rule-making in nature,** such as those involving the application of statutes or rules to specific well permit applications, water rights, change of water rights, or other matters focusing on particular water users in specific circumstances. Colo. Ground Water Comm'n v. Eagle Peak Farms, 919 P.2d 212 (Colo. 1996).

**The general assembly did not intend to subject the commission to de novo review of any type.** Agency rulemaking is quasi-legislative, not quasi-judicial, in character. De novo review of legislative proceedings does not take the traditional form of a new trial on the merits. Instead, it means that any relevant evidence may be introduced to prove illegality or the abuse of legislative discretion. Colo. Ground Water Comm'n v. Eagle Peak Farms, 919 P.2d 212 (Colo. 1996).

**Upon application for well, court determines amount of water available for appro-**

**priation.** In determining whether an application for a well should be granted, the trial court must initially determine the amount of ground water that is available for appropriation under the commission's "40% depletion in 25 years" formula. *Berens v. Ground Water Comm'n*, 200 Colo. 170, 614 P.2d 352 (1980).

**Inherent in determination are acres being irrigated and water applied to acres.** Inherent in the determination of the amount of ground water available for appropriation in a particular three-mile circle are two issues relating to the three-mile circle: (1) How many acres are being irrigated in the three-mile circle; and (2) How much ground water is being applied to each acre under irrigation? Only after specific findings have been made on each issue may the trial court reach a conclusion as to the quantity of existing claims senior to applicants. *Berens v. Ground Water Comm'n*, 200 Colo. 170, 614 P.2d 352 (1980).

**Upon determining amount of available water, court finds quantity of existing senior claims.** Upon determining the amount of ground water available for appropriation in the three-mile circle surrounding the point of the applicant's proposed well, the trial court must then make a specific finding as to the quantity of existing claims senior to applicants. *Berens v. Ground Water Comm'n*, 200 Colo. 170, 614 P.2d 352 (1980).

**Where conditional permits unexpired, court assumes full conditional appropriation used.** Where conditional permits have not expired as of the date of trial, the trial court should assume that the full conditional appropriation will be put to beneficial use. *Berens v. Ground*

*Water Comm'n*, 200 Colo. 170, 614 P.2d 352 (1980).

**Where court finds number of irrigated acres at time permits expired.** Once it has been determined that some or all of the conditional permits senior to the applicant for water have expired, the trial court must make an additional finding as to the number of acres under irrigation at the time those permits expired. *Berens v. Ground Water Comm'n*, 200 Colo. 170, 614 P.2d 352 (1980).

**Plaintiff's constitutional rights should be fully protected by the procedures made available by the act,** and the United States district court cannot presume otherwise. *Jackson v. Colo.*, 294 F. Supp. 1065 (D. Colo. 1968).

**By entertaining an adjudication of water obtained through an underground well, the court in no way clothes itself with exclusive jurisdiction** as to injunctions relating to those water priorities. *Larrick v. District Court*, 177 Colo. 237, 493 P.2d 647 (1972).

**Where an action is brought in a district court of one county to adjudicate priorities in a district, a court acquires and retains exclusive jurisdiction to adjudicate priorities** throughout the district, because exclusive jurisdiction to adjudicate priorities is a different matter than exclusive jurisdiction to entertain any future injunctive suit. *Larrick v. District Court*, 177 Colo. 237, 493 P.2d 647 (1972).

**Judgment upheld designating area as ground water basin.** *Hayes v. State*, 178 Colo. 447, 498 P.2d 1119 (1972).

**Applied** in *Peterson v. Ground Water Comm'n*, 195 Colo. 508, 579 P.2d 629 (1978); *Pioneer Irrigation Dists. v. Danielson*, 658 P.2d 842 (Colo. 1983).

**37-90-116. Fees.** (1) The state engineer or the commission shall collect the following fees:

- (a) (I) Repealed.
- (II) Effective July 1, 2006, with an application for the use of ground water, one hundred dollars, which sum shall not be refunded.
- (b) Repealed.
- (c) (I) Repealed.
- (II) Effective July 1, 2006, for issuing a permit to modify or replace an existing well, one hundred dollars.
- (d) For making a copy of a document filed in his office, fifty cents per page or fraction thereof;
- (e) For certifying copies of documents, records, or maps, two dollars for each certification;
- (f) The actual expenses of publication, if any is required, which sums shall be promptly billed to the applicant and paid prior to the approval of any permit or other application, unless the commission requires the applicant to pay these expenses directly to the newspaper, and the applicant provides a proof of such payment to the commission. All fees for publication expenses collected by the state engineer or by the commission shall be transmitted to the state treasurer, who shall credit them to the water resources cash fund created in section 37-80-111.7 (1).
- (g) With an objection to an application for the use of ground water, ten dollars, which sum shall not be refunded;



(h) (I) Repealed.

(II) Effective July 1, 2006, with an application for any change in a well permit, whether conditional or final, submitted pursuant to section 37-90-111 (1) (g), one hundred dollars, which sum shall not be refunded.

(i) (I) Repealed.

(II) Effective July 1, 2006, with a request to extend the expiration date on a well permit, other than a well permit issued pursuant to section 37-90-105, sixty dollars.

(2) Departments and agencies of the state of Colorado shall be exempt from the payment of fees for applications for the use of ground water or for a permit to construct a well.

(3) Notwithstanding the amount specified for any fee in subsection (1) of this section, the commission by rule or as otherwise provided by law may reduce the amount of one or more of the fees if necessary pursuant to section 24-75-402 (3), C.R.S., to reduce the uncommitted reserves of the fund to which all or any portion of one or more of the fees is credited. After the uncommitted reserves of the fund are sufficiently reduced, the commission by rule or as otherwise provided by law may increase the amount of one or more of the fees as provided in section 24-75-402 (4), C.R.S.

**Source:** L. 65: R&RE, p. 1256, § 1. C.R.S. 1963: § 148-18-15. L. 69: p. 1199, § 1. L. 71: p. 1316, § 12. L. 85: IP(1) and (1)(f) amended and (1)(b) repealed, pp. 1177, 1178, §§ 8, 14, effective May 31. L. 87: (1)(a), (1)(c), and (1)(h) amended, p. 1301, § 5, effective July 2. L. 98: (3) added, p. 1344, § 73, effective June 1; (1)(f) amended and (1)(i) added, p. 1222, § 12, effective August 5. L. 2003: (1)(a), (1)(c), (1)(h), and (1)(i) amended, p. 45, § 5, effective (see editor's note); (1)(a)(I)(A), (1)(a)(II), (1)(c)(I)(A), (1)(c)(II), (1)(h)(I)(A), and (1)(h)(II) amended, p. 1684, § 16, effective May 14. L. 2012: (1)(f) amended, (SB 12-009), ch. 197, p. 791, § 3, effective July 1.

**Editor's note:** (1) Section 10 of chapter 7, Session Laws of Colorado 2003, provides for an effective date of March 1, 2003; however, the Governor did not sign the act until March 5, 2003.

(2) Subsection (1)(a)(I)(B) provided for the repeal of subsection (1)(a)(I), subsection (1)(c)(I)(B) provided for the repeal of subsection (1)(c)(I), subsection (1)(h)(I)(B) provided for the repeal of subsection (1)(h)(I), and subsection (1)(i)(I)(B) provided for the repeal of subsection (1)(i)(I), effective July 1, 2006. (See L. 2003, p. 45.)

(3) Section 13 of chapter 197, Session Laws of Colorado 2012, provides that the act amending subsection (1)(f) applies to revenues credited on or after July 1, 2012.

**Cross references:** For the legislative declaration contained in the 2003 act amending subsections (1)(a), (1)(c), (1)(h), and (1)(i), see section 1 of chapter 7, Session Laws of Colorado 2003.

**37-90-117. Water conservation board - duties.** The Colorado water conservation board has the power, and it is its duty, to investigate and determine the nature and extent of the ground water resources of the state of Colorado. It is also the duty of said board to study and determine the effect, if any, of the withdrawal of ground water upon aquifer supply and upon the surface flow of streams, and the information obtained thereby shall be made available to the state engineer and the ground water commission and any designated ground water management district. Nothing in this section shall be construed as impairing the authority of the state engineer, the ground water commission, or any ground water management district to make such investigation as it may find necessary or desirable to enable it to perform its duties under this article.

**Source:** L. 65: R&RE, p. 1257, § 1. C.R.S. 1963: § 148-18-16.

**Cross references:** For other duties of the Colorado water conservation board, see § 37-60-106.

**37-90-118. Ground water management districts - formation.** Within areas determined as designated ground water basins by action of the commission in accordance with section 37-90-106, ground water management districts may be formed in the manner, and

having the power, provided in sections 37-90-118 to 37-90-135; but no district shall be organized unless all ground water aquifers containing designated ground water within the geographic boundaries of the district have been included as a part of the district by the commission.

**Source:** L. 65: R&RE, p. 1257, § 1. C.R.S. 1963: § 148-18-17. L. 85: Entire section amended, p. 1177, § 9, effective May 31.

#### ANNOTATION

Once a basin is so designated, the act gives tax-paying electors in the designated area the right to create ground water management districts within the basin, so any district thus formed, if approved by the commission, is a governmental subdivision of the state of Colorado, and a corporate body with the powers of a public or quasi-municipal corporation. North

Kiowa-Bijou Mgt. Dist. v. Ground Water Comm'n, 180 Colo. 314, 505 P.2d 377 (1973); Upper Black Squirrel Creek v. Goss, 993 P.2d 1177 (Colo. 2000).

**Formation of ground water management districts is optional.** Cherokee Water Dist. v. State, Ground Water Comm'n, 196 Colo. 192, 585 P.2d 586 (1978).

**37-90-119. Creation of districts - proposal - submission - changes - proposed boundaries.** A proposal for the formation of a designated ground water management district must be first submitted to the ground water commission, which shall make a hydrologic, geographic, and geologic evaluation of the proposed boundaries and recommend any changes in such boundaries as are indicated by such evaluation. No further steps for the formation of such district shall be taken until the commission, in writing, gives its consent to the boundaries thereof. The commission shall give either its consent or disapproval of the proposed boundaries within ninety days after the proposal has been submitted to it.

**Source:** L. 65: R&RE, p. 1257, § 1. C.R.S. 1963: § 148-18-18.

#### ANNOTATION

**Law reviews.** For article, "Principles and Law of Colorado's Nontributary Ground Water", see 62 Den. U. L. Rev. 809 (1985).

**37-90-120. Management districts - petition - signatures required - filing.** Following receipt of the consent required by section 37-90-119, a petition calling for formation of the proposed district may be filed with the commission. The petition shall be signed by not less than fifteen percent of the taxpaying electors within the proposed district.

**Source:** L. 65: R&RE, p. 1258, § 1. C.R.S. 1963: § 148-18-19. L. 67: p. 276, § 5.

**37-90-121. Management districts - petition - contents - minor defects - amendment.** (1) The petition referred to in section 37-90-120 shall set forth:

(a) The name of the proposed district and boundaries thereof;

(b) A proposed division of the district into divisions as nearly equal in size as may be practicable, and considering the population thereof, each of which is to be represented by a director, who shall be a resident taxpaying elector in such division or reside within the designated ground water basin within which the district is located and be a resident agriculturist who owns and actively farms or ranches land located within such division;

(c) The number of directors that the district shall have if formed, not less than five nor more than fifteen in number, together with the name and address of each of the proposed directors, the division to be represented by each of them, and their terms of office, which shall be so designated that approximately one-half of them shall expire on the first Tuesday in March of the second year after the organization of the district is completed, and the



remainder of them on the first Tuesday in March of the fourth year after the organization of the district is completed;

(d) Where the offices of such proposed district are to be maintained; and

(e) A prayer that the organization of the district be submitted to a vote of the taxpaying electors as provided in section 37-90-124.

(2) No petition for the organization of a district with the requisite signatures shall be declared null and void on account of minor defects, but the commission may at any time, prior to final determination of the sufficiency thereof, permit the petition to be amended in form to conform to the facts. Several similar petitions or duplicate copies of the same petition for the organization of the same district may be filed and shall together be regarded as one petition. All petitions, filed prior to the determination of the sufficiency of such petition, shall be considered as though filed with the first petition placed on file.

**Source:** L. 65: R&RE, p. 1258, § 1. C.R.S. 1963: § 148-18-20. L. 67: p. 276, § 6. L. 2009: (1)(b) amended, (HB 09-1159), ch. 43, p. 164, § 1, effective August 5.

**37-90-122. Management district - petition - certification of signatures - hearing - notice - publication.** The commission shall examine the petition, and, if it finds that it bears the requisite number of signatures and otherwise meets the stated requirements, it shall thereupon set a date for hearing upon such petition and shall cause notice of such hearing, together with a copy of such petition, to be published, the final publication being not less than ten days nor more than thirty days prior to the date set for such hearing. The cost of such publication shall be paid by the petitioners and shall be advanced by them prior to publication.

**Source:** L. 65: R&RE, p. 1259, § 1. C.R.S. 1963: § 148-18-21.

**37-90-123. Management districts - hearing - objections - change of boundaries.** At the time set for such hearing, the commission shall examine the petition and hear objections thereto and may order changes in the boundaries thereof by the inclusion or removal of land therefrom upon finding that such change would be hydrologically, geologically, and geographically sound. The action of the commission may be reviewed by the district court in appeal proceedings filed within twenty days after its decision has been announced, which decision shall be announced within ninety days after the hearing.

**Source:** L. 65: R&RE, p. 1259, § 1. C.R.S. 1963: § 148-18-22.

**37-90-124. Election on organization.** (1) If, after the completion of the hearing on the feasibility of the organization of a district, it is determined that such district shall be organized, the commission shall forthwith make an order allowing the prayer of the petition, and, by order duly entered upon its record, shall call an election of the taxpaying electors in the district for the purpose of determining whether such district shall be organized, and shall set the date for such election.

(2) The commission shall thereupon publish a notice, the final publication to be not less than ten days nor more than thirty days immediately preceding the election, which notice shall state: The fact of filing of the petition; in summary form, the information required by section 37-90-121 (1) to be included in the petition; that an election will be held to decide the question of organization of the proposed district; the date of such election; the polling places at which such election is to be held; the qualifications of those eligible to vote at such election; and the specific question to be submitted.

(3) The commission shall appoint three taxpaying electors of the district as judges for each designated polling place. The election shall be held and conducted as nearly as may be in the same manner as general elections in this state. There shall be no special registration for such election, but, for the purpose of determining qualifications of electors, the judges shall be permitted to use the last official registration lists of electors residing in the district and a certified list of taxpayers in the district prepared by the county treasurer

and, in addition, may require the execution of an affidavit concerning the qualification of any such taxpaying elector to vote.

(4) At such election the voters shall vote for or against the organization of the district. The judges of each polling place shall certify the returns of the election to the ground water commission. If a majority of votes cast at said election are against the organization of the district, the commission shall forthwith dismiss the petition, and no election shall be held on the original petition or another petition for organization of the same district within one year of such dismissal.

(5) If a majority of the votes cast at said election are for the organization of said district, the commission, by order duly entered of record, shall declare the district organized, define the boundaries thereof, and give it the corporate name designated in the petition by which in all proceedings it shall thereafter be known and designate the members of the first board of directors, as named in the organization petition and the districts they represent. Thereupon the district shall be a governmental subdivision of the state of Colorado and a body corporate with all the powers of a public or quasi-municipal corporation.

**Source:** L. 65: R&RE, p. 1259, § 1. C.R.S. 1963: § 148-18-23. L. 67: p. 276, § 7.

**Cross references:** For elections generally, see articles 1 to 13 of title 1.

**37-90-125. Filing decree.** Within thirty days after the district has been declared a corporation by the commission, it shall transmit to the county clerk and recorder of each of the counties in which the district or a part thereof extends copies of the decree of the commission incorporating the district.

**Source:** L. 65: R&RE, p. 1260, § 1. C.R.S. 1963: § 148-18-24. L. 67: p. 281, § 12.

**37-90-126. Management district - directors - qualifications - oath - bond - vacancies.** The members of the board of directors shall meet the qualifications established in section 37-90-121 (1) (b). Each member of the board shall take an oath of office, shall give bond in the sum of five thousand dollars conditioned that he or she shall faithfully perform the duties of director and of such further office to which he or she may be elected in such district, and shall account for all funds or property coming into his or her hands as such director or other officer. Such bonds shall run to the district, shall be signed by a surety approved by the ground water commission, and shall be filed and recorded in the office of the state engineer. When such bond is so filed and approved, such person so elected shall take and hold office until his or her successor is elected and qualified. When a vacancy occurs on the board, such vacancy shall be filled by the remaining members of the board.

**Source:** L. 65: R&RE, p. 1260, § 1. C.R.S. 1963: § 148-18-25. L. 67: p. 277, § 8. L. 2009: Entire section amended, (HB 09-1159), ch. 43, p. 164, § 2, effective August 5.

#### ANNOTATION

**An appointed director must stand for election at the district's next regular election.** This article does not address the issue but § 1-12-207 of the election code does. Because the election code was intended to provide answers

to election procedures not included in other statutes, the election code provision controls. *Deutsch v. Kalcevic*, 140 P.3d 340 (Colo. App. 2006).

**37-90-127. Management district - directors - election - term of office.** As the terms of the members of the board of directors expire, their successors shall be nominated by petitions containing the signatures of not less than fifteen percent of the number of qualified taxpaying electors of the division who voted at the last preceding district election, to be filed with the secretary of the district not less than thirty-five days before the election; thereafter, the members shall be elected for terms of four years by the plurality vote of the taxpaying



electors of the division of the district which they represent. Such elections shall be held on the first Tuesday in February preceding the expiration of such terms and shall be conducted by the district board in the general manner prescribed in section 37-90-124.

**Source:** L. 65: R&RE, p. 1261, § 1. C.R.S. 1963: § 148-18-26. L. 2012: Entire section amended, (SB 12-175), ch. 208, p. 883, § 154, effective July 1.

**Editor's note:** Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending this section applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

#### ANNOTATION

**To have standing to challenge the appointment of a director for a division,** an elector must be a resident of that division. *Deutsch v. Kalcevic*, 140 P.3d 340 (Colo. App. 2006).

**37-90-128. Management district - directors - no compensation - expenses.** The members of the board of directors shall receive no compensation but shall be paid their actual expenses while engaged in the business of such district.

**Source:** L. 65: R&RE, p. 1261, § 1. C.R.S. 1963: § 148-18-27.

**37-90-129. Management district - officers - election.** The board of directors shall annually elect a president, vice-president, secretary, treasurer, and such other officers as may be necessary.

**Source:** L. 65: R&RE, p. 1261, § 1. C.R.S. 1963: § 148-18-28.

**37-90-130. Management districts - board of directors.** (1) The district board has the duty and responsibility of consulting with the commission on all ground water matters affecting the district to determine whether proposed restrictions or regulations are suitable for such area, to determine in conjunction with the commission whether the area of the district should be enlarged or contracted, to cooperate with the commission and the state engineer in the assembling of data on the ground water aquifers in the area and the enforcement of regulations or restrictions which may be imposed thereon, and to assist the commission and the state engineer to the end of conserving the ground water supplies of the area for the maximum beneficial use thereof.

(2) After the issuance of any well permit for the use of ground water within the district by the ground water commission as provided in sections 37-90-107 and 37-90-108, the district board has the authority to regulate the use, control, and conservation of the ground water of the district covered by such permit by any one or more of the following methods, but the proposed controls, regulations, or conservation measures shall be subject to review and final approval by the ground water commission if objection is made in accordance with section 37-90-131:

(a) To provide for the spacing of wells producing from the ground water aquifer or subdivision thereof and to regulate the production therefrom so as to minimize as far as practicable the lowering of the water table or the reduction of the artesian pressure;

(b) To acquire lands for the erection of dams and for the purpose of draining lakes, draws, and depressions, and to construct dams, drain lakes, depressions, draws, and creeks, and to install pumps and other equipment necessary to recharge the ground water reservoir or subdivision thereof;

(c) To develop comprehensive plans for the most efficient use of the water of the ground water aquifer or subdivision thereof and for the control and prevention of waste of such water, which plans shall specify in such detail as may be practicable the acts, procedure, performance, and avoidance which are or may be necessary to effect such plans, including specifications therefor; to carry out research projects, develop information, and

determine limitations, if any, which should be made on the withdrawal of water from the ground water aquifer or subdivisions thereof; to collect and preserve information regarding the use of such water and the practicability of recharge of the ground water aquifer; and to publish such plans and information and bring them to the notice and attention of the users of such ground water within the district and to encourage their adoption and execution;

(d) To require the owner or operator of any land in the district upon which is located any open or uncovered well to close or cap the same permanently with a covering capable of sustaining weight of not less than four hundred pounds, except when said well is in actual use by the owner or operator thereof;

(e) To promulgate reasonable rules and regulations for the purpose of conserving, preserving, protecting, and recharging the ground water of the ground water aquifer or subdivision thereof, in conformity with the provisions of this article;

(f) To prohibit, after affording an opportunity for a hearing before the board of the local district and presentation of evidence, the use of ground water outside the boundaries of the district where such use materially affects the rights acquired by permit by any owner or operator of land within the district;

(g) In the control and administration of the quantity of ground water extracted from the aquifer, to adopt such devices, procedures, measures, or methods as it deems appropriate to effectuate this purpose;

(h) To promulgate reasonable rules and regulations with respect to the protection and compensation of the owners of any small capacity wells as defined in section 37-90-105 which may be injured by irrigation wells;

(i) To represent the district at any hearings or proceedings conducted or authorized by the commission affecting any water rights, either actual or potential, within the district;

(j) To exercise such other administrative and regulatory authority concerning the ground waters of the district as, without the existence of the district, would otherwise be exercised by the ground water commission.

(3) All special and regular meetings of the board shall be held at locations which are within the boundaries of the district or which are within the boundaries of any county in which the district is located, in whole or in part, or in any county so long as the meeting location does not exceed twenty miles from the district boundaries. The provisions of this subsection (3) may be waived only if the following criteria are met:

(a) The proposed change of location of a meeting of the board appears on the agenda of a regular or special meeting of the board; and

(b) A resolution is adopted by the board stating the reason for which a meeting of the board is to be held in a location other than under the provisions of this subsection (3) and further stating the date, time, and place of such meeting.

(4) After the issuance of any well permit for a small capacity well within the district pursuant to section 37-90-105, the district has the authority to enforce compliance with the terms and conditions governing the use of the ground water allowed by such permit to ensure that such use is within the scope of what is allowed by section 37-90-105 and the well permit.

**Source:** L. 65: R&RE, p. 1261, § 1. C.R.S. 1963: § 148-18-29. L. 71: p. 1316, § 13. L. 75: (2)(h) added, p. 1396, § 1, effective July 1. L. 79: IP(2) amended and (2)(i) and (2)(j) added, p. 1375, § 8, effective June 7. L. 85: (2)(h) amended, p. 1177, § 10, effective May 31. L. 90: (3) added, p. 1506, § 23, effective July 1. L. 98: IP(2) amended and (4) added, p. 1222, § 13, effective August 5.

#### ANNOTATION

The management district is a corporate government subdivision of the state of Colorado which is formed for the purpose of assisting the commission on all matters affecting

the district area, which include enforcing commission regulations, providing data on underground aquifers within the area, determining if commission regulations are suitable for the area,



and helping conserve the ground water for maximum beneficial use. Jackson v. Colo., 294 F. Supp. 1065 (D. Colo. 1968).

**The act provides that the district, along with its powers to enforce commission regulations, has general authority to regulate the use, control, and conservation of ground waters within the district, so to accomplish such purposes, the district board of directors has the power to impose upon water users within the district certain rules and regulations, subject to the approval of the commission if timely objection is filed to such a rule by a water user within the district; among others, the district possesses the power to promulgate regulations relating to the limitation upon exportation of ground waters outside of the district, where such use "materially affects the rights acquired by permit by any owner or operator of land within the district".** North Kiowa-Bijou Mgt. Dist. v. Ground Water Comm'n, 180 Colo. 314, 505 P.2d 377 (1973).

**Where a management district exists, the management district, not the ground water commission, has authority to administer designated ground water priorities within its boundaries.** Upper Black Squirrel Creek v. Goss, 993 P.2d 1177 (Colo. 2000).

**The Ground Water Management Act empowers the ground water commission, or a water management district where one exists, to issue well withdrawal curtailment orders in the administration of priorities, but does not impose a non-discretionary duty to do so.** Upper Black Squirrel Creek v. Goss, 993 P.2d 1177 (Colo. 2000).

**And, the management district's rules, its control and conservation measures, and its well spacing criteria apply to the ground water commissions's injury analysis in the permitting**

phase, as they do when the management district addresses questions of administration and enforcement. Upper Black Squirrel Creek v. Goss, 993 P.2d 1177 (Colo. 2000).

**Ground water management district may, by rule, limit allowable ground water pumping by previously-permitted wells, subject to review of the rules by the ground water commission. The vested property right created by a permit is not unchangeable, but rather is subject to management by the district or, in the absence of a district, by the commission.** Meridian v. Colo. Ground Water, 240 P.3d 382 (Colo. App. 2009).

**With respect to issuing permits and promulgating regulations the act makes available to affected water users the procedures providing for notice, hearing, and review of the commission and the management district measures.** Jackson v. Colo., 294 F. Supp. 1065 (D. Colo. 1968).

**Provisions for review of "control measures" refer to general district regulations and not individual decisions made within the ambit of such control measures.** North Kiowa-Bijou Mgt. Dist. v. Ground Water Comm'n, 180 Colo. 314, 505 P.2d 377 (1973).

**Federal court decision that plaintiff challenging management district's water control measure should exhaust administrative remedies through review by ground water commission is not res judicata on the issue of commission's jurisdiction to review management district's application and interpretation of measure.** North Kiowa-Bijou Mgt. Dist. v. Ground Water Comm'n, 180 Colo. 314, 505 P.2d 377 (1973).

**Applied in** Broyles v. Fort Lyon Canal Co., 638 P.2d 244 (Colo. 1981).

**37-90-131. Management district - board of directors - control measures - hearing - notice - publication - order.** (1) (a) Whenever the board of directors determines that controls, regulations, or conservation measures are necessary in order to ensure the proper conservation of ground water within the district, it shall confer with the ground water commission and ground water users within the district. No such measures or regulations shall be instituted until after a public hearing. Notice of such hearing shall be published. Such notice shall state the time and place of the hearing and in general terms the corrective measures or regulations proposed. Within sixty-three days after such hearing, the board shall announce the measures or regulations ordered to be taken and shall cause notice of such action to be published. The board has the authority to compel compliance with such measures or regulations by an action brought in the district court of the county in which any failure to comply is found to exist.

(b) Any person adversely affected or aggrieved by the announcement of control or conservation measures or regulations adopted by the district board may appeal such decision to the ground water commission by filing a notice of appeal and the grounds therefor with the commission not later than thirty-five days after the date of last publication. The commission shall hear all such appeals pursuant to section 37-90-113. The commission shall have authority to affirm or reject the measures or regulations adopted by the district or to modify such measures or regulations but only upon consent from the district board. Judicial review of commission actions in such appeals may be taken pursuant to section 37-90-115.

(c) Any person adversely affected or aggrieved by an act of the district board, other than the announcement of control or conservation measures or regulations, has the right to be heard by the board. Such person shall file a written request for a hearing that states the basis of the alleged injury. Unless agreed otherwise by all parties to a hearing or unless otherwise approved by the district due to extenuating circumstances, a hearing shall be held within one hundred eighty-two days after filing the request for such a hearing. Upon thirty-five days' written notice to all adverse parties, the district shall conduct a hearing upon the matter. Hearing procedures shall be as informal as possible, with due regard for the rights of the parties. All parties shall have the right to subpoena witnesses and to be heard either in person or by attorney. The district board may have such hearings conducted before an agent or hearing officer. After such hearing, the district board shall issue a written decision containing its findings and conclusions and shall serve its decision upon all parties by first-class mail. Judicial review of such district decisions may be taken in the manner and governed by the standards set forth for review of commission and state engineer decisions in section 37-90-115.

(2) Subject to review by the ground water commission pursuant to subsection (1) of this section, the board may institute control measures or regulations to prescribe satisfactory and economical measuring methods for the measurement of water levels in and the amount of water withdrawn from wells and to require reports to be made at the end of each pumping season showing the date and water level at the beginning of the pumping season, the date and water level at the end of the pumping season, and any period of more than thirty-five days cessation of pumping during such pumping season.

**Source:** L. 65: R&RE, p. 1262, § 1. C.R.S. 1963: § 148-18-30. L. 71: p. 1316, § 14. L. 79: (1) R&RE, p. 1375, § 9, effective June 7. L. 85: (1)(b) R&RE and (1)(c) added, pp. 1177, 1178, §§ 11, 12, effective May 31. L. 98: Entire section amended, p. 1223, § 14, effective August 5. L. 2012: Entire section amended, (SB 12-175), ch. 208, p. 883, § 155, effective July 1.

**Editor's note:** Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending this section applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

## ANNOTATION

**Law reviews.** For comment on the Colorado Administrative Procedure Act and its construction, see 51 Den. L.J. 275 (1974).

**The act prescribes review and final approval within the administrative process and it is significant that the commission's authority with respect to the management district's proposed measure is not limited to appellate review but involves the commission's rule-making power, and in effect all management district regulations objected to by interested persons become commission regulations upon approval.** Jackson v. Colo., 294 F. Supp 1065 (D. Colo. 1968).

**Proposed control, regulations, or conservation measures of the management districts are subject to review and final approval by the ground water commission if objection is made within 30 days after the publication of the corrective measure.** Jackson v. Colo., 294 F. Supp. 1065 (D. Colo. 1968).

The promulgation and adoption by management districts of proposed regulations and control measures applicable generally to water users

within the district may be reviewed by the commission. In re Water Rights in Irrigation Div. No. 1, 181 Colo. 395, 510 P.2d 323 (1973) (decided under former law).

**Following the pronouncement of any control measure, the district is required to send notice of such measures to every known ground water user in the district by registered or certified mail.** North Kiowa-Bijou Mgt. Dist. v. Ground Water Comm'n, 180 Colo. 314, 505 P.2d 377 (1973).

**The requirement that every user of ground water in a district be sent registered notice of every decision by the district pertaining to specific individuals would surely be a strained construction of legislative intent, as such notice requirement is obviously intended as a method of notifying water users of general control measures which the district proposes to adopt.** North Kiowa-Bijou Mgt. Dist. v. Ground Water Comm'n, 180 Colo. 314, 505 P.2d 377 (1973).

**The consequence of lodging a timely objection to a management district's proposed measure is to defer finality of the administra-**



**tive process** and allow for change and correction within the administrative agency should such be needed. *Jackson v. Colo.*, 294 F. Supp. 1065 (D. Colo. 1968).

**Provisions for review of "control measures" refer to general district regulations** and not individual decisions made within the ambit of such control measures. *North Kiowa-Bijou Mgt. Dist. v. Ground Water Comm'n*, 180 Colo. 314, 505 P.2d 377 (1973).

**In deference to the expertise of administrative agencies and in an attempt to avoid premature review** of incomplete regulations and orders, no person is entitled to judicial relief in the federal courts for threatening injury until he has exhausted his prescribed administrative remedies, and with final approval pending, no obligation nor fixing of civil or criminal liability has been imposed on the plaintiff as a consummation of the administrative process; hence, plaintiff's failure to exhaust his administrative remedies goes to the very jurisdiction of the United States district court, since the exhaustion requirement under the present facts is a prerequisite to invoking federal jurisdiction. *Jackson v. Colo.*, 294 F. Supp. 1065 (D. Colo. 1968).

**Federal court decision that plaintiff challenging management district's water control measure should exhaust administrative rem-**

**edies** through review by ground water commission is not res judicata on the issue of commission's jurisdiction to review management district's application and interpretation of measure. *North Kiowa-Bijou Mgt. Dist. v. Ground Water Comm'n*, 180 Colo. 314, 505 P.2d 377 (1973).

**Jurisdiction of district court rather than ground water commission controls review of action of management district.** *North Kiowa-Bijou Mgt. Dist. v. Ground Water Comm'n*, 180 Colo. 314, 505 P.2d 377 (1973).

Specific decisions made by a district in the execution or enforcement of district control measures may be reviewed by the appropriate district court. *In re Water Rights in Irrigation Div. No. 1*, 181 Colo. 395, 510 P.2d 323 (1973) (decided under former law).

**Where a management district exists, the management district, not the ground water commission, has authority to administer designated ground water priorities within its boundaries.** *Upper Black Squirrel Creek v. Goss*, 993 P.2d 1177 (Colo. 2000).

**This section clearly provides a mechanism by which the management district board receives and hears complaints regarding injury.** *Upper Black Squirrel Creek v. Goss*, 993 P.2d 1177 (Colo. 2000).

**37-90-132. Management district - board of directors - taxes - levy - limitation.** The board of directors may levy and collect annually taxes necessary to finance the activities of such district to the amount of not more than two mills on the dollar of the valuation for assessment of all taxable property within the district. It shall, in accordance with the schedule prescribed by section 39-5-128, C.R.S., certify its mill levy to the board of county commissioners of the counties wholly or partially within the district, who shall extend the same on the county tax list, and the same shall be collected by the county treasurer in the same manner as state and county taxes are collected. In addition, annually the board of directors of the district may assess and certify a special assessment on all water wells, except those wells described in section 37-90-105, in the district not to exceed fifteen cents per acre-foot of the maximum annual volume of the appropriation of each such well. Said assessment shall be collected by the county treasurer in the same manner as other special assessments. It is the duty of the board to apply for and to receive from the county treasurers all money to the credit of the district.

**Source:** L. 65: R&RE, p. 1263, § 1. C.R.S. 1963: § 148-18-31. L. 67: p. 277, § 9. L. 71: p. 1317, § 15. L. 77: Entire section amended, p. 1516, § 86, effective July 15. L. 79: Entire section amended, p. 1375, § 10, effective June 7. L. 85: Entire section amended, p. 1178, § 13, effective May 31.

**37-90-133. Management district - claims - warrants - payment.** All claims against ground water management districts may be paid by warrants or orders, duly drawn against the district, as authorized by the board.

**Source:** L. 65: R&RE, p. 1263, § 1. C.R.S. 1963: § 148-18-32.

**37-90-134. Management district - issuance of bonds - indebtedness - submission to electors.** (1) To pay for the construction, operation, and maintenance of any works, and expenses preliminary and incidental thereto, which the board is authorized to construct for

the benefit of the district, the board is authorized to enter into contracts providing for payment in installments or to issue negotiable bonds of the district. If bonds are authorized, the same shall bear interest at a rate such that the net effective interest rate of the issue does not exceed the maximum net effective interest rate authorized, payable semiannually, and shall be due and payable not more than fifty years from their dates. The form, terms, and provisions of said bonds or contracts, provisions for their payment, and conditions for their retirement and calling, not inconsistent with law, shall be vested and determined by the board, and they shall be issued in payment of the works, equipment, expenses, and interest during and after the period of construction. Said bonds or contracts shall be executed in the name of and on behalf of the district and signed by the president of the board, the seal of the district affixed thereto and attested by the secretary of the board. Said bonds or contracts must be in such denominations or upon such conditions as the board determines and shall be payable to bearer and may be registered in the office of the county treasurer of each of the counties wherein the district or part of it is situated, with the interest coupons payable to bearer, which shall bear the facsimile signature of the president of the board. Bond interest shall be exempt from all state, county, municipal, school, and other taxes imposed by any taxing authority of the state of Colorado and shall not be sold at less than par and accrued interest.

(2) Whenever the board incorporated under this article, by resolution adopted by majority of said board, determines that the interests of said district and the public interest or necessity demand the acquisition, construction, or completion of any source of water supply, waterworks, or other improvements or facilities, or the making of any contract with the United States or other persons or corporations, to carry out the objects and purposes of said district, wherein the indebtedness or obligation is created, to satisfy which shall require a greater expenditure than the ordinary annual income and revenue of the district permits, said board shall order the submission of the proposition of incurring such obligation or bonded or other indebtedness for the purposes set forth in said resolution to the qualified taxpaying electors of the district at an election held for that purpose. Any election held for the purpose of submitting any proposition of incurring such obligation or indebtedness may be held separately or may be consolidated or held concurrently with any other election authorized by law at which such qualified taxpaying electors of the district are entitled to vote. Notice of the resolution and election shall be published in a form sufficient to apprise the taxpaying electors of the objects and purposes for which the indebtedness is proposed to be incurred, the estimated cost of the works or improvement, the amount of principal of the indebtedness to be incurred therefor, and the maximum rate of interest to be paid on such indebtedness. Such resolution and notice shall also fix the date upon which such election shall be held, the manner of holding the same, and the method of voting for or against the incurring of the proposed indebtedness. Such election shall be held in the same general manner as in this article provided for the election of directors. The bond issue or indebtedness proposed shall not be valid unless a majority of those voting at the election held for that purpose vote in favor of such bond issue or indebtedness in accordance with the terms of the resolution.

**Source:** L. 65: R&RE, p. 1263, § 1. C.R.S. 1963: § 148-18-33. L. 81: (1) amended, p. 1782, § 1, effective June 18; (2) amended, p. 2029, § 37, effective July 14.

**37-90-135. Management district - dissolution - procedure - funds - disposition.** If there are no debts outstanding, the board of directors may, on its own motion or on the written petition of twenty percent of the taxpaying electors of the district, request of the ground water commission that the question of dissolution of such district be submitted to the electors of the district. The commission shall fix the date of such election, notice of which shall be given and which shall be conducted in the same manner as elections for the formation of such districts. If a majority of those voting on such question vote in favor of dissolution, the commission shall so certify to the county clerk and recorders of the counties involved and the district shall thereupon be dissolved. The question of dissolution shall not be submitted more often than once every twelve months. In case a district is dissolved the funds on hand or to be collected shall be held by the treasurer, and the directors shall



petition the district court of the county in which the main office is located for an order approving the distribution of funds to the taxpayers of the district on the same basis as collected.

**Source:** L. 65: R&RE, p. 1265, § 1. C.R.S. 1963: § 148-18-34.

**37-90-136. Unlawful to divert water for application outside of state. (Repealed)**

**Source:** L. 65: R&RE, p. 1265, § 1. C.R.S. 1963: § 148-18-35. L. 83: Entire section repealed, p. 1413, § 5, effective June 3.

**Cross references:** For diversion of groundwater outside the state, see § 37-81-101.

**37-90-137. Permits to construct wells outside designated basins - fees - permit no ground water right - evidence - time limitation - well permits - rules - repeal.** (1) On and after May 17, 1965, no new wells shall be constructed outside the boundaries of a designated ground water basin nor the supply of water from existing wells outside the boundaries of a designated ground water basin increased or extended, unless the user makes an application in writing to the state engineer for a permit to construct a well, in a form to be prescribed by the state engineer. The applicant shall specify the particular aquifer from which the water is to be diverted, the beneficial use to which it is proposed to apply such water, the location of the proposed well, the name of the owner of the land on which such well will be located, the average annual amount of water applied for in acre-feet per year, the proposed maximum pumping rate in gallons per minute, and, if the proposed use is agricultural irrigation, a description of the land to be irrigated and the name of the owner thereof, together with such other reasonable information as the state engineer may designate on the form prescribed.

(2) (a) (I) Repealed.

(II) Effective July 1, 2006, upon receipt of an application for a replacement well or a new, increased, or additional supply of ground water from an area outside the boundaries of a designated ground water basin, accompanied by a filing fee of one hundred dollars, the state engineer shall make a determination as to whether or not the exercise of the requested permit will materially injure the vested water rights of others.

(b) (I) The state engineer shall issue a permit to construct a well only if:

(A) The state engineer finds, as substantiated by hydrological and geological facts, that there is unappropriated water available for withdrawal by the proposed well and that the vested water rights of others will not be materially injured; and

(B) Except as specified in subparagraph (II) of this paragraph (b), the location of the proposed well will be more than six hundred feet from an existing well.

(II) If the state engineer, after a hearing, finds that circumstances in a particular instance so warrant, or if a court decree is entered for the proposed well location after notice has been given in accordance with sub-subparagraph (B) of this subparagraph (II), the state engineer may issue a permit without regard to the limitation specified in sub-subparagraph (B) of subparagraph (I) of this paragraph (b); except that no hearing shall be required and the state engineer may issue a well permit without regard to the limitation specified in sub-subparagraph (B) of subparagraph (I) of this paragraph (b):

(A) If the state engineer notifies the owners of all wells within six hundred feet of the proposed well by certified mail and receives no response within the time set forth in the notice;

(B) If the proposed well is part of a water court proceeding adjudicating the water right for the well, or if the proposed well is part of an adjudication of a plan for augmentation or change of water right and if evidence is provided to the water court that the applicant has given notice of the water court application, at least fourteen days before making the application, by registered or certified mail, return receipt requested, to the owners of record of all wells within six hundred feet of the proposed well;

(C) If the proposed well will serve an individual residential site and the proposed pumping rate will not exceed fifteen gallons per minute; except that, if there is an oil and gas well within six hundred feet of the surface location of the proposed well, the state engineer shall notify the owner of such well by certified mail of the proposed well and may issue the well permit subject to the limitations specified in sub-subparagraph (A) of subparagraph (I) of this paragraph (b);

(D) If the proposed well is an oil and gas well and the only wells within six hundred feet of the surface location of the proposed well are oil and gas wells; or

(E) If the proposed well is an oil and gas well, there is an existing production water well that is not an oil and gas well within six hundred feet of the surface location of the proposed oil and gas well, the state engineer has provided written notice of the application by certified mail to the owners of such wells that are not oil and gas wells within thirty-five days after receipt of a complete application for the proposed well, and the state engineer has given those to whom notice was provided thirty-five days after the date of mailing of such notice to file comments on the proposed well's application.

(c) The permit shall set forth such conditions for drilling, casing, and equipping wells and other diversion facilities as are reasonably necessary to prevent waste, pollution, or material injury to existing rights.

(d) (I) The state engineer shall endorse upon the application the date of its receipt, file and preserve such application, and make a record of such receipt and the issuance of the permit in his office so indexed as to be useful in determining the extent of the uses made from various ground water sources.

(II) The state engineer shall act upon an application filed under this section within forty-five days after its receipt.

(3) (a) (I) A permit to construct a well outside the boundaries of a designated ground water basin issued on or after April 21, 1967, shall expire one year after issuance unless, before the expiration and on forms as may be prescribed by the state engineer, the applicant to whom the permit was issued, or the well construction contractor, furnishes to the state engineer:

(A) Evidence that the well was constructed and that the pump was installed; or

(B) A showing of good cause as to why the well has not been constructed nor the pump installed and an estimate of time necessary to complete the tasks, upon which the state engineer may extend the permit for only one additional period, not to exceed one year. The limitation on the extension of well permits provided in this sub-subparagraph (B) shall not apply to well permits for federally authorized water projects contained in paragraph (d) of this subsection (3). The state engineer shall charge a fee of two hundred dollars for the extension; except that, on and after July 1, 2006, the state engineer shall charge a fee of sixty dollars for the extension.

(II) If the requirements of section 37-92-301 are met, the expiration of any permit pursuant to this paragraph (a) associated with a conditional ground water right shall not be the sole basis to determine the existence of reasonable diligence toward completion of such conditional water right.

(III) The state engineer may require the metering or other reasonable measurement of withdrawals of ground water pursuant to permits and the reasonable recording and disclosure of such measured withdrawals.

(b) Any permit to construct a well issued by the state engineer prior to April 21, 1967, shall expire on July 1, 1973, unless the applicant furnishes to the state engineer, prior to July 1, 1973, evidence that the water from such well has been put to beneficial use prior to that date. The state engineer shall give notice by certified or registered mail to all persons to whom such permits were issued at the address shown on the state engineer's records, setting forth the provisions of this subsection (3). Such notices shall be mailed not later than December 31, 1971.

(c) If evidence that the well has been constructed and that the pump was installed, as required pursuant to paragraph (a) of this subsection (3), has not been received as of the expiration date of the permit to construct a well, the state engineer shall so notify the applicant by certified mail. The notice shall give the applicant the opportunity to submit evidence that the well was constructed and that the pump was installed before the expiration



date. The evidence must be received by the state engineer within twenty-one days after receipt of the notice by the applicant and must be accompanied by a filing fee of thirty dollars. If the state engineer finds the evidence to be satisfactory, the permit shall remain in force and effect. The state engineer shall consider any records available in the state engineer's office, any evidence provided to the state engineer, and all other matters set forth in this section in determining whether the permit should remain in force and effect.

(d) In the case of federally authorized water projects wherein well permits are required by this section and have been secured, the expiration dates thereof may be extended for additional periods based upon a finding of good cause by the state engineer following a review of any such project at least annually by the state engineer.

(4) (a) In the issuance of a permit to construct a well outside a designated ground water basin and not meeting the exemptions set forth in section 37-92-602 to withdraw nontributary ground water or any ground water in the Dawson, Denver, Arapahoe, and Laramie-Fox Hills aquifers, the provisions of subsections (1) and (2) of this section shall apply.

(b) (I) Permits issued pursuant to this subsection (4) shall allow withdrawals on the basis of an aquifer life of one hundred years.

(II) Subject to the provisions of subsections (1) and (2) of this section, the amount of such ground water available for withdrawal shall be that quantity of water, exclusive of artificial recharge, underlying the land owned by the applicant or underlying land owned by another:

(A) Who has consented in writing to the applicant's withdrawal; or

(B) Whose consent exists by virtue of a lawful municipal ordinance or a quasi-municipal district resolution in effect prior to January 1, 1985, and which consent was the subject of a water court application for determination of nontributary ground water rights filed by the affected municipality or quasi-municipal district prior to January 1, 1985; or

(C) Who shall be deemed to have consented to the withdrawal of ground water pursuant to the provisions of subsection (8) of this section.

(b.5) (I) An applicant claiming to own the overlying land or to have the consent of the owner of the overlying land as contemplated in sub-subparagraph (A) of subparagraph (II) of paragraph (b) of this subsection (4) shall furnish to the state engineer, in addition to evidence of such consent, evidence that the applicant has given notice of the application by registered or certified mail, return receipt requested, no less than ten days prior to the making of the application, to every record owner of the overlying land and to every person who has a lien or mortgage upon, or deed of trust to, the overlying land recorded in the county in which the overlying land is located.

(II) For purposes of this paragraph (b.5), "person" means any individual, partnership, association, or corporation authorized to do business in the state of Colorado, or any political subdivision or public agency thereof, or any agency of the United States.

(III) The provisions of subparagraph (I) of this paragraph (b.5) do not apply to applicants whose right to withdraw the ground water has been determined by a valid decree nor to political subdivisions of the state of Colorado, special districts, municipalities, or quasi-municipal districts that have obtained consent to withdraw the ground water by deed, assignment, or other written evidence of consent where, at the time of application, the overlying land is within the water service area of such entity.

(c) Material injury to vested nontributary ground water rights shall not be deemed to result from the reduction of either hydrostatic pressure or water level in the aquifer.

(d) The annual amount of withdrawal allowed in any well permits issued under this subsection (4) shall be the same as the amount determined by court decree, if any, and may, if so provided by any such decree, provide for the subsequent adjustment of such amount to conform to the actual aquifer characteristics encountered upon drilling of the well or test holes.

(5) Any right to the use of ground water entitling its owner or user to construct a well, which right was initiated prior to July 6, 1973, as evidenced by an unexpired well permit issued prior to July 6, 1973, or a current decree, shall not be subject to the provisions of subsection (4) of this section.

(6) Rights to nontributary ground water outside of designated ground water basins may be determined in accordance with the procedures of sections 37-92-302 to 37-92-305. Such proceedings may be commenced at any time and may include a determination of the right to such water for existing and future uses. Such determination shall be in accordance with subsections (4) and (5) of this section. Claims pending as of October 11, 1983, which have been published pursuant to section 37-92-302 in the resume need not be republished.

(7) In the case of dewatering of geologic formations by withdrawing nontributary ground water to facilitate or permit mining of minerals: ~

(a) Except for coal bed methane wells, no well permit is required unless the nontributary groundwater being removed will be beneficially used. Except for coal bed methane wells, no well permit is required if the nontributary groundwater being removed to facilitate or permit the mining of minerals will be used only by operators within the geologic basin where the groundwater is removed to facilitate or permit the mining of minerals, including: Injection into a properly permitted disposal well; evaporation or percolation in a properly permitted pit; disposal at a properly permitted commercial facility; roadspreading or reuse for enhanced recovery, drilling, well stimulation, well maintenance, pressure control, pump operations, dust control on-site or off-site, pipeline and equipment testing, equipment washing, or fire suppression; discharge into state waters in accordance with the "Colorado Water Quality Control Act", article 8 of title 25, C.R.S., and the rules promulgated under that act; or evaporation at a properly permitted centralized exploration and production waste management facility.

(b) In the issuance of any well permit pursuant to this subsection (7), subsection (4) of this section does not apply and subsections (1), (2), and (3) of this section apply; except that, in considering whether the permit shall issue, the requirement that the state engineer find that there is unappropriated water available for withdrawal and the six-hundred-foot spacing requirement in subsection (2) of this section do not apply. The state engineer shall allow the rate of withdrawal stated by the applicant to be necessary to dewater the mine; except that, if the state engineer finds that the proposed dewatering will cause material injury to the vested water rights of others, the applicant may propose, and the permit shall contain, terms and conditions that will prevent such injury. The reduction of hydrostatic pressure level or water level alone does not constitute material injury. Permitting determinations pursuant to this subsection (7) neither confer a water right nor preclude determination of a water right by the water court.

(c) The state engineer may, pursuant to the "State Administrative Procedure Act", article 4 of title 24, C.R.S., adopt rules to assist with the administration of this subsection (7). The rule-making authority includes the promulgation of rules pursuant to which ground water within formations and basins, in whole or part, is determined to be nontributary for the purposes of this subsection (7). The rules may also provide rule-making and adjudicatory procedures for nontributary determinations to be made after the initial rule-making pursuant to this subsection (7). In all rule-making proceedings authorized by this subsection (7), the state engineer shall afford interested persons the right of cross-examination. Judicial review of all rules promulgated pursuant to this subsection (7), including all nontributary determinations made pursuant to this subsection (7), is in accordance with the "State Administrative Procedure Act"; except that venue for such review lies exclusively with the water judge or judges for the water division or divisions within which the ground water that is the subject of such rules or determinations is located. In any judicial action seeking to curtail the withdrawal, use, or disposal of ground water pursuant to this subsection (7) or to otherwise declare such activities unlawful, the court shall presume, subject to rebuttal, that any applicable nontributary determination made by the state engineer is valid. Any rules promulgated pursuant to this subsection (7) must not conflict with existing laws and do not affect the validity of ground water well permits existing prior to the adoption of such rules.

(8) It is recognized that economic considerations generally make it impractical for individual landowners to drill wells into the aquifers named in this subsection (8) for individual water supplies where municipal or quasi-municipal water service is available and that the public interest justifies the use of such ground water by municipal or quasi-municipal water suppliers under certain conditions. Therefore, wherever any existing municipal or quasi-municipal water supplier is obligated either by law or by contract in



effect prior to January 1, 1985, to be the principal provider of public water service to landowners within a certain municipal or quasi-municipal boundary in existence on January 1, 1985, said water supplier may adopt an ordinance or resolution, after ten days' notice pursuant to the provisions of part 1 of article 70 of title 24, C.R.S., which incorporates ground water from the Dawson, Denver, Arapahoe, or Laramie-Fox Hills aquifers underlying all or any specified portion of such municipality's or quasi-municipality's boundary into its actual municipal service plan. Upon adoption of such ordinance or resolution, a detailed map of the land area as to which consent is deemed to have been given shall be filed with the state engineer. Upon the effective date of such ordinance or resolution, the owners of land which overlies such ground water shall be deemed to have consented to the withdrawal by that water supplier of all such ground water; except that no such consent shall be deemed to be given with respect to any portion of the land if:

(a) Water service to such portion of the land is not reasonably available from said water supplier and no plan has been established by that supplier allowing the landowner to obtain an alternative water supply;

(b) Such ordinance or resolution is adopted prior to September 1, 1985, and, prior to January 1, 1985, such ground water was conveyed or reserved or consent to use such ground water was given or reserved in writing to anyone other than such water supplier and such conveyance, reservation, or consent has been properly recorded prior to August 31, 1985;

(c) Such ordinance or resolution is adopted on or after September 1, 1985, and said ground water has been conveyed or reserved or consent to use such ground water has been given or reserved in writing to anyone other than such water supplier and such conveyance, reservation, or consent is properly recorded before the effective date of that ordinance or resolution;

(d) Consent to use such ground water has been given to anyone other than such water supplier by the lawful effect of an ordinance or resolution adopted prior to January 1, 1985;

(e) Such ground water has been decreed or permitted to anyone other than such water supplier prior to the effective date of such ordinance or resolution; or

(f) Such portion of the land is not being served by said water supplier as of the effective date of such ordinance or resolution and such ground water is the subject of an application for determination of a right to use ground water filed in the water court prior to July 1, 1985.

(9) (a) For the purpose of making the state engineer's consideration of well permit applications for the withdrawal of ground water from wells described in subsection (4) of this section more certain and expeditious, the state engineer may, to the extent provided in this subsection (9) and pursuant to the "State Administrative Procedure Act", adopt rules and regulations to prescribe reasonable criteria and procedures for the application for, and the evaluation, issuance, extension, and administration of, such well permits. Such rules and regulations shall only be promulgated after the state engineer has conducted a hydrogeologic analysis, the results of which factually support the promulgation and the content of such rules and regulations for any particular aquifer or portion thereof. All such rules and regulations shall allow the withdrawal pursuant to such permits of the full amount of ground water determined under subsection (4) of this section and shall afford the applicant the opportunity to rebut any presumptive aquifer characteristics. Presumptive aquifer characteristics established by those rules and regulations shall also apply to the determination of rights to ground water from wells described in subsection (4) of this section by the water judges, subject to rebuttal by any party. In all rule-making proceedings authorized by this subsection (9), the state engineer shall afford interested persons the right of cross-examination. Judicial review of all rules and regulations promulgated pursuant to this subsection (9) shall be in accordance with the "State Administrative Procedure Act"; except that venue for such review shall lie exclusively with the water judge or judges for the water division or divisions within which the subject ground water is located.

(b) On or before December 31, 1985, the state engineer shall promulgate reasonable rules and regulations applying exclusively to the Dawson, Denver, Arapahoe, and Laramie-Fox Hills aquifers to the extent necessary to assure that the withdrawal of ground water from wells described in subsection (4) of this section will not materially affect vested water rights to the flow of any natural stream. In no event shall the rules and regulations promulgated under this paragraph (b) require that persons who withdraw nontributary

ground water, as defined in section 37-90-103 (10.5), relinquish the right to consume, by means of original use, reuse, and successive use, more than two percent of the amount of such ground water which is withdrawn without regard to dominion or control of the ground water so relinquished, nor shall they require that judicial approval of plans for augmentation providing for such relinquishment be obtained.

(c) (I) As to wells that will be completed in the Dawson, Denver, Arapahoe, and Laramie-Fox Hills aquifers and will withdraw ground water that is not nontributary ground water, as defined in section 37-90-103 (10.7), judicial approval of plans for augmentation shall be required prior to the use of such ground water. As to such wells completed in the Dawson aquifer, decrees approving such plans for augmentation shall provide for the replacement of actual stream depletion to the extent necessary to prevent any injurious effect, based upon actual aquifer conditions in existence at the time of such decree. As to such wells completed in the Denver, Arapahoe, or Laramie-Fox Hills aquifers more than one mile from any point of contact between any natural stream including its alluvium on which water rights would be injuriously affected by any stream depletion, and any such aquifer, such decrees shall provide for the replacement to the affected stream system or systems of a total amount of water equal to four percent of the amount of water withdrawn on an annual basis. As to such wells completed in such aquifers at points closer than one mile to any such contact, the amount of such replacement shall be determined using the assumption that the hydrostatic pressure level in each such aquifer has been lowered at least to the top of that aquifer throughout that aquifer. Such decrees may also require the continuation of replacement after withdrawal ceases if necessary to compensate for injurious stream depletions caused by prior withdrawals from such wells and shall meet all other statutory criteria for such plans.

(II) This paragraph (c) is not in effect until July 1, 2015, and until then paragraph (c.5) of this subsection (9) applies.

(c.5) (I) As to wells that will be completed in the Dawson, Denver, Arapahoe, and Laramie-Fox Hills aquifers and will withdraw ground water that is not nontributary ground water, as defined in section 37-90-103 (10.7), judicial approval of plans for augmentation shall be required prior to the use of such ground water. As to such wells completed in the Dawson aquifer, decrees approving such plans for augmentation shall provide for the replacement of actual out-of-priority depletions to the stream caused by withdrawals from such wells and shall meet all other statutory criteria for such plans. As to such wells completed in the Denver, Arapahoe, or Laramie-Fox Hills aquifers more than one mile from any point of contact between any natural stream including its alluvium on which water rights would be injuriously affected by any stream depletion, and any such aquifer, such decrees shall provide for the replacement to the affected stream system or systems of a total amount of water equal to four percent of the amount of water withdrawn on an annual basis. As to such wells completed in such aquifers at points closer than one mile to any such contact, the amount of such replacement shall be determined using the assumption that the hydrostatic pressure level in each such aquifer has been lowered at least to the top of that aquifer throughout that aquifer. Such decrees shall also require the replacement of actual out-of-priority depletions of the stream after withdrawal ceases to compensate for stream depletions caused by prior withdrawals from such wells and shall meet all other statutory criteria for such plans.

(II) This paragraph (c.5) is repealed, effective July 1, 2015.

(d) On or before July 1, 1995, the state engineer shall promulgate reasonable rules which shall apply to the permitting and use of waters artificially recharged into the Dawson, Denver, Arapahoe, and Laramie-Fox Hills aquifers. The rules shall effectuate the maximum utilization of these aquifers through the conjunctive use of surface and ground water resources.

(10) Owners of such permits issued pursuant to subsection (4) of this section shall be entitled to the issuance of permits for additional wells to be constructed on the land referred to in subsection (4) of this section. The standards of subsection (4) of this section shall be applied as if the applications for those additional well permits were filed on the same dates that the original applications were filed.



(11) (a) (I) No person shall, in connection with the extraction of sand and gravel by open mining as defined in section 34-32-103 (9), C.R.S., expose ground water to the atmosphere unless said person has obtained a well permit from the state engineer pursuant to this section. A well permit shall be issued upon approval by the water court of a plan for augmentation or upon approval by the state engineer of a plan of substitute supply; except that no increased replacement of water shall be required by the water court or the state engineer whenever the operator or owner of land being mined has, prior to January 15, 1989, entered into and continually thereafter complied with a written agreement with a water conservancy district or water users' association to replace or augment the depletions in connection with or resulting from open mining of sand and gravel.

(II) Any person who extracted sand and gravel by open mining and exposed ground water to the atmosphere after December 31, 1980, shall apply for a well permit pursuant to this section and, if applicable, shall apply for approval of a plan for augmentation or a plan of substitute supply prior to July 15, 1990.

(b) If any ground water was exposed to the atmosphere in connection with the extraction of sand and gravel by open mining as defined in section 34-32-103 (9), C.R.S., prior to January 1, 1981, no such well permit, plan for augmentation, or plan of substitute supply shall be required to replace depletions from evaporation; except that the burden of proving that such ground water was exposed prior to January 1, 1981, shall be upon the party claiming the benefit of this exception. Notwithstanding the provisions of this paragraph (b), judgments and decrees entered prior to July 1, 1989, approving plans for augmentation, which plans include the replacement of depletions from such evaporation, shall be given full effect and shall be enforced according to their terms.

(c) Any person who has reactivated or reactivates open mining operations which exposed ground water to the atmosphere but which ceased activity prior to January 1, 1981, shall obtain a well permit and shall apply for approval of a plan for augmentation or a plan of substitute supply pursuant to paragraph (a) of this subsection (11).

(d) No person who obtains or operates a plan for augmentation or plan of substitute supply prior to July 1, 1989, shall be required to make replacement for the depletions from evaporation exempted in this subsection (11) or otherwise replace water for increased calls which may result therefrom.

(e) In addition to the well permit filing fee required by subsection (2) of this section, the state engineer shall collect the following fees for exposing ground water to the atmosphere for the extraction of sand and gravel by open mining:

(I) For persons who exposed ground water to the atmosphere on or after January 1, 1981, but prior to July 15, 1989, one thousand five hundred ninety-three dollars; except that, if such plan is filed prior to July 15, 1990, as required by subparagraph (II) of paragraph (a) of this subsection (11), the filing fee shall be seventy dollars if such plan includes ten acres or less of exposed ground water surface area or three hundred fifty dollars if such plan includes more than ten acres of exposed ground water surface area;

(II) For persons who expose ground water to the atmosphere on or after July 15, 1989, one thousand five hundred ninety-three dollars regardless of the number of acres exposed. In the case of new mining operations, such fee shall cover two years of operation of the plan.

(III) For persons who reactivated or who reactivate mining operations that ceased activity prior to January 1, 1981, and enlarge the surface area of any gravel pit lake beyond the area it covered before the cessation of activity, one thousand five hundred ninety-three dollars;

(IV) For persons who request renewal of an approved substitute water supply plan prior to the expiration date of the plan, two hundred fifty-seven dollars regardless of the number of acres exposed;

(V) For persons whose approved substitute water supply plan has expired and who submit a subsequent plan, one thousand five hundred ninety-three dollars regardless of the number of acres exposed. An approved plan shall be considered expired if the applicant has not applied for renewal before the expiration date of the plan. The state engineer shall notify the applicant in writing if the plan is considered expired.

(VI) For persons whose proposed substitute water supply plan was disapproved and who submit a subsequent plan, one thousand five hundred ninety-three dollars regardless of the number of acres exposed. The state engineer shall notify the applicant in writing of disapproval of a plan.

(f) Excluding the well permit filing fee required by subsection (2) of this section, the state treasurer shall credit all fees collected with an application for approval of a plan for augmentation or a plan of substitute supply to the water resources cash fund created in section 37-80-111.7 (1).

(g) A person who has obtained a reclamation permit pursuant to section 34-32-112, C.R.S., shall be allowed to apply for a single well permit and to submit a single plan for augmentation or a single plan of substitute supply for the entire acreage covered by the reclamation plan without regard to the number of gravel pit lakes placed within such acreage.

(12) (a) In considering any well permit application in water division 3 that involves a new withdrawal of groundwater that will affect the rate or direction of movement of water in the confined aquifer, the state engineer shall recognize that unappropriated water is not made available and injury is not prevented as a result of the reduction of water consumption by nonirrigated native vegetation.

(b) (I) Repealed.

(II) Subparagraph (I) of this paragraph (b) is repealed, effective July 1, 2004; except that nothing in this subsection (12) shall affect the validity of the rules adopted by the state engineer for groundwater withdrawals in water division 3, or affect the applicability of such rules to well permits that have been or will be issued, and judicial decrees that have been or will be entered, for the withdrawal of groundwater in water division 3.

(13) Notwithstanding the amount specified for any fee in this section, the commission by rule or as otherwise provided by law may reduce the amount of one or more of the fees if necessary pursuant to section 24-75-402 (3), C.R.S., to reduce the uncommitted reserves of the fund to which all or any portion of one or more of the fees is credited. After the uncommitted reserves of the fund are sufficiently reduced, the commission by rule or as otherwise provided by law may increase the amount of one or more of the fees as provided in section 24-75-402 (4), C.R.S.

(14) The state engineer may issue permits for augmentation wells only in accordance with plans for augmentation approved by the water judge for water division 1 and substitute water supply plans approved pursuant to section 37-92-308 that include such wells.

**Source:** L. 65: R&RE, p. 1265, § 1. C.R.S. 1963: § 148-18-36. L. 67: p. 277, § 10. L. 71: pp. 1317, 1324, 1325, §§ 16, 3, 5. L. 73: p. 1520, § 1. L. 77: (3)(c) and (3)(d) added, p. 1700, § 1, effective July 1. L. 79: (3)(a) amended, p. 1377, § 1, effective May 18. L. 83: (5) added, p. 1418, § 1, effective May 23; (6) added, p. 2080, § 2, effective October 11. L. 85: (1), (3)(a), and (4) amended and (7) to (10) added, p. 1161, § 3, effective July 1; (8) amended, p. 1372, § 55, effective July 1. L. 87: (2) and (3)(a) amended, p. 1302, § 6, effective July 2. L. 89: (11) added, p. 1422, § 2, effective July 15. L. 92: (2) and (3)(c) amended, p. 2299, § 5, effective March 19; (4) amended, p. 2310, § 1, effective March 20. L. 93: (4)(b.5) amended, p. 85, § 1, effective March 30; (11)(e) and (11)(f) amended, p. 1833, § 3, effective June 6. L. 94: (9)(d) added, p. 617, § 1, effective April 13; (3)(a)(I) amended, p. 1208, § 1, effective May 19. L. 95: (2) amended, p. 139, § 2, effective April 7. L. 96: (2)(b)(I), (2)(b)(II), (4)(a), and IP(8) amended, pp. 327, 325, §§ 4, 1, effective April 16; (9)(c) amended and (9)(c.5) added, p. 1361, § 2, effective June 1. L. 98: (12) added, p. 853, § 2, effective May 26; (9)(c)(II) and (9)(c.5)(II) amended, p. 1072, § 1, effective June 1; (13) added, p. 1344, § 74, effective June 1. L. 99: (9)(c)(II) and (9)(c.5)(II) amended, p. 670, § 1, effective May 18. L. 2001: (12)(b) amended, p. 158, § 2, effective March 28; (9)(c)(II) and (9)(c.5)(II) amended, p. 727, § 2, effective July 1. L. 2003: (2)(a) and (3)(a)(I)(A) amended and (3)(a)(I)(A.3) and (3)(a)(I)(A.5) added, p. 46, § 6, effective March 1; (14) added, p. 1454, § 4, effective April 30; (9)(c), (9)(c.5), and (12)(b) amended, pp. 1595, 1596, §§ 1, 3, effective May 2; (2)(a)(I)(A) and (2)(a)(II) amended, p. 1684, § 17, effective May 14. L. 2004: (3)(a) R&RE and (3)(c) amended, pp. 1128, 1129, §§ 1, 2, effective May 27. L. 2006: (11)(e)



amended, p. 1271, § 2, effective July 1. **L. 2009:** (2)(b) and IP(7) amended and (7)(c) added, (HB 09-1303), ch. 390, pp. 2108, 2109, §§ 2, 3, effective June 2. **L. 2010:** IP(7), (7)(a), and (7)(b) amended, (SB 10-165), ch. 31, p. 112, § 1, effective March 22. **L. 2011:** IP(7) and (7)(c) amended, (HB 11-1286), ch. 135, p. 473, § 1, effective May 4. **L. 2012:** (9)(c)(II) and (9)(c.5)(II) amended, (SB 12-008), ch. 7, p. 21, § 1, effective March 8; (2)(b)(II)(B), (2)(b)(II)(E), and (3)(c) amended, (SB 12-175), ch. 208, p. 884, § 156, effective July 1; (11)(f) amended, (SB 12-009), ch. 197, p. 791, § 4, effective July 1.

**Editor's note:** (1) Section 10 of chapter 7, Session Laws of Colorado 2003, provides for an effective date of March 1, 2003; however, the Governor did not sign the act until March 5, 2003.

(2) Subsection (12)(b)(II) provided for the repeal of subsection (12)(b)(I), effective July 1, 2004. (See L. 2003, p. 1596.)

(3) Subsection (2)(a)(I)(B) provided for the repeal of subsection (2)(a)(I), effective July 1, 2006. (See L. 2003, p. 46.)

(4) Section 2 of chapter 135, Session Laws of Colorado 2011, provides that the act amending the introductory portion to subsection (7) and subsection (7)(c) applies to nontributary determinations made and rules promulgated before, on, or after May 4, 2011.

(5) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsections (2)(b)(II)(B), (2)(b)(II)(E), and (3)(c) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

(6) Section 2 of chapter 7, Session Laws of Colorado 2012, provides that the act amending subsections (9)(c)(II) and (9)(c.5)(II) applies to plans for augmentation decreed on or after March 8, 2012.

(7) Section 13 of chapter 197, Session Laws of Colorado 2012, provides that the act amending subsection (11)(f) applies to revenues credited on or after July 1, 2012.

**Cross references:** (1) For the "State Administrative Procedure Act", see article 4 of title 24; for the definition of designated ground water, see § 37-90-103 (6); for small capacity wells, see § 37-90-105; for the definition of underground water, see § 37-92-103 (11); for exemptions from and presumptions formed in the application of article 92 of this title, see § 37-92-602.

(2) For the legislative declaration contained in the 2003 act amending subsections (2)(a) and (3)(a)(I)(A) and enacting subsections (3)(a)(I)(A.3) and (3)(a)(I)(A.5), see section 1 of chapter 7, Session Laws of Colorado 2003.

## ANNOTATION

**Law reviews.** For comment on Hall v. Kuiper, see 51 Den. L.J. 127 (1974). For article, "Oil Shale and Water Quality: The Colorado Prospectus Under Federal, State, and International Law", see 58 Den. L.J. 715 (1981). For article, "The Effect of Water Law on the Development of Oil Shale", see 58 Den. L.J. 751 (1981). For article, "Recent Developments in Colorado Groundwater Law", see 58 Den. L.J. 801 (1981). For article, "Ground Water Mining Law and Policy", see 53 U. Colo. L. Rev. 505 (1982). For note, "Reinterpreting the Physical Act Requirements for Conditional Water Rights", see 53 U. Colo. L. Rev. 765 (1982). For article, "Water Rights — How to Avoid Getting in Over Your Head", see 11 Colo. Law. 2143 (1982). For article, "Nontributary Groundwater: The Continuing Saga", see 13 Colo. Law. 68 (1984). For article, "Water for Mining and Milling Operations — Part I", see 13 Colo. Law. 240 (1984). For article, "Principles and Law of Colorado's Nontributary Ground Water", see 62 Den. U. L. Rev. 809 (1985). For article, "The Continuing Groundwater Saga — Part I: Senate Bill 5", see 15 Colo. Law. 422 (1986). For article, "The Continuing Groundwater Saga —

Part II: The Denver Basin Rules", see 15 Colo. Law. 667 (1986). For article, "The Continuing Groundwater Saga — Part III: The Statewide Nontributary Groundwater Rules", see 15 Colo. Law. 813 (1986). For article, "The Physical Solution in Western Water Law", see 57 U. Colo. L. Rev. 445 (1986). For article, "When Worlds Collide — The Gravel Pit Evaporation Conflict", see 18 Colo. Law. 237 (1989).

**Inherent in the state engineer's authority to issue a well permit is the authority to revoke or modify the permit when the evidence shows that doing so is required by law.** The state engineer therefore has jurisdiction to resolve a petition to revoke a groundwater permit notwithstanding the fact that the issue is a water matter under § 37-92-203 because this section specifically delegates the issuance of groundwater permits to the state engineer's jurisdiction. The state engineer must follow the procedures established in § 24-4-104 of the State Administrative Procedures Act because the statutes specific to the state engineer are silent with regard to the procedures applicable to such a petition. *V Bar Ranch LLC v. Cotten*, 233 P.3d 1200 (Colo. 2010).

**Beneficial uses.** Land reclamation and dust control are proper beneficial uses for appropriations of tributary and nontributary water. State Dept. of Natural Res. v. Southwestern Colo. Water Conservation Dist., 671 P.2d 1294 (Colo. 1983), cert. denied, 466 U.S. 944, 104 S. Ct. 1929, 80 L. Ed.2d 474 (1984).

**Nontributary ground water rights.** The modified doctrine of prior appropriation provided for in the Colorado ground water management act applies to nontributary ground water, and rights to such water in designated ground water basins must be obtained through the procedures established in that act. Rights to nontributary ground water not located in a designated basin may be obtained only through application for a well permit from the state engineer under this section. Review of the state engineer's action on well permit applications may be obtained under § 24-4-106, as prescribed by § 37-90-115, for appeals taken before the 1983 revision of § 37-90-115 became applicable. State Dept. of Natural Res. v. Southwestern Colo. Water Conservation Dist., 671 P.2d 1294 (Colo. 1983), cert. denied, 466 U.S. 944, 104 S. Ct. 1929, 80 L. Ed.2d 474 (1984).

**Filing of applications in water court.** In securing a determination of water rights in tributary ground water, although § 37-92-302(2) provides that the water court shall not enter a decision on an application for determination of a water right requiring the construction of a well until the claimant supplements the application with a permit to construct a well, issued by the state engineer under this section, or evidence of its denial or failure of the state engineer to grant or deny the permit within six months, this section does not require the applicant to obtain the well permit prior to filing an application in water court. The claimant may file in the water court to protect his priority date while an application to construct a well is pending before the state engineer. State Dept. of Natural Res. v. Southwestern Colo. Water Conservation Dist., 671 P.2d 1294 (Colo. 1983), cert. denied, 466 U.S. 944, 104 S. Ct. 1929, 80 L. Ed.2d 474 (1984).

**Landowners of land overlying an aquifer have standing** to contest a Denver basin well permit application under this section. Chatfield East Well Co. v. Chatfield East Prop. Owners Ass'n, 956 P.2d 1260 (Colo. 1998).

The Colorado Ground Water Management Act creates in the owner of overlying land an inchoate right to control and use a specified amount of nontributary ground water. The right may vest upon construction of a well in accordance with a permit from the state engineer or by adjudication in the water court. E. Cherry Creek Water & Sanitation Dist. v. Rangeview Metro. Dist., 109 P.3d 154 (Colo. 2005).

**Rights under prior decree do not limit a later statutory entitlement.** Where a land-

owner has a decree that predates statutory changes, and the decree grants the landowner a portion of the full amount of nontributary ground water to which he is statutorily entitled, the decree will not be interpreted to reduce the amount of water available to the landowner under the statute as subsequently adopted. E. Cherry Creek Water & Sanitation Dist. v. Rangeview Metro. Dist., 109 P.3d 154 (Colo. 2005).

**An applicant for a Denver basin well permit must be the landowner or a person who has the landowner's express or statutorily implied consent.** Chatfield East Well Co. v. Chatfield East Prop. Owners Ass'n, 956 P.2d 1260 (Colo. 1998).

**Subsection (8) requires specific notice of governmental entity's intent to adopt an implied consent resolution** to appropriation nontributary groundwater in aquifers underlying land within the district's boundaries. Perry Park Water v. Cordillera Corp., 818 P.2d 728 (Colo. 1991).

**Subsection (10) entitles the holder of previously issued well permits to the issuance of additional well permits** to withdraw nontributary ground water from an aquifer beneath the overlying land. Willows Water Dist. v. Mission Viejo Co., 854 P.2d 1246 (Colo. 1993).

**Allowing the applicants credit for runoff water collected from land surfaces that have been made impermeable**, thereby eliminating their obligation under subsection (9)(c) to compensate holders of senior rights for injuries that may otherwise result from their withdrawals, would clearly undermine the purpose of the legislature's amendment to the definition of a plan for augmentation contained in § 37-92-103 (9). State Eng'r v. Castle Meadows, Inc., 856 P.2d 496 (Colo. 1993).

**After a plan for augmentation has been approved, there must be applications for all well permits** addressed to and granted by the state engineer in order for the wells to be constructed under this section. Cache LaPoudre Water Users Ass'n v. Glacier View Meadows, 191 Colo. 53, 550 P.2d 288 (1976); Kelly Ranch v. Southeastern Colo. Water Conservancy Dist., 191 Colo. 65, 550 P.2d 297 (1976).

**Consideration for subsequent applications under plan of augmentation.** After some wells have been constructed and are operable, on subsequent applications for wells under a plan for augmentation, the state engineer among other things may consider whether the plan actually is operating as contemplated and decreed. Cache LaPoudre Water Users Ass'n v. Glacier View Meadows, 191 Colo. 53, 550 P.2d 288 (1976); Kelly Ranch v. Southeastern Colo. Water Conservancy Dist., 191 Colo. 65, 550 P.2d 297 (1976).

**The state engineer was not required to fix an appropriation date of each well for which a**



permit is issued where one of the fundamentals of the plan for augmentation was that there would be equal priorities between well owners. *Cache LaPoudre Water Users Ass'n v. Glacier View Meadows*, 191 Colo. 53, 550 P.2d 288 (1976).

**Approval of plan for augmentation does not eliminate all duties of state engineer.** *Cache LaPoudre Water Users Ass'n v. Glacier View Meadows*, 191 Colo. 53, 550 P.2d 288 (1976); *Kelly Ranch v. Southeastern Colo. Water Conservancy Dist.*, 191 Colo. 65, 550 P.2d 297 (1976).

**Permit not required to appropriate appropriated water.** Permit to drill water well was not required to be issued by reason of § 6 of art. XVI, Colo. Const., where the evidence supported findings that the applicants were seeking to appropriate appropriated water and § 6 of art. XVI, Colo. Const., relates to the appropriation of unappropriated water. *Hall v. Kuiper*, 181 Colo. 130, 510 P.2d 329 (1973).

**A conditional decree is a vested property right, subject to forfeiture** if the holder fails to pursue his conditional water rights with reasonable diligence. *Mooney v. Kuiper*, 194 Colo. 477, 573 P.2d 538 (1978).

**Exempt "602" wells are "vested water rights" for purposes of this section.** Application of *Turkey Canon Ranch Ltd.*, 937 P.2d 739 (Colo. 1997).

**The "expiration" date** to which the statute refers, and from which the one-year renewal period begins, may be either the original expiration date or any new expiration date established by a prior extension. *Mooney v. Kuiper*, 194 Colo. 477, 573 P.2d 538 (1978).

**Drilling and testing a well with temporary pumps** does not, in itself, constitute "beneficial use of water" for purposes of tolling the expiration of a well permit. *Danielson v. Milne*, 765 P.2d 572 (Colo. 1988).

**Well permit extensions may be denied if for certain purposes.** Since subsection (3)(a) of this section requires that "good cause" be shown as a prerequisite to granting an extension, it thus authorizes the state engineer to deny repeated extensions sought for speculative or other illegitimate purposes. *Mooney v. Kuiper*, 194 Colo. 477, 573 P.2d 538 (1978).

**The operative date for purposes of determining the land on which water rights may be used is the date of appropriation, not the date of adjudication.** When a decree is silent regarding the place of use, the actual place of use is an implied term of the decree, and to prevent an expanded use, the state engineer properly modified a replacement well permit to limit the use of water to only those areas that were irrigated on the date of appropriation. *V Bar Ranch LLC v. Cotten*, 233 P.3d 1200 (Colo. 2010).

**This section allows repeated applications for well permit extensions.** *Mooney v. Kuiper*, 194 Colo. 477, 573 P.2d 538 (1978).

The general assembly intended renewable one-year extensions which can be granted when the state engineer, in his sound discretion, finds that good cause has been demonstrated. *Mooney v. Kuiper*, 194 Colo. 477, 573 P.2d 538 (1978).

**Replaced wells must be abandoned.** The statutory definition of "replacement well" imposes the obligation to abandon replaced wells upon completion of replacement wells. *Broyles v. Fort Lyon Canal Co.*, 638 P.2d 244 (Colo. 1981).

**Augmentation plan must provide that post withdrawal depletions are replaced** if they are injurious to vested water rights. *Simpson v. Yale Invs., Inc.*, 886 P.2d 689 (Colo. 1994).

**Factual findings are required to determine injurious effect.** *Simpson v. Yale Invs., Inc.*, 886 P.2d 689 (Colo. 1994).

**The state engineer must take into account all vested water rights of which he has notice, whether or not adjudicated,** in determining the impact of a proposed nonexempt well. This includes exempt wells. Application of *Turkey Canon Ranch Ltd.*, 937 P.2d 739 (Colo. 1997).

**Burden of proof of noninjurious effect with applicants.** Once applicants have established noninjurious effect the objectors bear the burden of going forward with evidence of injury. *Simpson v. Yale Invs., Inc.*, 886 P.2d 689 (Colo. 1994).

**Augmentation plan for gravel pits which are "wells"** must make provision for compensating for evaporative losses incident to reclamation use. *Zigan Sand & Gravel v. Cache La Poudre*, 758 P.2d 175 (Colo. 1988).

Since gravel pits are "wells", excavation of the pits that takes place during mining is part of the process of constructing the well. Therefore, water losses incurred during construction must be replaced. *Zigan Sand & Gravel v. Cache La Poudre*, 758 P.2d 175 (Colo. 1988).

**Requirement that owners and operators who excavate pits after 1980 obtain well permits and augmentation plans** while other owners and operators of sand and gravel pits are exempted does not violate equal protection or due process requirements. Act represents a rational effort of the general assembly to achieve the legitimate governmental purpose of developing a program of administration of sand and gravel pits. *Central Colo. Water v. Simpson*, 877 P.2d 335 (Colo. 1994).

Act requiring sand and gravel pit owners and operators who excavate pits after 1980 to obtain well permits and augmentation plans while exempting other owners and operators of sand and gravel pits does not constitute special legislation. The classes established by the general assembly are reasonable, are rationally related to a legitimate governmental interest, and reflect ap-

appropriate accommodation of various interests in the administration of the state's appropriation system. *Central Colo. Water v. Simpson*, 877 P.2d 335 (Colo. 1994).

**A permit is required for the extraction of methane from coal beds** because such an oil and gas well has the effect of obtaining ground water for beneficial use, and is therefore a "well" as defined in this article notwithstanding the Colorado oil and gas commission's exclusive jurisdiction over oil and gas operations. *Vance v. Wolfe*, 205 P.3d 1165 (Colo. 2009).

**The filing of a statement of beneficial use is evidence, not irrefutable proof, that water has been applied to a beneficial use;** the touchstone to perfecting a well permit is actual beneficial use. *Danielson v. Milne*, 765 P.2d 572 (Colo. 1988).

**The notice requirement contained in subsection (3)(c) cannot be applied retroactively** to reinstate a well permit which expired prior to the enactment in 1977 of said subsection. *Danielson v. Milne*, 765 P.2d 572 (Colo. 1988).

**Subsections (1), (2), and (4), when read together,** provide the circumstances under which a well applicant may obtain a permit to construct a well on land the applicant does not own. *Willows Water Dist. v. Mission Viejo Co.*, 854 P.2d 1246 (Colo. 1993).

**For issuance of a permit to construct wells on land not owned by the applicant, the state engineer or the water court must determine:** (1) Whether the landowner has contractually limited the consent such landowner has provided the applicant to construct wells on the overlying land, and (2) whether the construction of the well will materially injure the vested water rights of others. *Willows Water Dist. v. Mission Viejo Co.*, 854 P.2d 1246 (Colo. 1993).

**The statutory scheme of this section ensures** that the consensual contractual arrangements of

parties desiring to allocate nontributary ground water rights among themselves are given effect. *Willows Water Dist. v. Mission Viejo Co.*, 854 P.2d 1246 (Colo. 1993).

For permits previously issued to a nonlandowner based on the consent of an overlying landowner, an application for an additional well permit requires review of the conditions under which the landowner originally consented to the nontributary ground water beneath the landowner's land. *Willows Water Dist. v. Mission Viejo Co.*, 854 P.2d 1246 (Colo. 1993).

**Landowners have an inchoate right to extract and use the nontributary water underneath their land** in accordance with this section. Until the landowner takes steps to vest this right, the right to extract nontributary ground water is subject to legislative modification or termination. *Chatfield East Well Co. v. Chatfield East Prop. Owners Ass'n*, 956 P.2d 1260 (Colo. 1998).

**The right to extract nontributary ground water not in a designated basin exists and may be transferred prior to actual water court adjudication of a right to nontributary water.** *Bayou Land Co. v. Talley*, 924 P.2d 136 (Colo. 1996).

**Because the right to withdraw nontributary ground water is integrally associated with and incident to ownership of land,** such right is presumed to pass with the land either in a deed or a deed of trust unless explicitly excepted from the conveyance instrument. A party claiming that the right to withdraw nontributary ground water was not transferred with the land must prove that the grantor affirmatively did not intend to transfer such right. *Bayou Land Co. v. Talley*, 924 P.2d 136 (Colo. 1996); *In re Smith*, 924 P.2d 155 (Colo. 1996).

**Applied** in *Kenneth M. Good Irrevocable Trust v. Bell*, 759 P.2d 48 (Colo. 1988).

### **37-90-137.5. Special water committee - creation - study - repeal. (Repealed)**

**Source:** **L. 96:** Entire section added, p. 1362, § 3, effective June 1. **L. 98:** (6) amended, p. 1072, § 2, effective June 1. **L. 99:** (1.5) added and (6) amended, p. 670, § 2, effective May 18.

**Editor's note:** Subsection (6) provided for the repeal of this section, effective July 1, 2001. (See L. 99, p. 670.)

**37-90-138. Waste - violations - permits.** (1) The state engineer in cooperation with the commission has power to regulate the drilling and construction of all wells in the state of Colorado to the extent necessary to prevent the waste of water and the injury to or destruction of other water resources and shall require well drillers and private drillers to file a log of each well drilled whether or not exempt by virtue of section 37-90-105. The state engineer shall adopt such rules and regulations as are necessary to accomplish the purposes of this section.

(2) If the state engineer finds any well to have been drilled or maintained in a manner or condition or to be withdrawing ground water contrary to this article or the rules issued under this article, the state engineer shall immediately notify the user in writing of the



violation and give the user time as may reasonably be necessary, not to exceed sixty days, to correct deficiencies. If the user fails or refuses to correct the deficiencies within the allowed time, the state engineer is authorized to enter upon the user's land and do whatever is necessary in order that the user comply with this article or rules issued under this article. Prior to August 1, 2010, this subsection (2) does not apply to oil and gas wells. For an oil and gas well in existence on March 22, 2010, for which a well permit is required by this section, a well permit application shall be submitted to the state engineer on or before April 30, 2010. For an oil and gas well to be constructed between March 22, 2010, and August 1, 2010, for which a well permit is required by this section, a well permit application shall be submitted to the state engineer on or before June 15, 2010. All oil and gas wells to be constructed after August 1, 2010, for which a well permit is required by this section shall have a well permit prior to producing groundwater.

(3) No well construction contractor, pump installer, private pump installer, or private driller shall construct a new well or otherwise do work on any well requiring authority from the state engineer or commission until a permit with respect thereto has been secured for such work.

**Source:** L. 65: R&RE, p. 1266, § 1. C.R.S. 1963: § 148-18-37. L. 67: p. 697, § 14. L. 92: (3) amended, p. 2300, § 6, effective March 19. L. 2009: (2) amended, (HB 09-1303), ch. 390, p. 2110, § 4, effective June 2. L. 2010: (2) amended, (SB 10-165), ch. 31, p. 113, § 2, effective March 22.

**37-90-139. Existing beneficial uses not recorded - fee.** Existing uses of ground water put to beneficial use prior to May 17, 1965, not of record in the office of the state engineer on April 21, 1967, may be recorded upon written application and payment of a filing fee of twenty-five dollars and shall retain the date of initiation when first put to beneficial use, but no such recording shall be accepted after December 31, 1968.

**Source:** L. 67: p. 278, § 11. C.R.S. 1963: § 148-18-39.

**37-90-140. Inclusion of lands.** (1) (a) The boundaries of any district organized under the provisions of this article may be changed in the manner prescribed in this section, but the change of boundaries of the district shall not impair or affect its organization or its rights in or to property or any of its rights and privileges whatsoever, nor shall it affect or impair or discharge any contract, obligation, lien, or charge for or upon which it might be liable or chargeable had any such change of boundaries not been made. An election for the inclusion of real property in the district may be initiated by a petition, in writing, filed with the secretary of the board.

(b) The petition shall describe the boundaries of the proposed additional territory with such certainty as to enable a property owner to determine whether or not his property is within the district and shall contain a prayer for the inclusion of such additional territory. Such petition shall be signed by not less than fifteen percent of the taxpaying electors within the territory sought to be included and acknowledged in the same manner that conveyances of land are required to be acknowledged.

(c) If lands proposed to be included within a district, duly organized under the provisions of this article, are located within the water basin or aquifer within which the district lies, as determined by the commission, such lands are eligible for inclusion within said district under the provisions of this article and not otherwise.

(d) Within twenty-one days after the filing of the petition, the board shall examine the petition, and, if it finds that it bears the requisite number of signatures and otherwise meets the stated requirements, it shall accept the petition and shall fix a time and place, not less than thirty-five days nor more than forty-two days after the date of such acceptance, for a hearing thereon. The secretary of the board shall publish a notice of such hearing by one publication in a newspaper of general circulation in every county in which any portion of the district and the proposed additional territory to be included in the district are located. The publication shall be at least fourteen days prior to the date of the hearing. Such notice

shall state the nature of the petition, the description of the proposed additional territory, and that any person owning any interest in real property within the district or within the proposed additional territory to be included in the district may appear at the hearing and show cause in writing why the petition should not be granted.

(2) The board, at the time and place fixed, or at such times to which the hearing may be continued, shall proceed to hear the petition and all objections thereto presented in writing. The failure of any person to object in writing shall be deemed an assent on his part to the inclusion of the proposed additional territory in the district as prayed for in the petition. Upon completion of the hearing, the board may order changes in the boundaries of the proposed lands to be included in the district by the inclusion or exclusion of land therefrom upon finding that such change in boundaries would be hydrologically, geologically, and geographically sound. The board, in its discretion, and on conditions to be determined by the board and accepted by the petitioners, may grant the petition, deny it, or grant it as to part of the proposed additional territory and deny it as to the remaining portion. Unless the petitioners are the owners of all the territory proposed to be added to the district, the board shall submit the question of the inclusion of the additional territory as so determined, to the taxpaying electors within the territory to be included, in an election held for that purpose.

(3) The board shall appoint three taxpaying electors of the district, including two from the area sought to be included, as judges of the election. The secretary of the board shall have published a notice of the time and place of said election to be held in the territory proposed for inclusion in the district by one publication in a newspaper of general circulation in the territory proposed for inclusion in the district. Such election shall not be held less than twenty-one days after said publication of notice.

(4) Such elections shall be held and conducted as nearly as may be in the same manner for creating districts as set forth in section 37-90-124. At the election, the taxpaying electors in the territory proposed for inclusion in the district shall vote for or against such inclusion. The judges of election shall certify the returns of the election to the board. If a majority of the votes cast at such election are for the inclusion of the additional territory, the board shall make an order to that effect and file the same with the secretary of the board.

(5) Any action of the board with respect to the inclusion of territory within an existing district may be reviewed by the district court in appeal proceedings filed within fourteen days after the board's decision has been announced.

(6) If the district within which the lands are included has incurred any prior bonded indebtedness, outstanding at the time of such inclusion, such additional land area shall be liable for its proportionate share of such prior indebtedness of said district.

**Source:** L. 67: p. 278, § 11. C.R.S. 1963: § 148-18-40. L. 2012: (1)(d), (3), and (5) amended, (SB 12-175), ch. 208, p. 885, § 157, effective July 1.

**Editor's note:** Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsections (1)(d), (3), and (5) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

**37-90-141. Exclusion of lands.** (1) (a) The boundaries of any district organized under the provisions of this article may be changed in the manner prescribed in this section, but the change of boundaries of the district shall not impair or affect its organization or its rights in or to property or any of its rights and privileges whatsoever, nor shall it affect or impair or discharge any contract, obligation, lien, or charge for or upon which it might be liable or chargeable had any such change of boundaries not been made. An election for the exclusion of real property in the district may be initiated by a petition, in writing, filed with the secretary of the board.

(b) The petition shall describe the boundaries of the territory proposed for exclusion with such certainty as to enable a property owner to determine whether or not his property is within the district and shall contain a prayer for the exclusion of such territory. Such petition shall be signed by not less than fifteen percent of the taxpaying electors within the



territory proposed for exclusion, and such petition must be acknowledged in the same manner that conveyances of land are required to be acknowledged.

(c) If lands proposed for exclusion from a district, duly organized under the provisions of this article, are located outside the water basin or aquifer within which the district lies, as determined by the commission, such lands are eligible to be excluded under the provisions of this article and not otherwise.

(d) Within twenty days after the filing of the petition, the board shall examine the petition, and, if it finds that it bears the requisite number of signatures and otherwise meets the stated requirements, it shall accept the petition and shall fix a time and place, not less than thirty days nor more than fifty days after the date of such acceptance, for a hearing thereon. The secretary of the board shall publish a notice of such hearing by one publication in a newspaper of general circulation in every county in which any portion of the district and the proposed territory for exclusion are located. Such notice shall state the nature of the petition, the description of the territories proposed for exclusion, and that any person owning any interest in real property within such territories or within the district encompassing such territories may appear at the hearing and show cause in writing why the petition should not be granted.

(2) The board, at the time and place fixed, or at such times to which the hearing may be continued, shall proceed to hear the petition and all objections thereto presented in writing. The failure of any person to object in writing shall be deemed an assent on his part to the exclusion of the lands as prayed for in the petition. Upon completion of the hearing, the board may order changes in the boundaries of the lands proposed for exclusion from the district by the inclusion or exclusion of land therefrom upon finding that such change in boundaries would be hydrologically, geologically, and geographically sound. The board, in its discretion, and on conditions to be determined by the board and accepted by the petitioners, may grant the petition, deny it, or grant it as to part of the proposed exclusion of territory and deny it as to the remaining portion.

(3) Any action of the board with respect to the exclusion of territory from an existing district may be reviewed by the district court in appeal proceedings filed within ten days after the board's decision has been announced.

(4) If the district within which lands are excluded has incurred any prior bonded indebtedness, outstanding at the time of such exclusion, such excluded lands shall continue to be liable for the proportionate share of any such bonded indebtedness which they were under obligation to pay at the time of exclusion.

**Source:** L. 67: p. 279, § 11. C.R.S. 1963: § 148-18-41.

**37-90-142. State engineer - action upon permit.** Except as otherwise provided by specific statute, the state engineer shall act upon an application for a well permit within forty-five days of the receipt thereof.

**Source:** L. 87: Entire section added, p. 1303, § 7, effective July 2.

**37-90-143. Owners of well permits - update for name and address.** (1) Effective July 1, 1994, any owner of an unexpired well permit issued pursuant to this article or article 92 of this title who changes a name or mailing address from that on file with the office of the state engineer shall file an update to the name or mailing address with the state engineer by January 1, 1995, on a form prescribed by the state engineer.

(2) Effective January 1, 1995, any owner of an unexpired well permit issued pursuant to this article or article 92 of this title who changes a name or mailing address from that on file with the state engineer shall file, in person, by mail, or by fax, an update with the state engineer within sixty-three days after the date of the change, on a form prescribed by the state engineer.

**Source:** L. 94: Entire section added, p. 1748, § 5, effective July 1. L. 2012: (2) amended, (SB 12-175), ch. 208, p. 886, § 158, effective July 1.

**Editor’s note:** Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (2) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

ARTICLE 90.5

Geothermal Resources

**Editor’s note:** Prior to 1983, the “Colorado Geothermal Resources Act” was contained in article 70 of title 34.

**Cross references:** For the “Geothermal Heat Suppliers Act”, see article 40 of title 40.

**Law reviews:** For article, “Getting Into Hot Water: The Law of Geothermal Resources in Colorado”, see 39 Colo. Law. 65 (September 2010).

37-90.5-101.	Short title.	37-90.5-106.	Drilling permits - reinjection.
37-90.5-102.	Legislative declaration.	37-90.5-107.	Relationship to water - when permit required.
37-90.5-103.	Definitions.		
37-90.5-104.	Ownership declaration.	37-90.5-108.	Geothermal management districts.
37-90.5-105.	Access - reasonable accommodation.		

**37-90.5-101. Short title.** This article shall be known and may be cited as the “Colorado Geothermal Resources Act”.

**Source: L. 83:** Entire article added, p. 1419, § 1, effective June 10.

**37-90.5-102. Legislative declaration.** (1) The general assembly hereby declares that:

(a) The development of geothermal resources is in the public interest because it enhances local economies and provides an alternative to conventional fuel sources;

(b) The development of geothermal resources should be undertaken in such a manner as to safeguard life, health, property, public welfare, and the environment and to encourage the maximum economic recovery of the resource and prevent its waste;

(c) While the doctrine of prior appropriation is, and always has been, expressly recognized with respect to geothermal resources, such doctrine should be modified to permit the full economic development of the resource.

**Source: L. 83:** Entire article added, p. 1419, § 1, effective June 10.

**37-90.5-103. Definitions.** As used in this article, unless the context otherwise requires:

(1) “Direct use” means the utilization of geothermal resources for commercial, residential, agricultural, public facilities, or other energy needs other than the commercial production of electricity.

(1.5) “Geothermal by-products” means dissolved or entrained minerals and gases that may be obtained from the material medium, excluding hydrocarbon substances and carbon dioxide.

(2) “Geothermal fluid” means naturally occurring groundwater, brines, vapor, and steam associated with a geothermal resource.

(3) “Geothermal resource” means the natural heat of the earth and includes:

(a) The energy that may be extracted from that natural heat;

(b) The material medium used to extract the energy from a geothermal resource; and

(c) Geothermal by-products.

(4) “Hot dry rock” means a geothermal resource which lacks sufficient geothermal fluid to transport commercial amounts of energy to the surface and which is not in association with an economically useful groundwater resource.

(5) “Material medium” means geothermal fluid as well as any other substance used to transfer energy from a geothermal resource.



**Source:** L. 83: Entire article added, p. 1419, § 1, effective June 10. L. 2010: (1) amended and (1.5) added, (SB 10-174), ch. 189, p. 811, § 5, effective August 11.

**37-90.5-104. Ownership declaration.** (1) Where a geothermal resource is found in association with geothermal fluid which is tributary groundwater, such geothermal resource is declared to be a public resource to which usufructuary rights only may be established according to the procedures of this article. No correlative property right to such a geothermal resource in place is recognized as an incident of ownership of an estate in land.

(2) The property right to a hot dry rock resource is an incident of the ownership of the overlying surface, unless severed, reserved, or transferred with the subsurface estate expressly.

(3) Nothing in this section shall be deemed to derogate valid, existing property rights to geothermal resources which have vested prior to July 1, 1983. However, such property rights shall not be deemed vested absent the award of a decree for an application filed prior to June 10, 1983, pursuant to existing water law or the entering into of a geothermal lease prior to June 10, 1983, or unless utilizing facilities are actually in existence prior to July 1, 1983. A facility for utilization of geothermal resources shall be considered to be in existence if it is in actual operation or is undergoing significant construction activities prior to operation.

(4) Nothing in this section shall be deemed to derogate the rights of a landowner to nontributary groundwater.

**Source:** L. 83: Entire article added, p. 1420, § 1, effective June 10.

**37-90.5-105. Access - reasonable accommodation.** (1) Geothermal leases may be awarded by the state board of land commissioners for lands under its jurisdiction through negotiation or by competitive bidding, but no such lease may be awarded prior to a public notice period of thirty-five days.

(2) Where the property right to a severable geothermal resource has been severed, reserved, or transferred with the subsurface estate, its owner may enter upon the overlying surface parcel at reasonable times and in a reasonable manner to prospect for and produce the energy from such resource, if adequate compensation is paid to the owner of the surface parcel for damages and disturbance in accordance with subsection (3) of this section. This right of entry shall not include the right to construct surface utilization facilities, and such facilities may be constructed only upon agreement with the surface owner in accordance with subsection (3) of this section.

(3) (a) (I) A developer of any type of geothermal resource shall develop the resource in a manner that accommodates the surface owner by minimizing intrusion upon and damage to the surface of the land.

(II) As used in this section, “minimizing intrusion upon and damage to the surface” means selecting alternative locations for wells, roads, pipelines, or heat exchange or generation facilities, or employing alternative means of operation, that prevent, reduce, or mitigate the impacts of the geothermal development on the surface, where such alternatives are technologically sound, economically practicable, and reasonably available to the developer.

(III) The standard of conduct set forth in this subsection (3) does not prevent a developer from entering upon and using that amount of the surface as is reasonable and necessary to explore for and develop the geothermal resource.

(IV) The standard of conduct set forth in this subsection (3) does not abrogate or impair a contractual provision that is binding on the parties and that expressly provides for the use of the surface for the development of geothermal resources or that releases the developer from liability for the use of the surface.

(b) A geothermal resource developer’s failure to meet the requirements set forth in this subsection (3) or, if applicable, subsection (2) of this section, gives rise to a cause of action by the surface owner. Upon a determination by the trier of fact that such failure has occurred, a surface owner may seek compensatory damages or such equitable relief as is

consistent with paragraph (a) of this subsection (3) or, if applicable, subsection (2) of this section.

(c) (I) In any litigation or arbitration based upon subsection (2) of this section or paragraph (a) of this subsection (3), the surface owner shall present evidence that the developer's use of the surface materially interfered with the surface owner's use of the surface of the land. After such showing, the developer bears the burden of proof of showing that it met the standard set out in paragraph (a) of this subsection (3) and, if applicable, subsection (2) of this section. If a developer makes that showing, the surface owner may present rebuttal evidence.

(II) An operator may assert, as an affirmative defense, that it has conducted geothermal resource development in accordance with a regulatory requirement, contractual obligation, or land use plan provision that specifically applies to the alleged intrusion or damage.

(d) Nothing in this section:

(I) Precludes or impairs any person from obtaining any and all other remedies allowed by law;

(II) Prevents a developer and a surface owner from addressing the use of the surface for geothermal resource development in a lease, surface use agreement, or other written contract; or

(III) Establishes, alters, impairs, or negates the authority of local and county governments to regulate land use related to geothermal resource development.

**Source:** L. 83: Entire article added, p. 1420, § 1, effective June 10. L. 2010: (2) amended and (3) added, (SB 10-174), ch. 189, p. 812, § 6, effective August 11. L. 2012: (1) amended, (SB 12-175), ch. 208, p. 886, § 159, effective July 1.

**Editor's note:** Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (1) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

### **37-90.5-106. Drilling permits - reinjection.**

(1) (a) Repealed.

(b) Effective July 1, 2006, prior to constructing a geothermal resource exploration, production, or reinjection well, a permit shall be obtained from the state engineer. The state engineer shall adopt such rules as are necessary to protect the public health, safety, and welfare and the environment and to prevent the waste of any geothermal resource. The state engineer shall also adopt rules for the assessment of reasonable fees for the processing and granting of a permit under this section.

(2) The state engineer shall notify the Colorado water quality control commission of all applications for a reinjection permit under this section and shall consider its comments in deciding whether to issue a permit. The state engineer may incorporate such comments as conditions to a permit. The water quality control commission shall respond to the notice required by this subsection (2) within sixty days.

(3) Where the maintenance of underground pressures, the prevention of subsidence, or the disposal of brines is necessary, reinjection of geothermal fluid may be required by the state engineer.

(4) The state engineer shall notify the Colorado oil and gas conservation commission of all applications for a permit to construct a geothermal well which expects to encounter geothermal fluids having a temperature in excess of 212 degrees Fahrenheit or will be in excess of two thousand five hundred feet in depth. The state engineer shall consider the Colorado oil and gas conservation commission comments in deciding whether to issue a permit. The state engineer may incorporate such comments as conditions to a permit. The Colorado oil and gas conservation commission shall respond to the notice required by this subsection (4) within sixty days.

**Source:** L. 83: Entire article added, p. 1421, § 1, effective June 10. L. 2003: (1) amended, p. 47, § 7, effective March 1.



**Editor's note:** (1) Section 10 of chapter 7, Session Laws of Colorado 2003, provides for an effective date of March 1, 2003; however, the Governor did not sign the act until March 5, 2003.

(2) Subsection (1)(a)(II) provided for the repeal of subsection (1)(a), effective July 1, 2006. (See L. 2003, p. 47.)

**Cross references:** For the legislative declaration contained in the 2003 act amending subsection (1), see section 1 of chapter 7, Session Laws of Colorado 2003.

**37-90.5-107. Relationship to water - when permit required.** (1) The use of water as a material medium is recognized as a beneficial use of such water. All applications to appropriate groundwater in order to utilize its geothermal energy shall be considered an application to appropriate geothermal fluid.

(2) (a) Prior to the production of geothermal fluid from a well, other than for flow-testing purposes, a permit to appropriate shall be obtained from the state engineer. This requirement shall not apply to nondiversionary utilization methods; however, such exemption shall not prevent the developer of a geothermal resource from establishing a property right based on his actual utilization.

(b) The permit to appropriate required by this subsection (2) may be waived by the state engineer for a diversionary utilization method which is nonconsumptive and which will not impair valid, prior water rights.

(c) The permit to appropriate required by this subsection (2) may allow for nonconsumptive secondary uses of geothermal fluid, including the recovery of geothermal by-products, and may allow for consumptive secondary uses of geothermal fluid, including sale, which will not impair valid, prior water rights.

(3) The state engineer shall grant a permit to appropriate geothermal fluids within one hundred eighty-two days after the filing of an application upon a finding that:

(a) The proposed appropriation will not materially injure a valid, prior water or geothermal right;

(b) The applicant has acquired or purchased an option to acquire adequate water rights to offset any material injury; or

(c) The applicant has obtained and offered to provide to any affected party an equivalent amount of replacement water of comparable quality.

(4) The appropriation of a geothermal fluid that is nontributary groundwater shall be in accordance with section 37-90-137 (4).

(5) The essence of the water right granted by a permit to appropriate geothermal fluid is the ability to extract geothermal energy from such fluid. The beneficial use of such energy is the basis, measure, and limit of the right and requires that efficient application methods be utilized.

(6) The provisions of articles 90 and 92 of this title relating to notice, hearings, appeals, and the administration of water rights shall govern all matters arising under this section.

(7) Any application to appropriate a geothermal fluid pending on June 10, 1983, shall be processed and evaluated under existing law prior to June 10, 1983.

(8) For purposes of this section, "materially injure" and "material injury" include any diminution or alteration in the quantity, temperature, or quality of any valid, prior water or geothermal right; except that, with regard to a geothermal right, "materially injure" and "material injury" include a diminution or alteration in the temperature of water only if the diminution or alteration adversely affects the valid, prior geothermal right.

**Source:** **L. 83:** Entire article added, p. 1421, § 1, effective June 10. **L. 92:** (7) amended, p. 2181, § 50, effective June 2. **L. 2010:** (8) amended, (SB 10-174), ch. 189, p. 813, § 7, effective August 11. **L. 2012:** IP(3) amended, (SB 12-175), ch. 208, p. 886, § 160, effective July 1.

**Editor's note:** Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending the introductory portion to subsection (3) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

**37-90.5-108. Geothermal management districts.** (1) The state engineer may adopt procedures under which geothermal management districts may be established. In such districts, the state engineer has the authority to:

- (a) Control well-spacing and production rates;
- (b) Control the quantity of geothermal fluid extracted from geothermal resources by such methods and procedures as he deems appropriate, including requirements to reinject;
- (c) Adopt a comprehensive plan for the most efficient use of geothermal resources, guided by the principles of equitable apportionment, maximum economic recovery, and prevention of waste.

(2) The state engineer may delegate some or all of his authority under this section to a geothermal management district upon finding that the district has adequate organization and capability to administer an acceptable management plan.

**Source: L. 83:** Entire article added, p. 1422, § 1, effective June 10.

## ARTICLE 91

### Water Well Construction and Pump Installation Contractors

37-91-101.	Legislative declaration.	37-91-107.	Fees and bonds - license renewal - continuing education.
37-91-102.	Definitions.	37-91-108.	Denial, revocation, or suspension of license.
37-91-103.	State board of examiners of water well construction and pump installation contractors.	37-91-109.	Further scope of article - orders - penalties.
37-91-104.	Duties of the board.	37-91-110.	Basic principles and minimum standards.
37-91-105.	Licensing - registration of rigs.	37-91-111.	Violations and penalties.
37-91-106.	Persons previously licensed - exemptions.	37-91-112.	Injunctive proceedings.
		37-91-113.	Well inspection program.

**37-91-101. Legislative declaration.** (1) The general assembly hereby finds, determines, and declares that:

(a) It has been established by scientific evidence that improperly constructed wells, improperly abandoned wells, and improperly installed pumping equipment can adversely affect groundwater resources and the public health, safety, and welfare; and

(b) Therefore, the proper location, construction, repair, and abandonment of wells, the proper installation and repair of pumping equipment, the licensing and regulation of persons engaging in the business of contracting either for the construction of wells or for the installation of pumping equipment, and the periodic inspection of well construction and pump installation are essential for the protection of the public health and the preservation of groundwater resources.

**Source: L. 67:** p. 691, § 1. **C.R.S. 1963:** § 148-20-1. **L. 85:** Entire section amended, p. 1180, § 1, effective July 1. **L. 2003:** Entire section amended, p. 1675, § 1, effective May 14.

**37-91-102. Definitions.** As used in this article, unless the context otherwise requires:

(1) and (2) Repealed.

(3) "Board" means the state board of examiners of water well construction and pump installation contractors created by section 37-91-103.

(4) "Construction of wells" means any act undertaken at the well site for the establishment or modification of a well, including, without limitation, the location of the well and the excavation or fracturing thereof but not including surveying or other acts preparatory thereto, site preparation and modification or site modification, or the installation of pumping equipment.



(4.5) "Dewatering well" includes any excavation that is drilled, cored, bored, washed, fractured, driven, dug, jetted, or otherwise constructed when the intended use of such excavation is for temporary dewatering purposes for construction only.

(4.7) "Directly employed" means engaged in employment where the employer is responsible for and directly controls the performance of the employee, and, where applicable, the employee is covered by workers' compensation and unemployment compensation. "Directly employed" does not refer to independent contractors or subcontractors.

(5) and (6) Repealed.

(7) "Groundwater" means any water not visible on the surface of the ground under natural conditions.

(8) "Installation of pumping equipment" means the selection, placement, and preparation for operation of pumping equipment, including all construction involved in entering the well and establishing well seals and safeguards to protect groundwater from contamination.

(9) Repealed.

(10) "License" means the document issued by the board to qualified persons making application therefor, pursuant to section 37-91-105, authorizing such persons to engage in one or more methods of well construction or pump installation or any combination of such methods.

(10.5) "Monitoring and observation well" includes any excavation that is drilled, cored, bored, washed, fractured, driven, dug, jetted, or otherwise constructed when the intended use of such excavation is for locating such well, pumping equipment or aquifer testing, monitoring groundwater, or collection of water quality samples.

(11) Repealed.

(11.5) "Person" means an individual, a partnership, a corporation, a municipality, the state, the United States, or any other legal entity, public or private.

(12) "Private driller" means any individual, corporation, partnership, association, political subdivision, or public agency that uses equipment owned by it to dig, drill, redrill, case, recase, deepen, or excavate a well entirely for its own use upon property owned by it.

(12.5) "Private pump installer" means any individual, corporation, partnership, association, political subdivision, or public agency that uses equipment owned by it to install pumping equipment on a well entirely for its own use on property owned by it.

(13) "Pumping equipment" means any pump or related equipment used or intended for use in withdrawing or obtaining groundwater, including, but not limited to, well seals, pitless adapters, and other safeguards to protect the groundwater from contamination and any waterlines up to and including the pressure tank and any coupling appurtenant thereto.

(14) "Pump installation contractor" means any person licensed to install, remove, modify, or repair pumping equipment for compensation.

(15) "Repair" means any change, replacement, or other alteration of any well or pumping equipment which requires a breaking or opening of the well seal or any waterlines up to and including the pressure tank and any coupling appurtenant thereto.

(15.5) "Supervision" means personal and continuous on-the-site direction by a licensed well construction contractor or licensed pump installation contractor, unless the licensed contractor has applied for and received from the board an exemption from continuous on-the-site direction for a specific task.

(15.7) "Test hole" includes any excavation that is drilled, cored, bored, washed, fractured, driven, dug, jetted, or otherwise constructed when the intended use of such excavation is for geotechnical, geophysical, or geologic investigation or soil- or rock-sampling.

(16) (a) "Well" for the purpose of this article means any test hole or other excavation that is drilled, cored, bored, washed, fractured, driven, dug, jetted, or otherwise constructed for the purpose of location, monitoring, dewatering, observation, diversion, artificial recharge, or acquisition of groundwater for beneficial use or for conducting pumping equipment or aquifer tests.

(b) (I) "Well" does not include certain types of monitoring and observation wells, dewatering wells, and test holes that the board specifies in rules and regulations in order to allow for their construction, utilization, and abandonment by other than a well construction

contractor, nor does such term include an excavation made for the purpose of obtaining or prospecting for minerals or those wells subject to the jurisdiction of the oil and gas conservation commission, as provided in article 60 of title 34, C.R.S., or those wells subject to the jurisdiction of the office of mined land reclamation, as provided in article 33 of title 34, C.R.S.

(II) "Well" does not include a naturally flowing spring or springs where the natural spring discharge is captured or concentrated by installation of a near-surface structure or device less than ten feet in depth located at or within fifty feet of the spring or springs' natural discharge point and the water is conveyed directly by gravity flow or into a separate sump or storage, if the owner obtains a water right for such structure or device as a spring pursuant to article 92 of this title.

(17) "Well construction contractor" means any person licensed pursuant to this article and responsible for the construction, test-pumping, or development of wells, either by contract or for hire or for any consideration whatsoever.

(18) "Well seal" means an approved arrangement or device used to cover a well or to establish and maintain a junction between the casing or curbing of a well and the piping or equipment installed therein, the purpose or function of which is to prevent contaminated water or other material from entering the well at the upper terminal.

**Source:** L. 67: p. 691, § 2. C.R.S. 1963: § 148-20-2. L. 85: (3), (4), (8), (10), (12), (15), and (18) amended, (4.5), (4.7), (10.5), (11.5), (12.5), (15.5), and (15.7) added, (13), (14), (16), and (17) R&RE, and (1), (2), (5), (6), (9), and (11) repealed, pp. 1180, 1182, 1189, §§ 2, 3, 16, effective July 1. L. 90: (4.7) amended, p. 574, § 71, effective July 1. L. 92: (16) amended, p. 1971, § 78, effective July 1. L. 95: (16) amended, p. 140, § 3, effective April 7. L. 2003: (4.7), (8), (10), (12), (12.5), (13), (14), (15.5), and (16)(a) amended, p. 1675, § 2, effective May 14.

**37-91-103. State board of examiners of water well construction and pump installation contractors.** (1) There is created, under the division of water resources in the department of natural resources, a state board of examiners of water well construction and pump installation contractors, consisting of five members and comprised of the following persons: The state engineer or a representative designated by him; a representative of the department of health designated by the executive director of the department; and three members appointed by the governor, two of whom shall be well construction contractors or pump installation contractors, each with a minimum of ten years' experience in the well construction or pump installation business preceding his appointment, and one of whom shall be an engineer or geologist with a minimum of ten years' experience in water supply and well construction preceding his appointment.

(2) All members shall be appointed for four-year terms, but no member shall be reappointed to or serve more than two consecutive four-year terms. Any vacancy occurring in the board membership of the governor's appointees, other than by expiration, shall be filled by the governor by appointment for the unexpired term. Members shall serve without compensation but shall be reimbursed for actual expenses necessarily incurred in their official business.

(3) The board shall meet at least once every three months and at such other times as it deems necessary or advisable. Special board meetings may be called at any time on order of the chairman or vice-chairman or any three members of the board. The board shall determine the time and place of all meetings, but at least one meeting every three months shall be held in Denver. Three members of the board shall constitute a quorum, and the affirmative vote of three members shall be required to pass any action or motion of the board. The board may adopt bylaws to govern its own procedure.

**Source:** L. 67: p. 693, § 3. C.R.S. 1963: § 148-20-3. L. 68: p. 129, § 142. L. 85: (1) amended, p. 1182, § 4, effective July 1. L. 2003: (2) and (3) amended, p. 1677, § 3, effective May 14.



**37-91-104. Duties of the board.** (1) The board shall:

(a) Be responsible for the administration of this article and, with respect to such administration, shall enforce the provisions of this article and any rules adopted pursuant thereto and shall take such other actions as may be reasonably necessary to carry out the provisions of this article;

(b) Have general supervision and authority over the construction and abandonment of wells and the installation of pumping equipment, as provided by sections 37-91-109 and 37-91-110;

(c) Adopt, and from time to time revise, such rules, not inconsistent with law, as may be necessary to effectuate the provisions of this article, all such rules to be adopted in accordance with article 4 of title 24, C.R.S.;

(d) Employ, within funds available, personnel necessary for the proper performance of its work under this article;

(e) Examine for, deny, approve, revoke, suspend, and renew the licenses of applicants and licensees as provided in this article;

(f) Conduct hearings upon its own motion or upon receipt of written complaints with respect to any licensee under this article and with respect to the denial, revocation, or suspension of a license, all such hearings to be conducted in conformity with article 4 of title 24, C.R.S. The board may have such hearings conducted before a hearing officer or administrative law judge from the department of personnel designated by the board, who is technically qualified to conduct or assist in such hearings and who may be a member of the board.

(g) Repealed.

(h) Cause the prosecution and enjoinder of all persons violating this article;

(i) Disseminate information to pump installation contractors and well construction contractors in order to protect and preserve the groundwater resources of the state;

(j) Promulgate rules and regulations pursuant to article 4 of title 24, C.R.S., to allow certain types of monitoring and observation wells, dewatering wells, and test holes to be constructed, utilized, and abandoned by other than a well construction contractor;

(k) Adopt, and revise as necessary, such rules regarding the construction, use, and abandonment of monitoring and observation wells, dewatering wells, and test holes necessary to safeguard the public health of the people of Colorado. All such rules shall be adopted in accordance with article 4 of title 24, C.R.S. The board may require that such wells or holes be designed, constructed, used, or abandoned by a licensed professional engineer, professional geologist, licensed well construction contractor, or anyone directly employed by or under the supervision of one of these individuals.

(l) (I) Assure protection of groundwater resources and the public health by ordering the nondestructive investigation, abandonment, repair, drilling, redrilling, casing, recasing, deepening, or excavation of a well where it finds such action to be necessary to correct violations of this article or rules promulgated by the board with respect to this article or to protect groundwater resources and the public health.

(II) Existing wells that were constructed in compliance with the laws and regulations in effect at the time of their construction shall not be required to be repaired, redrilled, or otherwise modified to meet the current standards for well construction contained in this article or the rules adopted by the board. Any such wells that present an imminent threat to public health or groundwater contamination may be ordered to be repaired or abandoned. The remedial action required by the board for such wells shall be the minimum repair necessary to remove the threat to public health or of groundwater pollution. An order to abandon a well that is issued under this article is not a determination of intent to abandon any water right associated with the well.

(2) The board may delegate to the state engineer the authority to perform any of the duties of the board as set forth in this article, except those duties authorized in paragraphs (c), (e), (j), and (k) of subsection (1) of this section.

**Source:** L. 67: p. 693, § 4. C.R.S. 1963: § 148-20-4. L. 83: (1)(g) amended, p. 844, § 77, effective July 1. L. 85: (1)(b), (1)(f), and (1)(h) amended and (2) added, p. 1183, §§ 5, 6, effective July 1. L. 87: (1)(f) amended, p. 976, § 99, effective March 13. L. 95:

(1)(f) amended, p. 666, § 106, effective July 1. **L. 96:** (1)(g) repealed, p. 1216, § 5, effective August 7. **L. 2003:** (1)(l) added, p. 1677, § 4, effective May 14. **L. 2004:** (1)(k) amended, p. 1315, § 69, effective May 28.

**Editor's note:** Subsection (1)(l)(I) was originally enacted as (1)(l) and subsection (1)(l)(II) was originally enacted as (1)(m) in Senate Bill 03-045 but have been renumbered on revision for ease of location.

**Cross references:** (1) For the "Information Coordination Act", its policy, and the functions of the heads of principal departments, see § 24-1-136; for rule-making and licensing procedures by state agencies, see article 4 of title 24.

(2) For the legislative declaration contained in the 1996 act repealing subsection (1)(g), see section 1 of chapter 237, Session Laws of Colorado 1996.

**37-91-105. Licensing - registration of rigs.** (1) Every person, before engaging in the business of contracting either for the construction of wells or for the installation of pumping equipment, shall obtain a license for one or more methods of well construction or pump installation from the board and shall secure a registration from the board for each well-drilling or pump-installing rig to be operated or leased by him or his employee.

(2) The board shall issue a license to each applicant who files an application upon a form and in such manner as the board prescribes, accompanied by such fees and bond as required by section 37-91-107, and who furnishes evidence satisfactory to the board that the applicant:

- (a) Is at least twenty-one years of age;
- (b) Is a citizen of the United States or has declared his intention to become a citizen;
- (c) (Deleted by amendment, L. 2003, p. 1678, § 5, effective May 14, 2003.)
- (d) Has had not less than two years' experience in the type of well construction work or pump installation work for which the applicant is initially applying for a license; however:

(I) Once a person is licensed in one or more methods of well construction, the person is eligible without further experience to take an examination to obtain a license for a different method of well construction;

(II) Once a person is licensed for installing one or more types of pumps, the person is eligible without further experience to take an examination to obtain a license for a different type of pump installation; and

(III) Education in an accredited program approved by the board may substitute for well construction or pump installation experience upon application to and acceptance by the board;

(e) Demonstrates professional competence by passing a written and oral examination prescribed by the board.

(2.5) The board shall issue a special license for the use of special equipment or limited procedures in well construction or pump installation to each applicant who files an application upon a form and in such manner as the board prescribes, accompanied by such fees and bond as are required by section 37-91-107, and who furnishes evidence satisfactory to the board that he meets the requirements established in subsection (2) of this section; except that a special licensee shall not be eligible to take an examination to obtain a license for a different method of well construction or pump installation unless said licensee has at least two years of experience in the method of well construction or pump installation for which the additional license is sought.

(3) Upon investigation of the application and other evidence submitted, the board shall, not less than thirty days prior to the examination, notify each applicant that the application and evidence submitted for licensing is satisfactory and accepted, or unsatisfactory and rejected; if rejected, said notice shall state the reasons for such rejection.

(4) The place of examination shall be designated in advance by the board and shall be given annually and at such other times as, in the opinion of the board, the number of applicants warrants.

(5) The examination shall consist of an oral and written examination and shall fairly test the applicant's knowledge and application thereof in the following subjects: Basics of



drilling methods, specific drilling methods, basics of pump installation methods, specific pump installation methods, and basics of well construction and his knowledge and application of state laws and local ordinances concerning the construction of wells or the installation of pumping equipment, or both, and rules promulgated in connection therewith.

(6) If an applicant fails to receive a passing grade on the examination, the applicant may reapply for examination after forty-five days and shall pay a reexamination fee upon such reapplication.

(7) Each licensee shall complete eight hours of continuing education training as approved by the board every year in order to maintain or renew a license.

**Source:** L. 67: p. 694, § 5. C.R.S. 1963: § 148-20-5. L. 73: p. 531, § 82. L. 85: (1), (2)(d), and (4) to (6) amended, p. 1184, § 7, effective July 1. L. 89: (1) amended and (2.5) added, p. 1428, § 1, effective April 7. L. 2003: IP(2), (2)(c), (2)(d), and (6) amended and (7) added, p. 1678, § 5, effective May 14.

**Cross references:** For the effect of a criminal conviction on employment rights, see § 24-5-101.

### **37-91-106. Persons previously licensed - exemptions.**

(1) (Deleted by amendment, L. 2003, p. 1678, § 6, effective May 14, 2003.)

(2) A license shall not be required of any person who performs labor or services if he is directly employed by, or under the supervision of, a licensed well construction contractor or pump installation contractor.

(3) Private drillers and private pump installers are exempt from all license requirements under this article; except that such entities shall be required to comply with minimum construction standards as required by section 37-91-110 and the rules of the board.

(4) A license shall not be required of a professional engineer, professional geologist, or professional hydrologist or anyone directly employed by, or under the supervision of, a professional engineer, professional geologist, or professional hydrologist for the purpose of sampling, measuring, or test-pumping for scientific, engineering, or regulatory purposes. The board may promulgate rules governing such sampling, measuring, or test-pumping, and all such sampling, measuring, or test-pumping shall be done in compliance with such rules.

**Source:** L. 67: p. 695, § 6. C.R.S. 1963: § 148-20-6. L. 85: Entire section amended, p. 1184, § 8, effective July 1. L. 2003: (1), (3), and (4) amended, p. 1678, § 6, effective May 14. L. 2005: (3) amended, p. 157, § 1, effective April 5.

**37-91-107. Fees and bonds - license renewal - continuing education.** (1) All fees from applicants seeking a license under this article, and all renewal fees, shall be transmitted to the state treasurer, who shall credit the same to the well inspection cash fund created in section 37-80-111.5. No fees shall be refunded. A license shall be nontransferable and unassignable.

(2) The board shall charge an application fee of twenty dollars to accompany each application from a resident of the state of Colorado and a further fee of fifty dollars upon successful completion of examination before issuance of a license. In addition, each successful resident applicant shall file and maintain with the board evidence of financial responsibility, in the form of a savings account, deposit, or certificate of deposit, in the amount of ten thousand dollars, meeting the requirements of section 11-35-101, C.R.S., or an irrevocable letter of credit for the amount of ten thousand dollars, meeting the requirements of section 11-35-101.5, C.R.S., or shall file and maintain with the board an approved compliance bond with a corporate surety authorized to do business in the state of Colorado, in the amount of ten thousand dollars, for the use and benefit of any person or the state of Colorado suffering loss or damage, conditioned that such licensee will comply with the laws of the state of Colorado in engaging in the business for which he receives a license and the rules of the board promulgated in the regulation of such business.

(3) The board shall charge an application fee of fifty dollars to accompany each application from a nonresident of the state of Colorado and a further nonresident fee of four

hundred dollars upon successful completion of examination before issuance of a license. In addition, each successful nonresident applicant shall file and maintain with the board evidence of financial responsibility, in the form of a savings account, deposit, or certificate of deposit in the amount of twenty thousand dollars, meeting the requirements of section 11-35-101, C.R.S., or shall file and maintain with the board an approved compliance bond in the amount of twenty thousand dollars with a corporate surety authorized to do business in the state of Colorado for the use and benefit of any person or the state of Colorado suffering loss or damage, conditioned that such licensee will comply with the laws of the state in engaging in the business for which he receives a license and the rules of the board promulgated in compliance therewith.

(3.5) The board shall not set the application and license fees in subsections (2) and (3) of this section at amounts greater than becomes necessary to further the purposes of this article. Such amounts shall not exceed the direct and indirect costs of the board in administering the provisions of this article.

(3.7) The board is authorized to set the bond amounts in subsections (2) and (3) of this section at higher amounts if such an increase becomes necessary to further the purposes of this article.

(4) Every licensed well construction contractor and licensed pump installation contractor in this state shall pay to the board during the month of January of each year, beginning in the year immediately subsequent to his or her initial licensing, a renewal fee of fifty dollars, shall concurrently file and maintain a new bond or letter of credit if required pursuant to this section, and shall annually file a certificate of completion of continuing education as required pursuant to section 37-91-105 (7). The secretary shall thereupon issue a renewal license for one year. The license of any well construction contractor or pump installation contractor who fails to have his or her license renewed during the month of January in each year shall lapse. Any lapsed license may be renewed, without reexamination, within a period of one year after such lapse upon payment of all fees in arrears. Licensees may elect to renew their licenses and file and maintain a bond or letter of credit for a term of up to three years, paying fifty dollars for each year the license will be in effect.

(4.5) A licensee shall maintain the amount of financial responsibility required by subsections (2), (3), and (4) of this section for the life of the license for which the financial responsibility is required. The license of any well construction contractor or pump installation contractor who fails to maintain such financial responsibility shall lapse. A license that has so lapsed may be reinstated upon submission of current evidence of the required financial responsibility to the board and payment to the board of a one-hundred-dollar reinstatement fee.

(5) The board shall charge an annual registration fee of ten dollars for each well drilling or pump installation rig to be operated in the state of Colorado.

(6) The board shall, no later than January 7, 2007, develop a continuing education program in conjunction with the Colorado water well contractors association or any analogous or successor organization.

**Source:** L. 67: p. 695, § 7. C.R.S. 1963: § 148-20-7. L. 79: (3) amended, p. 426, § 19, effective July 1. L. 85: (2), (3), (4), and (5) amended and (3.5) and (3.7) added, p. 1185, § 9, effective July 1. L. 87: (2), (3), (3.7), and (4) amended, p. 491, § 42, effective July 1. L. 89: (2), (3), and (4) amended and (4.5) added, p. 1428, § 2, effective April 7. L. 2003: (1), (4), (4.5), and (5) amended and (6) added, p. 1679, § 7, effective May 14.

**37-91-108. Denial, revocation, or suspension of license.** (1) The board, by an affirmative vote of three of its five members, may withhold, deny, revoke, or suspend any license issued or applied for in accordance with the provisions of this article, upon proof that the licensee or applicant:

(a) Has used fraud or deception in applying for a license or in taking an examination provided for in this article;

(b) Has willfully or negligently violated any of the provisions of this article or of the "Colorado Ground Water Management Act";



(c) Has failed to comply with minimum standards prescribed by section 37-91-110 or the rules of the board promulgated with respect to this article;

(d) Has knowingly constructed a well or installed pumping equipment without a valid permit;

(e) Has knowingly filed with the division of water resources a document containing untrue statements;

(f) Has used fraud or deception in collecting fees from persons with whom he has contracted for well construction or pump installation;

(g) Has failed to submit a well completion report or a pump installation report pursuant to the requirement therefor in the rules and regulations of the board;

(h) Has authorized a person, not directly employed or directly supervised by the licensee, to construct wells or install pumping equipment under the authority of the licensee's license; or

(i) Has failed to complete the continuing education requirement established in section 37-91-107 within one year after the establishment of such requirement.

(2) No license shall be withheld, denied, revoked, or suspended except in conformity with article 4 of title 24, C.R.S.

(3) A hearing upon a complaint may be initiated only if the complaint was filed with the board within two years of the filing of the completion report for the well or pumping equipment, the construction or installation of which formed the basis of the complaint. If no completion report was filed, a hearing upon the complaint may be initiated only if the complaint was filed with the board within two years of the discovery of the violation or defect that constituted the grounds for the complaint.

(4) The board may order the nondestructive investigation, abandonment, repair, drilling, redrilling, casing, recasing, deepening, or excavation of a well to protect groundwater resources and the public health if the board finds such action to be necessary to correct violations of article 90 of this title, this article, or the rules promulgated by the board pursuant to this article.

(5) The board may assess fines of not less than fifty dollars nor more than one thousand dollars for violations of article 90 of this title, this article, or the rules promulgated by the board pursuant to this article for each such violation. Such fines shall be transmitted to the state treasurer, who shall credit them to the well inspection cash fund created in section 37-80-111.5.

**Source:** L. 67: p. 696, § 8. C.R.S. 1963: § 148-20-8. L. 85: (1)(c) amended and (1)(d) to (1)(h) and (3) added, p. 1186, §§ 10, 11, effective July 1. L. 2003: (1)(h) amended and (1)(i), (4), and (5) added, p. 1680, §§ 8, 9, effective May 14.

**Cross references:** For rule-making and licensing procedures by state agencies, see article 4 of title 24; for the "Colorado Ground Water Management Act", see article 90 of this title.

**37-91-109. Further scope of article - orders - penalties.** (1) In addition to the licensing of well construction contractors and pump installation contractors as required by this article, no well shall be located, constructed, repaired, or abandoned and no pumping equipment shall be installed or repaired contrary to the provisions of this article and applicable rules of the board promulgated to effectuate the purposes of this article. The board may by order require any licensee, private driller, or private pump installer to remedy any such noncompliant installation, construction, or repair and may, pursuant to rules and after due notice and a hearing, impose penalties for such noncompliance. The provisions of this article shall apply to any well or any pumping equipment not otherwise subject to regulation under the laws of this state and to any distribution, observation, monitoring, or dewatering of water therefrom; but this article shall not apply to any distribution of water beyond the point of discharge from the pressure tank or to any distribution of water beyond the point of discharge from the pumping equipment if no pressure tank or an overhead pressure tank is employed.

(2) Only a licensed pump installation contractor may install a cistern or other water storage tank between the wellhead and the pressure tank or downstream of the wellhead if no pressure tank is utilized.

**Source:** L. 67: p. 696, § 9. C.R.S. 1963: § 148-20-9. L. 85: Entire section amended, p. 1187, § 12, effective July 1. L. 2003: Entire section amended, p. 1680, § 10, effective May 14.

**37-91-110. Basic principles and minimum standards.** (1) The following basic principles, general in scope and fundamental in character, shall govern the construction, repair, or abandonment of any well and the installation or repair of any pumping equipment:

(a) Water wells shall be:

(I) Located in such manner that the well and its surroundings can be kept in a sanitary condition;

(II) Adequate in size to permit the installation of pumping equipment to produce the volume of water sought to be obtained in compliance with the well permit;

(III) Constructed or abandoned in such a manner as to maintain natural protection against pollution of water-bearing formations and to exclude known sources of contamination;

(b) The pumping equipment shall be:

(I) Located in such a manner that the pump and its surroundings can be kept in a sanitary condition;

(II) Selected, constructed, and installed: To meet the water yield and drawdown characteristic of the well; to be durable and reliable in character; of such material that no toxic or otherwise objectionable condition will be created in the water; in such a manner that continued operation without priming is assured at the time of installation; and to provide adequate protection against pollution of any character from any surface or subsurface source.

(2) The board shall adopt and may, from time to time, amend rules and regulations reasonably necessary to insure the proper construction or proper abandonment of wells and the proper installation of pumping equipment. The board has the authority to require the filing of information and reports relating to the construction or abandonment of wells and the installation of pumping equipment whenever it may deem such action to be necessary.

(3) All wells shall be constructed or abandoned and all pumping equipment shall be installed in compliance with this article and with the rules and regulations promulgated by the board.

**Source:** L. 67: p. 696, § 10. C.R.S. 1963: § 148-20-10. L. 85: IP(1), (1)(a)(II), (1)(a)(III), and (2) amended and (3) added, p. 1187, § 13, effective July 1.

**37-91-111. Violations and penalties.** (1) It is unlawful:

(a) For any person to represent himself as a well construction contractor or a pump installation contractor who is not licensed under this article or to so represent himself after his license has been suspended or revoked or has lapsed;

(b) For any person not licensed under this article to advertise or issue any sign, card, or other device which would indicate that he is a well construction contractor or a pump installation contractor;

(c) For any person not licensed or whose license is suspended to construct wells unless he is a private driller or directly employed by or under the supervision of a licensed well construction contractor;

(d) For any person not licensed or whose license is suspended to install pumping equipment unless he is a private pump installer or directly employed by or under the supervision of a licensed pump installation contractor, except as excluded pursuant to section 37-91-106 (4); or

(e) For any person to otherwise violate any of the provisions of this article.



(2) Any person who violates any provision of subsection (1) of this section is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than five hundred dollars, or by imprisonment in the county jail for not more than ninety days, or by both such fine and imprisonment.

(3) Any person who violates any provision of subsection (1) of this section shall also be subject to a civil penalty assessed by the court of not less than one hundred dollars nor more than five thousand dollars for each such violation. All civil penalties collected under this subsection (3) shall be transmitted to the state treasurer, who shall credit the same to the well inspection cash fund created in section 37-80-111.5.

**Source:** L. 67: p. 697, § 11. C.R.S. 1963: § 148-20-11. L. 85: Entire section amended, p. 1188, § 14, effective July 1. L. 2003: (3) amended, p. 1681, § 11, effective May 14.

**37-91-112. Injunctive proceedings.** (1) The board may, through the attorney general of the state of Colorado, apply for civil penalties and for an injunction to enjoin any person from committing any act declared to be unlawful by this article. Such application shall be heard in the district court in which the grounds for the injunction arose.

(2) Such injunctive proceedings shall be in addition to and not in lieu of any other penalty or remedy provided in this article.

(3) In such proceedings, if the court enters a temporary restraining order, preliminary injunction, or permanent injunction or awards civil penalties, the person against whom such injunctive order was entered or against whom such civil penalties were awarded shall pay the costs of the proceeding, including reasonable attorney fees.

**Source:** L. 67: p. 697, § 12. C.R.S. 1963: § 148-20-12. L. 85: (1) amended and (3) added, p. 1188, § 15, effective July 1.

**37-91-113. Well inspection program.** (1) The state engineer shall monitor compliance with this article, including by inspecting water well construction and pump installation, and may employ inspectors for such purpose. The costs of such monitoring and inspection shall be paid from the well inspection cash fund created by section 37-80-111.5.

(2) Inspectors shall have the following qualifications, but need not be licensed pursuant to this article:

(a) Knowledge of proper well construction and pump installation techniques and practices;

(b) Drill site experience;

(c) Computer skills;

(d) Interpersonal skills; and

(e) Knowledge of all applicable statutes and rules.

(3) Inspectors shall annually spend a majority of their time conducting field inspections and a minority of their time preparing and evaluating reports and related office work. Duties shall include the following:

(a) Well construction and pump installation inspection and observation;

(b) Complaint investigation;

(c) Education and outreach;

(d) Inspection and observation of geotechnical wells, observation and monitoring wells, dewatering wells, and test holes;

(e) Field inspections of existing wells and pumps;

(f) Field inspections of well and hole plugging and abandonment; and

(g) Staff support for the state engineer and board.

**Source:** L. 2003: Entire section added, p. 1681, § 12, effective May 14.

Water Right Determination and Administration

ARTICLE 92

Water Right Determination and Administration

**Cross references:** For the Colorado Rules of Civil Procedure that govern proceedings under this article, see C.R.C.P. 87.

**Law reviews:** For article, “A Summary of Colorado Water Law”, see 21 Colo. 63 (1992); for article, “Water Law Requirements Affecting Environmental Compliance and Remediation Activities”, see 22 Colo. Law. 299 (1993); for article, “Absolute Ownership as a Prerequisite For a Change Decree”, see 22 Colo. Law. 1915 (1993); for article, “Representing a Developer Purchaser of Water and Water Rights”, see 13 Colo. Law. 627 (1984); for article, “Conditions in a Water Rights Augmentation Plan or Change Case”, see 13 Colo. Law. 2039 (1984); for article, “Plans and Studies: The Recent Quest for a Utopia in the Utilization of Colorado’s Water Resources”, see 55 U. Colo. L. Rev. 391 (1984); for article, “Principles and Law of Colorado’s Nontributary Ground Water”, see 62 Den. U. L. Rev 809 (1985); for article, “Indian Water Rights: Then and Now”, see 15 Colo. Law. 1 (1986); for article, “Area-of-Origin Protection in Transbasin Water Diversions: An Evaluation of Alternative Approaches”, see 57 U. Colo. L. Rev. 527 (1986); for article, “The Physical Solution in Western Water Law”, see 57 U. Colo. L. Rev. 445 (1986); for article, “Constitutional Limits on Police Power Regulation Affecting the Exercise of Water Rights”, see 16 Colo. Law. 1626 (1987); for article, “Historical Water Use and the Protection of Vested Rights: A Challenge for Colorado Water Law”, see 69 U. Colo. L. Rev. 503 (1998); for article, “Water Rights Title and Conveyancing”, see 28 Colo. Law. 69 (May 1999); for comment, “Safeguarding Colorado’s Water Supply: The New Confluence of Title Insurance and Water Rights Conveyances”, see 77 U. Colo. L. Rev. 491 (2006).

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## REGULATION OF WATER - VIOLATIONS

## PART 6

- 37-92-501. Jurisdiction over water - rules and regulations.
- 37-92-501.5. Special procedures with respect to plans for augmentation.
- 37-92-502. Orders as to waste, diversions, distribution of water.
- 37-92-503. Enforcement - injunction.

## APPLICATION OF ARTICLE

- 37-92-601. Disposition of pending proceedings - showings of reasonable diligence.
- 37-92-602. Exemptions - presumptions - legislative declaration.

## PART 1

## GENERAL

**37-92-101. Short title.** This article shall be known and may be cited as the "Water Right Determination and Administration Act of 1969".

**Source:** L. 69: p. 1200, § 1. C.R.S. 1963: § 148-21-1.

## ANNOTATION

**Law reviews.** For article, "Water Administration in Colorado — Higher-priority or Priority?", see 30 Rocky Mt. L. Rev. 293 (1958). For note, "Water Title Examinations", see 34 Rocky Mt. L. Rev. 509 (1962). For article, "A Review of Recent Activity in Colorado Water Law", see 47 Den. L.J. 181 (1970). For article, "A Guide to the Examination of Water Tabulations", see 47 Den. L.J. 213 (1970). For note, "A Survey of Colorado Water Law", see 47 Den. L.J. 226 (1970). For note, "Adjudication of Federal Reserve Water Rights", see 42 U. Colo. L. Rev. 161 (1970). For article, "The Groundwater-Surface Water Conflict and Recent Colorado Water Legislation", see 43 U. Colo. L. Rev. 1 (1971). For article, "Colorado Water Law Problems", see 50 Den. L.J. 293 (1973). For article, "Deference to State Courts in the Adjudication of Reserved Water Rights", see 53 Den. L.J. 643 (1976). For comment on determining the priority of federal reserved rights relative to the water rights of state appropriators, see 48 U. Colo. L. Rev. 547 (1977). For case note, "Water Use Regulation in Colorado: The Constitutional Limitations", see 49 U. Colo. L. Rev. 493 (1978). For comment, "A Fee Simple in Water or a Trend Toward Favoring Cities?", see 55 Den. L.J. 153 (1978). For comment, "Colorado River Water Conservation Dist. v. Colorado Water Conservation Bd.: Diversion as an Element of Appropriation", see 57 Den. L.J. 661 (1980). For article, "Intergovernmental Relations and Energy Taxation", see 58 Den. L.J. 141 (1980). For article, "Oil Shale and Water Quality: The Colorado Prospectus Under Federal, State, and International Law", see 58 Den. L.J. 715 (1981). For article, "The Effect of Water Law on the Development of Oil Shale", see 58 Den. L.J.

751 (1981). For comment, "Town of De Beque v. Enwold: Conditional Water Rights and Statutory Water Law", see 58 Den. L.J. 837 (1981). For article, "Pollution or Resources Out-of-Place: Reclaiming Municipal Wastewater for Agricultural Use", see 53 U. Colo. L. Rev. 559 (1982). For note, "Reinterpreting the Physical Act Requirement for Conditional Water Rights", see 53 U. Colo. L. Rev. 765 (1982). For article, "Water Rights — How to Avoid Getting in Over Your Head", see 11 Colo. Law. 2143 (1982). For article, "Use of Colorado Water Rights In Secured Transactions", see 18 Colo. Law. 2307 (1989). For article, "Substitute Supply Plans: Recent Water Law Developments", see 31 Colo. Law. 67 (August 2002).

**Provisions create conceptual framework for appropriation and administration of ground and tributary water.** The Colorado Ground Water Management Act, §§ 37-90-101 et seq., and the Water Right Determination and Administration Act of 1969, §§ 37-92-101 et seq., create a conceptual framework which provides for the appropriation and administration of designated ground water under the management act, and the appropriation and administration of all tributary water, except that which may be included in the definition of "designated ground water", under the 1969 act. State ex rel. Danielson v. Vickroy, 627 P.2d 752 (Colo. 1981).

**The Water Right Determination and Administration Act provides that the water judges shall make determinations of water rights and conditional water rights,** approve plans for augmentation and, after a certain time, take jurisdiction of water adjudications pending at the time of passage of the act; places the

responsibility for administration and distribution of water upon the state engineer and the division engineer; and provides that any injunction to enforce orders of the state engineer or the division engineer shall be issued by the water judge of the division involved. *Kuiper v. Well Owners Conservation Ass'n*, 176 Colo. 119, 490 P.2d 268 (1971).

**This act creates two levels of adversary involvement** in a water adjudication involving a proposed plan for augmentation or a change of water right: (1) Permission to file a statement of opposition; and (2) standing to assert injury. The first is available to "any person" and allows such person to participate to the extent of holding the applicant to a standard of "strict proof". The second, however, requires the objector to show that he or she has a legally protected interest in a vested water right or conditional decree. *Application of Turkey Canon Ranch Ltd.*, 937 P.2d 739 (Colo. 1997).

**Article provides statutory framework for implementing constitutional right to divert unappropriated waters** of any natural stream to beneficial uses. *State ex rel. Danielson v. Vickroy*, 627 P.2d 752 (Colo. 1981).

**This article was enacted in an effort to revamp Colorado's legal procedures** for determining claims to water within the state. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 96 S. Ct. 1236, 47 L. Ed.2d 483, reh'g denied, 426 U.S. 912, 96 S. Ct. 2239, 48 L. Ed.2d 839 (1976).

**This article and article 90 deal with separate waters.** This article and the ground water management act, article 90 of this title, deal with separate and mutually exclusive waters. *Broyles v. Fort Lyon Canal Co.*, 638 P.2d 244 (Colo. 1981).

**Differences explained** between determination and administration of water rights under this article and under article 90. *E. Cherry Creek Water & Sanitation Dist. v. Rangeview Metro. Dist.*, 109 P.3d 154 (Colo. 2005).

**The entire plan of the water adjudication act is based on the concept of "rivers and natural streams".** *Whitten v. Coit*, 153 Colo. 157, 385 P.2d 131 (1963) (decided under repealed § 147-9-1, CRS 53).

**Water right is a legal right to use water;** often, it is characterized as a property right. *Gardner v. State*, 200 Colo. 221, 614 P.2d 357 (1980).

**Colorado applies the doctrine of prior appropriation** in establishing rights to the use of water. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 96 S. Ct. 1236, 47 L. Ed.2d 483, reh'g denied, 426 U.S. 912, 96 S. Ct. 2239, 48 L. Ed.2d 839 (1976).

**Doctrine of prior appropriation stated.** *Colo. River Water Conservation Dist. v. United*

*States*, 424 U.S. 800, 96 S. Ct. 1236, 47 L. Ed.2d 483, reh'g denied, 426 U.S. 912, 96 S. Ct. 2239, 48 L. Ed.2d 839 (1976).

**The general rule which must be adhered to in determining the appropriation date** is that intent to take must be accompanied by some open physical demonstration of the intent. *Colo. River Water Conservation Dist. v. Rocky Mt. Power Co.*, 174 Colo. 309, 486 P.2d 438 (1971).

**What constitutes the elements of intent and physical act is not the same in every case,** and therefore, each case must and should be considered on an ad hoc basis. *Colo. River Water Conservation Dist. v. Rocky Mt. Power Co.*, 174 Colo. 309, 486 P.2d 438 (1971).

**Colorado water rights are based on the appropriation system which requires the permanent fixing of rights** to the use of water at the time of the adjudication, with no provision for the future needs, as is often required in case of reserved water rights. *United States v. District Court*, 401 U.S. 520, 91 S. Ct. 998, 28 L. Ed.2d 278 (1971).

**Water adjudication proceedings are "special statutory proceedings"** as contemplated under C.R.C.P. 81(a), which states: "These rules do not govern procedure and practice in any special statutory proceeding insofar as they are inconsistent or in conflict with the procedure and practice provided by the applicable statute". *Colo. River Water Conservation Dist. v. Rocky Mt. Power Co.*, 174 Colo. 309, 486 P.2d 438 (1971).

Proceedings under this article are special statutory proceedings within the contemplation of C.R.C.P. 81(a). *Gardner v. State*, 200 Colo. 221, 614 P.2d 357 (1980).

**Water judge determines applications expressly authorized to be filed.** Under this article, the types of applications the water judge may determine under the resume-notice procedure of § 37-92-302 (3) are those applications expressly authorized to be filed under § 37-92-302 (1)(a). *Gardner v. State*, 200 Colo. 221, 614 P.2d 357 (1980).

**Determination of abandonment not permitted under § 37-92-302 (3).** This article does not permit the water judge to make a determination of abandonment under § 37-92-302 (1)(a), when the application has been filed in accordance only with the resume—notice procedures outlined in subsection (3) of § 37-92-302. *Gardner v. State*, 200 Colo. 221, 614 P.2d 357 (1980).

**Applied** in *Upper Harmony Ditch Co. v. Carwin*, 189 Colo. 190, 539 P.2d 1282 (1975); *Twin Lakes Reservoir & Canal Co. v. City of Aspen*, 192 Colo. 209, 557 P.2d 825 (1976); *In re Simineo v. Kelling*, 199 Colo. 225, 607 P.2d 1289 (1980); *Alamosa-La Jara Water Users Prot. Ass'n v. Gould*, 674 P.2d 914 (Colo. 1983).



**37-92-102. Legislative declaration - basic tenets of Colorado water law.** (1) (a) It is hereby declared to be the policy of the state of Colorado that all water in or tributary to natural surface streams, not including nontributary groundwater as that term is defined in section 37-90-103, originating in or flowing into this state have always been and are hereby declared to be the property of the public, dedicated to the use of the people of the state, subject to appropriation and use in accordance with sections 5 and 6 of article XVI of the state constitution and this article. As incident thereto, it is the policy of this state to integrate the appropriation, use, and administration of underground water tributary to a stream with the use of surface water in such a way as to maximize the beneficial use of all of the waters of this state.

(b) A stream system which arises as a natural surface stream and, as a natural or man-induced phenomenon, terminates within the state of Colorado through naturally occurring evaporation and transpiration of its waters, together with its underflow and tributary waters, is a natural surface stream subject to appropriation as provided in paragraph (a) of this subsection (1).

(2) Recognizing that previous and existing laws have given inadequate attention to the development and use of underground waters of the state, that the use of underground waters as an independent source or in conjunction with surface waters is necessary to the present and future welfare of the people of this state, and that the future welfare of the state depends upon a sound and flexible integrated use of all waters of the state, it is hereby declared to be the further policy of the state of Colorado that, in the determination of water rights, uses, and administration of water, the following principles shall apply:

(a) Water rights and uses vested prior to June 7, 1969, in any person by virtue of previous or existing laws, including an appropriation from a well, shall be protected subject to the provisions of this article.

(b) The existing use of groundwater, either independently or in conjunction with surface rights, shall be recognized to the fullest extent possible, subject to the preservation of other existing vested rights, but, at his own point of diversion on a natural watercourse, each diverter must establish some reasonable means of effectuating his diversion. He is not entitled to command the whole flow of the stream merely to facilitate his taking the fraction of the whole flow to which he is entitled.

(c) The use of groundwater may be considered as an alternate or supplemental source of supply for surface decrees entered prior to June 7, 1969, taking into consideration both previous usage and the necessity to protect the vested rights of others.

(d) No reduction of any lawful diversion because of the operation of the priority system shall be permitted unless such reduction would increase the amount of water available to and required by water rights having senior priorities.

(3) Further recognizing the need to correlate the activities of mankind with some reasonable preservation of the natural environment, the Colorado water conservation board is hereby vested with the exclusive authority, on behalf of the people of the state of Colorado, to appropriate in a manner consistent with sections 5 and 6 of article XVI of the state constitution, such waters of natural streams and lakes as the board determines may be required for minimum stream flows or for natural surface water levels or volumes for natural lakes to preserve the natural environment to a reasonable degree. In the adjudication of water rights pursuant to this article and other applicable law, no other person or entity shall be granted a decree adjudicating a right to water or interests in water for instream flows in a stream channel between specific points, or for natural surface water levels or volumes for natural lakes, for any purpose whatsoever. The board also may acquire, by grant, purchase, donation, bequest, devise, lease, exchange, or other contractual agreement, from or with any person, including any governmental entity, such water, water rights, or interests in water that are not on the division engineer's abandonment list in such amount as the board determines is appropriate for stream flows or for natural surface water levels or volumes for natural lakes to preserve or improve the natural environment to a reasonable degree. At the request of any person, including any governmental entity, the board shall determine in a timely manner, not to exceed one hundred twenty days unless further time is granted by the requesting person or entity, what terms and conditions it will accept in a contract or agreement for such acquisition. Any contract or agreement executed between the

board and any person or governmental entity that provides water, water rights, or interests in water to the board shall be enforceable by either party thereto as a water matter under this article, according to the terms of the contract or agreement. The board shall adopt criteria for evaluating proposed contracts or agreements for leases or loans of water, water rights, or interests in water under this subsection (3), including, but not limited to, criteria addressing public notice, the extent to which the leased or loaned water will benefit the natural environment to a reasonable degree, and calculation of the compensation paid to the lessor of the water based upon the use of the water after the term of the lease. As a condition of approval of a proposed contract or agreement for a lease or loan of water, water rights, or interests in water pursuant to this subsection (3), the board shall obtain confirmation from the division engineer that the proposal is administrable and is capable of meeting all applicable statutory requirements. All contracts or agreements entered into by the board for leases or loans of water, water rights, or interests in water pursuant to this subsection (3) shall require the board to maintain records of how much water the board uses under the contract or agreement each year it is in effect and to install any measuring devices deemed necessary by the division engineer to administer the contract or agreement and to measure and record how much water flows out of the reach after use by the board under the contract or agreement, unless a measuring device already exists on the stream that meets the division engineer's requirements. All contracts or agreements for water, water rights, or interests in water under this subsection (3) shall provide that, pursuant to the water court decree implementing the contract or agreement, the board or the lessor, lender, or donor of the water may bring about beneficial use of the historical consumptive use of the leased, loaned, or donated water right downstream of the instream flow reach as fully consumable reusable water. The board shall file a change of water right application or other application with the water court to obtain a decreed right to use water for instream flow purposes under a contract or agreement for a lease or loan of water, water rights, or interests in water pursuant to this subsection (3). The resulting water court decree shall quantify the historical consumptive use of the leased or loaned water right and determine the method by which the historical consumptive use should be quantified and credited during the term of the agreement for the lease or loan of the water right. Said method shall recognize the actual amount of consumptive use available under the leased or loaned water right and shall not result in a reduction of the historical consumptive use of that water right during the term of the lease or loan, except to the extent such reduction is based upon the actual amount of water available under said rights. All water rights under such decrees shall be administered in priority. The board may not accept a donation of water rights that either would require the removal of existing infrastructure without approval of the current owner of such infrastructure or that were acquired by condemnation. The board may use any funds available to it for acquisition of water rights and their conversion to instream flow rights. The board may initiate such applications as it determines are necessary or desirable for utilizing water, water rights, or interests in water appropriated, acquired, or held by the board, including applications for changes of water rights, exchanges, or augmentation plans. Prior to the initiation of any such appropriation or acquisition, the board shall request recommendations from the division of parks and wildlife. The board also shall request recommendations from the United States department of agriculture and the United States department of the interior. Nothing in this article shall be construed as authorizing any state agency to acquire water by eminent domain or to deprive the people of the state of Colorado of the beneficial use of those waters available by law and interstate compact. Nothing in this subsection (3) shall impact section 37-60-121 (2.5). Any appropriation made pursuant to this subsection (3) shall be subject to the following principles and limitations:

(a) Any such appropriation which is based upon water imported from one water division to another by some other appropriator shall not, as against the appropriator of such imported water or his successor in interest, constitute a claim, bar, or use for any purpose whatsoever.

(b) Any such appropriation shall be subject to the present uses or exchanges of water being made by other water users pursuant to appropriation or practices in existence on the date of such appropriation, whether or not previously confirmed by court order or decree.



(c) Before initiating a water rights filing, the board shall determine that the natural environment will be preserved to a reasonable degree by the water available for the appropriation to be made; that there is a natural environment that can be preserved to a reasonable degree with the board's water right, if granted; and that such environment can exist without material injury to water rights.

(c.5) Notwithstanding section 37-92-103 (6), as to any application filed by the board on or after July 1, 1994, the board may not acquire conditional water rights or change conditional water rights to instream flow uses.

(d) Nothing in this section is intended or shall be construed to allow condemnation by this state or any person of easements or rights-of-way across private lands to gain access to a segment of a stream or lake where a water right decree has been awarded to the Colorado water conservation board.

(e) All recommendations, including those of the United States, which are transmitted to the board for water to be retained in streams or lakes to preserve the natural environment to a reasonable degree must be made with specificity and in writing in order that any appropriation made by the board may be integrated into the statewide system for the administration of water rights. Filings for appropriations by the board shall be consistent with other appropriations and with the requirements of this article.

(4) Any appropriation made pursuant to subsection (3) of this section shall also be subject to the following principles and limitations:

(a) Utilizing a public notice and comment procedure, the board, in its discretion, may determine whether or not to appropriate minimum stream flows or natural lake levels, or decrease such an appropriation, to preserve the natural environment to a reasonable degree. The board may adopt conditions attached to an appropriation or decreased appropriation, may file or withdraw statements of opposition in water court cases, and enter into stipulations for decrees or other forms of contractual agreements, including enforcement agreements, that it determines will preserve the natural environment to a reasonable degree. All contractual agreements and stipulations entered into by the board prior to May 23, 1996, regarding enforcement of its appropriations shall be given full force and effect. Any increase to an existing minimum stream flow or natural lake level appropriation or decree shall be made as a new appropriation.

(b) (I) Except as provided pursuant to paragraph (d) of this subsection (4), if the board determines that it is appropriate to consider decreasing an existing decreed appropriation, the board shall proceed through an adequate public notice and comment process to consider such decrease at a public meeting.

(II) For the purposes of this paragraph (b), "adequate public notice and comment process" shall include the following:

(A) Notice of the proposed decrease and the date of the public meeting at which it will first be considered shall be printed in the resume in the water court having jurisdiction over the decree that is the subject of the decrease. The first public meeting of the board at which the decrease is to be considered shall occur at least sixty-three days after the month in which the resume is published. Notice shall also be published in a newspaper of statewide distribution within thirty-five to forty-nine days prior to such first public meeting.

(B) If the board decides at such first public meeting to consider the proposed decrease, the board shall announce publicly the date of a subsequent public meeting for such purpose.

(C) On the written request of any person made within thirty-five days after the date of the first public meeting, the board shall delay the subsequent public meeting for up to one year to allow such person the opportunity for the collection of scientific data material to the proposed decrease. Such request may not be interposed solely for delay of the proceedings.

(D) On the written request of any person made within thirty-five days after the date of the first public meeting, the board shall, within sixty-three days after such request, establish fair and formal procedures for the subsequent public meeting, including the opportunity for reasonable disclosure, discovery, subpoenas, direct examination, and cross examination, and may promulgate rules that will assure orderly procedures. Subject to these rights and requirements, where a meeting will be expedited and the interests of the participants will not be substantially prejudiced thereby, the board may receive all or part of the evidence in written form.

(III) The board's final written determination regarding the decrease shall state its effective date, be mailed promptly to the persons who appeared by written or oral comment at the board's proceeding, and be filed promptly with the water court. Within thirty-five days after such effective date, any person who appeared by written or oral comment at the board's proceeding may file with the water court and serve the board a petition for judicial review of the board's determination that the decreed appropriation as decreased will preserve the natural environment to a reasonable degree, based on the administrative record and utilizing the criteria of section 24-4-106 (6) and (7), C.R.S. Any such person may request a stay in accordance with the criteria of section 24-4-106 (5), C.R.S., pending the review proceeding. If no petition is filed, the court shall promptly enter an order decreasing the board's appropriation decree in accordance with the board's written determination. If a petition is filed, the court shall promptly order briefing and oral argument and render its decision to affirm or set aside the board's determination. If the board's determination is affirmed, the court shall promptly enter an order decreasing the board's appropriation decree in accordance with the board's written determination. If the board's determination is set aside, the court shall enter its order of relief under the provisions of section 24-4-106 (7), C.R.S. Appellate review of the court's order shall be as allowed in other water matters.

(c) The board's determinations regarding the matters to be determined by the board under paragraph (c) of subsection (3) of this section and paragraph (d) of this subsection (4) for new appropriations shall be subject to judicial review in the water court application and decree proceedings initiated by the board, based on the board's administrative record and utilizing the criteria of section 24-4-106 (6) and (7), C.R.S. The board may file applications for changes of water rights and augmentation plans, and the water court shall determine matters that are within the scope of section 37-92-305.

(d) The board may participate in the recovery implementation program for endangered fish species in the upper Colorado river basin and appropriate and obtain decrees for minimum instream flows or natural lake levels, including decree provisions for modification and enforcement, the implementation of which shall not be subject to paragraph (b) of this subsection (4), as it determines will preserve the natural environment of the Colorado river endangered fish within Colorado to a reasonable degree while protecting existing uses within Colorado and not depriving the people of the state of Colorado of the beneficial use of those waters available by law and interstate compact.

(e) Sub-subparagraphs (A) and (C) of subparagraph (II) of paragraph (b) of this subsection (4) shall not apply to the board's consideration of any proposed decrease which was included in a meeting notice and agenda issued by the board prior to May 23, 1996, whether or not the board had scheduled or taken any action on the proposal by such date. Sub-subparagraph (D) of subparagraph (II) of paragraph (b) of this subsection (4) shall not apply to such a proposal so long as the board establishes fair and formal procedures pursuant to such sub-subparagraph (D) at or before the first public meeting thereon for any subsequent public meeting, including the opportunity for reasonable disclosure, discovery, subpoenas, direct examination, and cross examination of witnesses. All other provisions in paragraph (b) of this subsection (4) shall apply to any decrease after May 23, 1996.

(5) Within thirty-five days after initiating any water rights filing for the adjudication of a recreational in-channel diversion, any county, municipality, city and county, water district, water and sanitation district, water conservation district, or water conservancy district shall submit a copy of the water rights application to the board for review.

(6) (a) (Deleted by amendment, L. 2006, p. 906, § 1, effective May 11, 2006.)

(b) The board, after deliberation in a public meeting, shall consider the following factors and make written findings as to each:

(I) Whether the adjudication and administration of the recreational in-channel diversion would materially impair the ability of Colorado to fully develop and place to consumptive beneficial use its compact entitlements;

(II) and (III) (Deleted by amendment, L. 2006, p. 906, § 1, effective May 11, 2006.)

(IV) Whether exercise of the recreational in-channel diversion would cause material injury to instream flow water rights appropriated pursuant to subsections (3) and (4) of this section; and



(V) Whether adjudication and administration of the recreational in-channel diversion would promote maximum utilization of waters of the state.

(VI) (Deleted by amendment, L. 2006, p. 906, § 1, effective May 11, 2006.)

(c) Within ninety days after the filing of statements of opposition, the board shall report its findings to the water court for review pursuant to section 37-92-305 (13). The board may fully participate in the water court proceedings.

(d) Nothing in subsection (5) of this section or this subsection (6) shall apply in any way to any application for a water right or conditional water right for recreational in-channel diversion purposes that was filed prior to January 1, 2001.

(e) Nothing in subsection (5) of this section or this subsection (6) shall apply in any way to any water right or conditional water right for recreational in-channel diversion purposes for which a decree was entered prior to June 5, 2001, including any proceeding concerning diligence on such conditional water right or any proceeding to make such conditional water right absolute.

**Source:** L. 69: p. 1200, § 1. C.R.S. 1963: § 148-21-2. L. 73: p. 1521, § 2. L. 79: (1) amended, p. 1367, § 4, effective June 22. L. 81: (3) amended, p. 1784, § 1, effective June 23. L. 85: (1)(a) amended, p. 1166, § 5, effective July 1. L. 86: IP(3) amended and (3)(e) added, p. 1095, § 1, effective May 3. L. 87: (3) amended, p. 1305, § 2, effective June 20. L. 94: (3)(c.5) added, p. 766, § 1, effective April 20. L. 96: (4) added, p. 952, § 1, effective May 23. L. 2000: (3)(c.5) amended, p. 1443, § 1, effective June 1. L. 2001: (5) and (6) added, p. 1187, § 1, effective June 5. L. 2002: IP(3) amended, p. 445, § 1, effective August 7. L. 2003: (6)(c) amended, p. 2001, § 63, effective May 22. L. 2006: (6)(a), (6)(b), and (6)(c) amended, p. 906, § 1, effective May 11. L. 2008: IP(3) amended, p. 1573, § 27, effective May 29; IP(3) amended, p. 587, § 1, effective August 5. L. 2012: (4)(b)(II)(A), (4)(b)(II)(C), (4)(b)(II)(D), (4)(b)(III), and (5) amended, (SB 12-175), ch. 208, p. 886, § 161, effective July 1.

**Editor's note:** (1) Section 4 of chapter 197, Session Laws of Colorado 2006, provides that the act amending subsections (6)(a), (6)(b), and (6)(c) applies only to applications for and the administration of new recreational in-channel diversions filed on or after May 11, 2006, and shall not apply to applications for reasonable diligence or to make absolute recreational in-channel diversions that were decreed or applied for prior to May 11, 2006.

(2) Amendments to the introductory portion to subsection (3) by House Bill 08-1280 and House Bill 08-1346 were harmonized.

(3) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsections (4)(b)(II)(A), (4)(b)(II)(C), (4)(b)(II)(D), (4)(b)(III), and (5) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

**Cross references:** For water of streams being public property, see § 5 of art. XVI, Colo. Const.; for diverting unappropriated water, see § 6 of art. XVI, Colo. Const.

## ANNOTATION

- I. General Consideration.
- II. Federal Water Rights and Determination.
  - A. Federal Reserved Water Rights.
  - B. Equitable Apportionment.
- III. Recreational In-Channel Diversions.

### I. GENERAL CONSIDERATION.

**Law reviews.** For note, "Adjudication of Federal Reserved Water Rights", see 42 U. Colo. L. Rev. 161 (1970). For comment, "Water: Statewide or Local Concern? City of Thornton v. Farmers Reservoir & Irrigation Co.", see 56 Den. L.J. 625 (1979). For comment, "Maximum Utilization Collides With Prior Appropri-

ation in A-B Cattle Co. v. United States", see 57 Den. L.J. 103 (1979). For comment, "United States v. New Mexico and the Course of Federal Reserved Water Rights", see 51 U. Colo. L. Rev. 209 (1980). For comment, "Colorado River Water Conservation Dist. v. Colorado Water Conservation Bd.: Diversion as an Element of Appropriation", see 57 Den. L.J. 661 (1980). For article, "Recent Developments in Colorado Groundwater Law", see 58 Den. L.J. 801 (1981). For article, "The Emerging Relationship Between Environmental Regulations and Colorado Water Law", see 53 U. Colo. L. Rev. 597 (1982). For article, "Water for Mining and Milling Operations", see 13 Colo. Law. 437 (1984). For casenote, "Nontributary, Nondesignated

Ground Water: The Huston Decision", see 56 U. Colo. L. Rev. 135 (1984). For article, "Principles and Law of Colorado's Nontributary Ground Water", see 62 Den. U. L. Rev. 809 (1985). For article, "The Physical Solution in Western Water Law", see 57 U. Colo. L. Rev. 445 (1986). For article, "Sporhase, El Paso, and the Unilateral Allocation of Water Resources: Some Reflections on International and Interstate Groundwater Law", see 57 U. Colo. L. Rev. 549 (1986). For article, "Trusting the Public Interest to Judges: A Comment on the Public Trust Writings of Professors Sax, Wilkinson, Dunning and Johnson", see 63 Den. U.L. Rev. 565 (1986). For comment, "The Public Trust Doctrine as a Source of State Reserved Water Rights", see 63 Den. U.L. Rev. 585 (1986). For article, "Colorado's Law of 'Underground Water': A Look at the South Platte Basin and Beyond", see 59 U. Colo. L. Rev. 579 (1988). For article, "The Legal Evolution of Colorado's Instream Flow Program", see 17 Colo. Law. 861 (1988). For article, "Abandonment of Water Rights: Is 'Use It or Lose It' the Law?", see 18 Colo. Law. 2125 (1989). For article, "The Constitution, Property Rights and the Future of Water Law", see 61 U. Colo. L. Rev. 257 (1990). For article, "Protection of Instream Flows: The Aspen Wilderness Workshop Decision", see 24 Colo. Law. 2577 (1995). For article, "Water Banking: Should There Be More Interest?", see 25 Colo. Law. 97 (August 1996). For article, "Private Means to Enhance Public Streams", see 33 Colo. Law. 69 (April 2004). For article, "Preserving Historical Consumptive Use During Water Leases for Instream Use", see 40 Colo. Law. 49 (June 2011).

**Annotator's note.** Although there is no section similar to § 37-92-102 in the former Colorado codes, relevant cases construing repealed § 148-9-7, C.R.S. 1963, and CSA, C. 90, § 189(24), have been included in the annotations to this section.

**Not unconstitutional delegation of power to appropriate.** The statutory language in this section and § 37-92-103 (4) empowering the Colorado water conservation board to appropriate such waters of natural streams and lakes as may be required to preserve the natural environment to reasonable degree is not unconstitutionally vague and, therefore, not an impermissible delegation of authority. *Colo. River Water Conservation Dist. v. Colo. Water Conservation Bd.*, 197 Colo. 469, 594 P.2d 570 (1979).

**Subsection (1)(b) is of general and uniform applicability and does not constitute unconstitutional special legislation.** *Am. Water Dev., Inc. v. City of Alamosa*, 874 P.2d 352 (Colo. 1994).

**The statement in subsection (1)(a) accords with the principle enunciated in many of our previous cases that the waters of our state are such a scarce and valuable resource that they**

must be administered in ways that effectuate the goal of "maximum utilization", including use of as much underground water as possible. *State Eng'r v. Castle Meadows, Inc.*, 856 P.2d 496 (Colo. 1993).

**One of the avowed purposes of this article** is to afford some practicable degree of protection to water rights and uses vested prior to the effective date of these sections, June 7, 1969. *Gardner v. State*, 200 Colo. 221, 614 P.2d 357 (1980).

**In adopting the Water Right Determination and Administration Act of 1969**, the general assembly expressly recognized the need to protect those who hold vested water rights and required that such rights be preserved under our current water system. *State Eng'r v. Castle Meadows, Inc.*, 856 P.2d 496 (Colo. 1993).

**Nontributary ground waters.** Legislature has plenary power over the disposition of nontributary ground water outside of designated basins. *Qualls, Inc. v. Berryman*, 789 P.2d 1095 (Colo. 1990).

**The exclusive authority granted to the Colorado water conservation board by this section to appropriate minimum stream flows does not detract from the right to divert and to put to beneficial use unappropriated waters by removal or control.** *City of Thornton v. City of Fort Collins*, 830 P.2d 915 (Colo. 1992).

**In this semiarid region, a water right has long been recognized as a property right**, often more valuable than the land upon which the water is applied. *City of Colo. Springs v. Yost*, 126 Colo. 289, 249 P.2d 151 (1952).

**Value of property right in water is in its use, not its possession.** The uncertain nature of the property right in water is evidence that its primary value is in its relative priority and the right to use the resource and not in the continuous tangible possession of the resource. *Navajo Dev. Co. v. Sanderson*, 655 P.2d 1374 (Colo. 1982).

**The right to appropriate and divert water is not absolute.** *City & County of Denver v. Bergland*, 517 F. Supp. 155 (D. Colo. 1981), aff'd in part and rev'd on other grounds, 695 F. 2d 465 (10th Cir. 1982).

**Board's right to appropriate waters is burdened by a fiduciary duty** to appropriate the minimum amount necessary to preserve the natural environment for the people of the state. *Aspen Wilderness Workshop, Inc. v. Colo. Water Conservation Bd.*, 901 P.2d 1251 (Colo. 1995).

**This section does not create in the board a blanket grant of authority** as to its appropriation of instream flow waters. *Aspen Wilderness Workshop, Inc. v. Colo. Water Conservation Bd.*, 901 P.2d 1251 (Colo. 1995).

**Board's appropriations are designated as the minimum stream flows necessary** to preserve the natural environment to a reasonable



degree. *Aspen Wilderness Workshop, Inc. v. Colo. Water Conservation Bd.*, 901 P.2d 1251 (Colo. 1995).

**Board's appropriations not plenary.** As any other appropriator, the board may perfect its water rights by applying for and obtaining a decree from the water court. And once the water court issues a decree, that decree becomes controlling as to the right to appropriate water. *Aspen Wilderness Workshop, Inc. v. Colo. Water Conservation Bd.*, 901 P.2d 1251 (Colo. 1995).

**This section does not grant the board the power to unilaterally modify lawful decrees of the water court.** *Aspen Wilderness Workshop, Inc. v. Colo. Water Conservation Bd.*, 901 P.2d 1251 (Colo. 1995).

**Board may modify a previous adjudication** by petitioning the water court for changes to its decreed water rights. *Aspen Wilderness Workshop, Inc. v. Colo. Water Conservation Bd.*, 901 P.2d 1251 (Colo. 1995).

**This section did not provide carte blanche authority to substitute water consumption and raise it to a preferential right.** *Southeastern Colo. Water Conservancy Dist. v. Shelton Farms, Inc.*, 187 Colo. 181, 529 P.2d 1321 (1974).

**There must be a balancing effect, and the elements of water and land must be used in harmony** to the maximum feasible use of both. *Southeastern Colo. Water Conservancy Dist. v. Shelton Farms, Inc.*, 187 Colo. 181, 529 P.2d 1321 (1974).

**Persons who cut down water-consuming vegetation along river banks did not have a right to equivalent amount of water for their own "beneficial use"** free from the call of the river. *Southeastern Colo. Water Conservancy Dist. v. Shelton Farms, Inc.*, 187 Colo. 181, 529 P.2d 1321 (1974).

**Water is available for appropriation if the taking thereof does not cause injury.** *Cache La Poudre Water Users Ass'n v. Glacier View Meadows*, 191 Colo. 53, 550 P.2d 288 (1976).

**Maximum utilization of an aquifer** is not license to get all the water from it, but rather the objective of "maximum use" administration is "optimum use" which can only be achieved with proper regard for all significant factors, including economic and environmental concerns. *Alamosa-La Jara Water Users Prot. Ass'n v. Gould*, 674 P.2d 914 (Colo. 1983).

**An argument to the effect that water withdrawn must be replaced 100 percent** fell where senior users could show no injury by the diversion of water, even though the river involved was over-appropriated. *Cache La Poudre Water Users Ass'n v. Glacier View Meadows*, 191 Colo. 53, 550 P.2d 288 (1976).

**An acceptable plan for augmentation does not require the addition of new water into the water system**, such as the introduction of

transmountain diverted water into the system. *Kelly Ranch v. Southeastern Colo. Water Conservancy Dist.*, 191 Colo. 65, 550 P.2d 297 (1976).

**The fact that rivers involved are over-appropriated**, rather than being an argument against the plans for augmentation, is the very reason for the valid exercise of ingenuity of persons seeking to maximize the use of water, whether they are present or future owners of land and wells, developers, or as characterized by the water court here, promoters, speculators, or nonusers. *Kelly Ranch v. Southeastern Colo. Water Conservancy Dist.*, 191 Colo. 65, 550 P.2d 297 (1976).

**Plan of augmentation held valid.** *Cache La Poudre Water Users Ass'n v. Glacier View Meadows*, 191 Colo. 53, 550 P.2d 288 (1976).

**Under subsection (3), Colorado water conservation board can make in-stream appropriation without diversion** in the conventional sense. *Colo. River Water Conservation Dist. v. Colo. Water Conservation Bd.*, 197 Colo. 469, 594 P.2d 570 (1979).

**Appropriations pursuant to subsection (3) are to protect and preserve** the natural habitat, and decrees confirming them award priorities which are superior to the rights of those who may later appropriate. *Colo. River Water Conservation Dist. v. Colo. Water Conservation Bd.*, 197 Colo. 469, 594 P.2d 570 (1979).

**When adjudicated priorities are not being filled as a result of pumping unappropriated ground water**, it cannot be said that this ground water is unappropriated. *Kuiper v. Well Owners Conservation Ass'n*, 176 Colo. 119, 490 P.2d 268 (1971).

**This section does not require an owner of a surface decree to first apply his well water to that decree** before making the call upon junior appropriators, be they surface or underground, for this section states that use of ground water may be considered as an alternate or supplemental source of supply for surface decrees heretofore entered, taking into consideration both previous usage and necessity to protect the vested rights of others. *Kuiper v. Well Owners Conservation Ass'n*, 176 Colo. 119, 490 P.2d 268 (1971).

**Decree of abandonment terminates the water right** and divests the owner of any interest in it, thereby rendering the water once again subject to appropriation by the public under § 5 of art. XVI, Colo. Const. *Gardner v. State*, 200 Colo. 221, 614 P.2d 357 (1980).

**The water court is not required to consider environmental factors** to determine whether to grant conditional water right decree. *Matter of Bd. of County Comm'rs*, 891 P.2d 952 (Colo. 1995).

**In addition to the dual focus on maximum beneficial use and the protection of water rights**, water judges must give consideration to the

potential impact of the utilization of water on other resources. Maximum utilization must be implemented so as to ensure that water resources are utilized in harmony with the protection of other valuable state resources. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

**Water which is appropriated by a structure or device which controls water within its natural watercourse** is not an appropriation of a minimum stream flow. *City of Thornton v. City of Fort Collins*, 830 P.2d 915 (Colo. 1992).

**The legislature expressed a clear intent to prohibit private parties from adjudicating instream flow rights.** The general assembly vested exclusive authority in the Colorado water conservation board. The judiciary is without authority to decree an instream flow right to any private entity. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

**The district's application was not an impermissible application for an instream flow right** where the beneficial use of the water was effectuated by a structure and the water right sought would be used to improve fishery and other recreational uses throughout the year. *Bd. of County Comm'rs v. Upper Gunnison River Water Conservancy Dist.*, 838 P.2d 840 (Colo. 1992).

**Applied in** *In re Water Rights in Water Dist. No. 19*, 194 Colo. 510, 574 P.2d 83 (1978); *Kuiper v. Atchison, T. & S.F. Ry.*, 195 Colo. 557, 581 P.2d 293 (1978); *State Dept. of Natural Res. v. Southwestern Colo. Water Conservation Dist.*, 671 P.2d 1294 (Colo. 1983), cert. denied, 466 U.S. 944, 104 S. Ct. 1929, 80 L. Ed.2d 474 (1984).

## II. FEDERAL WATER RIGHTS AND DETERMINATION.

### A. Federal Reserved Water Rights.

**The federal government has the authority both before and after a state is admitted into the union to reserve waters** for the use and benefit of federally reserved lands, which include any federal enclave. *United States v. District Court*, 401 U.S. 520, 91 S. Ct. 998, 28 L. Ed.2d 278 (1971).

**The United States often has reserved water rights based on withdrawals from the public domain.** *United States v. District Court*, 401 U.S. 520, 91 S. Ct. 998, 28 L. Ed.2d 278 (1971).

**The reservation of waters by the United States may be only implied and the amount will reflect the nature of the federal enclave.** *United States v. District Court*, 401 U.S. 520, 91 S. Ct. 998, 28 L. Ed.2d 278 (1971).

**Federal reserved water rights.** The United States possesses reserved rights for its federal reservations in Colorado in waters unappropriated upon the date of reservation of the federal

lands from the public domain, and in the amount necessary to achieve the primary purposes of the reservations. *United States v. City & County of Denver*, 656 P.2d 1 (Colo. 1982); *Park Center Water Dist. v. United States*, 781 P.2d 90 (Colo. 1989).

**Reserved rights determined by Colorado law.** Colorado law governing the determination of water rights is properly applied as the rule of decision by which the courts will determine the contours of the reserved rights asserted by the United States. *United States v. City & County of Denver*, 656 P.2d 1 (Colo. 1982); *Park Center Water Dist. v. United States*, 781 P.2d 90 (Colo. 1989).

**Seniority of federal reserved rights.** The federal government's position is similar to the holder of a conditional senior water right who can step ahead of junior appropriators causing a diminution of the amount of water available for diversion. *Navajo Dev. Co. v. Sanderson*, 655 P.2d 1374 (Colo. 1982).

**For extent of federal reserved water rights on different categories of public lands**, see *United States v. City & County of Denver*, 656 P.2d 1 (Colo. 1982).

**For effect of federal reserved water rights**, see *Navajo Dev. Co. v. Sanderson*, 655 P.2d 1374 (Colo. 1982).

**Applied in** *United States v. District Court*, 169 Colo. 555, 458 P.2d 760 (1969), aff'd, 401 U.S. 520, 91 S. Ct. 998, 28 L. Ed.2d 278 (1971).

### B. Equitable Apportionment.

**Equitable apportionment governs water disputes between states.** Equitable apportionment is the doctrine of federal common law that governs disputes between states concerning their rights to use the water of an interstate stream. *Colo. v. New Mexico*, 459 U.S. 176, 103 S. Ct. 539, 74 L. Ed.2d 348 (1982).

**To be settled by U.S. supreme court.** Each state through which rivers pass has a right to the benefit of the water but it is for the United States supreme court, as a matter of discretion, to measure their relative rights and obligations and to apportion the available water equitably. *Colo. v. New Mexico*, 459 U.S. 176, 103 S. Ct. 539, 74 L. Ed.2d 348 (1982)(specially concurring opinion).

**Equitable apportionment is a flexible doctrine** which calls for the exercise of an informed judgment on a consideration of many factors to secure a just and equitable allocation. *Colo. v. New Mexico*, 459 U.S. 176, 103 S. Ct. 539, 74 L. Ed.2d 348 (1982).

**Such apportionment weighs harms and benefits to competing states.** In an equitable apportionment of interstate waters, it is proper to weigh the harm and benefits to competing states. *Colo. v. New Mexico*, 459 U.S. 176, 103 S. Ct. 539, 74 L. Ed.2d 348 (1982).



**In addition to rule of priority.** In the determination of an equitable apportionment between Colorado and New Mexico, the rule of priority is not the sole criterion. While the equities supporting the protection of established, senior uses are substantial, it is also appropriate to consider additional factors relevant to a just apportionment, such as the conservation measures available to both states and the balance of harm and benefit that might result from the diversion sought. Colo. v. New Mexico, 459 U.S. 176, 103 S. Ct. 539, 74 L. Ed.2d 348 (1982).

**Equitable apportionment will not protect wasteful or inefficient uses.** Equitable apportionment will protect only those rights to water that are reasonably acquired and applied. Wasteful or inefficient uses will not be protected. Colo. v. New Mexico, 459 U.S. 176, 103 S. Ct. 539, 74 L. Ed.2d 348 (1982).

**Doctrine of equitable apportionment applies to diversion for future uses.** The flexible doctrine of equitable apportionment clearly ex-

tends to a state's claim to divert water for future uses. Colo. v. New Mexico, 459 U.S. 176, 103 S. Ct. 539, 74 L. Ed.2d 348 (1982).

### III. RECREATIONAL IN-CHANNEL DIVERSIONS.

**Nothing in the statute allows the Colorado water conservation board to look beyond the stream flow claimed or the recreation experience intended by an applicant when reviewing a recreational in-channel diversion application;** rather, the board functions as a narrowly-constrained factfinding and advisory body when it reviews such applications, which it must analyze purely as submitted instead of determining what recreation experience would be reasonable or what minimum stream flow would meet that recreational need. Colo. Water Conservation Bd. v. Upper Gunnison Water Conservancy Dist., 109 P.3d 585 (Colo. 2005).

**37-92-103. Definitions.** As used in this article, unless the context otherwise requires:

(1) "Abandonment of a conditional water right" means the termination of a conditional water right as a result of the failure to develop with reasonable diligence the proposed appropriation upon which such water right is to be based.

(2) "Abandonment of a water right" means the termination of a water right in whole or in part as a result of the intent of the owner thereof to discontinue permanently the use of all or part of the water available thereunder. Any period of nonuse of any portion of a water right shall be tolled, and no intent to discontinue permanent use shall be found for purposes of determining an abandonment of a water right for the duration that:

(a) The land on which the water right has been historically applied is enrolled under a federal land conservation program; or

(b) The nonuse of a water right by its owner is a result of participation in:

(I) A water conservation program approved by a state agency, a water conservation district, or a water conservancy district;

(II) A water conservation program established through formal written action or ordinance by a municipality or its municipal water supplier;

(III) An approved land fallowing program as provided by law in order to conserve water;

(IV) A water banking program as provided by law;

(V) A loan of water to the Colorado water conservation board for instream flow use under section 37-83-105 (2); or

(VI) Any contract or agreement with the Colorado water conservation board that allows the board to use all or a part of a water right to preserve or improve the natural environment to a reasonable degree under section 37-92-102 (3).

(3) (a) "Appropriation" means the application of a specified portion of the waters of the state to a beneficial use pursuant to the procedures prescribed by law; but no appropriation of water, either absolute or conditional, shall be held to occur when the proposed appropriation is based upon the speculative sale or transfer of the appropriative rights to persons not parties to the proposed appropriation, as evidenced by either of the following:

(I) The purported appropriator of record does not have either a legally vested interest or a reasonable expectation of procuring such interest in the lands or facilities to be served by such appropriation, unless such appropriator is a governmental agency or an agent in fact for the persons proposed to be benefited by such appropriation.

(II) The purported appropriator of record does not have a specific plan and intent to divert, store, or otherwise capture, possess, and control a specific quantity of water for specific beneficial uses.

(b) Nothing in this subsection (3) shall affect appropriations by the state of Colorado for minimum streamflows as described in subsection (4) of this section.

(4) "Beneficial use" is the use of that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the appropriation is lawfully made and, without limiting the generality of the foregoing, includes the impoundment of water for recreational purposes, including fishery or wildlife, and also includes the diversion of water by a county, municipality, city and county, water district, water and sanitation district, water conservation district, or water conservancy district for recreational in-channel diversion purposes. For the benefit and enjoyment of present and future generations, "beneficial use" shall also include the appropriation by the state of Colorado in the manner prescribed by law of such minimum flows between specific points or levels for and on natural streams and lakes as are required to preserve the natural environment to a reasonable degree.

(5) "Change of water right" means a change in the type, place, or time of use, a change in the point of diversion, a change from a fixed point of diversion to alternate or supplemental points of diversion, a change from alternate or supplemental points of diversion to a fixed point of diversion, a change in the means of diversion, a change in the place of storage, a change from direct application to storage and subsequent application, a change from storage and subsequent application to direct application, a change from a fixed place of storage to alternate places of storage, a change from alternate places of storage to a fixed place of storage, or any combination of such changes. The term "change of water right" includes changes of conditional water rights as well as changes of water rights.

(5.5) "Coal bed methane well" means a well permitted by the Colorado oil and gas conservation commission or a well authorized by a federal or tribal entity and constructed for the primary purpose of producing methane gas from a coal bed.

(6) "Conditional water right" means a right to perfect a water right with a certain priority upon the completion with reasonable diligence of the appropriation upon which such water right is to be based.

(6.3) "Control structure" means a structure consisting of durable man-made or natural materials that has been placed with the intent to divert, capture, possess, and control water in its natural course for an appropriator's intended and specified recreational in-channel diversion. The control structure and its efficiency shall be designed by a professional engineer, as that term is defined in section 12-25-102, C.R.S., or under the direct supervision of a professional engineer, and constructed so that it will operate efficiently and without waste to produce the intended and specified reasonable recreation experience. Concentration of river flow by a control structure constitutes control of water for a recreational in-channel diversion.

(6.7) "County" means any county and any city and county established under Colorado law.

(7) "Diversion" or "divert" means removing water from its natural course or location, or controlling water in its natural course or location, by means of a control structure, ditch, canal, flume, reservoir, bypass, pipeline, conduit, well, pump, or other structure or device; except that, on and after January 1, 2001, only a county, municipality, city and county, water district, water and sanitation district, water conservation district, or water conservancy district may file an application to control water in its natural course or location by means of a control structure for recreational in-channel diversions.

(8) "Person" means an individual, a partnership, a corporation, a municipality, the state of Colorado, the United States, or any other legal entity, public or private.

(9) "Plan for augmentation" means a detailed program, which may be either temporary or perpetual in duration, to increase the supply of water available for beneficial use in a division or portion thereof by the development of new or alternate means or points of diversion, by a pooling of water resources, by water exchange projects, by providing substitute supplies of water, by the development of new sources of water, or by any other appropriate means. "Plan for augmentation" does not include the salvage of tributary waters by the eradication of phreatophytes, nor does it include the use of tributary water collected from land surfaces that have been made impermeable, thereby increasing the runoff but not adding to the existing supply of tributary water.



(10) "Priority" means the seniority by date as of which a water right is entitled to use or conditional water right will be entitled to use and the relative seniority of a water right or a conditional water right in relation to other water rights and conditional water rights deriving their supply from a common source.

(10.1) "Reasonable recreation experience" means the use of a recreational in-channel diversion for, and limited to, nonmotorized boating. Other recreational activities may occur but may not serve as evidence of a reasonable recreation experience.

(10.3) "Recreational in-channel diversion" means the minimum amount of stream flow as it is diverted, captured, controlled, and placed to beneficial use between specific points defined by control structures pursuant to an application filed by a county, municipality, city and county, water district, water and sanitation district, water conservation district, or water conservancy district for a reasonable recreation experience in and on the water from April 1 to Labor Day of each year unless the applicant can demonstrate that there will be demand for the reasonable recreation experience on additional days. The recreational in-channel diversion shall be limited to one specified flow rate for each time period claimed by the applicant. Individual time periods shall not be shorter than fourteen days unless the applicant can demonstrate a need for a shorter time period. There shall be a presumption that there will not be material injury to a recreational in-channel diversion water right from subsequent appropriations or changes of water rights if the effect on the recreational in-channel diversion caused by such appropriations or changes does not exceed one-tenth of one percent of the lowest decreed rate of flow for the recreational in-channel diversion as measured at the recreational in-channel diversion and the cumulative effects on the recreational in-channel diversion caused by such appropriations or changes do not exceed two percent of the lowest decreed rate of flow for the recreational in-channel diversion measured at the recreational in-channel diversion. The owner of a water right for a recreational in-channel diversion may not call for water that has been lawfully stored by another appropriator.

(10.4) "Removal of water" means a change in the type and place of use of an absolute decreed agricultural water right from irrigated agricultural use in one county to a use not primarily related to agriculture in another county.

(10.5) "Revegetation" means the establishment of a ground cover of plant life demonstrated to be, without irrigation, reasonably capable of sustaining itself under the climatic conditions, soils, precipitation, and terrain prevailing for the lands from which irrigation water is removed. Grasses or other plants used for the purpose of revegetation shall not be noxious as such plants are defined under the provisions of the "Colorado Noxious Weed Act", article 5.5 of title 35, C.R.S.

(10.6) "Rotational crop management contract" means a written contract in which the owner or groups of owners of irrigation water rights agree to implement a change of the rights to a new use by foregoing irrigation of a portion of the lands historically irrigated and that provides that the water rights owner or groups of owners may rotate the lands that will not be irrigated as long as there is no injurious effect as specified in section 37-92-305 (3). The contract shall also provide that in the change of water right proceeding the water rights owner or groups of owners shall seek water court approval to rotate the lands that will not be irrigated as long as there is no injurious effect as specified in section 37-92-305 (3).

(10.7) "Significant water development activity" means any removal of water that results in the transfer of more than one thousand acre-feet of consumptive use of water per year by a single applicant or an applicant's agents.

(10.8) "Storage" or "store" means the impoundment, possession, and control of water by means of a dam. Waters in underground aquifers are not in storage or stored except to the extent waters in such aquifers are placed there by other than natural means with water to which the person placing such water in the underground aquifer has a conditional or decreed right.

(11) "Underground water", as applied in this article for the purpose of defining the waters of a natural stream, means that water in the unconsolidated alluvial aquifer of sand, gravel, and other sedimentary materials and all other waters hydraulically connected thereto which can influence the rate or direction of movement of the water in that alluvial aquifer

or natural stream. Such “underground water” is considered different from “designated groundwater” as defined in section 37-90-103 (6).

(12) “Water right” means a right to use in accordance with its priority a certain portion of the waters of the state by reason of the appropriation of the same.

(13) “Waters of the state” means all surface and underground water in or tributary to all natural streams within the state of Colorado, except waters referred to in section 37-90-103 (6).

(14) (a) “Well” means any structure or device used for the purpose or with the effect of obtaining groundwater for beneficial use from an aquifer. “Well” includes an augmentation well that diverts groundwater tributary to the South Platte river and delivers it to a surface stream, ditch, canal, reservoir or recharge facility to replace out-of-priority stream depletions, or to meet South Platte river compact obligations, either directly or by recharge accretions, as part of a plan for augmentation approved by the water judge for water division 1 or a substitute water supply plan approved pursuant to section 37-92-308.

(b) “Well” does not include a naturally flowing spring or springs where the natural spring discharge is captured or concentrated by installation of a near-surface structure or device less than ten feet in depth located at or within fifty feet of the spring or springs’ natural discharge point and the water is conveyed directly by gravity flow or into a separate sump or storage, if the owner obtains a water right for such structure or device as a spring pursuant to article 92 of this title.

**Source:** L. 69: 1201, § 1. C.R.S. 1963: § 148-21-3. L. 73: p. 1521, § 1. L. 75: (9) amended, p. 1397, § 1, effective June 20. L. 79: (3) amended and (10.5) added, p. 1368, § 5, effective June 22. L. 86: (2) amended, p. 1097, § 1, effective April 24. L. 92: (10.4) added, p. 2289, § 1, effective April 16. L. 95: (14) added, p. 141, § 4, effective April 7. L. 96: (9) amended, p. 125, § 1, effective March 25. L. 2001: (4) and (7) amended and (10.3) added, p. 1188 § 2, effective June 5. L. 2003: (14)(a) amended, p. 1453, § 3, effective April 30; (10.4) and (10.5) amended and (6.7), (10.6), and (10.7) added, p. 880, § 1, effective August 6. L. 2005: (2) amended, p. 232, § 1, effective April 14. L. 2006: (6.3) and (10.1) added and (7) and (10.3) amended, p. 907, § 2, effective May 11; (10.6) and (10.7) amended and (10.8) added, p. 999, § 1, effective May 25. L. 2007: (2)(b)(V) added, p. 48, § 2, effective August 3. L. 2008: IP(2)(b) amended and (2)(b)(VI) added, p. 589, § 2, effective August 5. L. 2009: (5.5) added, (HB 09-1303), ch. 390, p. 2110, § 5, effective June 2.

**Editor’s note:** Section 4 of chapter 197, Session Laws of Colorado 2006, provides that the act enacting subsections (6.3) and (10.1) and amending subsections (7) and (10.3) applies only to applications for and the administration of new recreation in-channel diversions filed on or after May 11, 2006, and shall not apply to applications for reasonable diligence or to make absolute recreational in-channel diversions that were decreed or applied for prior to May 11, 2006.

## ANNOTATION

- I. General Consideration.
- II. Abandonment.
- III. Appropriation.
- IV. Beneficial Use.
- V. Change of Water Right.
- VI. Conditional Water Right.
- VII. Plan for Augmentation.
- VIII. Priority.
- IX. Water Right.
- X. Underground Water.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, “Optimizing Water Use: The Return Flow Issue”, see 44 U. Colo. L.

Rev. 301 (1973). For article, “Adjudication of Indian and Federal Water Rights in the Federal Courts”, see 46 U. Colo. L. Rev. 555 (1974-75). For comment on determining the priority of federal reserved rights relative to the water rights of state appropriators, see 48 U. Colo. L. Rev. 547 (1977). For comment, “Maximum Utilization Collides With Prior Appropriation in A-B Cattle Co. v. United States”, see 57 Den. L.J. 103 (1979). For comment, “United States v. New Mexico and the Course of Federal Reserved Water Rights”, see 51 U. Colo. L. Rev. 209 (1980). For comment, “Colorado River Water Conservation Dist. v. Colorado Water Conservation Bd.: Diversion as an Element of Appropriation”, see 57 Den. L.J. 661 (1980). For



comment, "Bubb v. Christensen: The Rights of the Private Landowner Yield to the Rights of the Water Appropriator Under the Colorado Doctrine", see 58 Den. L.J. 825 (1981). For comment, "Town of De Beque v. Enewold: Conditional Water Rights and Statutory Water Law", see 58 Den. L.J. 837 (1981). For article, "Pollution or Resources Out-of-Place: Reclaiming Municipal Wastewater for Agricultural Use", see 53 U. Colo. L. Rev. 559 (1982). For note, "Reinterpreting the Physical Act Requirement for Conditional Water Rights", see 53 U. Colo. L. Rev. 765 (1982). For article, "Water Rights — How to Avoid Getting in Over Your Head", see 11 Colo. Law. 2143 (1982). For article, "Water for Mining and Milling Operations — Part I", see 13 Colo. Law. 240 (1984). For article, "Water for Mining and Milling Operations", see 13 Colo. Law. 437 (1984). For casenote, "Nontributary, Nondesignated Ground Water: The Huston Decision", see 56 U. Colo. L. Rev. 135 (1984). For article, "Developments in Conditional Water Rights Law", see 14 Colo. Law. 353 (1985). For article, "The Physical Solution in Western Water Law", see 57 U. Colo. L. Rev. 445 (1986). For article, "Colorado's Law of 'Underground Water': A Look at the South Platte Basin and Beyond", see 59 U. Colo. L. Rev. 579 (1988). For comment, "Water Use Efficiency and Appropriation in Colorado: Salvaging Incentives for Maximum Beneficial Use", see 58 U. Colo. L. Rev. 657 (1988). For article, "The Legal Evolution of Colorado's Instream Flow Program", see 17 Colo. Law. 861 (1988). For article, "Abandonment of Water Rights: Is 'Use It or Lose It' the Law?", see 18 Colo. Law. 2125 (1989). For comment, "The Case For Private Instream Appropriations in Colorado", see 60 U. Colo. L. Rev. 1087 (1990). For comment, "Colorado's Foreign Water Doctrine: License To Speculate", see 60 U. Colo. L. Rev. 1113 (1990). For article, "The Constitution, Property Rights and the Future of Water Law", see 61 U. Colo. L. Rev. 257 (1990). For article, "Transaction Costs as Determinants of Water Transfers", see 61 U. Colo. L. Rev. 393 (1990). For comment, "Pagosa Area Water & Sanitation District v. Trout Unlimited and an Anti-Speculation Doctrine for a New Era of Water Supply Planning", see 82 U. Colo. L. Rev. 640 (2011).

**Annotator's note.** Since § 37-92-103 is similar to repealed § 148-9-1, C.R.S. 1963, § 147-9-1, CRS 53, and CSA, C. 90, § 189 (1), relevant cases construing these provisions have been included in the annotations to this section.

**The statute is not applicable to designated ground water basins as defined and established by the Colorado ground water management act.** Larrick v. District Court, 177 Colo. 237, 493 P.2d 647 (1972).

**This act is quite specific in giving mandates by using the word "must", and in making**

**matters permissive by using the word "may".** Kuiper v. Well Owners Conservation Ass'n, 176 Colo. 119, 490 P.2d 268 (1971).

**The conditional versus the absolute status of a water right cannot provide a ground for distinguishing between rights** that arise from the same intent and overt acts initiating an appropriation. An absolute water right is not a right separate and distinct from the conditional right from which it originates, rather, a conditional right matures into an absolute right. Purgatoire River Water Conservancy v. Witte, 859 P.2d 825 (Colo. 1993).

**The water court is not required to consider environmental factors** to determine whether to grant conditional water right decree. Matter of Bd. of County Comm'rs, 891 P.2d 952 (Colo. 1995).

**Any regulation of well pumping and determination of the effect thereof upon a surface stream** must be predicated upon hydrologic projections. Kuiper v. Well Owners Conservation Ass'n, 176 Colo. 119, 490 P.2d 268 (1971).

**An argument to the effect that water withdrawn must be replaced 100 percent fell** where senior users could show no injury by the diversion of water, even though the river involved was over-appropriated. Cache La Poudre Water Users Ass'n v. Glacier View Meadows, 191 Colo. 53, 550 P.2d 288 (1976).

**Where not more than half of the water adjudicated to priority was ever applied to beneficial use,** such adjudication could only afford protection to the extent that such water, or fraction thereof, was actually applied to beneficial use. Green v. Chaffee Ditch Co., 150 Colo. 91, 371 P.2d 775 (1962).

**A "storage water right" is defined to mean** "the right of impounding water for future beneficial use", and there is nothing in the statutes which limits the beneficial use of water for adjudication purposes to the particular year in which it was diverted and stored, and if it is applied to a beneficial use within a reasonable time such use is sufficient to meet the requirements of the law. North Sterling Irrigation Dist. v. Riverside Reservoir & Land Co., 119 Colo. 50, 200 P.2d 933 (1948).

**Stream administration.** Streams independently appropriated remain independent under the doctrine of prior appropriation unless the water of those streams becomes subject to equitable apportionment by compact, in which case the streams must be administered as mandated by the compact or statutory provisions for priority administration of water rights. Alamosa-La Jara Water Users Prot. Ass'n v. Gould, 674 P.2d 914 (Colo. 1983).

**Developed water implies new waters** not previously part of the river system. Southeastern Colo. Water Conservancy Dist. v. Shelton Farms, Inc., 187 Colo. 181, 529 P.2d 1321 (1974).

**State engineer's authority to apply compact tributary rule.** A compact requiring administration of the Rio Grande mainstem and Conejos river according to delivery schedules that did not include the contributions of three creeks as significant to the delivery obligation did away with the state engineer's authority to apply the tributary rule of the compact to the three creeks. *Alamosa-La Jara Water Users Prot. Ass'n v. Gould*, 674 P.2d 914 (Colo. 1983).

**Reduction of consumptive use of tributary water cannot provide basis for water right** that is independent of the system of priorities on the stream. *R.J.A., Inc. v. Water Users Ass'n of Dist. 6*, 690 P.2d 823 (Colo. 1984).

**Water proposed to be saved by removing trees and replacing them with nonirrigated grasses is tributary ground water and thus, subject to water priority system.** *Giffen v. State*, 690 P.2d 1244 (Colo. 1984).

**Nontributary ground water** is that ground water not in or tributary to a natural stream within the meaning of subsection (13). *State Dept. of Natural Res. v. Southwestern Colo. Water Conservation Dist.*, 671 P.2d 1294 (Colo. 1983), cert. denied, 466 U.S. 944, 104 S. Ct. 1929, 80 L.Ed.2d 474 (1984).

**"Underground water"** is water that could influence rate or direction of movement of a stream for over a century. *Kuiper v. Lundvall*, 187 Colo. 40, 529 P.2d 1328 (1974), cert. denied, 421 U.S. 996, 95 S. Ct. 2391, 44 L.Ed.2d 663 (1975).

**Mutual ditch company not entitled to reuse or successive uses of water obtained by diversion from river tributary.** Mutual ditch company which had many differing ideas for reuse or successive use of water but which had no fixed purpose to pursue any particular idea lacked intent to appropriate and, therefore, was not entitled to reuse or successive uses of such water after first beneficial use, and, thus, returning liquids to be stored in reservoir under conditional water storage rights were "waters of the state" subject to diversion and use to supply existing and future appropriations on stream. *Water Supply and Storage Co. v. Curtis*, 733 P.2d 680 (Colo. 1987).

**Where the issue is abandonment, the effect of such abandonment on any other water right diverting from the same source of supply is not the subject of the inquiry.** *Denver v. Middle Park Water Conservancy Dist.*, 925 P.2d 283 (Colo. 1996).

**Applied in Twin Lakes Reservoir & Canal Co. v. City of Aspen**, 192 Colo. 209, 568 P.2d 45 (1977); *In re Bohn v. Kuiper*, 195 Colo. 17, 575 P.2d 402 (1978); *Broyles v. Fort Lyon Canal Co.*, 638 P.2d 244 (Colo. 1981); *Harvey Land & Cattle Co. v. Southeastern Colo. Water Conservancy Dist.*, 631 P.2d 1111 (Colo. 1981); *In re Rominiecki v. McIntyre Livestock Corp.*, 633 P.2d 1064 (Colo. 1981). *Fort Lyon Canal Co. v.*

*Catlin Canal Co.*, 642 P.2d 501 (Colo. 1982); *Beaver Park Water, Inc. v. City of Victor*, 649 P.2d 300 (Colo. 1982); *Lionelle v. S. E. Colo. Water Conservancy Dist.*, 676 P.2d 1162 (Colo. 1984); *S.E. Colo. Water Cons. v. Ft. Lyon Canal Co.*, 720 P.2d 133 (Colo. 1986).

## II. ABANDONMENT.

**Abandonment of water rights occurs when there is nonuse coupled with an intention to abandon.** *In re CF&I Steel Corp.*, 183 Colo. 135, 515 P.2d 456 (1973); *Masters Inv. Co. v. Irrigationists Ass'n*, 702 P.2d 268 (Colo. 1985); *People v. City of Thornton*, 775 P.2d 11 (Colo. 1989); *Denver v. Snake River Water Dist.*, 788 P.2d 772 (Colo. 1990); *Consol. Home Supply v. Town of Berthoud*, 896 P.2d 260 (Colo. 1995).

**Nonuse for an unreasonable period creates a rebuttable presumption** that there was an intention to abandon water rights. *In re CF&I Steel Corp.*, 183 Colo. 135, 515 P.2d 456 (1973); *Masters Inv. Co. v. Irrigationists Ass'n*, 702 P.2d 268 (Colo. 1985); *People v. City of Thornton*, 775 P.2d 11 (Colo. 1989); *Denver v. Snake River Water Dist.*, 788 P.2d 772 (Colo. 1990).

**Requisite intent for abandonment** may be inferred from all circumstances rather than proven directly. *Denver v. Snake River Water Dist.*, 788 P.2d 772 (Colo. 1990).

**To rebut the presumption of abandonment** of water rights arising from a long period of nonuse, there must be established not merely expressions of desire or hope or intent, but some fact or condition excusing such long nonuse. *In re CF&I Steel Corp.*, 183 Colo. 135, 515 P.2d 456 (1973); *Denver v. Snake River Water Dist.*, 788 P.2d 772 (Colo. 1990); *SRJ I Venture v. Smith Cattle, Inc.*, 820 P.2d 341 (Colo. 1991).

**Amount of time considered unreasonable** varies with facts of each case. *Denver v. Snake River Water Dist.*, 788 P.2d 772 (Colo. 1990).

**Fifty-four years of nonuse was an unreasonable period** and created a rebuttable presumption that there was an intention to abandon water rights. *In re CF&I Steel Corp.*, 183 Colo. 135, 515 P.2d 456 (1973).

**A presumption of abandonment may be rebutted** by evidence of justifiable excuse for nonuse. *Southeastern Colo. Water Conservancy Dist. v. Twin Lakes Assocs., Inc.*, 770 P.2d 1231 (Colo. 1989); *Consol. Home Supply v. Town of Berthoud*, 896 P.2d 260 (Colo. 1995).

**Statements of intent by owner of water rights insufficient to rebut presumption** of abandonment without other supporting evidence. *Denver v. Snake River Water Dist.*, 788 P.2d 772 (Colo. 1990); *Consol. Home Supply v. Town of Berthoud*, 896 P.2d 260 (Colo. 1995).

**Diligent efforts to sell water rights** show an intent not to abandon such rights. *Denver v.*



Snake River Water Dist., 788 P.2d 772 (Colo. 1990).

**Abandonment of water right** must be shown by preponderance of evidence. *Denver v. Snake River Water Dist.*, 788 P.2d 772 (Colo. 1990).

**Abandonment is a factual question** determined by weighing all of the evidence and assessing the credibility of the witnesses. *Water Rights of Masters Inv. Co., Inc. v. Irrigationists Ass'n*, 702 P.2d 268 (Colo. 1985); *Consol. Home Supply v. Town of Berthoud*, 896 P.2d 260 (Colo. 1995).

**Water court's decision regarding question of abandonment** of water right will not be disturbed on appeal unless the evidence is wholly insufficient to support the decision. *Denver v. Snake River Water Dist.*, 788 P.2d 772 (Colo. 1990); *Consol. Home Supply v. Town of Berthoud*, 896 P.2d 260 (Colo. 1995).

**An asserted water right which never comes into being** cannot be "abandoned". *Green v. Chaffee Ditch Co.*, 150 Colo. 91, 371 P.2d 775 (1962).

**If the former user of water has abandoned the water originally decreed to it, then there would be no valid or existing appropriation** of water which could be made the subject matter of a petition by the former user to change the point of diversion. *Rocky Mt. Power Co. v. White River Elec. Ass'n*, 151 Colo. 45, 376 P.2d 158 (1962).

**If in fact the original decreed water rights have been abandoned, the water originally decreed belongs to the stream** and is available for subsequent appropriators who would otherwise have been junior in point of time. *Rocky Mt. Power Co. v. White River Elec. Ass'n*, 151 Colo. 45, 376 P.2d 158 (1962).

**Different tests for abandonment of conditional and absolute water rights.** The general assembly clearly intended different tests to be applied in determining when a conditional water right is abandoned and when an absolute water right is abandoned. The difference is the element of intent, which must be shown before an abandonment of an absolute water right can be decreed, but which is not necessary in establishing the abandonment of a conditional water right. The test applicable to determining whether a conditional water right has been abandoned is whether there has been a "failure to develop with reasonable diligence". *Town of De Beque v. Enewold*, 199 Colo. 110, 606 P.2d 48 (1980); *Municipal Subdistrict v. Rifle Ski Corp.*, 726 P.2d 635 (Colo. 1986).

### III. APPROPRIATION.

**An appropriation is the intent to take accompanied by some open physical demonstration of the intent.** *Elk-Rifle Water Co. v. Templeton*, 173 Colo. 438, 484 P.2d 1211 (1971).

**The appropriation is, in legal contemplation, made when the act evidencing the intent is performed.** *Elk-Rifle Water Co. v. Templeton*, 173 Colo. 438, 484 P.2d 1211 (1971).

**When the individual, by some open, physical demonstration, indicates an intent to take, for a valuable or beneficial use, and through such demonstration ultimately succeeds in applying the water to the use designated, there is an appropriation.** *Elk-Rifle Water Co. v. Templeton*, 173 Colo. 438, 484 P.2d 1211 (1971).

**An effective appropriation requires the actual diversion of a definite quantity of water with intent to apply that water to a beneficial use.** *Fort Lyon Canal Co. v. Amity Mut. Irr. Co.*, 688 P.2d 1110 (Colo. 1984).

**To be effective, an appropriation must divert a definite quantity of water with the intent of applying such water to a beneficial use.** Whether the requirements of diversion and intent have been established is a factual question and the water court's determination of such question will not be reversed unless it is clearly unsupported by the evidence. *Bd. of County Comm'rs v. Upper Gunnison River Water Conservancy Dist.*, 838 P.2d 840 (Colo. 1992).

**An application for a conditional water right turns in part on the existence of a claimant's intent to appropriate water.** Thus, the issue of claimant's intent directly affects the outcome of the case and should not be determined on a motion for summary judgment. *Dominguez Reservoir Corp. v. Feil*, 854 P.2d 791 (Colo. 1993).

**Under the "intent" prong of the first step test necessary to appropriate a conditional water right, an applicant must establish an intent to appropriate water for application to beneficial use.** *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

**A city may appropriate water for its future needs without violating the "anti-speculation" doctrine** so long as the amount of the appropriation is in line with the city's "reasonably anticipated requirements" based on substantiated projections of future growth as determined by the water court. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

**Trial court may impose volumetric limitation on the yield of a project if the limitation conforms to the amount of water available** that the applicant has established a need and future intent and ability to use or that the limitation is specifically found by the court to be necessary to prevent injury to other water users. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

**A conditional water right is limited to the amount of water available for appropriation and for which the applicant can establish a non-speculative intent to put to beneficial use**

while satisfying the “can and will” requirements. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

**In quantifying the permissible yield of a conditional water right, the water court is not imposing an independent limitation,** it is merely formalizing in the decree the scope of the conditional water right as it has been established by the applicant. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

**A governmental water entity has the burden of demonstrating three elements in regard to its intent to make a nonspeculative conditional appropriation of unappropriated water:** (1) What is a reasonable water supply planning period; (2) what are the substantiated population projections based on a normal rate of growth for that period; and (3) what amount of available unappropriated water is reasonably necessary to serve the reasonably anticipated needs of the governmental agency for the planning period above its current water supply. *Pagosa Area Water & Sanitation Dist. v. Trout Unlimited*, 170 P.3d 307 (Colo. 2007).

In the water court’s application of the third element, there are four non-exclusive considerations relevant to determining the amount of the conditional water right: (1) Implementation of reasonable water conservation measures during the planning period; (2) reasonably expected land use mixes during the planning period; (3) reasonably attainable per capita usage projections for indoor and outdoor use based on the land use mixes during the planning period; and (4) the amount of consumptive use reasonably necessary to serve the increased population. *Pagosa Area Water & Sanitation Dist. v. Trout Unlimited*, 170 P.3d 307 (Colo. 2007).

**The governmental agency exception to the anti-speculation doctrine** allows some freedom from anti-speculation limitations to allow them to plan for future water needs of constituents. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

**The governmental agency exception to the anti-speculation doctrine should be narrowly construed,** and where the water court did not make specific findings that a 100-year water supply planning period was reasonable or that the applicant’s population projections were substantiated, the judgment must be reversed and remanded. A planning period in excess of 50 years should be closely scrutinized. *Pagosa Area Water & Sanitation Dist. v. Trout Unlimited*, 170 P.3d 307 (Colo. 2007).

**A 50-year planning period, to 2055, is reasonable in this case,** particularly given the length of time needed for land acquisition, environmental compliance and permitting, financing, and construction of a substantial new reservoir and the fact that the population projection period for the water conservation board’s statewide water supply study has been extended to

2050. *Pagosa Area Water & Sanitation Dist. v. Trout Unlimited*, 219 P.3d 774 (Colo. 2009).

**Even though the court decreed conditional rights to Thornton pursuant to the governmental agency exception to the anti-speculation doctrine,** the potential for a decree in excess of its needs still exists, as the water court must make its determinations of the city’s reasonably anticipated requirements based on projections that cannot be verified at the time the decree is entered. Therefore, the court’s imposition of specific diligence requirements was within its authority to ensure that Thornton show its continuing need for the volumetric amount of the water claimed. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

**Anti-speculation doctrine applies** to diligence proceedings. *Municipal Subdist., Northern Colo. Water Conservancy Dist. v. OXY USA, Inc.*, 990 P.2d 701 (Colo. 1999).

**The anti-speculation requirement of subsection (3)(a) applies in a change proceeding; accordingly, the applicant must show a legally vested interest in the place to be served by the change of use and a specific plan and intent to use the water for specific purposes.** The proposed change, to any of over 50 proposed uses in any of 28 counties without a single agreement with any end user of the water, was properly dismissed. *High Plains A & M, Inc. v. S.E. Colo. Water Conservancy Dist.*, 120 P.3d 710 (Colo. 2005); *ISG, LLC v. Arkansas Valley Ditch Ass’n*, 120 P.3d 724 (Colo. 2005).

**Water is available for appropriation if the taking thereof does not cause injury.** *Cache La Poudre Water Users Ass’n v. Glacier View Meadows*, 191 Colo. 53, 550 P.2d 288 (1976).

**Although legislature cannot prohibit appropriation or diversion of unappropriated water for useful purposes,** it may regulate manner in which appropriation or diversion is effected. *Fox v. Div. Eng. for Water Div. 5*, 810 P.2d 644 (Colo. 1991).

**If water court erred and decreed a private in-stream flow right,** this would simply constitute legal error vulnerable to reversal upon appeal, but would not constitute an overstepping of jurisdictional authority. *Bd. of County Comm’rs v. Collard*, 827 P.2d 546 (Colo. 1992).

**Controlling water within its natural course or location by some structure or device, such as a dam, for a beneficial use** may result in a valid appropriation. *City of Thornton v. City of Fort Collins*, 830 P.2d 915 (Colo. 1992).

**A boat chute or a fish ladder may qualify as a “structure or device”** which controls water in its natural course or location. *City of Thornton v. City of Fort Collins*, 830 P.2d 915 (Colo. 1992).

**Once the collected water in the drainage canal is turned into a natural watercourse,** it becomes a part of the supply of that stream and is subject to public appropriation and use.



Quirico v. Hickory Jackson Ditch Co., 130 Colo. 481, 276 P.2d 746 (1954).

**Reclamation plan which includes filling gravel pits with water obtained from an aquifer constitutes an "appropriation".** Three Bells Ranch v. Cache La Poudre, 758 P.2d 164 (Colo. 1988).

#### IV. BENEFICIAL USE.

**Not unconstitutional delegation of power to appropriate.** The statutory language in § 37-92-102 and subsection (4) empowering the Colorado water conservation board to appropriate such waters of natural streams and lakes as may be required to preserve the natural environment to a reasonable degree is not unconstitutionally vague and, therefore, not an impermissible delegation of authority. Colo. River Water Conservancy Dist. v. Colo. Water Conservation Bd., 197 Colo. 469, 594 P.2d 570 (1979).

**Appropriations for piscatorial purposes without diversion intended.** The general assembly in the enactment of the second sentence in subsection (4) and § 37-46-107 (1) (j) intended to have appropriations for piscatorial purposes without diversion. Colo. River Water Conservancy Dist. v. Colo. Water Conservation Bd., 197 Colo. 469, 594 P.2d 570 (1979).

**Capture and storage of flood waters may be a "beneficial use" underlying an appropriation of water.** Pueblo West Metro. Dist. v. Southeastern Colo. Water Conservancy Dist., 689 P.2d 594 (Colo. 1984).

**Hydroelectric power and flood control are both recognized as beneficial uses in Colorado.** Bd. of Comm'rs v. Crystal Creek Homeowner's Ass'n, 14 P.3d 325 (Colo. 2000).

**The extraction of ground water to facilitate the production of coal bed methane is a beneficial use** because the oil and gas operator relies on the presence of ground water to keep the gas in place until the well is drilled and relies on the extraction of the ground water to release the gas. Therefore, absent rebuttal of the presumption that the ground water is nontributary, coal bed methane wells are subject to administration and capable of being adjudicated. If such wells cannot operate based on their own priority, they must be curtailed absent an adequate substitute water supply plan or plan of augmentation. Vance v. Wolfe, 205 P.3d 1165 (Colo. 2009).

**Persons who cut down water-consuming vegetation along river banks did not have a right to equivalent amount of water for their own "beneficial use" free from the call of the river.** Southeastern Colo. Water Conservancy Dist. v. Shelton Farms, Inc., 187 Colo. 181, 529 P.2d 1321 (1974).

**Salvaged water implies waters in the river or its tributaries, including the aquifer, which ordinarily would go to waste, but somehow are**

made available for beneficial use. Southeastern Colo. Water Conservancy Dist. v. Shelton Farms, Inc., 187 Colo. 181, 529 P.2d 1321 (1974).

**The volume of water applied to beneficial use is the full measure of the water right acquired.** Green v. Chaffee Ditch Co., 150 Colo. 91, 371 P.2d 775 (1962).

**Where not more than half of the water adjudicated to priority was ever applied to beneficial use,** such adjudication could only afford protection to the extent that such water, or fraction thereof, was actually applied to beneficial use. Green v. Chaffee Ditch Co., 150 Colo. 91, 371 P.2d 775 (1962).

**A "storage water right" is defined to mean,** "the right of impounding water for future beneficial use", and there is nothing in the statutes which limits the beneficial use of water for adjudication purposes to the particular year in which it was diverted and stored, and if it is applied to a beneficial use within a reasonable time, such use is sufficient to meet the requirements of the law. North Sterling Irrigation Dist. v. Riverside Reservoir & Land Co., 119 Colo. 50, 200 P.2d 933 (1948).

**Storage of water is not a beneficial use,** at least where flood control and fire or drought protection are not the stated uses of the water. To perfect a conditional storage right, the water must be released from storage and put to beneficial use. Upper Yampa Water Conservancy Dist. v. Wolfe, 255 P.3d 1108 (Colo. 2011).

#### V. CHANGE OF WATER RIGHT.

**Right to change point of diversion is limited in quantity by historical use.** Southeastern Colo. Water Conservancy Dist. v. Rich, 625 P.2d 977 (Colo. 1981).

**Definition of "change of water right".** It is clear that both a change in the place of storage and a change from direct flow to storage are included within the definition "change of water right". S.E. Colo. Water Cons. v. Ft. Lyon Canal Co., 720 P.2d 133 (Colo. 1986).

**Change in point of diversion of water right constitutes "change of water right".** A change in the point of diversion of a water right is included in the term "change of water right", and it is, therefore, subject to all of the provisions of this article. Town of Breckenridge v. City & County of Denver, 620 P.2d 1048 (Colo. 1980).

**Application for alternate places of storage for a previously decreed conditional right to store a certain amount of water constitutes a change of water right as defined in subsection (5).** City of Thornton v. Clear Creek Water Users Alliance, 859 P.2d 1348 (Colo. 1993).

**Proposed water exchange involving foreign water and addressed by section concerning right to reuse of imported water does not fit**

criteria for general change of water right. *City of Florence v. Bd. of Waterworks*, 793 P.2d 148 (Colo. 1990).

**In order to use an alternate point of diversion to make absolute a conditional water right at another location, there must first be a decree** establishing the new source as an alternate point of diversion. This process provides notice to interested persons of a proposed new diversion point and allows for the establishment of terms and conditions that will protect other water rights. *Northern Colo. Water v. Three Peaks Water*, 859 P.2d 836 (Colo. 1993).

## VI. CONDITIONAL WATER RIGHT.

**Purpose of a conditional water decree** has always been to allow an ultimate appropriation of water to relate back to the time of the "first step" toward that appropriation. *Rocky Mt. Power Co. v. Colo. River Water Conservation Dist.*, 646 P.2d 383 (Colo. 1982); *Mun. Subdistrict v. Rifle Ski Corp.*, 726 P.2d 635 (Colo. 1986).

Conditional water decrees are designed to establish that the first step toward the appropriation of water has been taken and to recognize the relation back of the ultimate appropriation to the date of that first step. *Pub. Serv. Co. v. Bd. of Water Works*, 831 P.2d 470 (Colo. 1992).

**A conditional water decree requires** an intent to appropriate and an overt, physical act constituting the first step toward diversion and application to a beneficial use. *Mun. Subdistrict v. Rifle Ski. Corp.*, 726 P.2d 635 (Colo. 1986); *Bd. of County Comm'rs v. Upper Gunnison River Water Conservancy Dist.*, 838 P.2d 840 (Colo. 1992).

To show the first step toward appropriation of water, the applicant must show the concurrence of intent and overt acts. The date on which the first step is taken determines the date of the appropriation. *City of Thornton v. City of Fort Collins*, 830 P.2d 915 (Colo. 1992).

Applicant who had negotiated for three years for the purpose of ensuring water would be used to improve fishery and recreational and irrigational purposes and had entered into a contract and paid fees for such purpose showed sufficient overt acts to demonstrate its intent to appropriate. *Bd. of County Comm'rs v. Upper Gunnison River Water Conservancy Dist.*, 838 P.2d 840 (Colo. 1992).

**Intent to abandon was clearly shown**, and presumption of abandonment arising from over 10 years' non-use was not rebutted, where city purchased senior downstream irrigation rights, never diverted or applied them, did not protest their inclusion on the decennial abandonment list, and made all subsequent diversions under junior priorities. *Denver v. Middle Park Water Conservancy Dist.*, 925 P.2d 283 (Colo. 1996).

**The overt acts required under the first step test must perform the following three functions:** (1) Manifest the necessary intent to appropriate water to beneficial use; (2) Demonstrate the taking of a substantial step toward the application of water to beneficial use; and (3) Give notice to interested parties of the nature and extent of the proposed demand upon the water supply. *City of Thornton v. City of Fort Collins*, 830 P.2d 915 (Colo. 1992); *Pub. Serv. Co. v. Bd. of Water Works*, 831 P.2d 470 (Colo. 1992); *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

**Acts which demonstrate a substantial step toward application of water to a beneficial use and acts which constitute notice to third parties of the proposed demand upon the water supply may precede the formation of the intent to appropriate and an act manifesting such intent.** However, the appropriation date of a conditional water right cannot be set prior to the formation of the necessary intent to appropriate and completion of an act manifesting such intent. *City of Thornton v. City of Fort Collins*, 830 P.2d 915 (Colo. 1992).

**Filing of an application for a conditional water right may be evidence of an act manifesting the intent to appropriate and it may be deemed to constitute notice to third parties of the proposed demand upon the water supply**, but it is doubtful that filing of an application is, by itself, a substantial step toward application of water to a beneficial use. Other overt acts would normally be required. *City of Thornton v. City of Fort Collins*, 830 P.2d 915 (Colo. 1992).

**Establishment of conditional water right requires** concurrence of an intent to appropriate water for a beneficial use and the performance of overt acts in furtherance of such intent. Concurrence of such intent and overt acts qualifies as the first step toward appropriation of water and the date the first step is taken determines the date of appropriation. *Pub. Serv. Co. v. Bd. of Water Works*, 831 P.2d 470 (Colo. 1992).

**Conditional decree of water rights which would injure senior appropriators cannot be granted** without plan for augmentation which would assure sufficient water to exercise right. *Fox v. Div. Eng'r for Water Div. 5*, 810 P.2d 644 (Colo. 1991).

**Owner or user of conditional decree of water rights must comply with §§ 37-92-301(4) and 37-92-601**, and the failure to do so results in the loss of his conditional water rights. *Town of De Beque v. Enewold*, 199 Colo. 110, 606 P.2d 48 (1980).

**Appropriation and development with reasonable diligence required for conditional decree.** Subsection (6) requires that an applicant for a conditional water right demonstrate that an appropriation has been made and that the appropriation has been developed with reasonable diligence before the conditional decree will is-



sue. Colo. River Water Conservation Dist. v. City & County of Denver, 642 P.2d 510 (Colo. 1982).

**Finding of reasonable diligence equal to development with reasonable diligence.** In considering § 37-92-301 (4) in juxtaposition with subsection (1), it is evident that the general assembly was drawing a clear connecting line between "failure to develop with reasonable diligence" and the requirement that the owner or user of a conditional water right obtain a finding of reasonable diligence. In effect, the general assembly equated a failure to obtain a finding of reasonable diligence with a failure to develop with reasonable diligence. *Town of De Beque v. Enewold*, 199 Colo. 110, 606 P. 2d 48 (1980).

**Reasonable diligence in the development of conditional water rights is demonstrated** when conditional water rights remain part of an integrated water project and the diligent work performed on the project as a whole is properly attributed to such conditional water rights. *Vail Valley Consolidated Water District v. City of Aurora*, 731 P.2d 665 (Colo. 1987).

Site-specific work to develop each individual conditional water right is not a precondition to finding of a reasonable diligence in the development of water rights which are part of an integrated project. *Vail Valley Consol. Water Dist. v. City of Aurora*, 731 P.2d 665 (Colo. 1987).

**Prospective appropriator shall be deemed to have made a "diversion" of water by "controlling water in its natural course".** Such control may be accomplished by the construction of a boat chute and fish ladder to control water and put it to recreational uses or uses benefiting wildlife. *City of Thornton v. City of Fort Collins*, 830 P.2d 915 (Colo. 1992).

**A court can complete an adjudication proceeding involving a conditional water right if:** (1) Prior to the designation and creation of the designated ground water basin, the claim for a conditional water right has been filed in the court adjudication proceedings; and (2) either before or after the designation and creation of the designated ground water basin, proof is introduced showing that the applicant was entitled to a conditional decree prior to the time of the designation and creation of the basin. *Sweetwater Dev. Corp. v. Schubert Ranches, Inc.*, 188 Colo. 379, 535 P.2d 215 (1975).

**An application for a conditional water right turns in part on the existence of a claimant's intent to appropriate water.** Thus, the issue of claimant's intent directly affects the outcome of the case and should not be determined on a motion for summary judgment. *Dominguez Reservoir Corp. v. Feil*, 854 P.2d 791 (Colo. 1993).

**To establish a "conditional water right", an applicant must show in general that a "first step" toward the appropriation of a cer-**

tain amount of water has been taken, that the applicant's intent to appropriate is not based upon the speculative sale or transfer of the appropriative rights, and that there is a substantial probability that the applicant "can and will" complete the appropriation with diligence. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

**Whether the relevant act or acts were sufficiently "overt" is a mixed question of law and fact,** the resolution of which must be made by the court through the application of a legal standard to the facts of the case. The applicant bears the burden of proving that an overt act or acts have fulfilled the necessary functions and that the first step has been accomplished on a particular date. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

**The inquiry notice required of the overt acts** context is more than mere notice of an unrefined intent to appropriate by something less than a detailed summary of exact diversion specifications. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

**Thornton's activities of formal acts taken by city officials, posting the signs, and surveying the general points of diversion were insufficient "overt acts".** *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

The formal acts taken by Thornton, such as the passing of a resolution by its utilities board, were insufficiently publicized to the extent necessary to charge potentially interested parties with inquiry notice. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

The signs were sufficient to provide notice of general intent to appropriate; however, they were insufficient as "inquiry notice" because interested parties would have to wait until the publication of the resume to know the nature and extent of the proposed demand upon the water supply. Therefore, the date of the filing of Thornton's application is the appropriation date. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

Surveying general points of diversion were not sufficiently public or informative, either in isolation or in combination with the posted signs to put interested parties on inquiry notice of the extensive nature of the proposed diversion. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

**Under the "intent" prong of the first step test necessary to appropriate a conditional water right,** an applicant must establish an intent to appropriate water for application to beneficial use. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

**A city may appropriate water for its future needs without violating the "anti-speculation" doctrine** so long as the amount of the appropriation is in line with the city's "reasonably anticipated requirements" based on sub-

stantiated projections of future growth as determined by the water court. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

**Trial court may impose volumetric limitation on the yield of a project if the limitation conforms to the amount of water available** that the applicant has established a need and future intent and ability to use or that the limitation is specifically found by the court to be necessary to prevent injury to other water users. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

**A conditional water right is limited to the amount of water available for appropriation** and for which the applicant can establish a nonspeculative intent to put to beneficial use while satisfying the "can and will" requirements. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

**In quantifying the permissible yield of a conditional water right, the water court is not imposing an independent limitation**, it is merely formalizing in the decree the scope of the conditional water right as it has been established by the applicant. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

**The governmental agency exception to the anti-speculation doctrine** allows some freedom from anti-speculation limitations to allow them to plan for future water needs of constituents. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

**Even though the court decreed conditional rights to Thornton pursuant to the governmental agency exception to the anti-speculation doctrine**, the potential for a decree in excess of its needs still exists, as the water court must make its determinations of the city's reasonably anticipated requirements based on projections that cannot be verified at the time the decree is entered. Therefore, the court's imposition of specific diligence requirements was within its authority to ensure that Thornton show its continuing need for the volumetric amount of the water claimed. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

## VII. PLAN FOR AUGMENTATION.

**An acceptable plan for augmentation does not require the addition of new water into the water system**, such as the introduction of transmountain diverted water into the system. *Kelly Ranch v. Southeastern Colo. Water Conservancy Dist.*, 191 Colo. 65, 550 P.2d 297 (1976).

**An exchange plan is not part of a plan for augmentation** where the exchange is not part of a detailed program to increase the supply of water available for beneficial use in a division. *City of Florence v. Bd. of Waterworks*, 793 P.2d 148 (Colo. 1990).

**It would contravene the purpose of subsection (9) to allow stream depletions to be offset by anticipated increases in runoff** with the result of circumventing the applicants' obligations to compensate holders of water rights for injuries that would otherwise occur, and the district court erred when it considered this factor in concluding that applicants' withdrawals will not result in such injury. *State Eng'r v. Castle Meadows, Inc.*, 856 P.2d 496 (Colo. 1993).

**In amending subsection (9) to prevent runoff water collected from land surfaces that have been made impermeable from serving as a source of augmentation**, the legislature intended to remove the incentive for persons to attempt to increase water supplies by replacing natural land conditions with impermeable surfaces. *State Eng'r v. Castle Meadows, Inc.*, 856 P.2d 496 (Colo. 1993).

**Allowing the applicants credit for runoff water collected from land surfaces that have been made impermeable**, thereby eliminating their obligation under § 37-90-137 (9)(c) to compensate holders of senior rights for injuries that may otherwise result from their withdrawals, would clearly undermine the purpose of the legislature's amendment to the definition of a plan for augmentation contained in subsection (9). *State Eng'r v. Castle Meadows, Inc.*, 856 P.2d 496 (Colo. 1993).

**A tributary aquifer that would be used as a reservoir is not analogous to an unlined gravel pit or an on-stream reservoir and, thus, is not exempt from the prohibition against crediting a plan of augmentation for reductions in evapotranspiration.** However, the claim is not frivolous as it is a good-faith attempt to extend existing law. In re *Water Rights of Park County Sportsmen's Ranch*, 105 P.3d 595 (Colo. 2005).

**Reduction in consumptive use of tributary water** cannot be considered development of new sources of water as part of a plan for augmentation. Therefore, such reductions cannot provide the basis for a water right that is independent of water priority system, and revision in definition of "augmentation" did not provide that such reduction can be the basis for a water right independent of the water priority system. *Giffen v. State*, 690 P.2d 1244 (Colo. 1984).

**The fact that rivers involved are over-appropriated**, rather than being an argument against the plans for augmentation, is the very reason for the valid exercise of ingenuity of persons seeking to maximize the use of water, whether they are present or future owners of land and wells, developers, or as characterized by the water court here, promoters, speculators, or nonusers. *Kelly Ranch v. Southeastern Colo. Water Conservancy Dist.*, 191 Colo. 65, 550 P.2d 297 (1976).

**Plan of augmentation held valid.** *Cache La Poudre Water Users Ass'n v. Glacier View Meadows*, 191 Colo. 53, 550 P.2d 288 (1976).



### VIII. PRIORITY.

Although an appropriation is not complete until actual diversion and use, still, the right may relate back to the time when the first open step was taken giving notice of intent to secure it. *Rocky Mt. Power Co. v. White River Elec. Ass'n*, 151 Colo. 45, 376 P.2d 158 (1962).

What constitutes the "first step" required to establish a priority date, or date of first appropriation in a water rights matter is not the same in every proposed diversion because the facts must be taken into consideration in each case on an ad hoc basis; and although there are no precise standards, general guidelines have been established. *Elk-Rifle Water Co. v. Templeton*, 173 Colo. 438, 484 P.2d 1211 (1971).

The required "first step" must consist of open work "on the land" in order that notice can be given to others of the intention of the appropriators. *Elk-Rifle Water Co. v. Templeton*, 173 Colo. 438, 484 P.2d 1211 (1971).

"On the land" test disavowed in favor of test which determines whether the acts performed might have been substantial enough to provide notice, manifest intent, and demonstrate a serious step toward application of water to beneficial use. *City of Aspen v. Colo. River Conservation Dist.*, 696 P.2d 758 (Colo. 1985).

The "first step" may include, when the appropriator is a public entity, a resolution passed or other official action taken by the entity but the adoption of a land use policy by the entity would not be sufficient because it would not give notice to interested parties of the intent to appropriate water. *City of Thornton v. City of Fort Collins*, 830 P.2d 915 (Colo. 1992).

For discussion of what constitutes the "first step" required to establish a priority date in a conditional water rights matter, see *Bar 70 Enters., Inc. v. Tosco Corp.*, 703 P.2d 1297 (Colo. 1985).

The requisite intent to appropriate does not have to precede or be contemporaneous with the acts which constitute the work on the land; what is required is that at some point in time the two requirements — the open physical demonstration and the requisite intent to appropriate — coexist, with the priority date to be set not earlier than the date on which both elements

are present. *Elk-Rifle Water Co. v. Templeton*, 173 Colo. 438, 484 P.2d 1211 (1971).

### IX. WATER RIGHT.

Water right is a property right. *Weibert v. Rothe Bros.*, 200 Colo. 310, 618 P.2d 1367 (1980); *People v. City of Thornton*, 775 P.2d 11 (Colo. 1989).

Water right definitionally does not include a right to use "designated ground water", as defined in § 37-90-103 (6). *State ex rel. Danielson v. Vickroy*, 627 P.2d 752 (Colo. 1981).

There is absolutely no question that a decreed water right is valuable property; that it may be used, its use changed, its point of diversion relocated; and that a municipal corporation is not precluded from purchasing water rights previously used for agricultural purposes and thereafter devoting them to municipal uses, provided that no adverse effect be suffered by other users from the same stream, particularly those holding junior priorities. *Green v. Chaffee Ditch Co.*, 150 Colo. 91, 371 P.2d 775 (1962).

Value of water right is in its relative priority and its use. The uncertain nature of the property right in water is evidence that its primary value is in its relative priority and the right to use the resource and not in the continuous tangible possession of the resource. *Navajo Dev. Co. v. Sanderson*, 655 P.2d 1374 (Colo. 1982).

When the application of water to beneficial use is effected by some structure or device, the resulting appropriation is by a diversion as defined in subsection (7). *City of Thornton v. City of Fort Collins*, 830 P.2d 915 (Colo. 1992).

### X. UNDERGROUND WATER.

Junior appropriators with vested rights in underground water tributary to a natural stream are entitled to protection against injury resulting from another water user's change of rights. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

Aquifer storage and augmentation claims based on the natural percolation of irrigation run-off and precipitation are frivolous when the water has not been placed there by other than natural means. In re *Water Rights of Park County Sportsmen's Ranch*, 105 P.3d 595 (Colo. 2005).

## PART 2

### WATER DIVISIONS - COURTS

**37-92-201. Water divisions.** (1) For the purposes of this article, the following water divisions are hereby established:

(a) Division 1: Division 1 consists of all lands in the state of Colorado in the drainage basins of the South Platte river, the Big Laramie river, the Arikaree river, the north and south

forks of the Republican river, the Smokey Hill river, Sandy and Frenchman creeks, and streams tributary to said rivers and creeks.

(b) Division 2: Division 2 consists of all lands in the state of Colorado in the drainage basins of the Arkansas river and the Dry Cimarron river, and streams tributary to said rivers.

(c) Division 3: Division 3 consists of all lands in the state of Colorado in the drainage basin of the Rio Grande and all of its tributaries, and all lands in the drainage basins of the San Luis creek, Saguache creek, Tuttle creek, Carnero creek, La Garita creek, Sand or Medano creek, Big Spring creek, Little Spring creek, Mosca creek, Sierra Blanca creek, and all of their tributaries, and all lands in the drainage basins of all other creeks between Trinchera creek and Sand or Medano creek, and lands in the drainage basins of all other creeks which have their sources of water supply in the La Garita mountains and flow eastward into the San Luis valley.

(d) Division 4: Division 4 consists of all lands in the state of Colorado in the drainage basins of the Gunnison river and all of its tributaries, the Little Dolores river, the San Miguel river, and that portion of the Dolores river and its tributaries north of the north township line of Township 45 North, New Mexico Principal Meridian.

(e) Division 5: Division 5 consists of all lands in the state of Colorado in the drainage basins of the Colorado river and all of its tributaries arising within Colorado, with the exception of the Gunnison river.

(f) Division 6: Division 6 consists of all lands in the state of Colorado in the drainage basins of the White river, the Yampa or Bear river, the Green river, the North Platte river, and all of their tributaries.

(g) Division 7: Division 7 consists of all lands located in the southwest corner of the state of Colorado and in the drainage basins of the San Juan river, Rio Piedra, Rio Las Animas, Los Pinos river, La Plata river, Rio Mancos and streams tributary to said rivers and creeks as well as that portion of the Dolores river and its tributaries lying south of the north line of Township 45 North, New Mexico Principal Meridian.

**Source:** L. 69: p. 1202, § 1. C.R.S. 1963: § 148-21-8. L. 2009: (1)(e) and (1)(f) amended, (SB 09-015), ch. 6, p. 57, § 1, effective August 5.

#### ANNOTATION

**Law reviews.** For article, "Water Administration in Colorado — Higher-order or Priority?" see 30 Rocky Mt. L. Rev. 293 (1958). For article, "Adjudication of Indian and Federal Water Rights in the Federal Courts", see 46 U. Colo. L. Rev. 555 (1974-75). For article, "United States v. New Mexico and the Course of Federal Reserved Water Rights", see 51 U. Colo. L. Rev. 209 (1980). For article, "Statutory and Rule Changes to Water Court Practice", see 38 Colo. Law. 53 (June 2009).

**Annotator's note.** Since § 37-92-201 is similar to repealed laws antecedent to CSA, C. 90, § 249, relevant cases construing those provisions have been included in the annotations to this section.

**Water districts did not in each instance embrace the entire drainage of a main stream,** and naturally when a stream and its tributaries were included in two or more districts, water was not always distributed in accordance with the rights of appropriators in the several districts, irrigation divisions (now water divisions) were created which practically embrace all the drainage of a given stream to obviate the difficulties resulting from these con-

ditions. *Comstock v. Ft. Morgan Reservoir & Irrigation Co.*, 60 Colo. 101, 151 P. 929 (1915).

**A county was not embraced within a water division unless it appeared that there were lands in such county** irrigated from some of the streams mentioned in the statute creating the division; and if there were no such lands, it could not be held liable for any portion of the compensation due to the superintendent of irrigation, and it was not sufficient to impose such liability that the lands within a county should lie within the watershed of any one or more of the streams mentioned in the statute. *Chew v. Bd. of Comm'rs*, 18 Colo. App. 162, 70 P. 764 (1902); *Chapman v. Bd. of Comm'rs*, 17 Colo. App. 236, 68 P. 134 (1902); *Ballard v. Bd. of Comm'rs*, 18 Colo. App. 68, 70 P. 1130 (1902).

**All of the counties which contained lands that were irrigated by water** taken from any one or more of the streams mentioned in the act creating the water division were embraced within the division, and were each liable for their respective shares of the compensation earned by the superintendent of irrigation for that division. *Chew v. Bd. of Comm'rs*, 18 Colo. App. 162, 70 P. 764 (1902).



In dividing the state up into water divisions, the general assembly in using the words “tributary to a natural stream” did not intend their use in a restricted sense, that is that the tributaries themselves should be natural continuous running streams, but as therein used it

indicates that the word “tributaries” is used to include all sources of supply which go to make up the natural stream and which properly belong thereto. In re German Ditch & Reservoir Co., 56 Colo. 252, 139 P. 2 (1914).

**37-92-202. Division engineers.** (1) (a) The state engineer, with the approval of the executive director of the department of natural resources, shall appoint one division engineer for each division. Each division engineer shall be a licensed professional engineer and shall have such additional qualifications as may be specified from time to time by the state engineer. The state engineer, with the approval of said executive director, may employ such assistants and staff members as are necessary to enable each division engineer to carry out his or her duties.

(b) Each division engineer shall reside in his division, and the offices of the various division engineers shall be maintained in the following locations:

Division 1	Greeley
Division 2	Pueblo
Division 3	Alamosa
Division 4	Montrose
Division 5	Glenwood Springs
Division 6	Steamboat Springs
Division 7	Durango

(2) The division engineers shall perform such functions as are specified in this article and other laws and such functions as may be specified in written instructions and orders issued to them or to any one of them from time to time by the state engineer.

(3) With the approval of the state engineer, each division engineer may establish one or more field offices within his division and may appoint as a member of his staff a water commissioner for each such office.

(4) The expenses of the offices and staffs of the division engineers shall be provided for out of state funds.

(5) To the extent required by the constitution and laws of Colorado, appointments under this section shall be subject and pursuant to the state personnel system.

**Source:** L. 69: p. 1203, § 1. C.R.S. 1963: § 148-21-9. L. 2004: (1)(a) amended, p. 1316, § 70, effective May 28.

#### ANNOTATION

**Annotator’s note.** Since § 37-92-202 is similar to repealed laws antecedent to CSA, C. 90, §§ 224, 241, and 242, relevant cases construing those provisions have been included in the annotations to this section.

**The office of division engineer is within the classified civil service.** People v. Chew, 67 Colo. 394, 179 P. 812 (1919).

**The division engineer is vested with control over the commissioners in his division.** Comstock v. Fort Morgan Reservoir & Irrigation Co., 60 Colo. 101, 151 P. 929 (1915).

**Since it is the duty of the division engineer to make inter-district distribution of water in his division, and this was accomplished by directions to the commissioners under his control, it follows that when he directed a commissioner in his division to cease supplying water, to priorities post-dating a specified date, it was the**

**duty of the commissioner receiving such order to obey it.** Comstock v. Ft. Morgan Reservoir & Irrigation Co., 60 Colo. 101, 151 P. 929 (1915).

**The division engineer is required to prepare the register and tabulated statement of priorities.** Comstock v. Ft. Morgan Reservoir & Irrigation Co., 60 Colo. 101, 151 P. 929 (1915); Weiland v. Reorganized Catlin Consol. Canal Co., 61 Colo. 125, 156 P. 596 (1916).

**The law presumed that public officials discharge their duties in conformity with the statutes, and the burden of showing to the contrary rested with him who relies thereon.** McLean v. Farmers’ High Line Canal & Reservoir Co., 44 Colo. 148, 98 P. 16 (1908).

**Water officials had to distribute water according to decreed priorities, and a court had no power to direct them to do that which the duties of their office did not require of them.** Ft.

Morgan Reservoir & Irrigation Co. v. McCune, 71 Colo. 256, 206 P. 393 (1922).

**Water officials have no concern with unappropriated waters.** Ft. Morgan Reservoir & Irrigation Co. v. McCune, 71 Colo. 256, 206 P. 393 (1922).

**The former laws of 1887 made it the duty of the superintendent of irrigation** to see that the water of the division was distributed according to the priorities as established by the decrees in the districts. O'Neill v. Northern Colo. Irrigation Co., 56 Colo. 545, 139 P. 536 (1914); Comstock v. Larimer & Weld Reservoir Co., 58 Colo. 186, 145 P. 700 (1914).

**A river with its tributaries had to be administered by the water officials as a whole,** and all the decrees and appropriations of the water division of which water district three was a part, were collated, tabulated and combined for the purposes of such administration accord-

ing to priorities. Comstock v. Larimer & Weld Reservoir Co., 58 Colo. 186, 145 P. 700 (1914).

**Several decrees of the water districts within a division were to be treated as one,** and the water distributed accordingly. McLean v. Farmers' High Line Canal & Reservoir Co., 44 Colo. 184, 98 P. 16 (1908); Comstock v. Fort Morgan Reservoir & Irrigation Co., 60 Colo. 101, 151 P. 929 (1915).

**The trial court exceeded its authority when it decreed that the state engineer petition the court to have Thornton pay the cost of administrative assistance from the state engineer's office for the administration of the northern project.** This statute merely authorized the state engineer and division engineer to utilize private funds that may be available to them, not to impose obligations on private parties to provide such funds. City of Thornton v. Bijou Irrigation Co., 926 P.2d 1 (Colo. 1996).

**37-92-203. Water judges - jurisdiction.** (1) There is established in each water division the position of water judge of the district courts of all counties situated entirely or partly within the division. Said district courts collectively acting through the water judge have exclusive jurisdiction of water matters within the division, and no judge other than the one designated as a water judge shall act with respect to water matters in that division. Water matters shall include only those matters which this article and any other law shall specify to be heard by the water judge of the district courts. Water matters include determinations of rights to nontributary groundwater outside of designated groundwater basins. Judgments and decrees entered prior to July 1, 1985, in accordance with the procedures of sections 37-92-302 to 37-92-305 with respect to such groundwater shall be given full effect and enforced according to the terms of such decrees.

(2) On or before January 10 of each year, the supreme court shall designate or redesignate a water judge for each division to hear all pending and new water matters in that division for the year in which the designation is made, and any vacancy that occurs during such year shall be filled by designation of the supreme court. The services of the water judge shall be in addition to his regular duties as a district judge but shall take priority over such regular duties, and the schedules of the judges in the various divisions shall be arranged and adjusted so that the water judge shall be free to hear water matters. If it becomes necessary during any year for the proper handling of water matters in any division, the supreme court shall designate one or more additional water judges of the district courts in that division, and the term "water judge", as used in this article, refers to all water judges acting in a division. The water judge for a particular division shall be selected from among the judges of the district courts of the counties situated entirely or partly within the division; except that the chief justice may make temporary assignments of other judges.

(3) The water judge of a division shall normally sit in the county where the water clerk is located, but, at the discretion of the judge for convenience of parties, he may sit in other counties in the state, and he shall conduct hearings in other counties as specified in section 37-92-304 (4). Should the functions of the water judge require separate or additional facilities, the same shall be provided for by the state from funds appropriated to the supreme court.

(4) For the purpose of making investigations required by section 37-92-302 (4) and rulings required by section 37-92-303, the water judge of each division shall appoint such referees as may be necessary for that division. The term "referee", as used in this article, refers to all referees acting in a particular division.

(5) Each water referee authorized by this section shall be appointed by the water judge of the water division from a list of not less than three qualified persons to be submitted to the water judge by the executive director of the department of natural resources; but, in any water division, the water judge may elect to perform the functions which by this article



would otherwise be vested in the water referee. When and if an extraordinary work load exists in any water division, additional referees may be appointed.

(6) Persons appointed as water referees shall possess such training and experience as to qualify them to render expert opinions and decisions on the complex matters of water rights and administration. The persons may, as the situation requires, be either full-time, part-time, or contractual court employees of the state of Colorado. All expenses in connection with the performance of the functions of water referees, including salaries and other compensation, office space, and clerical and technical assistance shall be paid from funds appropriated to the supreme court. Each water referee shall execute such oath of office as may be prescribed by the supreme court.

(7) The water judge of each division by order shall refer promptly to a referee of that division all applications filed pursuant to section 37-92-302, and the water clerk of that division shall transmit promptly to such referee the order of referral and the duplicate application and thereafter shall transmit promptly to such referee duplicates of any statements of opposition that are filed.

**Source:** L. 69: p. 1204, § 1. C.R.S. 1963: § 148-21-10. L. 70: p. 430, § 1. L. 83: (1) amended, p. 2079, § 1, effective October 11. L. 85: (1) amended, p. 1167, § 6, effective July 1.

#### ANNOTATION

**Law reviews.** For article, "Adjudication of Indian and Federal Water Rights in the Federal Courts", see 46 U. Colo. L. Rev. 555 (1974-75). For article, "Recent Developments in Colorado Groundwater Law", see 58 Den. L.J. 801 (1981). For article, "Principles and Law of Colorado's Nontributary Ground Water", see 62 Den. U. L. Rev. 809 (1985).

**Annotator's note.** Since § 37-92-202 is similar to repealed § 148-9-2, C.R.S. 1963, and § 147-9-2, CRS 53, relevant cases construing those provisions have been included in the annotations to this section.

**In those cases which arose before the 1983 amendment to this section, the water court had jurisdiction** to adjudicate rights to nontributary ground water outside a designated basin. State Dept. of Natural Res. v. Southwestern Colo. Water Conservation Dist., 671 P.2d 1294 (Colo. 1983), cert. denied, 466 U.S. 944, 104 S. Ct. 1929, 80 L. Ed.2d 474 (1984); State Eng'r v. Smith Cattle, Inc., 780 P.2d 546 (Colo. 1989).

**This act divides the state into seven divisions, each having a district judge designated as "water judge",** giving exclusive jurisdiction to the water judge of "water matters" as defined in the act. Larrick v. District Court, 177 Colo. 237, 493 P.2d 647 (1972).

**Each water judge has exclusive jurisdiction over water matters within his water division.** Fort Lyon Canal Co. v. Catlin Canal Co., 642 P.2d 501 (Colo. 1982).

**Formerly, the term "court" was defined as the court having jurisdiction of the adjudication of water rights in a particular water district.** Whitten v. Coit, 153 Colo. 157, 385 P.2d 131 (1963).

**District courts in the several counties had general jurisdiction to determine disputes involving the use of water which could arise between residents** of any community, but one was not required to resort to the particular court authorized to conduct a general adjudication proceeding in the several water districts in order to secure redress in an action involving an alleged infringement of a right to the use of water. Town of Genoa v. Westfall, 141 Colo. 533, 349 P.2d 370 (1960).

**Where water court's decree did not modify or impair an earlier federal district court's water rights decree, the water court had jurisdiction to issue a decree granting a city application for reservoir refill rights.** Even though the federal district court retained exclusive continuing jurisdiction concerning the federal decree, the city was seeking a new water right not addressed by the federal court that was junior to all appropriations adjudicated in the federal decree. City of Grand Junction v. Denver, 960 P.2d 675 (Colo. 1998).

**It is water matters over which the water courts have exclusive jurisdiction.** State ex rel. Danielson v. Vickroy, 627 P.2d 752 (Colo. 1981).

**The resolution of what constitutes a water matter, and thus is within the water court's exclusive jurisdiction, turns on the distinction between the legal right to use of water and the ownership of a water right.** Humphrey v. Southwestern Development Co., 734 P.2d 637 (Colo. 1987); Crystal Lakes Water and Sew. v. Backlund, 908 P.2d. 534 (Colo. 1995).

**Claim involving the right to use water, not the ownership of it, and was a water matter.** Kobobel v. State Dept. of Natural Res., 215 P.3d 1221 (Colo. App. 2009).

**A dispute over ownership of decreed water rights arising from various conveyances of title does not constitute a "water matter" within the exclusive jurisdiction of the water court,** and therefore other district courts have the power to adjudicate such disputes. *Humphrey v. Southwestern Development Co.*, 734 P.2d 637 (Colo. 1987); *Bijou Irrigation Dist. v. Empire Club*, 804 P.2d 175 (Colo. 1991).

**Because the substance of the complaint addressed primarily the use of water rights rather than their ownership, the complaint related to a water matter and should have been filed in a water court. However, the appeal was properly transferred** from the supreme court to the court of appeals because the appeal was from a district court judgment. *City of Sterling v. Sterling Irrig. Co.*, 42 P.3d 72 (Colo. App. 2002).

**Application for a conditional water right involves a "water matter" over which the water court has exclusive jurisdiction.** *Bubb v. Christensen*, 200 Colo. 21, 610 P.2d 1343 (1980); *Chatfield East Well Co. v. Chatfield East Prop. Owners Ass'n*, 956 P.2d 1260 (Colo. 1998).

**The determination of rights to nontributary ground water involves a "water matter" over which the water court has exclusive jurisdiction.** *Southwestern Development Co. v. Humphrey*, 709 P.2d 51 (Colo. App. 1985).

**Water matters include an application for change of a water right.** *State ex rel. Danielson v. Vickroy*, 627 P.2d 752 (Colo. 1981).

**The limitation on use of a decreed water right is a water matter and is properly resolved in water court.** *Kobobel v. State Dept. of Natural Res.*, 215 P.3d 1221 (Colo. App. 2009).

**Abandonment of a water right is a water matter** within the jurisdiction of the water court. *Gardner v. State*, 200 Colo. 221, 614 P.2d 357 (1980).

**The state engineer has jurisdiction to resolve a petition to revoke a groundwater permit notwithstanding the fact that the issue is a water matter** because § 37-90-137 specifically delegates the issuance of groundwater permits to the state engineer's jurisdiction. *V Bar Ranch LLC v. Cotten*, 233 P.3d 1200 (Colo. 2010).

**Water judges have exclusive jurisdiction of determining the validity of the rules and regulations of the state engineer,** for it would be illogical, in fact nearly unthinkable, to set up a system for the determination of "water matters" and to provide for the selection of judges skilled in this field of law to preside as water judges, and then turn the determination to a non-water judge of a subject that goes to the very heart of the administration of water. *Kuiper*

*v. Well Owners Conservation Ass'n*, 176 Colo. 119, 490 P.2d 268 (1971).

**It is not within the jurisdiction of water judges** to review rules or regulations promulgated to implement the Water Right Act. *Eagle Peak Farms v. Ground Water Comm'n*, 870 P.2d 539 (Colo. App. 1993), rev'd on other grounds, 919 P.2d 212 (Colo. 1996).

**Jurisdiction to determine effect of prior contract or priorities awarded.** It is inconceivable that the general assembly intended to grant the water judge jurisdiction with respect to priorities but to bar him from determining the effect of a prior contract upon the priorities awarded. This jurisdiction is implied in the state constitution and this section. In re *Application for Water Rights of Fort Lyon Canal Co.*, 184 Colo. 219, 519 P.2d 954 (1974); *Oliver v. District Court*, 190 Colo. 524, 549 P.2d 770 (1976).

**The water court is the proper forum to define the scope of previously decreed plans for augmentation.** *Crystal Lakes Water and Sew. v. Backlund*, 908 P.2d 534 (Colo. 1995).

**The water court has ancillary jurisdiction to resolve matters that would directly affect the outcome of matters over which it has exclusive jurisdiction.** *Crystal Lakes Water and Sew. v. Backlund*, 908 P.2d 534 (Colo. 1995).

**Where a hearing before a court does not involve beneficial application of water nor matters of priorities of appropriation,** but with the manner in which water was allowed to run off the land after irrigation, a district court as a court of general jurisdiction has power to prevent negligent or deliberate damage, by whatever means, to property and to enforce court orders designed to prevent irreparable injury. *Baumgartner v. Stremel*, 178 Colo. 209, 496 P.2d 705 (1972).

**Water court judge could not make an order concerning appropriation and diversion,** where the diversion takes place in a different water division than that in which adjudication is sought. *Metro. Sub. Water Users Ass'n v. Colo. River Water Conservation Dist.*, 148 Colo. 173, 365 P.2d 273 (1961).

**Ancillary suit transferrable to water court for determination.** Where a covenant in a deed required the grantee to maintain a certain reservoir level; the covenant was the subject of a suit for injunctive relief in the district court; and the covenant would affect the outcome of a suit pending in the water court, the district court suit was ancillary to that in the water court and could be transferred to the water court for determination. *Oliver v. District Court*, 190 Colo. 524, 549 P.2d 770 (1976).

**Although the water court has jurisdiction to hear ancillary matters,** such jurisdiction does not extend to an adjudication of interests in land which are only tangentially related to the water dispute. *FWS Land and Cattle Co.*, v.



State Div. of Wildlife 795 P.2d 837 (Colo. 1990).

**Water judge may be conferred extraordinary jurisdiction** over applications for water rights filed by various applicants in different water divisions. Southeastern Colo. Water Conservancy Dist. v. Huston, 197 Colo. 365, 593 P.2d 1347 (1979).

**No jurisdiction over nontributary water not designated ground water.** Where nontributary water has not been designated ground water, this type of water is included within the term "water matters", and a water judge does not have jurisdiction. In re Application for Water Rights of Fort Lyon Canal Co., 184 Colo. 219, 519 P.2d 954 (1974); Southeastern Colo. Water Conservancy Dist. v. Huston, 197 Colo. 365, 593 P.2d 1347 (1979).

**Relief involving taking ground water sought first under ground water provisions.** It is appropriate, as a matter of policy, and is consistent with legislative intent, to require that any relief sought which involves the taking of ground water in a designated ground water basin must be sought first through the administrative and judicial channels, as appropriate, prescribed for resolution of questions arising under article 90 of this title. State ex rel. Danielson v. Vickroy, 627 P.2d 752 (Colo. 1981).

**Vickroy decision not retrospectively applied.** State ex rel. Danielson v. Vickroy (627 P.2d 752 (Colo. 1981)) should not be retrospectively applied to those decrees involving well permits in designated ground water basins issued prior to the Vickroy decision. Ground Water Comm'n v. Shanks, 658 P.2d 847 (Colo. 1983).

**Applications for appropriating designated ground water committed to commission's jurisdiction.** Applications for the appropriation of designated ground water to beneficial use are committed to the jurisdiction of the ground water commission. State ex rel. Danielson v. Vickroy, 627 P.2d 752 (Colo. 1981).

**Even where water not within definition of "designated ground water".** An application for an initial appropriation of ground water, even if not within the definition of "designated ground water", in a designated ground water basin must be addressed to the ground water commission. State ex rel. Danielson v. Vickroy, 627 P.2d 752 (Colo. 1981).

**Same presumption of correctness attaches to judgment of water court** as to that of a court of general jurisdiction. Michel v. Front Range Land & Livestock Co., 638 P.2d 74 (Colo. 1981).

**Authority of water referee is derivative from, and not greater than, water judge.** Gardner v. State, 200 Colo. 221, 614 P.2d 357 (1980).

**Applications under § 37-92-302 referred to water referee.** The water judge must refer all applications and statements of opposition filed under § 37-92-302 to a water referee. Gardner v. State, 200 Colo. 221, 614 P.2d 357 (1980).

**Statements opposing water right application may be based on abandonment theory.** The statutory delegation in § 37-92-301 (2) of authority to water referees to make determinations of abandonment is merely a recognition that statements of opposition to an application may be based on the theory of abandonment as an affirmative defense to the application. Gardner v. State, 200 Colo. 221, 614 P.2d 357 (1980).

**Water right definitionally does not include a right to use "designated ground water",** as defined in § 37-90-103 (6). State ex rel. Danielson v. Vickroy, 627 P.2d 752 (Colo. 1981).

**Easement to diversion point not required before conditional water right decreed absolute.** No useful purpose would be served by requiring that a conditional water right cannot be decreed to be absolute until an easement to the point of diversion has been obtained by condemnation. Bubb v. Christensen, 200 Colo. 21, 610 P.2d 1343 (1980).

**Trespass onto property upon which diversion point located no defense to application.** Under the circumstances of the case, trespass by a person with a conditional water right onto property upon which the point of diversion for the water right was located was not a defense to an application to make a conditional water right absolute. Bubb v. Christensen, 200 Colo. 21, 610 P.2d 1343 (1980).

**Landowners bound by conditional water decree where no protest filed, nor correction sought.** Where the landowners of the property upon which the point of diversion for a conditional water right was located had notice of an application for the water right by reason of the publication of the summary in the resume, but they did not file a statement of opposition to the application, did not file a protest to the ruling of the referee, and did not seek correction of any substantive errors in the judgment and decree of the water court within three years after it was entered, and they took no action until the water had been applied to beneficial use and an application had been filed to make the conditional decree absolute, the time for challenging the conditional decree has expired and the landowners were bound by the decree. Bubb v. Christensen, 200 Colo. 21, 610 P.2d 1343 (1980); United States v. City & County of Denver, 656 P.2d 1 (Colo. 1982).

**Applied** in State Dept. of Natural Res. v. Southwestern Colo. Water Conservation Dist., 671 P.2d 1294 (Colo. 1983), cert. denied, 466 U.S. 944, 104 S. Ct. 1929, 80 L. Ed.2d 474 (1984).

**37-92-204. Water clerks - duties.** (1) (a) There is established in each water division the office of water clerk, who shall be an associate clerk of the district court and shall be appointed in the same manner as clerks of the various district courts. The water clerk may be a part-time employee, or an existing clerk of the district court may be assigned additional duties as water clerk. Any reference in this article to a filing with the water clerk means a filing in the district court where such clerk serves.

(b) The water clerk shall maintain his office in the offices of the clerk of the district court of the county in each division as follows:

Division 1	Weld
Division 2	Pueblo
Division 3	Alamosa
Division 4	Montrose
Division 5	Garfield
Division 6	Routt
Division 7	La Plata

(2) The water clerk shall maintain the records of all proceedings related to appropriations, determinations of water rights and conditional water rights and the amount and priority thereof, changes of water rights, plans for augmentation, abandonment of water rights and conditional water rights, and the records of all proceedings of the water judge and of all rulings and actions of the referee required by this article to be filed with the water clerk. The clerks of the various district courts in each division, if requested by the water clerk of that division, shall transfer to the water clerk duplicate copies of any of the files, or parts thereof, of cases relating to water rights. The water clerk shall perform such other duties as may be prescribed by the water judge or the supreme court.

(3) Subject to the approval of the water judge, the water clerk in each division shall employ such assistants and deputies as may be necessary for him to carry out his duties. The water clerk, assistants, and deputies shall execute such oath of office and such bond as may be prescribed by the supreme court.

(4) The expense of the office and staff of the water clerk shall be provided for out of state funds appropriated to the supreme court, and each county in which a water clerk's office is located shall be reimbursed for the cost thereof to the county.

**Source:** L. 69: p. 1205, § 1. C.R.S. 1963: § 148-21-11. L. 70: p. 431, § 2.

## PART 3

### DETERMINATION AND ADMINISTRATION OF WATER RIGHTS

**Cross references:** For the appointments and functions of water division engineers, see § 37-92-202.

**37-92-301. Administration and distribution of waters.** (1) The state engineer shall be responsible for the administration and distribution of the waters of the state, and, in each division, such administration and distribution shall be accomplished through the offices of the division engineer as specified in this article.

(2) In accordance with procedures specified in this article, the referee in each division shall in the first instance have the authority and duty to rule upon determinations of water rights and conditional water rights and the amount and priority thereof, including a determination that a conditional water right has become a water right by reason of completion of the appropriation, determinations with respect to changes of water rights, plans for augmentation, approvals of reasonable diligence in the development of appropriations under conditional water rights, and determinations of abandonment of a water rights or a conditional water rights; and he may include in any ruling for a determination of water right or conditional water right any use or combination of uses, any diversion or



combination of points or methods of diversion, and any place or alternate places of storage and may approve any change of water right as defined in this article.

(3) In the distribution of water, the division engineer in each division and the state engineer shall be governed by the priorities for water rights and conditional water rights established by adjudication decrees entered in proceedings concluded or pending on June 7, 1969, and by the priorities for water rights and conditional water rights determined pursuant to the provisions of this article. All such priorities shall take precedence in their appropriate order over other diversions of waters of the state. Subject to section 37-92-502 (2), in determining and administering the use of water, judicial and administrative officers shall be governed by the following:

(a) In every case in which the owner of an appropriative right to divert water supplies his water needs by the use of a well, the water diverted by that well may be charged to its own appropriation; or it may be used to divert water under the provisions set forth in paragraph (b) of this subsection (3). This statutory statement is intended as a legislative acknowledgment of the long-held practice in Colorado under which various water rights may be carried through the same physical structure.

(b) In any case in which the owner of an appropriative right to divert water at the surface of a stream or to have water so diverted delivered for his use or benefit has a well so situated as to draw water from the same stream system, that owner may secure the right to have such well, or more than one if he has more than one such well, made an alternate point of diversion to said surface right by procedures provided in this article for securing alternate points of diversion.

(c) Until July 1, 1972, all diversions by well to supply a water use for which there is a surface decree may be charged against and be considered as part of the exercise of said surface decree even if the owner has not secured the right to an alternate point of diversion at the well, but nothing in this article shall be construed to prevent regulation of the well in accordance with law and within the system of priorities established for regulation of diversions of water in Colorado.

(d) In authorizing alternate points of diversion for wells, the widest possible discretion to permit the use of wells shall prevail. In administering the waters of a watercourse, the withdrawal of water which will lower the water table shall be permitted but not to such a degree as will prevent the water source to be recharged or replenished under all predictable circumstances to the extent necessary to prevent injury to senior appropriators in the order of their priorities, and with due regard for daily, seasonal, and longer demands on the water supply.

(4) (a) (I) In every sixth calendar year after the calendar year in which a water right is conditionally decreed, or in which a finding of reasonable diligence has been decreed, the owner or user thereof, if such owner or user desires to maintain the same, shall file an application for a finding of reasonable diligence, or said conditional water right shall be considered abandoned.

(II) If a conditional underground water right requires construction of a well, the expiration of the permit issued for the construction of such well by the state engineer pursuant to section 37-90-137 (1) shall not be the sole basis for a determination of abandonment pursuant to subparagraph (I) of this paragraph (a).

(III) The judgment and decree of the court shall specify the month and calendar year in which a subsequent application for a finding of reasonable diligence shall be filed with the water clerk pursuant to section 37-92-302 (1). A subsequent application shall be filed during the same month as the previous decree was entered every six years after such entry of the decree until the right is made absolute or otherwise disposed of.

(IV) The provisions of this paragraph (a) shall supersede any contrary provision or requirement of a previous conditional decree or determination of reasonable diligence.

(b) The measure of reasonable diligence is the steady application of effort to complete the appropriation in a reasonably expedient and efficient manner under all the facts and circumstances. When a project or integrated system is comprised of several features, work on one feature of the project or system shall be considered in finding that reasonable diligence has been shown in the development of water rights for all features of the entire project or system.

(c) Subject to the provisions of paragraph (b) of this subsection (4), neither current economic conditions beyond the control of the applicant which adversely affect the feasibility of perfecting a conditional water right or the proposed use of water from a conditional water right nor the fact that one or more governmental permits or approvals have not been obtained shall be considered sufficient to deny a diligence application, so long as other facts and circumstances which show diligence are present.

(5) In all proceedings for a change of water right and for approval of reasonable diligence with respect to a conditional water right, it is appropriate for the referee and the courts to consider abandonment of all or any part of such water right or conditional water right; except that no conditional underground water right requiring the construction of a well shall be declared abandoned pursuant to this subsection (5) solely upon the ground that the permit issued for the construction of such well by the state engineer pursuant to section 37-90-137 (1) has expired.

**Source:** L. 69: p. 1205, § 1. C.R.S. 1963: § 148-21-17. L. 71: p. 1324, § 4. L. 73: p. 1523, § 1. L. 74: (2) amended, p. 442, § 2, effective May 7. L. 77: (2) amended, p. 1702, § 1, effective June 19. L. 88: (4) amended, p. 1239, § 1, effective July 1. L. 90: (4) amended, p. 1625, § 1, effective April 13. L. 94: (4)(a) and (5) amended, p. 1209, § 2, effective May 19.

**Cross references:** For the division engineer ordering discontinuance of diversion, see § 37-92-502 (2).

## ANNOTATION

I. General Consideration.

II. Federal Reserved Water Rights.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "Water for Oil Shale Development", see 43 Den. L.J. 72 (1966). For article, "Adjudication of Indian and Federal Water Rights in the Federal Courts", see 46 U. Colo. L. Rev. 555 (1974-75). For article, "Developments in Conditional Water Rights Law", see 14 Colo. Law 353 (1985). For article, "The Effect of Water Law on the Development of Oil Shale", see 58 Den. L.J. 751 (1981). For comment, "Town of De Beque v. Enewold: Conditional Water Rights and Statutory Water Law", see 58 Den. L.J. 837 (1981). For article, "Developments in Conditional Water Rights Law", see 14 Colo. Law. 353 (1985). For article, "The Physical Solution in Western Water Law", see 57 U. Colo. L. Rev. 445 (1986). For article, "Colorado's Law of 'Underground Water': A Look at the South Platte Basin and Beyond", see 59 U. Colo. L. Rev. 579 (1988). For article, "Ethical Considerations in Water Right Adjudications", see 17 Colo. Law. 2381 (1988). For article, "Abandonment of Water Rights: Is 'Use It or Lose It' the Law?", see 18 Colo. Law. 2125 (1989). For article, "Water Rights Protection In Water Quality Law", see 60 U. Colo. L. Rev. 841 (1990). For article, "Transaction Costs as Determinants of Water Transfers", see 61 U. Colo. L. Rev. 393 (1990).

**The state engineer does not have statutory authority to place and dig any wells.** Kuiper v.

Well Owners Conservation Ass'n, 176 Colo. 119, 490 P.2d 268 (1971).

**State engineer's authority to apply compact tributary rule.** A compact requiring administration of the Rio Grande mainstem and Conejos river according to delivery schedules that did not include the contributions of three creeks as significant to the delivery obligation did away with the state engineer's authority to apply the tributary rule of the compact to the three creeks. Alamosa-La Jara Water Users Prot. Ass'n v. Gould, 674 P.2d 914 (Colo. 1983).

**Stream administration.** Streams independently appropriated remain independent under the doctrine of prior appropriation unless the water of those streams becomes subject to equitable apportionment by compact, in which case the streams must be administered as mandated by the compact or statutory provisions for priority administration of water rights. Alamosa-La Jara Water Users Prot. Ass'n v. Gould, 674 P.2d 914 (Colo. 1983).

**Water rights governed by water deed.** Where a landowner's rights were determined by the terms of a water deed through and on which his claim for water is based, he had a right to use water at such times, manner, and place as is provided in the water deed, and his rights were governed by the water deed and not by § 37-92-305 (3). Merrick v. Fort Lyon Canal Co., 621 P.2d 952 (Colo. 1981).

**Administration of water rights is accomplished pursuant to water court decrees,** not stipulations among the parties. Colo. River Water Conservation Dist. v. Bar Forty Seven Co., 195 Colo. 478, 579 P.2d 636 (1978).



**Right to change point of diversion is limited in quantity by historical use.** *Southeastern Colo. Water Conservancy Dist. v. Rich*, 625 P.2d 977 (Colo. 1981).

**Diversions made pursuant to water right considered historical use where not ordered discontinued.** Where the water commissioner was aware of the landowners' diversions of water and had never ordered them to be discontinued or limited the diversions made pursuant to a water right, though not in priority, such diversions could be considered as establishing an historical use for the purpose of the change of water right. *Southeastern Colo. Water Conservancy Dist. v. Rich*, 625 P.2d 977 (Colo. 1981).

**Out-of-priority undetected diversions** made by appropriator's predecessor in interest should not be considered in establishment of historical use of water right. *Pueblo West Metro. Dist. v. S.E. Colo. Water Cons. Dist.*, 717 P.2d 955 (Colo. 1986).

**Automatic cessation of diversions by junior appropriator not contemplated.** Sections 37-92-501 and 37-92-502 do not contemplate automatic cessation of diversions by a junior appropriator in response to a river call. *Southeastern Colo. Water Conservancy Dist. v. Rich*, 625 P.2d 977 (Colo. 1981).

**Division engineer must evaluate each junior appropriator's diversion to determine material injury caused.** The statutory plan in §§ 37-92-501 and 37-92-502 contemplates that the division engineer will evaluate each junior appropriator's diversion to determine whether it is causing material injury to water rights having senior priorities before ordering the discontinuance of the diversion by the junior appropriator. *Southeastern Colo. Water Conservancy Dist. v. Rich*, 625 P.2d 977 (Colo. 1981).

**Statements opposing water right application may be based on abandonment theory.** The statutory delegation in subsection (2) of authority to water referees to make determinations of abandonment is merely a recognition that statements of opposition to an application may be based on the theory of abandonment as an affirmative defense to the application. *Gardner v. State*, 200 Colo. 221, 614 P.2d 357 (1980).

**Different tests for abandonment of conditional and absolute water rights.** The general assembly clearly intended different tests to be applied in determining when a conditional water right is abandoned and when an absolute water right is abandoned. The difference is the element of intent, which must be shown before an abandonment of an absolute water right can be decreed, but which is not necessary in establishing the abandonment of a conditional water right. The test applicable to determining whether a conditional water right has been abandoned is whether there has been a "failure to develop with reasonable diligence". *Town of De Beque v. Enewold*, 199 Colo. 110, 606 P.2d 48 (1980).

Every six years after the issuance of a **conditional water right decree**, the owner or user must obtain, from the water court, a finding of reasonable diligence in the development of the proposed appropriation or the conditional water right will be considered abandoned. *City of Lafayette v. New Anderson Ditch Co.*, 962 P.2d 955 (Colo. 1998).

**Purpose of subsection (4)** is to prevent the accumulation of conditional water rights without diligent efforts to complete the projects to the detriment of those needing and seeking to make immediate beneficial use of the same water. *Colo. River Water Conservation Dist. v. City & County of Denver*, 640 P.2d 1139 (Colo. 1982); *Trans-County Water v. Central Colo. Water Conservancy District*, 727 P.2d 60 (Colo. 1986); *City of Lafayette v. New Anderson Ditch Co.*, 962 P.2d 955 (Colo. 1998).

**Conditional water rights may be lost by failure to timely file.** The general assembly demonstrated in this section that it intends that conditional water rights could be lost because of failure to timely file. *Town of De Beque v. Enewold*, 199 Colo. 110, 606 P.2d 48 (1980); *In re Simineo v. Kelling*, 199 Colo. 225, 607 P.2d 1289 (1980); *Municipal Subdistrict v. Rifle Ski Corp.*, 726 P.2d 635 (Colo. 1986); *Purgatoire River Water Conservancy v. Witte*, 859 P.2d 825 (Colo. 1993).

**A conditional water right may not be perfected and may be terminated for lack of diligence or by abandonment.** *Matter of Bd. of County Comm'rs*, 891 P.2d 952 (Colo. 1995).

**Subsection (4) can be considered as a statute of limitations**, and a failure to file the necessary application within the period of limitation mandates cancellation of the conditional water right. *Broyles v. Fort Lyon Canal Co.*, 695 P.2d 1136 (Colo. 1985); *Fort Lyon Canal v. Purgatoire River*, 818 P.2d 747 (Colo. 1991).

**Under the 1990 amendments to subsection (4), the controlling date for the six-year filing period for reasonable diligence reports** is the date on which the last finding of reasonable diligence was made. *Darby v. All J Land and Rental Co.*, 821 P.2d 297 (Colo. 1991).

**Water court erred in applying the 1990 statute** to its diligence determination where general assembly did not express any intention that the new standards apply to diligence determinations initiated prior to the 1990 statute's effective date. *Upper Gunnison River v. Bd. of County Comm'rs*, 841 P.2d 1061 (Colo. 1992).

**Failure to file due diligence application** pursuant to subsection (4) after receiving notice that failure to file would result in cancellation or expiration of conditional water right constitutes abandonment of such right. *Bar 70 Enterprises, Inc. v. Highland Ditch Ass'n*, 694 P.2d 1253 (Colo. 1985); *Municipal Subdistrict v. Rifle Ski Corp.*, 726 P.2d 635 (Colo. 1986).

**But failure to file a timely due diligence application** pursuant to subsection (4) of this section does not result in the cancellation of a conditional water right if the water court does not provide notice of cancellation to the owner pursuant to § 37-92-305 (7). *Double RL Co. v. Telluray Ranch Props.*, 54 P.3d 908 (Colo. 2002).

**Failure to obtain quadrennial finding of reasonable diligence** in the development of proposed appropriation results in abandonment and terminates a conditional water right. *Application of Talco, Ltd.*, 769 P.2d 468 (Colo. 1989).

**A conditional decree is a vested property right, subject to forfeiture** if the holder fails to pursue his conditional water rights with reasonable diligence. *Mooney v. Kuiper*, 194 Colo. 477, 573 P.2d 538 (1978); *Trans-County Water v. Central Colo. Water Conservancy District*, 727 P.2d 60 (Colo. 1986); *Application of Talco, Ltd.*, 769 P.2d 468 (Colo. 1989).

**Diligence determination made only on case-by-case basis.** A judicial determination of diligence can only be made on a case-by-case basis after considering all of the facts and circumstances relating to the development of each particular project. *Colo. River Water Conservation Dist. v. City & County of Denver*, 640 P.2d 1139 (Colo. 1982); *Municipal Subdistrict v. Rifle Ski Corp.*, 726 P.2d 635 (Colo. 1986); *Trans-County Water v. Central Colo. Water Conservancy District*, 727 P.2d 60 (Colo. 1986); *Application of Talco, Ltd.*, 769 P.2d 468 (Colo. 1989); *Northern Colo. Water v. Three Peaks Water*, 859 P.2d 836 (Colo. 1993); *City of Lafayette v. New Anderson Ditch Co.*, 962 P.2d 955 (Colo. 1998).

**Factors considered in diligence determination.** A court in making a diligence determination must look at all factors which can be considered as important in determining whether an appropriator is satisfying the terms of a conditional water decree by developing it for a beneficial use in the most expedient and efficient fashion possible under the circumstances. *Colo. River Water Conservation Dist. v. City & County of Denver*, 640 P.2d 1139 (Colo. 1982); *Municipal Subdistrict v. Rifle Ski Corp.*, 726 P.2d 635 (Colo. 1986).

To obtain a finding of reasonable diligence, the holder of the right must prove continuous, project-specific effort directed toward the development of the conditional right commensurate with his capabilities, as well as evidence of reasonable progress in the development of the conditional appropriation in the most expedient and efficient manner. *Trans-County Water v. Central Colo. Water Conservancy District*, 727 P.2d 60 (Colo. 1986).

Consideration by the court to determine a finding of due diligence include, but are not necessarily limited to: (1) Economic feasibility; (2) status of requisite permit applications and

other required governmental approvals; (3) expenditures made to develop the appropriation; (4) ongoing conduct of engineering and environmental studies; (5) design and construction of facilities; and (6) nature and extent of land holdings and contracts demonstrating the water demand and beneficial uses which the conditional right is to serve when perfected. *Dallas Creek Water Co. v. Huey*, 933 P.2d 27 (Colo. 1997); *City of Lafayette v. New Anderson Ditch Co.*, 962 P.2d 955 (Colo. 1998).

Under subsection (4)(c), water project's current economic unfeasibility and the diligence applicant's consequent decision to not build project facilities during the diligence period do not justify denial of a finding of reasonable diligence, where water court's findings of other factors relevant to diligence are supported by competent evidence. *Municipal Subdistrict v. Chevron Shale Oil Co.*, 986 P.2d 918 (Colo. 1999).

**Party seeking to establish reasonable diligence with respect to a conditional water right** does not have the burden of proof regarding the economic feasibility of a particular project; rather, such economic feasibility is one factor to be considered in a finding of reasonable diligence. *Pub. Serv. Co. v. Blue River Irr.*, 782 P.2d 792 (Colo. 1989).

**If no other facts and circumstances that show diligence are present,** the lack of governmental approvals and permits supports the water court's determination that the applicant failed to satisfy the can and will test, and a final denial of such approvals or permits is not required. *Natural Energy Res. Co. v. Upper Gunnison River Water Conservancy Dist.*, 142 P.3d 1265 (Colo. 2006).

**The existence of current economic factors beyond a diligence applicant's control that made a water project infeasible** does not preclude a finding of diligence. *Municipal Subdist., Northern Colo. Water Conservancy District v. OXY USA, Inc.*, 990 P.2d 701 (Colo. 1999).

**Work performed on a water project that was not part of a common system with the rights at issue can be considered in determining diligence** if the work is complementary to the rights at issue. *Municipal Subdist., N. Colo. Water Conservancy Dist. v. Getty Oil Exploration Co.*, 997 P.2d 557 (Colo. 2000).

**Nonproject efforts insufficient for finding of reasonable diligence.** Nonproject-related efforts and activities to protect or promote the future development of a conditional water right, standing alone, will not be sufficient to support a finding of reasonable diligence. *Colo. River Water Conservation Dist. v. City & County of Denver*, 640 P.2d 1139 (Colo. 1982); *Application of Talco, Ltd.*, 769 P.2d 468 (Colo. 1989).

**Finding of reasonable diligence equal to development with reasonable diligence.** In considering subsection (4) in juxtaposition with



§ 37-92-103(1), it is evident that the general assembly was drawing a clear connecting line between "failure to develop with reasonable diligence" and the requirement that the owner or user of a conditional water right obtain a finding of reasonable diligence. In effect, the general assembly equated a failure to obtain a finding of reasonable diligence with a failure to develop with reasonable diligence. *Town of De Beque v. Enewold*, 199 Colo. 110, 606 P.2d 48 (1980).

**Test well, which diverted underground waters in violation of court order granting conditional water right**, was not sufficiently related to original appropriation of conditional water right holder as to constitute reasonable diligence in the development of the conditional water right. *Application of Talco, Ltd.*, 769 P.2d 468 (Colo. 1989).

**Third parties are entitled to notice** and hearing in a change of water right proceeding under this section. *Broyles v. Fort Lyon Canal Co.*, 638 P.2d 244 (Colo. 1981).

**Applied** in *Purgatoire River Water Conservancy Dist. v. Kuiper*, 197 Colo. 200, 593 P.2d 333 (1979); *Broyles v. Fort Lyon Canal Co.*, 638 P.2d 244 (Colo. 1981); *Colo. River Water Conservation Dist. v. City & County of Denver*, 642 P.2d 510 (Colo. 1982); *United States v. City & County of Denver*, 656 P.2d 1 (Colo. 1982).

## II. FEDERAL RESERVED WATER RIGHTS.

**Law reviews.** For note, "Adjudication of Federal Reserved Water Rights", see 42 U. Colo. L. Rev. 161 (1970). For article, "Adjudication of Indian and Federal Water Rights in the Federal Courts", see 46 U. Colo. L. Rev. 555 (1974-75). For comment on determining the priority of federal reserved rights relative to the water rights of state appropriators, see 48 U. Colo. L. Rev. 547 (1977).

**Federal reserved water rights.** The United States possesses reserved rights for its federal

reservations in Colorado in waters unappropriated upon the date of reservation of the federal lands from the public domain, and in the amount necessary to achieve the primary purposes of the reservations. *United States v. City & County of Denver*, 656 P.2d 1 (Colo. 1982).

**Reserved rights to be determined by Colorado law.** Colorado law governing the determination of water rights is properly applied as the rule of decision by which the courts will determine the contours of the reserved rights asserted by the United States. *United States v. City & County of Denver*, 656 P.2d 1 (Colo. 1982).

**Seniority of federal reserved rights.** The federal government's position is similar to the holder of a conditional senior water right who can step ahead of junior appropriators causing a diminution of the amount of water available for diversion. *Navajo Dev. Co. v. Sanderson*, 655 P.2d 1374 (Colo. 1982).

**Immunity from nonuse requirement.** Federal reserved water rights are immune from Colorado's nonuse requirement to the extent necessary to fulfill the purposes of the reservation. *United States v. City & County of Denver*, 656 P.2d 1 (Colo. 1982).

**Federal right is outside of state appropriation system.** Once the federal right has been quantified, that amount is then outside the state appropriation system. *United States v. City & County of Denver*, 656 P.2d 1 (Colo. 1982).

**Federal reserved water rights subject to state administration.** Federal reserved water rights ultimately adjudicated to the United States are subject to administration by the state engineer. *United States v. City & County of Denver*, 656 P.2d 1 (Colo. 1982).

**For extent of federal reserved water rights on different categories of public lands**, see *United States v. City & County of Denver*, 656 P.2d 1 (Colo. 1982).

**For effect of federal reserved water rights**, see *Navajo Dev. Co. v. Sanderson*, 655 P.2d 1374 (Colo. 1982).

**37-92-302. Applications for water rights or changes of such rights - plans for augmentation.** (1) (a) Any person who desires a determination of a water right or a conditional water right and the amount and priority thereof, including a determination that a conditional water right has become a water right by reason of the completion of the appropriation, a determination with respect to a change of a water right, approval of a plan for augmentation, finding of reasonable diligence, approval of a proposed or existing exchange of water under section 37-80-120 or 37-83-104, or approval to use water outside the state pursuant to section 37-81-101 shall file with the water clerk a verified application setting forth facts supporting the ruling sought, a copy of which shall be sent by the water clerk to the state engineer and the division engineer. The term "determination of a water right or conditional water right" includes any plan or change in plan under the provisions of section 37-45-118 (1) (b) (II) that is or has been incorporated into a decree.

(b) Any person, including the state engineer, who wishes to oppose the application may file with the water clerk a verified statement of opposition setting forth facts as to why the application should not be granted or why it should be granted only in part or on certain conditions. The statement of opposition may be filed on behalf of all owners of water rights

who, by affixing their signatures to the statement of opposition, in person or by attorney, consent to being included in the statement and who may be detrimentally affected by granting of the application. The water clerk shall send a copy of the statement of opposition to the state engineer and the division engineer.

(c) Such statement of opposition must be filed by the last day of the second month following the month in which the application is filed.

(d) (I) The fee for filing an application, complaint, petition, or any other pleading initiating a water matter shall be the same as that for filing a civil complaint in district court, as provided in section 13-32-101, C.R.S.; except that, for any application seeking a determination of a change of water right or approval of a plan for augmentation, the filing fee shall be twice as much. For filing a statement of opposition, the fee shall be the same as that for filing an answer to a civil action in district court. A tax of one dollar must be included with every application, pursuant to section 2-5-119, C.R.S. No fee or tax shall be assessed to the state of Colorado or any agency of its executive department under this subsection (1) or subsection (3) of this section, but no other person or entity shall be exempt from such fee or tax.

(II) All fees collected under this paragraph (d) shall be transmitted to the state treasurer and be divided as provided in section 13-32-101, C.R.S.

(e) (Deleted by amendment, L. 2008, p. 2144, § 13, effective June 4, 2008.)

(2) (a) The water judges of the various divisions shall jointly prepare and supply to the water clerks standard forms which shall be used for such applications and statements of opposition. These forms shall designate the information to be supplied and may be modified from time to time. Supplemental material may be submitted with any form. In the case of applications for a determination of a water right or a conditional water right, the forms shall require, among other things, a legal description of the diversion or proposed diversion, a description of the source of the water, the date of the initiation of the appropriation or proposed appropriation, the amount of water claimed, and the use or proposed use of the water. In the case of applications for approval of a change of water right or plan for augmentation, the forms shall require a complete statement of such change or plan, including a description of all water rights to be established or changed by the plan, a map showing the approximate location of historic use of the rights, and records or summaries of records of actual diversions of each right the applicant intends to rely on to the extent such records exist. In the case of applications that will require construction of a well, other than applications for determinations of rights to groundwater from wells described in section 37-90-137 (4), no application shall be heard on its merits by the referee or water judge until a written consultation report, as required by subsection (4) of this section, has been submitted and considered. The consultation report shall be submitted within four months after the filing of the application and shall include findings as to whether the construction and use of any well proposed in the application will injuriously affect the owner of, or persons entitled to use, water under a vested water right or decreed conditional water right. In the case of applications for determinations of rights to groundwater from wells described in section 37-90-137 (4), the application shall be supplemented by evidence that the state engineer has issued or failed to issue, within four months of the filing of the application in water court, a determination as to the facts of such application. Such state engineer's determination shall be made by the state engineer upon receipt from the water clerk of a copy of the application, and no separate filing or docketing with the state engineer shall be required.

(b) The application shall be supplemented by evidence that the applicant has, within fourteen days after filing the application, given notice of the application by registered or certified mail, return receipt requested, to:

(I) In the case of applications for determinations of rights to groundwater from wells described in section 37-90-137 (4), every record owner of the overlying land and to every person who has a lien or mortgage on, or deed of trust to, the overlying land recorded in the county in which the overlying land is located, and, for purposes of such notice, the term "person" shall have the same meaning as is set forth in section 37-90-137 (4) (b.5); and

(II) The owner of the land upon which any new diversion or storage structure or modification to any existing diversion or storage structure or existing storage pool is or will



be constructed or upon which water is or will be stored. In determining the owner of potentially affected land for purposes of such notice, the applicant may rely upon the real estate records of the county assessor for the county or counties in which the land is located.

(c) The provisions of paragraph (b) of this subsection (2) do not apply to political subdivisions of the state of Colorado, special districts, municipalities, or quasi-municipal districts that have obtained consent to withdraw groundwater pursuant to section 37-90-137 (8) or by deed, assignment, or other written evidence of consent where the application concerns only such groundwater and, at the time of application, the overlying land is within the water service area of such entity.

(3) (a) Not later than the fifteenth day of each month, the water clerk shall prepare a resume of all applications in the water division which have been filed in his office during the preceding month. The resume shall give the name and address of the applicant, a description of the water right or conditional water right involved, and a description of the ruling sought. The resume may be provided by the applicant at the time of filing the application or at the time of any republication pursuant to paragraph (b) of this subsection (3), or, if no resume is provided, the water clerk shall prepare the resume for publication. The water clerk shall promptly submit to each applicant a bill for costs incurred by the water court in publishing the resume of the application. No ruling or decree shall be entered prior to payment of the charges.

(b) Not later than the end of such month, the water clerk shall cause such publication to be made of each resume or portion thereof in a newspaper or newspapers as is necessary to obtain general circulation once in every county affected, as determined by the water judge. If, at the request of or as the result of amendments made by an applicant, the resume of an application is republished, the applicant shall pay the cost of such republication. A newspaper in which the resume is published or republished shall directly bill the applicant rather than the water clerk for the costs of publication.

(c) (I) (A) to (C) Repealed.

(D) On and after January 1, 2006, not later than the end of each month, the water clerk shall post a copy of the resume on the water court's web site. Not later than the end of such month, the referee or the water clerk shall send a copy of such resume by mail or electronic mail to any person who the referee has reason to believe would be affected. The water clerk shall notify each person who has requested a copy of the resume by submitting his or her name and electronic mail address to the water clerk of the availability of the resume on such web site. The water clerk shall maintain an electronic mailing list of such names and addresses, and a person desiring to have his or her name and address retained on the list shall resubmit the information by January 5. A person who has not so resubmitted the information shall not be retained on the list, but such person may submit his or her name and electronic mail address at any time thereafter for inclusion on the list subject to the requirements of this section. In order to obtain an electronic mail notification of the availability of the resume for a particular month, a person's name and address shall be received not later than the fifth day of the month of publication of the resume. A copy of the resume shall be furnished without charge to the state engineer and the appropriate division engineer.

(E) The water clerk shall provide a paper copy of the resume to a person upon payment of the fee required in section 13-32-104 (1) (a), C.R.S.

(II) Repealed.

(d) All publications provided for in paragraph (b) of this subsection (3) may be augmented, in the discretion of the water judge, by notices broadcast over any or all standard radio, FM radio, TV stations, and cable television. Such broadcast notices shall make reference to locations or publications wherein details of the subject matter of the notices are located.

(3.5) In addition to the resume notice required to be given by subsection (3) of this section, any notice of an application for a change of irrigation water rights that constitutes a significant water development activity shall include evidence that the applicant has given notice of the contents of such application by mail within ten days after filing to the:

(a) Board of county commissioners of the county from which the water is being removed;

(b) Board of the school district that encompasses the land from which the water is being removed;

(c) Offices of every water conservancy and water conservation district from which the water is to be removed;

(d) Secretary of every ditch company whose water is involved in the significant water development activity; and

(e) Governing body of every city, city and county, and town that encompasses land from which the water is being removed.

(4) The referee, without conducting a formal hearing, shall make such investigations as are necessary to determine whether or not the statements in the application and statements of opposition are true and to become fully advised with respect to the subject matter of the applications and statements of opposition. The referee shall consult with the appropriate division engineer or the state engineer or both. The engineer consulted shall file a report in writing within thirty-five days, unless such time is extended by the referee, which original report shall be filed in the proceedings, and a copy shall be sent by the division engineer to the applicant or the applicant's attorney, who shall then send copies to all parties of record if they have not otherwise been served and so certify before any ruling shall be entered or become effective. A water judge who is acting as a referee in the water judge's division shall have the same authority as provided for the referee in this subsection (4). If the application is rereferred to the water judge by the referee prior to consultation, the division engineer shall file a written recommendation in the proceedings within thirty-five days of rereferral, unless such time is extended by the court, and shall send a copy thereof to the applicant or the applicant's attorney, who shall send copies to the other parties, if they have not otherwise been served, before any decree shall be entered or become effective. The water judge may request such written report from the state engineer if the water judge desires.

(5) Persons alone or in concert may initiate and implement plans for augmentation including water exchange projects. Water conservancy districts, irrigation districts, mutual or public ditch and reservoir companies, municipalities, or other entities which are governed by a board of directors or similar body may initiate and implement plans for augmentation for the benefit of all water users within their boundaries.

(6) The general assembly hereby recognizes the authority of the Colorado supreme court to adopt rules for filing and service of documents and other case management procedures in water court proceedings. Any such rules that are adopted shall supplement the procedures set forth in this section.

**Source:** L. 69: p. 1207, § 1. C.R.S. 1963: § 148-21-18. L. 70: p. 431, § 3. L. 71: pp. 1321, 1323, 1326, 1330, §§ 1, 1, 1, 1. L. 73: pp. 1522, 1523, §§ 3, 2. L. 77: (1)(d) and (3)(b) amended, p. 1702, § 2, effective June 19. L. 79: (1)(b) amended, p. 1378, § 1, effective May 31. L. 81: (1)(a) amended, p. 1786, § 1, effective April 24; (3)(c) amended and (4) R&RE, p. 1788, §§ 1, 2, effective July 1. L. 83: (1)(a) amended, p. 1412, § 4, effective June 3; (1)(b), (1)(d), (2), (3)(a), (3)(c), and (4) amended, p. 1425, § 1, effective July 1. L. 85: (2) amended, p. 1167, § 7, effective July 1. L. 88: (1)(a) and (4) amended, p. 1239, § 2, effective May 17. L. 90: (1)(a) amended, p. 1626, § 2, effective April 13. L. 92: (2) amended, p. 2311, § 2, effective March 20. L. 93: (2) amended, p. 86, § 2, effective March 30. L. 96: (2)(a) amended, p. 326, § 2, effective April 16. L. 98: (3)(c) amended, p. 1345, § 75, effective June 1. L. 2001: (3)(c)(I) amended, p. 306, § 2, effective August 8. L. 2003: (3.5) added, p. 881, § 2, effective August 6. L. 2004: (3)(c)(I) amended, p. 268, § 1, effective August 4. L. 2005: (3)(c)(I)(A) amended and (3)(c)(I)(C), (3)(c)(I)(D), and (3)(c)(I)(E) added, p. 121, § 2, effective April 5; (2)(b), (2)(c), and (3)(b) amended, p. 120, § 1, effective January 1, 2006. L. 2007: (1)(e) added, p. 1269, § 7, effective May 25; (1)(d) amended, p. 1538, § 31, effective May 31. L. 2008: (1)(d) and (1)(e) amended, p. 2144, § 13, effective June 4. L. 2009: (1)(a), (1)(b), and (4) amended and (6) added, (HB 09-1185), ch. 85, p. 310, § 1, effective July 1. L. 2012: IP(2)(b) and (4) amended, (SB 12-175), ch. 208, p. 888, § 162, effective July 1.

**Editor's note:** (1) In *United States v. District Ct. in & for the Co. of Eagle, Colo.* (1971) 401 U.S. 520, 91 S. Ct. 998 and the companion case of *United States v. District Ct. in & for Water Div. No.*



5, Colo. 1971) 401 U.S. 527, 91 S. Ct. 1003, the United States supreme court held that the United States had consented under federal statute, 43 U.S.C. sec. 666, to adjudication of its reserved rights in supplemental adjudication proceedings under former section 148-9-7, C.R.S. 1963, and in monthly proceedings under this section, both of which were held to be general adjudications within the meaning of the federal statute.

(2) Subsection (3)(c)(I)(C) provided for the repeal of subsections (3)(c)(I)(A), (3)(c)(I)(B), (3)(c)(I)(C), and (3)(c)(II), effective January 1, 2006. (See L. 2005, p. 121.)

(3) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending the introductory portion to subsection (2)(b) and subsection (4) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

**Cross references:** For the legislative declaration contained in the 2001 act amending subsection (3)(c)(I), see section 1 of chapter 114, Session Laws of Colorado 2001. For the legislative declaration contained in the 2008 act amending subsections (1)(d) and (1)(e), see section 1 of chapter 417, Session Laws of Colorado 2008.

## ANNOTATION

- I. General Consideration.
- II. Applications.
  - A. Procedural Requirements.
  - B. Action by Water Referee.
  - C. Determination of Water Right.
  - D. Determination of Conditional Water Right.
  - E. Determination of Change of Water Right.
  - F. Approval of Plan for Augmentation.
  - G. Determination of Abandonment.
- III. Federal Reserved Water Rights.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "Optimizing Water Use: The Return Flow Issue", see 44 U. Colo. L. Rev. 301 (1973). For article, "Adjudication of Indian and Federal Water Rights in the Federal Courts", see 46 U. Colo. L. Rev. 555 (1974-75). For comment on determining the priority of federal reserved rights relative to the water rights of state appropriators, see 48 U. Colo. L. Rev. 547 (1977). For comment, "Bubb v. Christensen: The Rights of the Private Landowner Yield to the Rights of the Water Appropriator Under the Colorado Doctrine", see 58 Den. L.J. 825 (1981). For article, "The Emerging Relationship Between Environmental Regulations and Colorado Water Law", see 53 U. Colo. L. Rev. 597 (1982). For note, "Reinterpreting the Physical Act Requirement for Conditional Water Rights", see 53 U. Colo. L. Rev. 765 (1982). For article, "Water Rights — How to Avoid Getting in Over Your Head", see 11 Colo. Law. 2143 (1982). For case note, "Nontributary, Nondesignated Ground Water: The Huston Decision", see 56 U. Colo. L. Rev. 135 (1984). For article, "Developments in Conditional Water Rights Law", see 14 Colo. Law. 353 (1985). For article, "Principles and Law of Colorado's Nontributary Ground Water", see 62 Den. U. L. Rev. 809 (1985). For article, "The Continuing Groundwater Saga — Part I: Senate Bill 5", see 15 Colo. Law. 422 (1986). For

article, "The Continuing Groundwater Saga — Part III: The Statewide Nontributary Groundwater Rules", see 15 Colo. Law. 813 (1986). For article, "The Physical Solution in Western Water Law", see 57 U. Colo. L. Rev. 445 (1986). For article, "The Legal Evolution of Colorado's Instream Flow Program", see 17 Colo. Law. 861 (1988). For article, "Ethical Considerations in Water Right Adjudications", see 17 Colo. Law. 2381 (1988). For article, "Heightened Notice Requirements for Water Rights Applications", see 32 Colo. Law. 93 (June 2003). For article, "Statutory and Rule Changes to Water Court Practice", see 38 Colo. Law. 53 (June 2009).

**Annotator's note.** Since § 37-92-302 is similar to repealed CSA, C. 90, § 195, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

**The conditional versus the absolute status of a water right cannot provide a ground for distinguishing between rights** that arise from the same intent and overt acts initiating an appropriation. An absolute water right is not a right separate and distinct from the conditional right from which it originates, rather, a conditional right matures into an absolute right. *Purgatoire River Water Conservancy v. Witte*, 859 P.2d 825 (Colo. 1993).

**Water rights vest upon appropriation, not adjudication.** Adjudication of water rights does not vest those rights, but rather establishes a priority date that can be enforced against other users. *Application of Turkey Canon Ranch Ltd.*, 937 P.2d 739 (Colo. 1997).

**Water rights are generally unenforceable within the priority administration system without an adjudication under the Water Right Determination and Administration Act of 1969.** *City of Lafayette v. New Anderson Ditch Co.*, 962 P.2d 955 (Colo. 1998).

A decree does not confer but rather confirms a pre-existing water right. *City of Lafayette v. New Anderson Ditch Co.*, 962 P.2d 955 (Colo. 1998).

**Owners of unadjudicated, exempt "602" wells have vested water rights** and may assert injury to their water rights in water court once they have filed for adjudication of those rights. However, the priority of such a right is not enforceable until an application for adjudication has been filed. Once the exempt well owner files, he or she has a statutorily guaranteed expectation of the original priority date of the well regardless of the date of application. Application of Turkey Canon Ranch Ltd., 937 P.2d 739 (Colo. 1997).

Actual entry of a decree is not a condition precedent to an appearance by an exempt well owner in an augmentation proceeding. Once the exempt well owner has filed for adjudication, any uncertainty in the award of a priority date is statutorily resolved. Application of Turkey Canon Ranch Ltd., 937 P.2d 739 (Colo. 1997).

Findings by the state engineer were held not to be a condition precedent to a water court ruling in the context of an augmentation proceeding where objectors were not permitted to assert injury to their exempt wells. Application of Turkey Canon Ranch Ltd., 937 P.2d 739 (Colo. 1997).

State engineer must take into account injury to all existing wells, whether exempt or nonexempt, in reviewing permit applications for nonexempt wells. Application of Turkey Canon Ranch Ltd., 937 P.2d 739 (Colo. 1997).

**Out-of-priority diverters pursuant to an unadjudicated substitute supply plan do not have standing to assert the futility call or enlargement doctrines** against a downstream decreed senior appropriator. Empire Lodge Homeowners' Ass'n v. Moyer, 39 P.3d 1139 (Colo. 2001).

**Applied** in Benson v. Burgess, 192 Colo. 556, 561 P.2d 11 (1977); Ground Water Comm'n v. Shanks, 658 P.2d 847 (Colo. 1983); Lionelle v. S. E. Colo. Water Conservancy Dist., 676 P.2d 1162 (Colo. 1984); Great Western Sugar v. Jackson Lake Reservoir, 681 P.2d 484 (Colo. 1984).

## II. APPLICATIONS.

### A. Procedural Requirements.

**The Water Right Determination and Administration Act creates two levels of adversary involvement** in a water adjudication involving a proposed plan for augmentation or a change of water right: (1) Permission to file a statement of opposition; and (2) standing to assert injury. The first is available to "any person" and allows such person to participate to the extent of holding the applicant to a standard of "strict proof". The second, however, requires the objector to show that he or she has a legally protected interest in a vested water right or conditional decree. Application of Turkey Canon Ranch Ltd., 937 P.2d 739 (Colo. 1997).

**A homeowners association has standing to hold the applicant to a standard of strict proof** because the association itself is a "person", its members have standing, the interests the association seeks to protect are germane to the association's purpose, and the litigation does not require the participation of the individual homeowners. Buffalo Park Dev. Co. v. Mtn. Mut. Reservoir Co., 195 P.3d 674 (Colo. 2008).

**C.R.C.P. 15 applies to proceedings under Water Right Determination and Administration Act of 1969.** United States v. Bell, 724 P.2d 631 (Colo. 1986).

**Traditional service of process not required.** Proceedings commenced under subsection (1)(a) are not subject to the service of process requirements of C.R.C.P. 4, but rather are handled through the unique resume-notice provisions of subsection (3). Gardner v. State, 200 Colo. 221, 614 P.2d 357 (1980); Closed Basin Landowners Ass'n v. Rio Grande, 734 P.2d 627 (Colo. 1987).

**Claim under C.R.C.P. 19 not applicable.** Shareholders of mutual ditch company in which division of wildlife owned water rights, having been given an opportunity to object and either actual or publication notice of the division's request for a change of storage rights and augmentation plan, were not indispensable parties to the water court action. S.E. Colo. Water Cons. v. Ft. Lyon Canal Co., 720 P.2d 133 (Colo. 1986).

**Joinder under C.R.C.P. 20 and 21 is applicable** when a non-party principle becomes liable for attorney fees due to its agent's frivolous claim. In re Water Rights of Park County Sportsmen's Ranch, 105 P.3d 595 (Colo. 2005) (distinguishing S.E. Colo. Water Cons. v. Ft. Lyons Canal Co., 720 P.2d 133 (Colo. 1986)).

**Publication and notice provisions applicable to decree modifications.** The publication and notice provisions of this section are applicable to a request for modification of a decree involving a change of water right. Town of Breckenridge v. City & County of Denver, 620 P.2d 1048 (Colo. 1980).

**Subsection (3)(a) does not expand types of applications that may be filed.** The provisions of paragraph (a) of subsection (3), which direct the water clerk to include in the resume all applications filed under paragraph (a) of subsection (1), does not expand the types of applications that may be filed under the resume-notice procedures. Gardner v. State, 200 Colo. 221, 614 P.2d 357 (1980).

**Under the plain meaning of this section, an application to determine whether previously decreed water rights included rights for year-round stockwatering and domestic use incidental to agricultural purposes is a "determination of a water right".** Therefore, publication of resume notice was the proper means for the court to obtain jurisdiction, and



the water court did not abuse its discretion in disallowing an untimely-filed statement of opposition and denying a motion to intervene, particularly when the moving party had actual notice of the application and the division engineer had already filed a report. Personal service was not required despite the moving party's argument that the application was for a declaratory judgment. *S. Ute Indian Tribe v. King Consol. Ditch*, 250 P.3d 1226 (Colo. 2011).

**Lack of verification of an application is a technical defect in an application, and the statutory requirement of verification should not be strictly construed.** The water court did not abuse its discretion in holding that a verification filed after the application was filed related back to the date of the original filing. *S. Ute Indian Tribe v. King Consol. Ditch*, 250 P.3d 1226 (Colo. 2011).

**Where application erroneously failed to list adjoining landowner as the owner of the land upon which the water subject to the application was used,** the water court abused its discretion in summarily dismissing a petition for reconsideration for failure to show excusable neglect. *SL Group, LLC v. Go West Indus., Inc.*, 42 P.3d 637 (Colo. 2002).

**Trial court's findings involving factual issues binding.** Where application for finding of reasonable diligence concerning conditional water decree involves factual issues, it is fundamental that a trial court's findings are binding upon the appellate court and will not be overturned if the evidence is sufficient to sustain them. *Orchard Mesa Irrigation Dist. v. City & County of Denver*, 182 Colo. 59, 511 P.2d 25 (1973).

**Effect of abandonment on an applicant's ability to establish a new right does not differ** depending on whether the abandoned right was conditional or absolute. An abandonment of a conditional right effectively augments the stream by making water available for appropriation in the same manner as abandonment of an absolute water right. *Purgatoire River Water Conservancy v. Witte*, 859 P.2d 825 (Colo. 1993).

**Any person who has filed opposition to an application for adjudication of water rights has standing to challenge** on appeal the adequacy of the published notice. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

**Resume not in substantial compliance with subsection (3)(a).** Where resume did not mention the nontributary character of the water right, it did not substantially comply with the provision of subsection (3)(a). *Stonewall Estates v. CF & I Steel Corp.*, 197 Colo. 255, 592 P.2d 1318 (1979).

**Whether resume was sufficient notice is applied in** *Pueblo West Metro. Dist. v. South-eastern Colo. Water Conservancy Dist.*, 689 P.2d 594 (Colo. 1984).

**The resume notice procedures are calculated to alert all water users on the stream system** whose rights may be affected by the application and to participate in the proceeding and to oppose the application. It is designed to put interested parties to the extent reasonably possible on "inquiry notice" of the nature, scope, and impact of the proposed diversion. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

**Inquiry notice requires sufficient facts to attract the attention of interested persons and prompt a reasonable person to inquire further.** Once the applicant satisfies the initial burden of providing information that would alert a reasonable person to investigate claims further, the potential objector bears the burden of conducting a reasonably diligent inquiry and is charged with all notice that such an inquiry would produce. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

**Details such as identity of end user and place of use need not be included.** In *re Water Rights of Columbine Assocs.*, 993 P.2d 483 (Colo. 2000).

A description of the ruling sought and the conditional water right involved, as required under subsection (3)(a), are sufficient to put interested parties on inquiry notice of the nature, scope, and impact of the proposed diversion. In *re Water Rights of Columbine Assocs.*, 993 P.2d 483 (Colo. 2000).

**The potential objector must be viewed as a "reasonably prudent party" and cannot establish the lack of adequate notice** if, on the basis of the published resume, the objector should have anticipated that the disputed rights might be at issue. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

**Inquiry notice evaluation** requires consideration of the facts surrounding each individual application and resume. Here, Thornton's reference in its applications and resumes to use of its proposed exchanges and diversions "by storage" was sufficient to trigger an inquiry by objectors into the extent of the storage rights claimed by Thornton. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

**A claim or issue adjudicated without proper notice can be collaterally attacked.** A prior decree is not res judicata in regard to the issue of whether water beneath a subdivision is nontributary if there is a lack of resume notice. *Chatfield East Well Co. v. Chatfield East Prop. Owners Ass'n*, 956 P.2d 1260 (Colo. 1998).

**Formerly, the statement of claim to be filed was somewhat similar to a pleading in other actions.** It required the setting forth of the respective claims of the parties, and no evidence would be received upon behalf of any claimant until such statement had been filed. *New Mercer Ditch Co. v. Armstrong*, 21 Colo. 357, 40 P. 989 (1895); *Fort Collins Milling & Elevator Co. v.*

Larimer & Weld Irrigation Co., 61 Colo. 45, 156 P. 140 (1916); H. H. Ditch Co. v. Big Stick Ditch Co., 62 Colo. 313, 162 P. 149 (1916).

**Objectors had standing to challenge application.** In re Bunker v. Uncompahgre Valley Water Users Ass'n, 192 Colo. 159, 557 P.2d 389 (1976); FWS Land and Cattle Co. v. State Div. of Wildlife, 795 P.2d 837 (Colo. 1990).

**Under this section, only owners of a decreed water right have standing to obtain a change in such water right.** Bd. of County Comm'rs v. Upper Gunnison River Water Conservancy Dist., 838 P.2d 840 (Colo. 1992).

**Applicant did not have standing to request a change in the water right** although the owner of such right had agreed by contract not to oppose applicant's request. Bd. of County Comm'rs v. Upper Gunnison River Water Conservancy Dist., 838 P.2d 840 (Colo. 1992).

**Any person who seeks a determination of a conditional water right** must file a verified application in accordance with this section showing a substantial probability that the water can and will be diverted, stored, or otherwise captured, possessed, and controlled and will be beneficially used and that the project can and will be completed with diligence and within a reasonable time. City of Lafayette v. New Anderson Ditch Co., 962 P.2d 955 (Colo. 1998).

#### B. Action by Water Referee.

**Applications under section referred to water referee.** The water judge must refer all applications and statements of opposition filed under this section to a water referee. Gardner v. State, 200 Colo. 221, 614 P.2d 357 (1980).

**Authority of water referee is derivative from, and not greater than, authority of water judge.** Gardner v. State, 200 Colo. 221, 614 P.2d 357 (1980).

**Jurisdiction of court.** Matters of jurisdiction and sufficiency of process are questions of law for the court based upon uncontested or properly determined jurisdictional facts. Closed Basin Landowners Ass'n v. Rio Grande, 734 P.2d 627 (Colo. 1987).

It is axiomatic that a court must have jurisdiction over the parties and the subject matter of the case if its judgment is to be valid. Closed Basin Landowners Ass'n v. Rio Grande, 734 P.2d 627 (Colo. 1987).

To invoke the jurisdiction of a water court, a person seeking a determination of a water right must file an application with the water clerk setting forth facts supporting the ruling sought and a legal description of the diversion or proposed diversion, a description of the source of the water, the date of the initiation of the appropriation or proposed appropriation, the amount of water claimed, and the use or proposed use of

the water. Closed Basin Landowners Ass'n v. Rio Grande, 734 P.2d 627 (Colo. 1987).

**Sufficiency of an application turns on the facts of each case** and must be determined on an ad hoc basis in light of the circumstances and facts before the water court. Harvey Land & Cattle Co. v. Southeastern Colo. Water Conservancy Dist., 631 P.2d 1111 (Colo. 1981); Rocky Mt. Power Co. v. Colo. River Water Conservancy Dist., 646 P.2d 383 (Colo. 1982).

**Water judge determines applications expressly authorized to be filed.** Under this article, the types of applications the water judge may determine under the resume-notice procedure of subsection (3) are those applications expressly authorized to be filed under subsection (1)(a). Gardner v. State, 200 Colo. 221, 614 P.2d 357 (1980).

**Proper venue for proceedings to change transmountain water rights is in the basin of use, not the basin of origin, therefore water court had jurisdiction to approve Thornton's application for a change in use of transmountain water.** Once an application is filed, the responsibility for publishing notice shifts to the water court. City of Thornton v. Bijou Irrigation Co., 926 P.2d 1 (Colo. 1996).

#### C. Determination of Water Right.

**In order to initiate an appropriation, there must be an intent and purpose by the appropriator** actually to take the water and to put it to beneficial use. City & County of Denver v. Northern Colo. Water Conservancy Dist., 130 Colo. 375, 276 P.2d 992 (1954).

To initiate an appropriation, two elements — an intent and an act — must coexist. Colo. River Water Conservancy Dist. v. City & County of Denver, 642 P.2d 510 (Colo. 1982).

An appropriation is the intent to take accompanied by some open, physical demonstration of the intent, and for some valuable use. Central Colo. Water Conservancy Dist. v. City & County of Denver, 189 Colo. 272, 539 P.2d 1270 (1975).

An applicant for a conditional water right must establish that he has taken the first step toward the appropriation of water; that is, he must show an intent to appropriate and some open, physical demonstration of that intent. Harvey Land & Cattle Co. v. Southeastern Colo. Water Conservancy Dist., 631 P.2d 1111 (Colo. 1981).

**An appropriation must be made in connection with some land area.** In re Bunker v. Uncompahgre Valley Water Users Ass'n, 192 Colo. 159, 557 P.2d 389 (1976).

**Intent to appropriate ordinarily precedes an open, physical manifestation of this intent.** Harvey Land & Cattle Co. v. Southeastern Colo. Water Conservancy Dist., 631 P.2d 1111 (Colo. 1981).



**Surveys and filing of plats alone constitute no evidence of intent to appropriate water** from a natural stream. *City & County of Denver v. Northern Colo. Water Conservancy Dist.*, 130 Colo. 375, 276 P.2d 992 (1954).

**Mere filing of the preliminary maps prepared by the bureau of reclamation does not suffice**, without more, to complete the first step to constitute appropriation. *Central Colo. Water Conservancy Dist. v. City & County of Denver*, 189 Colo. 272, 539 P.2d 1270 (1975).

Reports and studies made by the bureau of reclamation, where there is no privity between the bureau and the person seeking to base an appropriation on the bureau work, do not constitute a basis for such person's claim to a water right unless there has been an assignment or other conveyance of the bureau's rights to him. *In re Bunker v. Uncompahgre Valley Water Users Ass'n*, 192 Colo. 159, 557 P.2d 389 (1976).

**Filing of map and statement does not establish appropriation.** The filing of the map and statement of claim did not of itself establish an appropriation for water rights. *Michel v. Front Range Land & Livestock Co.*, 200 Colo. 104, 612 P.2d 1128 (1980).

**Map and statement filed with the state engineer** are not incorporated by reference into the statement of claim and therefore could not satisfy the requirement that the applicant name the sources of water sought to be appropriated. *City & County of Denver v. Vail Valley*, 751 P.2d 68 (Colo. 1988) (statement of claim at issue was filed under the Adjudication Act of 1943 which was repealed in 1969).

**Where water court's decree did not modify or impair an earlier federal district court's water rights decree, the water court had jurisdiction to issue a decree granting a city application for reservoir refill rights.** Even though the federal district court retained exclusive continuing jurisdiction concerning the federal decree, the city was seeking a new water right not addressed by the federal court that was junior to all appropriations adjudicated in the federal decree. *City of Grand Junction v. Denver*, 960 P.2d 675 (Colo. 1998).

**Priority measured from "first step" in appropriation.** Although an appropriation is not complete until actual diversion and use, the right may relate back to a valid "first step", and the priority measured from that time. *Central Colo. Water Conservancy Dist. v. City & County of Denver*, 189 Colo. 272, 539 P.2d 1270 (1975); *In re Bunker v. Uncompahgre Valley Water Users Ass'n*, 192 Colo. 159, 557 P.2d 389 (1976).

**A valid "first step" is established when an intent to take water is formed, together with an open, overt action on the land giving notice of the intent to apply the water to a beneficial use.** *Central Colo. Water Conservancy Dist. v. City & County of Denver*, 189 Colo. 272, 539 P.2d 1270 (1975); *In re Bunker v. Uncompahgre*

*Valley Water Users Ass'n*, 192 Colo. 159, 557 P.2d 389 (1976).

Certainly the first step demanded is nothing short of an open and notorious physical demonstration, conclusively indicating a fixed purpose to diligently pursue and, within a reasonable time, ultimately acquire a right to the use of water, and as its primary function is to give notice to those subsequently desiring to initiate similar rights, it must necessarily be of such character that they may fairly be said to be thereby charged with at least such notice as would reasonably be calculated to put them on inquiry of the prospective extent of the proposed use and consequent demand upon the water supply involved. *In re Bunker v. Uncompahgre Valley Water Users Ass'n*, 192 Colo. 159, 557 P.2d 389 (1976).

**The "first step" consists of two prongs:** The formation of an intent to appropriate a definite quantity of water for a beneficial use, and an overt manifestation of that intent through physical acts sufficient to constitute notice to third parties. *Rocky Mt. Power Co. v. Colo. River Water Conservation Dist.*, 646 P.2d 383 (Colo. 1982).

**The first prong of the first step, intent to take, was unquestionably satisfied by the filing of maps**, which constituted prima facie evidence of an intent to take water. *Central Colo. Water Conservancy Dist. v. City & County of Denver*, 189 Colo. 272, 539 P.2d 1270 (1975).

The filing of an application for adjudication of a water right may itself be evidence of an intent to appropriate. *Harvey Land & Cattle Co. v. Southeastern Colo. Water Conservancy Dist.*, 631 P.2d 1111 (Colo. 1981).

**Appellant may not claim, as a basis for his first step, work completed while an employee of the bureau of reclamation.** *In re Bunker v. Uncompahgre Valley Water Users Ass'n*, 192 Colo. 159, 557 P.2d 389 (1976).

**Whether a first step has been taken must turn on the facts of each case.** *In re Bunker v. Uncompahgre Valley Water Users Ass'n*, 192 Colo. 159, 557 P.2d 389 (1976).

**Sufficiency of the overt acts necessary for "first step"** discussed in *City and County of Denver v. Colo. River Water Conservation Dist.*, 696 P.2d 730 (Colo. 1985).

**Water is available for appropriation if the taking thereof does not cause injury.** *Cache La Poudre Water Users Ass'n v. Glacier View Meadows*, 191 Colo. 53, 550 P.2d 288 (1976).

**No one is entitled to have a priority adjudged for more water than he has actually appropriated**, nor for more than he actually needs; priority of right is limited by each of these considerations. *Nichols v. McIntosh*, 19 Colo. 22, 34 P. 278 (1893).

**It seems clear that the source of supply shall be determined**, in fact, such a determination is an indispensable prerequisite to the de-

termination of priorities, for the term "priority" connotes two appropriations from the same source of supply, and if a decree were not res judicata as to the source of supply of a ditch, neither could it be res judicata as to the priority of that ditch as related to other ditches drawing upon the same source of supply. *In re Nix*, 96 Colo. 540, 45 P.2d 176 (1935).

**There are two classes of appropriations for irrigation, one for ditches diverting water to be used directly** from the stream, and one for the storage of water to be used subsequently. *City & County of Denver v. Northern Colo. Water Conservancy Dist.*, 130 Colo. 375, 27 P.2d 992 (1954).

**The same irrigating ditch may have two or more priorities** belonging to the same party, or to different parties. *Thomas v. Guiraud*, 6 Colo. 530 (1883); *Rominger v. Squires*, 9 Colo. 327, 12 P. 213 (1886); *Fuller v. Swan River Placer Mining Co.*, 12 Colo. 12, 19 P. 836 (1888); *Farmers' High Line Canal & Reservoir Co. v. Southworth*, 13 Colo. 111, 21 P. 1028, 4 L.R.A. 767 (1889); *Nichols v. McIntosh*, 19 Colo. 22, 34 P. 278 (1893); *Park v. Park*, 45 Colo. 347, 101 P. 403 (1909).

**An appropriation of water for irrigation purposes may be changed to a use for storage, but such change cannot be made to the detriment** of other appropriators whose rights are subsequent to the appropriation for irrigation, but prior to the appropriation for storage. Further, when the water in the stream is needed by the subsequent appropriators, the diversion of the prior appropriator for storage purposes would be limited to what he was entitled to divert for irrigation purposes, both as to amount and time of diversion. The state general assembly has given statutory recognition of this rule by providing for such a change if no injury will result or if conditions can be imposed to prevent injury. *Ackerman v. City of Walsenburg*, 171 Colo. 304, 467 P.2d 267 (1970).

**Notice requirement.** The appropriator must provide interested persons with notice of such a character that they may fairly be said to be thereby charged with at least such notice as would reasonably be calculated to put them on inquiry of the prospective extent of the proposed use and consequent demand upon the water supply involved. *Closed Basin Landowners Ass'n v. Rio Grande*, 734 P.2d 627 (Colo. 1987); *State Eng'r v. Smith Cattle, Inc.*, 780 P.2d 546 (Colo. 1989); *In re Water Rights of Columbine Assocs.*, 993 P.2d 483 (Colo. 2000).

A would-be appropriator need not determine the exact amount of water to be diverted at a precisely located point of diversion before that appropriator can form the necessary intent to appropriate or provide sufficient notice to others. *Closed Basin Landowners Ass'n v. Rio Grande*, 734 P.2d 627 (Colo. 1987).

The determination must always be made on an ad hoc basis, taking into account whether the particular facts of each case satisfy the purposes underlying the requirements of the first step test. *Closed Basin Landowners Ass'n v. Rio Grande*, 734 P.2d 627 (Colo. 1987).

**Change of diversion point is water matter.** Application for a change in point of diversion is a water matter. *Fort Lyon Canal Co. v. Catlin Canal Co.*, 642 P.2d 501 (Colo. 1982).

A change in a water right includes a change in the point of diversion. *Orr v. Arapahoe Water and Sanitation Dist.*, 753 P.2d 1217 (Colo. 1988).

**Prior to the water court granting an application for a change in the point of diversion,** the applicant must demonstrate that the proposed change will not injuriously affect the vested rights of other water users. *Orr v. Arapahoe Water and Sanitation Dist.*, 753 P.2d 1217 (Colo. 1988).

**An appropriation consists of an actual diversion of water from a natural stream,** followed within a reasonable time thereafter by an application thereof to some beneficial use. *City & County of Denver v. Northern Colo. Water Conservancy Dist.*, 130 Colo. 375, 276 P.2d 992 (1954).

**Water can be actually diverted only by taking it from the stream, and the amount so diverted is necessarily limited to the capacity** of the ditch or tunnel through which diversion is made. *City & County of Denver v. Northern Colo. Water Conservancy Dist.*, 130 Colo. 375, 276 P.2d 992 (1954).

**Right to change point of diversion is limited in quantity by historical use.** *Southeastern Colo. Water Conservancy Dist. v. Rich*, 625 P.2d 977 (Colo. 1981); *Orr v. Arapahoe Water and Sanitation Dist.*, 753 P.2d 1217 (Colo. 1988).

**Automatic cessation of diversions by junior appropriator not contemplated.** Sections 37-92-501 and 37-92-502 do not contemplate automatic cessation of diversions by junior appropriator in response to a river call. *Southeastern Colo. Water Conservancy Dist. v. Rich*, 625 P.2d 977 (Colo. 1981).

**Division engineer evaluates each junior appropriator's diversion to determine material injury caused.** The statutory plan in §§ 37-92-501 and 37-92-502 contemplates that the division engineer will evaluate each junior appropriator's diversion to determine whether it is causing material injury to water rights having senior priorities before ordering the discontinuance of the diversion by the junior appropriator. *Southeastern Colo. Water Conservancy Dist. v. Rich*, 625 P.2d 977 (Colo. 1981).

**Diversions made pursuant to water right considered historical use where not ordered discontinued.** Where the water commissioner was aware of the landowners' diversions of water and had never ordered them to be discon-



tinued or limited, the diversions made pursuant to a water right, though not in priority, could be considered as establishing an historical use for the purpose of the change of water right. *South-eastern Colo. Water Conservancy Dist. v. Rich*, 625 P.2d 977 (Colo. 1981).

**An argument to the effect that water withdrawn must be replaced 100 % fell** where senior users could show no injury by the diversion of water, even though the river involved was over-appropriated. *Cache La Poudre Water Users Ass'n v. Glacier View Meadows*, 191 Colo. 53, 550 P.2d 288 (1976).

**For the doctrine of relation back to apply**, there must have been on the part of claimant both an intention to appropriate the particular water and also an open physical demonstration of that intention to put the water to some valuable use. In *re Burger v. Uncompahgre Valley Water Users Ass'n*, 192 Colo. 159, 557 P.2d 389 (1976).

**Filing application to protect priority date while well application pending.** In securing a determination of water rights in tributary ground water, although subsection (2) provides that the water court shall not enter a decision on an application for determination of a water right requiring the construction of a well until the claimant supplements the application with a permit to construct a well, issued by the state engineer under § 37-90-137, or evidence of its denial or of failure of the state engineer to grant or deny the permit within six months, this section does not require the applicant to obtain the well permit prior to filing an application in water court. The claimant may file in the water court to protect his priority date while an application to construct a well is pending before the state engineer. *State Dept. of Natural Res. v. Southwestern Colo. Water Conservation Dist.*, 671 P.2d 1294 (Colo. 1983), cert. denied, 466 U.S. 944, 104 S. Ct. 1929, 80 L.Ed.2d 474 (1984).

**An appropriator has a reasonable time in which to effect his originally intended use** as well as to complete his originally intended means of diversion. *City & County of Denver v. Northern Colo. Water Conservancy Dist.*, 130 Colo. 375, 276 P.2d 992 (1954).

**Nontributary ground water rights excluded.** The water right determination proceedings authorized by subsection (1)(a) do not extend to rights in nontributary ground water. *State Dept. of Natural Res. v. Southwestern Colo. Water Conservation Dist.*, 671 P.2d 1294 (Colo. 1983), cert. denied, 466 U.S. 944, 104 S. Ct. 1929, 80 L.Ed.2d 474 (1984) (decided prior to 1983 amendment).

**A motion to enjoin diversions pursuant to operation of a temporary substitute water supply plan is outside of the scope of an application for determination of a water right**; therefore, the water court was correct in denying the motion. *Groundwater Appropriators*

*of the S. Platte River Basin, Inc. v. City of Boulder*, 73 P.3d 22 (Colo. 2003).

**An inverse condemnation action based on the state engineer's well curtailment order is a water matter** because a court must first determine whether the well owner had a right to use the wells without interference from the state, and the determination of the right to use water is, quintessentially, a water matter. *Kobobel v. State*, 249 P.3d 1127 (Colo. 2011).

#### D. Determination of Conditional Water Right.

**Application for a conditional water right involves a "water matter"** over which the water court has exclusive jurisdiction. *Bubb v. Christensen*, 200 Colo. 21, 610 P.2d 1343 (1980).

**A conditional water decree requires** an intent to appropriate and an overt, physical act constituting the first step toward diversion and application to a beneficial use. *Municipal Sub-district v. Rifle Ski. Corp.*, 726 P.2d 635 (Colo. 1986).

**To prove due diligence to utilize water granted by conditional water decree**, there must be shown an intention to use the water, coupled with concrete action amounting to diligent efforts to finalize the intended appropriation. *Orchard Mesa Irrigation Dist. v. City & County of Denver*, 182 Colo. 59, 511 P.2d 25 (1973).

**Showing necessary to substantiate need for claimed water.** A claimant of a conditional water right must substantiate a need for the claimed water by showing, at the least, a contractual or an agency relationship with those who are to put the water to a beneficial use. *Rocky Mt. Power Co. v. Colo. River Water Conservation Dist.*, 646 P.2d 383 (Colo. 1982).

**Limited relevance of evidentiary matters.** In an application for a conditional water right, evidentiary matters have relevance only as they relate to whether the applicant has taken a first step toward appropriation of water. *Harvey Land & Cattle Co. v. Southeastern Colo. Water Conservancy Dist.*, 631 P.2d 1111 (Colo. 1981).

**Speculative future beneficial use insufficient basis for conditional decree.** Conditional decrees will not be granted to those who cannot show more than a speculative or conjectural future beneficial use. *Rocky Mt. Power Co. v. Colo. River Water Conservation Dist.*, 646 P.2d 383 (Colo. 1982).

**Hope to use water coupled with inaction insufficient.** Support of a claim of due diligence to utilize water granted by conditional water decree by the applicant must be proved by a preponderance of the evidence, and a record which shows only a hope someday to use the water, but with admitted prior years of inaction, will not support the claim. *Orchard Mesa Irri-*

gation Dist. v. City & County of Denver, 182 Colo. 59, 511 P.2d 25 (1973).

**Landowners bound by conditional water decree where no protest filed, nor correction sought.** Where the landowners of property upon which the point of diversion for a conditional water right was located had notice of an application for the water right by reason of the publication of the summary in the resume, but they did not file a statement of opposition to the application, did not file a protest to the ruling of the referee, and did not seek correction of any substantive errors in the judgment and decree of the water court within three years after it was entered, and they took no action until the water had been applied to beneficial use and an application had been filed to make the conditional decree absolute, the time for challenging the conditional decree has expired and the landowners were bound by the decree. *Bubb v. Christensen*, 200 Colo. 21, 610 P.2d 1343 (1980).

**Award of right for already existing wells.** A decree for a conditional water right may be awarded for wells already in existence, even though the priority date attached to the conditional water right cannot be set earlier than the date on which the applicant formed the actual intent to appropriate. *Harvey Land & Cattle Co. v. Southeastern Colo. Water Conservancy Dist.*, 631 P.2d 1111 (Colo. 1981).

**Unexpired permit to drill well for tributary ground water** is a prerequisite to a hearing on the merits of an application for a conditional water right under the Water Right Determination and Administration Act of 1969. *Kenneth M. Good Irrevocable Trust v. Bell*, 759 P.2d 48 (Colo. 1988).

**Easement to diversion point not required before conditional water right decreed absolute.** No useful purpose would be served by requiring that a conditional water right cannot be decreed to be absolute until an easement to the point of diversion has been obtained by condemnation. *Bubb v. Christensen*, 200 Colo. 21, 610 P.2d 1343 (1980).

**Trespass onto property upon which diversion point located no defense to application.** Under the circumstances of the case, trespass by a person with a conditional water right onto property upon which the point of diversion for the water right was located was not a defense to an application to make a conditional water right absolute. *Bubb v. Christensen*, 200 Colo. 21, 610 P.2d 1343 (1980).

**An application for conditional appropriate rights of exchange should be treated as an application for a conditional water right, rather than as a proposed augmentation plan.** *Centennial Water & Sanitation Dist. v. City & County of Broomfield*, 256 P.3d 677 (Colo. 2011).

E. Determination of Change of Water Right.

**Water right is a legal right to use water;** often, it is characterized as a property right. *Gardner v. State*, 200 Colo. 221, 614 P.2d 357 (1980).

**Change of water rights requires judicial approval.** Changes of water rights cannot be effected in any manner other than through judicial approval, following statutorily authorized procedures. *Fort Lyon Canal Co. v. Catlin Canal Co.*, 642 P.2d 501 (Colo. 1982).

**Diverting water from a natural stream at a point other than one decreed to an existing water right constitutes an out-of-priority diversion,** justifying an order to cease further diversion in the absence of a change of water rights for the protection of existing adjudicated rights and to prevent enlargement of the water right. *Trail's End Ranch, L.L.C. v. Colo. Div. of Water Res.*, 91 P.3d 1058 (Colo. 2004).

**The owner of a water right** may apply to the water court for a determination with respect to a change of the water right. *Orr v. Arapahoe Water & Sanitation Dist.*, 753 P.2d 1217 (Colo. 1988).

**Appropriate court for determining change of use of water right.** Where the proposed change of use of a water right does not in any respect affect water in the division of diversion, the appropriate court for the determination of the requested change is the water court in the division of use. *State Dept. of Natural Res. v. Ogburn*, 194 Colo. 60, 570 P.2d 4 (1977).

**Application for alternate places for storage** for a previously decreed conditional right to store a certain amount of water constitutes a change of water right. *City of Thornton v. Clear Creek Water Users Alliance*, 859 P.2d 1348 (Colo. 1993).

F. Approval of Plan for Augmentation.

**Action by state engineer not condition precedent to approval of plan of augmentation.** This section does not require action by the state engineer upon application for well permit as a condition precedent to consideration and approval of a plan for augmentation. *Cache La Poudre Water Users Ass'n v. Glacier View Meadows*, 191 Colo. 53, 550 P.2d 288 (1976).

The purpose and intent of this section is to permit the court first to approve or disapprove a plan for augmentation, and if it approves of the plan, let the issuance of well permits follow. *Cache La Poudre Water Users Ass'n v. Glacier View Meadows*, 191 Colo. 53, 550 P.2d 288 (1976).

**The state engineer was not required to fix an appropriation date of each well** for which a permit is issued where one of the fundamentals of the plan for augmentation was that there would be equal priorities between well owners. *Cache La Poudre Water Users Ass'n v. Glacier*



View Meadows, 191 Colo. 53, 550 P.2d 288 (1976).

**An acceptable plan for augmentation does not require the addition of new water into the water system,** such as the introduction of transmountain diverted water into the system. *Kelly Ranch v. Southeastern Colo. Water Conservancy Dist.*, 191 Colo. 65, 550 P.2d 297 (1976).

**The fact that rivers involved are over-appropriated,** rather than being an argument against the plans for augmentation, is the very reason for the valid exercise of ingenuity of persons seeking to maximize the use of water, whether they are present or future owners of land and wells, developers, or as characterized by the water court here, promoters, speculators, or nonusers. *Kelly Ranch v. Southeastern Colo. Water Conservancy Dist.*, 191 Colo. 65, 550 P.2d 297 (1976).

**The burden is upon the proponent of a proposed plan for augmentation** to prove the amount of return flow from in-house use of water withdrawn from wells on the property. *Kelly Ranch v. Southeastern Colo. Water Conservancy Dist.*, 191 Colo. 65, 550 P.2d 297 (1976).

**All wells involved in a plan for augmentation must be treated as if they were nonexempt.** *Kelly Ranch v. Southeastern Colo. Water Conservancy Dist.*, 191 Colo. 65, 550 P.2d 297 (1976).

Under a plan for augmentation, wells, which might be exempt otherwise, must be treated as nonexempt. *Cache La Poudre Water Users Ass'n v. Glacier View Meadows*, 191 Colo. 53, 550 P.2d 288 (1976).

Under the act, an exempt well, standing alone, was and is free from regulation by either a water court or the state engineer. When, however, one studies this section, relating to a plan for augmentation, the conclusion is inescapable that all wells involved in a plan for augmentation must be treated as if they were nonexempt. *Cache La Poudre Water Users Ass'n v. Glacier View Meadows*, 191 Colo. 53, 550 P.2d 288 (1976).

Of necessity, the issuance of well permits, the adjudication of a plan for augmentation involving wells, and the enforcement of that plan and regulations involving wells must relate to wells which are subject to administration. *Cache La Poudre Water Users Ass'n v. Glacier View Meadows*, 191 Colo. 53, 550 P.2d 288 (1976).

**Plan of augmentation held valid.** *Cache La Poudre Water Users Ass'n v. Glacier View Meadows*, 191 Colo. 53, 550 P.2d 288 (1976).

**Res judicata bars consideration of a claim** where the subject matter of historical usage under the certain water rights had been litigated and the claimant could have raised its claim at that time. Concerning Application for Water Rights, 938 P. 2d 515 (Colo. 1997).

#### G. Determination of Abandonment.

**Publication and notice provisions not applicable to abandonment determination.** Paragraph (a) of subsection (1) excludes applications for determination of abandonment from the resume-notice provisions of subsection (3). *Gardner v. State*, 200 Colo. 221, 614 P.2d 357 (1980).

**Determination of abandonment not permitted under subsection (3).** This article does not permit the water judge to make a determination of abandonment under subsection (1)(a), when the application has been filed in accordance only with the resume-notice procedures outlined in subsection (3). *Gardner v. State*, 200 Colo. 221, 614 P.2d 357 (1980).

**Exclusion of abandonment determination from subsection (3) procedures purposeful decision.** The exclusion of applications for the determination of abandonment from the resume-notice procedure of subsection (3) was a purposeful legislative decision. *Gardner v. State*, 200 Colo. 221, 614 P.2d 357 (1980).

**Exclusion of abandonment determination reasonable to require applicant to utilize notice procedures likely to apprise owners.** Where an applicant for a determination of abandonment takes under the same source as the putative abandoned interest, or where the applicant's position in relation to unknown owners or their successors in interest is such that the applicant's water right will be enhanced by the decree, it is reasonable to require that the applicant utilize notice procedures more likely to apprise the water right owners or their successors in interest of the pending action than the resume-notice provisions of subsection (3). *Gardner v. State*, 200 Colo. 221, 614 P.2d 357 (1980).

**Applicant may apply for abandonment determination under pertinent provisions of C.R.C.P. 4 and 19.** When an application for a determination of abandonment is filed, the water judge may require the applicant to make reasonable efforts to determine the identity and location of the owner or the successor in interest, and, if those efforts are successful, to proceed under the pertinent provisions of C.R.C.P. 4 and 19. But if the efforts to determine the identity and location of the owner or the successor in interest are unsuccessful, then the applicant may still proceed under the service by publication provision of C.R.C.P. 4(h). *Gardner v. State*, 200 Colo. 221, 614 P.2d 357 (1980).

**Statements opposing water right application may be based on abandonment theory.** The statutory delegation in § 37-92-301 (2) of authority to water referees to make determinations of abandonment is merely a recognition that statements of opposition to an application may be based on the theory of abandonment as an affirmative defense to the application. *Gardner v. State*, 200 Colo. 221, 614 P.2d 357 (1980).

**Decree of abandonment terminates the water right** and divests the owner of any interest in it, thereby rendering the water once again subject to appropriation by the public under § 5 of art. XVI, Colo. Const. *Gardner v. State*, 200 Colo. 221, 614 P.2d 357 (1980).

**A subsequent owner's removal of water rights from the abandonment list and inclusion of water right in warranty deeds does not rebut the presumption of the previous owner's intent to abandon**, which arose when the water rights were not used and the ditches for the water rights were unusable for at least 22 years. *Haystack Ranch, LLC v. Fazzio*, 997 P.2d 548 (Colo. 2000).

### III. FEDERAL RESERVED WATER RIGHTS.

**Federal reserved water rights.** The United States possesses reserved rights for its federal reservations in Colorado in waters unappropriated upon the date of reservation of the federal

lands from the public domain, and in the amount necessary to achieve the primary purposes of the reservations. *United States v. City & County of Denver*, 656 P.2d 1 (Colo. 1982); *Park Center Water Dist. v. United States*, 781 P.2d 546 (Colo. 1989).

**Reserved rights determined by Colorado law.** Colorado law governing the determination of water rights is properly applied as the rule of decision by which the courts will determine the contours of the reserved rights asserted by the United States. *United States v. City & County of Denver*, 656 P.2d 1 (Colo. 1982); *Park Center Water Dist. v. United States*, 781 P.2d 90 (Colo. 1989).

**For extent of federal reserved water rights on different categories of public lands**, see *United States v. City & County of Denver*, 656 P.2d 1 (Colo. 1982).

**United States' claim to mainstem Colorado River water in 1983 does not relate back to its original application in 1971.** *U.S. v. Bell*, 724 P.2d 631 (Colo. 1986).

**37-92-303. Rulings by the referee.** (1) Within sixty-three days after the last day on which statements of opposition may be filed with respect to a particular application, unless such time is extended by the water judge for good cause shown, the referee shall make a ruling on the application unless the referee determines to rerefer the matter to the water judge as specified in subsection (2) of this section. The ruling may disapprove the application in whole or in part in the discretion of the referee even though no statements of opposition have been filed. The ruling of the referee shall give the names of the applicants with respect to each water right or conditional water right involved, the location of the point of diversion or place of storage, the means of diversion, the type of use, the amount and priority, and other pertinent information. In the case of a plan for augmentation, such ruling shall include a complete statement of such plan as approved or disapproved. The ruling shall be filed with the water clerk, subject to judicial review. A copy of the ruling shall be sent by the water clerk by regular or electronic mail to the applicant, to each person who has filed a statement of opposition, to the state engineer, and to the division engineer.

(2) The referee may determine not to make a ruling as specified in subsection (1) of this section and to rerefer the matter to the water judge for a decision as provided in this article. Such rereferral shall be accomplished by order of the referee, which shall be entered within sixty-three days following the last month in which statements of opposition may be filed with respect to the particular application, unless such time is extended by the water judge for good cause shown. The referee shall rerefer the matter to the water judge at any time before the referee's hearing upon a motion to rerefer by the applicant or any opposer certifying that party's intent to protest an adverse ruling of the referee. A motion to rerefer shall not be a prerequisite to a protest of the ruling of the referee. A copy of the order shall be sent by the water clerk to the applicant and to each person who has filed a statement of opposition and to the state engineer and the division engineer by regular or electronic mail.

**Source:** L. 69: p. 1208, § 1. C.R.S. 1963: § 148-21-19. L. 71: p. 1327, § 2. L. 83: Entire section amended, p. 1427, § 2, effective July 1. L. 88: (2) amended, p. 1240, § 3, effective July 1. L. 2005: Entire section amended, p. 122, § 3, effective April 5. L. 2012: Entire section amended, (SB 12-175), ch. 208, p. 888, § 163, effective July 1.

**Editor's note:** Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending this section applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.



**37-92-304. Proceedings by the water judge.** (1) On the first Tuesday of March and September in division 1, the second Tuesday of March and September in division 2, the third Tuesday of March and September in division 3, the fourth Tuesday of March and September in division 4, the first Tuesday of April and October in division 5, the second Tuesday of April and October in division 6, and the third Tuesday of April and October in division 7, the water judge for the particular division may set for hearing matters in which protests have been filed or orders of rereferral entered by the referee during the preceding six calendar months. Such matters shall generally be considered by the water judge in chronological order; however, the dates and times of hearings shall be adjusted by the water judge at his discretion for the convenience of persons involved or for other reasonable cause.

(2) Within twenty-one days after the date of mailing thereof, any person, including the state engineer, who wishes to protest or support a ruling of the referee shall file in writing a pleading in quadruplicate with the water clerk and shall mail or deliver a copy to all parties and so certify. Such pleading shall clearly identify the matter and shall state the factual and legal grounds therefor. Upon filing of such a pleading, the party, except for the state engineer who shall pay no filing fee, shall pay a filing fee equal to that for filing an answer to a civil action in district court, as provided in section 13-32-101, C.R.S. No person who is already a party in the matter may be required to file any additional pleading or to pay any additional filing fee to maintain a party status in the case. All fees collected pursuant to this subsection (2) shall be transmitted to the state treasurer and be divided as provided in section 13-32-101, C.R.S.

(3) As to the rulings with respect to which a pleading has been filed and as to matters which have been rereferred to the water judge by the referee, there shall be de novo hearings. The court shall not be bound by findings of the referee. The division engineer shall appear to furnish pertinent information and may be examined by any party, and, if requested by the division engineer, the attorney general shall represent the division engineer. The applicant shall appear either in person or by counsel and shall have the burden of sustaining the application, whether it has been granted or denied by the ruling or has been rereferred by the referee, and in the case of a change of water right or a plan for augmentation the burden of showing absence of any injurious effect. All parties of record shall remain parties in the proceedings before the water judge. Any person may move to intervene in proceedings before the water court upon payment of a fee, equal to that for filing an answer to a civil action in district court, except for the state engineer who shall pay no fee, and upon a showing of mistake, inadvertence, surprise, or excusable neglect or to support a referee's ruling. The water court shall grant the motion to intervene only if intervention is sought no less than thirty-five days before any pretrial conference or due date for trial data certificates and if intervention will not unduly delay or prejudice the adjudication of the rights of the original parties. Service of copies of applications, written pleadings, or any other documents is not necessary for jurisdictional purposes, but the water judge may order service of copies of any documents on any persons and in any manner which he or she deems appropriate.

(3.5) In connection with a water adjudication proceeding to change the place of use of a water right from a mutual agricultural ditch or mutual agricultural ditch system or mutual agricultural reservoir company, the remaining owners of water rights in such ditch or ditch system or reservoir company, in the discretion of the court and where material injury has been demonstrated by the objector, may be awarded payment of their reasonable attorney fees and costs, including reasonable engineering and expert witness fees and the cost of any structures or measures necessary within the ditch or reservoir system to ensure the continuation of such owners' historically available surface water supply, under the remaining water rights which such owners continue to own, without injury or any increase in cost, unless the applicant seeking such change of water right shall have sought such change based on limitations, conditions, and structural changes necessary to prevent material injury to the exercise of such owners' water right. In cases where the objector fails to demonstrate material injury or the applicant has incorporated sufficient limitations, conditions, and structural changes to prevent material injury and such opposition has been maintained frivolously or for purposes of harassment, the applicant, in the discretion of the court, may be awarded payment of his reasonable attorney fees and costs, including reasonable

engineering and expert witness fees. The provisions of this subsection (3.5) shall not apply to decrees which have been entered prior to May 17, 1988, or decrees pending before the referee as of May 17, 1988, and which are concluded before the referee without being protested to the water judge.

(3.6) Any decree entered for a water right requiring a well to be constructed on lands owned by other than the applicant shall specify that no person shall construct a well on property owned by another unless the right to construct such a well is obtained by consent of the landowner or the exercise of the power of eminent domain by a person having the power of eminent domain under law.

(4) If an applicant, a person who has filed a statement of opposition, or a protestant requests, the hearing shall be conducted by the water judge in the district court of the county in which is located the point of diversion of the water right or conditional water right involved. In case the hearing involves points of diversion located in more than one county, the hearing shall be conducted by the water judge in the district court of that county in which is located the major part, as determined by the water judge, of the diversions or proposed diversions involved.

(5) A decision of the water judge with respect to a protested ruling of the referee shall either confirm, modify, reverse, or reverse and remand such ruling, and, in the case of the modification of a ruling, the decision may grant a different priority than that granted by the referee and may specify its own terms and conditions with respect to a change of water right or plan for augmentation. A decision of the water judge in regard to a matter which has been rereferred by the referee shall dispose fully of such matter and may contain such provisions as the water judge deems appropriate. The water judge shall confirm and approve by judgment and decree a ruling of the referee with respect to which no protest was filed, but the water judge may reverse, or reverse and remand, any such ruling which he deems to be contrary to law.

(6) Any decision of the water judge as specified in subsection (5) of this section dealing with a change of water right, implementation of a rotational crop management contract, or a plan for augmentation shall include the condition that the approval of such change, contract, or plan shall be subject to reconsideration by the water judge on the question of injury to the vested rights of others for such period after the entry of such decision as is necessary or desirable to preclude or remedy any such injury. Such condition setting forth the period allowed for reconsideration shall be determined by the water judge after making specific findings and conclusions including, when applicable, the historical use to which the water rights involved were put, if any, and the proposed future use of the water rights involved. The water judge shall specify such period in the decision, but the period may be extended upon further decision by the water judge that the nonoccurrence of injury shall not have been conclusively established. Any decision may contain any other provision that the water judge deems proper in determining the rights and interests of the persons involved. All decisions of the water judge, including decisions as to the period of reconsideration and extension thereof, shall become a judgment and decree as specified in this article and be appealable upon entry, notwithstanding conditions subjecting the decisions to reconsideration on the question of injury to the vested rights of others as provided in this subsection (6).

(6.5) Any decision of a water judge concerning a significant water development activity shall include, as a condition of the decree approving the change application, a provision in the decree for retained jurisdiction to ensure payment of any fees imposed pursuant to section 37-92-305 (4.5).

(7) Judgments and decrees shall be entered promptly with respect to matters that have been heard and matters in which no protest has been filed or order of rereferral entered. A judgment and decree may be confined to one matter or may include more than one matter at the discretion of the water judge. The judgment and decree shall give the names of the applicants with respect to each water right or conditional water right involved, the location of the point of diversion or place of storage, the means of diversion, the type of use, the amount and priority, and other pertinent information. In the case of a plan for augmentation, the judgment and decree shall contain a complete statement of the plan. In the case of



applications for determination of water rights or conditional water rights, the judgment and decree shall state the date of the filing of the application.

(8) A copy of such judgment and decree shall be filed with the state engineer and the division engineer, and a copy thereof shall be provided by the water clerk to any other person requesting same upon payment of a fee of seventy-five cents per page; except that the state engineer by rule or as otherwise provided by law may reduce the amount of the fee if necessary pursuant to section 24-75-402 (3), C.R.S., to reduce the uncommitted reserves of the fund to which all or any portion of the fee is credited. After the uncommitted reserves of the fund are sufficiently reduced, the state engineer by rule or as otherwise provided by law may increase the amount of the fee as provided in section 24-75-402 (4), C.R.S. Promptly after receiving a judgment and decree, the division engineer and the state engineer shall enter in their records the determinations therein made as to priority, location, and use of the water rights and conditional water rights, and they shall regulate the distribution of water accordingly.

(9) Appellate review shall be allowed to the judgment and decree, or any part thereof, as in other civil actions, but no appellate review shall be allowed with respect to that part of the judgment or decree which confirms a ruling with respect to which no protest was filed.

(10) Clerical mistakes in said judgment and decree may be corrected by the water judge on his own initiative or on the petition of any person, and substantive errors therein may be corrected by the water judge on the petition of any person whose rights have been adversely affected thereby and a showing satisfactory to the water judge that such person, due to mistake, inadvertence, or excusable neglect, failed to file a protest with the water clerk within the time specified in this section. Any petition referred to in the preceding sentence shall be filed with the water clerk within three years after the date of the entry of said judgment and decree. The water judge may order such notice of any such correction proceedings as he determines to be appropriate. Any order of the water judge making such corrections shall be subject to appellate review as in other civil actions.

(11) Repealed.

**Source:** L. 69: p. 1208, § 1. C.R.S. 1963: § 148-21-20. L. 70: p. 432, § 4. L. 71: pp. 1327, 1328, §§ 3, 4. L. 73: p. 1525, § 1. L. 77: (6) amended, p. 1703, § 3, effective June 19. L. 81: (6) amended, p. 1792, § 1, effective May 28. L. 83: (2), (3), and (8) amended and (11) repealed, pp. 1428, 1430, §§ 3, 6, effective July 1. L. 88: (1) to (3) amended and (3.5) and (3.6) added, p. 1241, § 4, effective May 17. L. 98: (8) amended, p. 1345, § 76, effective June 1. L. 2003: (6.5) added, p. 881, § 3, effective August 6. L. 2006: (6) amended, p. 1000, § 2, effective May 25. L. 2008: (2) amended, p. 2144, § 14, effective June 4. L. 2012: (2) and (3) amended, (SB 12-175), ch. 208, p. 889, § 164, effective July 1.

**Editor's note:** Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsections (2) and (3) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

**Cross references:** For the legislative declaration contained in the 2008 act amending subsection (2), see section 1 of chapter 417, Session Laws of Colorado 2008.

## ANNOTATION

- I. General Consideration.
- II. Adjudication of Priorities.
- III. Protests and Appeals.
- IV. Evidence of Material Injury.
- V. Clerical Mistakes.
- VI. Substantive Errors.
- VII. Federal Reserved Water Rights.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "Adjudication of Indian and Federal Water Rights in the Federal Courts", see 46 U. Colo. L. Rev. 555 (1974-75). For article, "Recent Developments in Colorado Groundwater Law", see 58 Den. L.J. 801 (1981). For comment, "Water Use Efficiency

and Appropriation in Colorado: Salvaging Incentives for Maximum Beneficial Use", see 58 U. Colo. L. Rev. 657 (1988). For article, "Colorado's Law of 'Underground Water': A Look at the South Platte Basin and Beyond", see 59 U. Colo. L. Rev. 579 (1988).

**Annotator's note.** Since § 37-92-304 is similar to repealed §§ 148-9-8 and 148-9-10, C.R.S. 1963, § 147-9-10, CRS 53, CSA, C. 90, § 195, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to § 37-92-304.

**The supreme court has determined that "one who holds the legal title"** is "the real party in interest in adjudication water rights". Elk-Rifle Water Co. v. Templeton, 173 Colo. 438, 484 P.2d 1211 (1971).

**Where a proceeding is conducted pursuant to statutory direction, all users of water affected by said proceeding** are, in effect, parties, and have full right to protect their rights had they so desired. Green v. Chaffee Ditch Co., 150 Colo. 91, 371 P.2d 775 (1962).

**One of the objects of this section was to put a stop to a multiplicity of actions** and not to allow such changes to be made until all persons who might be affected thereby are notified and given an opportunity to be heard. Lower Latham Ditch Co. v. Bijou Irrigation Co., 41 Colo. 212, 93 P. 483 (1907).

**A municipal corporation has no different status from that of an individual or any other party to the proceeding.** City & County of Denver v. Northern Colo. Water Conservancy Dist., 130 Colo. 375, 276 P.2d 992 (1954).

**The state is a party in interest.** Farmers' High Line Canal & Reservoir Co. v. Wolff, 23 Colo. App. 570, 131 P. 291 (1913).

**United States is not an indispensable party to a suit against the secretary of the interior** for interfering with water rights in operating a reclamation project. City & County of Denver v. Northern Colo. Water Conservancy Dist., 130 Colo. 375, 276 P.2d 992 (1954).

**All persons who may be affected by the desired change of a water right must be notified of the proceeding**, and given an opportunity to be heard before the court is authorized to enter an order allowing such change. New Cache La Poudre Irrigation Co. v. Water Supply & Storage Co., 29 Colo. 469, 68 P. 781 (1902); Fluke v. Ford, 35 Colo. 112, 84 P. 469 (1905); New Cache La Poudre Irrigating Co. v. Arthur Irrigation Co., 37 Colo. 350, 87 P. 799 (1906).

**It is the duty of the courts to require that all persons who may be affected by the desired change** shall be notified of the proceeding and given an opportunity to be heard. New Cache La Poudre Irrigation Co. v. Water Supply & Storage Co. 29 Colo. 469, 68 P. 781 (1902); Farmers' High Line Canal & Reservoir Co. v. Wolff, 23 Colo. App. 570, 131 P. 291 (1913).

**Where plaintiffs did not enter appearances in the diversion proceeding, but as interested parties and owners of water rights**, they were duly served with notice of the proceeding. They were parties to that proceeding for change of point of diversion and are bound by the decree. City of Westminster v. Church, 167 Colo. 1, 445 P.2d 52 (1968).

**The water court did not abuse its discretion in denying a motion to intervene** when the water court properly obtained jurisdiction pursuant to publication of the water resume, the moving party had actual notice of the application, and the division engineer had already filed a report. The party failed to show excusable neglect and granting the motion would create undue delay. S. Ute Indian Tribe v. King Consol. Ditch, 250 P.3d 1226 (Colo. 2011).

**There is no provision in this section for extension of the time limit for filing**, no reference whatsoever to amended filings, no language allowing waiver of the mandatory filing fee, and nothing from which it can be inferred that late filings may relate back to a previous defective protest. In re Oxley, 182 Colo. 206, 513 P.2d 1062 (1973).

**Hearing requirement held satisfied.** Hearings on motions for summary judgment, together with the depositions in each of the respective water courts, satisfied the requirement of the 1969 water act that a hearing be held. In re Bunger v. Uncompahgre Valley Water Users Ass'n, 192 Colo. 159, 557 P.2d 389 (1976).

**Rights to water for reservoirs may be adjudicated.** Bd. of Comm'rs v. Hider, 47 Colo. 443, 107 P. 1068 (1910); Windsor Reservoir & Canal Co. v. Lake Supply Ditch Co., 44 Colo. 214, 98 P. 727 (1908).

**Before a decree in favor of any reservoir was entered, it should have been made to appear**, inter alia, that thereby an appropriation of a certain quantity of water had been made. Windsor Reservoir & Canal Co., v. Lake Supply Ditch Co., 44 Colo. 214, 98 P. 729 (1908).

**Water court which adopts conclusions from report describing historic use** should expressly incorporate the report into and make it a physical part of the decree in order to guide the resolution of future questions relating to the decree's effect. Matter of Application for Water Rights, 688 P.2d 1102 (Colo. 1984).

**Decree void if no substantial compliance with notice requirements.** Where there was not substantial compliance with statutory notice requirement, water rights decree was entered without jurisdiction and was void. Stonewall Estates v. CF & I Steel Corp., 197 Colo. 255, 592 P.2d 1318 (1979).

**A proposed or existing water exchange is not subject to the retained jurisdiction provision** of subsection (6) unless it is part of a plan for augmentation, because it is an independent



claim. *City of Florence v. Bd. of Waterworks*, 793 P.2d 148 (Colo. 1990).

**Applied** in *Kuiper v. Atchison, T. & S.F. Ry.*, 195 Colo. 557, 581 P.2d 293 (1978); *Weibert v. Rothe Bros.*, 200 Colo. 310, 618 P.2d 1367 (1980); *Harvey Land & Cattle Co. v. Southeastern Colo. Water Conservancy Dist.*, 631 P.2d 1111 (Colo. 1981); *Broyles v. Fort Lyon Canal Co.*, 638 P.2d 244 (Colo. 1981); *Rocky Mt. Power Co. v. Colo. River Water Conservation Dist.*, 646 P.2d 383 (Colo. 1982); *Bd. of County Commissioners v. Collard*, 827 P.2d 546 (Colo. 1992).

## II. ADJUDICATION OF PRIORITIES.

**Ownership of water right may be deemed ownership of real property for purposes of adverse possession claims.** *Matter of Water Rights of V-Heart Ranch*, 690 P.2d 1271 (Colo. 1984).

**Continuous and exclusive scheduled use by claimant of water right claimed by adverse possession** may satisfy the burden of proof of ownership of water right even if all the disputed water is at times used by others, and question is whether, under all surrounding circumstances, such practice is consistent or inconsistent with the claim of adverse use. *Matter of Water Rights of V-Heart Ranch*, 690 P.2d 1271 (Colo. 1984).

**An adjudication of priorities will not, without due process of law, deprive a person of his constitutional or vested rights**, such as prior rights to the use of water; nor will such rights be affected by the lapse of time so long as they are not actually denied, abridged, or interfered with by the enforcement of the decree entered in such proceedings. *Nichols v. McIntosh*, 19 Colo. 22, 34 P. 278 (1893).

**Adjudication proceedings and appropriation decrees are essentially statutory, and a water decree is a determination of a specific issue** presented to the court in the specific manner prescribed by statute. The statement of claim presents the issue, and the decree is limited by the issue it resolves. *Orchard City Irrigation Dist. v. Whitten*, 146 Colo. 127, 361 P.2d 130 (1961).

**An adjudication of priorities is the judicial determination of the claims of different parties** to the use of water for irrigation. *Combs v. Farmers' High Line Canal & Reservoir Co.*, 38 Colo. 420, 88 P. 396 (1906).

**A decree in a water adjudication is only confirmatory of preexisting rights**; the decree does not create or grant any rights; it serves as evidence of rights previously acquired. *Cline v. Whitten*, 144 Colo. 126, 355 P.2d 306 (1960).

**The contention that only adjudicated water right can be protected from interference is without merit**, because adjudication only confirms preexisting rights. *Cline v. Whitten*, 144 Colo. 126, 355 P.2d 306 (1960).

**An adjudication of priorities for ditches drawing water for irrigation from the same stream** or its tributaries within the same water districts is provided for. *Lamson v. Vailles*, 27 Colo. 201, 61 P. 231 (1900); *Kibbee v. Kostelic*, 87 Colo. 215, 287 P. 652 (1930).

**In a proceeding involving the adjudication of water rights, where the interests of beneficiaries are not represented** or protected by their trustees, the beneficiaries become proper and necessary parties, with the right to appear and present their case. *City & County of Denver v. Northern Colo. Water Conservancy Dist.*, 130 Colo. 375, 276 P.2d 992 (1954).

**In a proceeding to adjudicate the priorities to use of water for irrigating purposes**, the determination by the court of the carrying capacity of a ditch was *res judicata* and could not be attacked in a collateral proceeding after the statutory time for reformation or review in the court of original jurisdiction had expired and the time for appeal had elapsed. A mistake of the court in computing the carrying capacity could be corrected in such proceeding. *Water Supply & Storage Co. v. Larimer & Weld Irrigation Co.*, 24 Colo. 322, 51 P. 496 (1897).

## III. PROTESTS AND APPEALS.

**The intent is manifest in this article that only the protest to the referee's ruling need be filed** in order to obtain appellate review by right. *Colo. River Water Conservation Dist. v. Rocky Mt. Power Co.*, 174 Colo. 309, 486 P.2d 438 (1971), cert. denied, 405 U.S. 996, 92 S. Ct. 1245, 31 L.Ed.2d 465 (1972).

**The state is a "person" entitled to protest** a referee's ruling and to participate in a hearing thereunder. *In re Wadsworth*, 193 Colo. 95, 562 P.2d 1114 (1977).

The general assembly intended that persons, including the state, might file a protest to the ruling of a referee even though they had not filed a statement of opposition to the application. *In re Wadsworth*, 193 Colo. 95, 562 P.2d 1114 (1977).

Absent a claim of surprise or prejudice, the state was a proper party based on its entry of appearance in one of two consolidated proceedings, even though it has not filed a statement of opposition in either of the two consolidated actions. *Masters Inv. Co. v. Irrigationists Ass'n*, 702 P.2d 268 (Colo. 1985).

**The state engineer has standing to file a protest** to a water referee's ruling even though he had not filed a statement in opposition. *In re Wadsworth*, 193 Colo. 95, 562 P.2d 1114 (1977).

**"Interested persons"** in subsection (3) of this section can only reasonably be interpreted to refer to the "persons" whose capacity to protest or object is generally described elsewhere in the act. *In re Bunger v. Uncompahgre*

Valley Water Users Ass'n, 192 Colo. 159, 557 P.2d 389 (1976).

Any person who qualifies under other sections, e.g., § 37-92-302 (1)(b) or § 37-92-304 (2) and (4), is not barred from participating in the hearing mandated by his action. In re Bunker v. Uncompahgre Valley Water Users Ass'n, 192 Colo. 159, 557 P.2d 389 (1976).

**The expansion by the 1969 act of the class of persons who may object in a water adjudication is not limited** to the filing of objections and supporting documents. In re Bunker v. Uncompahgre Valley Water Users Ass'n, 192 Colo. 159, 557 P.2d 389 (1976).

**A plaintiff is not a proper protestant under this section.** Where in no manner, either in his own claim for new storage rights or as a holder of senior decrees, does he allege, offer to show, or show that he is injuriously affected. In re Water Dist. No. 11, Water Div. No. 2, 178 Colo. 160, 496 P.2d 311 (1972).

**When a technically defective motion to intervene is filed,** the existing parties may waive their right to object to the intervention by failing to make timely objections. Pub. Serv. Co., v. Blue River Irrigation Co., 753 P.2d 737 (Colo. 1988).

**Subsection (3) construed with C.R.C.P. 1(a).** Subsection (3)'s mandatory language that hearings shall be held where a protest has been filed and on cases of rereferral by a water referee to a water judge must be construed together with C.R.C.P. 1(a), which provides for liberal construction of the rules of civil procedure. In re Bunker v. Uncompahgre Valley Water Users Ass'n, 192 Colo. 159, 557 P.2d 389 (1976).

**Letter not following statutory procedure not proper protest.** Letter written by applicant for water rights, whose application was denied, merely stating that he was protesting the ruling of the water referee, was not considered a proper protest where letter did not comply with the statutory procedure for filing a protest. In re Oxley, 182 Colo. 206, 513 P.2d 1062 (1973).

**All decisions of water referee are subject to review by water judge.** Gardner v. State, 200 Colo. 221, 614 P.2d 357 (1980).

**However, timely protest of water referee's ruling** is a jurisdictional prerequisite to appellate review. Monaghan Farms v. City & County of Denver, 807 P.2d 9 (Colo. 1991).

**For discussion of parties with standing to appeal under previous version of subsection (3),** see Bar 70 Enterprises, Inc. v. Tosco Corp., 703 P.2d 1297 (Colo. 1985).

**The volume of the priority awarded a ditch in adjudication proceedings was res adjudicata,** and the facts upon which such award was based could not be inquired into in a collateral proceeding. Rogers v. Nevada Canal Co., 60 Colo. 59, 151 P. 923, 1917C Ann. Cas. 669 (1915).

#### IV. EVIDENCE OF MATERIAL INJURY.

**A prima facie case of material injury to senior water rights** is established by a preponderance of the evidence that material injury will be caused to senior appropriators generally, rather than to a particular senior user. Fellhauer v. People, 167 P.2d 320, 447 P.2d 986 (1967); Hall v. Kuiper, 181 Colo. 130, 510 P.2d 329 (1973); Danielson v. Jones, 698 P.2d 240 (Colo. 1985).

**State engineer's findings on material injury should be accepted as presumptively valid** by a water judge adjudicating a water right involving the use of a well when the applicant has not appealed the state engineer's denial of the well permit pursuant to § 37-90-115, and applicant should bear the burden of proving no material injury. Broyles v. Fort Lyon Canal Co., 638 P.2d 244 (Colo. 1981); State of Colo. v. Southwestern Colo. Water Conservation District, 671 P.2d 1294 (Colo. 1983), cert. denied, 466 U.S. 944, 104 S. Ct. 1929, 80 L.Ed.2d 474 (1984); Danielson v. Jones, 698 P.2d 240 (Colo. 1985).

**Where findings of state engineer on original application are not presumptive of material injury to senior water rights from the application as amended,** such findings are nevertheless sufficient to raise an inference of adverse effect from increased production on the well, and when trial evidence establishes a prima facie case of material injury, the applicant must rebut by presenting evidence which would reasonably support a finding of no material injury. Danielson v. Jones, 698 P.2d 240 (Colo. 1985).

**Subsection (3) requires an applicant to sustain the allegations** upon which the claimed rights are based. In re Bunker v. Uncompahgre Valley Water Users Ass'n, 192 Colo. 159, 557 P.2d 389 (1976).

**Retention of jurisdiction by court pursuant to subsection (6) valid** so court could review determination of whether lack of injury is conclusive within such time. City of Thornton v. Clear Creek Water Users Alliance, 859 P.2d 1348 (Colo. 1993).

**The critical issue for the water court to decide in determining whether to reconsider injury under its retained jurisdiction is whether operational experience obtained after entry of the decree indicates that the water rights may not be sufficiently protected to preclude or remedy injury under the decree,** not whether replacement releases under the plan have occurred or whether actual injury has already occurred. If the court finds that insufficient operational experience exists to permit it to resolve the question of injury, it should extend the period of retained jurisdiction. Here, the water court erred in failing to invoke its retained jurisdiction when the petitioners alleged suffi-



cient facts to support their claim that injury had occurred or was likely to occur. In re Upper Eagle Reg'l Water Auth., 230 P.3d 1203 (Colo. 2010).

**A water court does not have a duty to reconsider injury through retained jurisdiction until after the water court approves an applicant's augmentation plan based upon the no-injury analysis,** because the purpose of retained jurisdiction is to reconsider injury once an augmentation plan is operating, not to prove depletions or prove injury for the first time. In re Water Rights of Park County Sportsmen's Ranch, 105 P.3d 595 (Colo. 2005).

**Water quality problems associated with the actual operation of an augmentation plan can justify invocation of a court's retained jurisdiction;** hence, it was error for the water judge to refuse a senior appropriator's petition to either make a finding of injury or extend the period of retained jurisdiction without holding a hearing. City of Thornton v. City & County of Denver, 44 P.3d 1019 (Colo. 2002).

**Historic consumptive use determinations are not susceptible to redetermination under the retained jurisdiction provision,** which is intended to address injurious effects that result from placing the change of water right or augmentation plan into operation. Farmers Reservoir and Irrig. Co. v. Consolidated Mut. Water Co., 33 P.3d 799 (Colo. 2001).

**A ditch-wide analysis of historic consumptive use of one portion of a mutual ditch company's rights does not amount to an improper reconsideration under subsection (6)** when a previous change decree erroneously awarded the applicant more than its pro rata share of a different portion of the ditch's rights based on a parcel-by-parcel determination of historic consumptive use. Central Colo. Water Conservancy Dist. v. City of Greeley, 147 P.3d 9 (Colo. 2006).

## V. CLERICAL MISTAKES.

**Express addition in the decretal portion of amended decree making appropriation one out of a different creek** was indeed a substantive matter, not a correction of a mere clerical mistake. Benson v. Burgess, 192 Colo. 556, 561 P.2d 11 (1977).

The owner of a ditch and the water adjudicated thereto was adversely affected by an amended decree making another appropriation one out of a different creek so that his ditch was not entitled to priority over the other ditch's water, and since the resume of the application for the other ditch which was published in the newspaper in August, 1971, gave no inkling of the other owner's position and the first owner did not have knowledge of the position until action by the water official in the summer of 1974 with regard to the priority of his ditch over

the other one, the court's finding that failure to protest was due to mistake, inadvertence, or excusable neglect was entirely correct. Benson v. Burgess, 192 Colo. 566, 561 P.2d 11 (1977).

**When amendment of referee's ruling mandated.** Subsection (10) mandates that the amendment of a water referee's ruling with respect to certain conditional water rights, when, through inadvertence, the ruling omitted three conditional rights which were properly before the referee for his consideration and which the referee had intended to include within the purview of his ruling. Town of De Beque v. Enewold, 199 Colo. 110, 606 P.2d 48 (1980).

**When omission of finding of reasonable diligence not clerical error.** To characterize as "clerical error", as that term is used in subsection (10), the omission of a finding of reasonable diligence with respect to a conditional water right never mentioned in the application and never considered by the court would be to expand the definition of clerical error beyond the bounds of precedent and of reason. Town of De Beque v. Enewold, 199 Colo. 110, 606 P.2d 48 (1980).

**City's failure to include certain creek in statement of claim** cannot be remedied as a clerical error because the creek which the city sought to include in the decree was not "tributary drainage lying between" creeks specifically named in the statement of claim and because the water court may decree rights no more extensive than those sought in an applicant's statement of claim. City & County of Denver v. Vail Valley, 751 P.2d 68 (Colo. 1988).

**A municipal corporation has no different status from that of an individual or any other party to the proceeding.** City & County of Denver v. Northern Colo. Water Conservancy Dist., 130 Colo. 375, 276 P.2d 992 (1954).

**Subsection (10) not applied retroactively.** Meyring Livestock Co. v. Wamsley Cattle Co., 687 P.2d 955 (Colo. 1984).

## VI. SUBSTANTIVE ERRORS.

**If a resume notice is adequate, the water court has subject matter jurisdiction over the water matter and there can be no collateral attack on the resulting decree based on an alleged substantive error such as a failure to require republication unless a petition is filed within three years of entry of the decree.** In re Water Rights of Columbine Assocs., 993 P.2d 483 (Colo. 2000).

**Where petition alleged that a landowner was unaware of the published resume of the application and further alleged facts sufficient to demonstrate that it was entitled to identification in a water adjudication application and a mailed copy of the resume from the clerk,** the water court abused its discretion in summarily dismissing the petition for recon-

sideration for failure to show excusable neglect. *SL Group, LLC v. Go West Indus., Inc.*, 42 P.3d 637 (Colo. 2002).

## VII. FEDERAL RESERVED WATER RIGHTS.

**Federal reserved water rights.** The United States possesses reserved rights for its federal reservations in Colorado in waters unappropriated upon the date of reservation of the federal lands from the public domain, and in the amount necessary to achieve the primary purposes of the

reservations. *United States v. City & County of Denver*, 656 P.2d 1 (Colo. 1982).

**Reserved rights determined by Colorado law.** Colorado law governing the determination of water rights is properly applied as the rule of decision by which the courts will determine the contours of the reserved rights asserted by the United States. *United States v. City & County of Denver*, 656 P.2d 1 (Colo. 1982).

**For extent of federal reserved water rights on different categories of public lands**, see *United States v. City & County of Denver*, 656 P.2d 1 (Colo. 1982).

**37-92-305. Standards with respect to rulings of the referee and decisions of the water judge.** (1) In the determination of a water right the priority date awarded shall be that date on which the appropriation was initiated if the appropriation was completed with reasonable diligence. If the appropriation was not completed with reasonable diligence following the initiation thereof, then the priority date thereof shall be that date from which the appropriation was completed with reasonable diligence.

(2) Subject to the provisions of this article, a particular means or point of diversion of a water right may also serve as a point or means of diversion for another water right.

(3) (a) A change of water right, implementation of a rotational crop management contract, or plan for augmentation, including water exchange project, shall be approved if such change, contract, or plan will not injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right. In cases in which a statement of opposition has been filed, the applicant shall provide to the referee or to the water judge, as the case may be, a proposed ruling or decree to prevent such injurious effect in advance of any hearing on the merits of the application, and notice of such proposed ruling or decree shall be provided to all parties who have entered the proceedings. If it is determined that the proposed change, contract, or plan as presented in the application and the proposed ruling or decree would cause such injurious effect, the referee or the water judge, as the case may be, shall afford the applicant or any person opposed to the application an opportunity to propose terms or conditions that would prevent such injurious effect.

(b) Decrees for changes of water rights that implement a contract or agreement for a lease, loan, or donation of water, water rights, or interests in water to the Colorado water conservation board for instream flow use under section 37-92-102 (3) (b) shall provide that the board or the lessor, lender, or donor of the water may bring about beneficial use of the historical consumptive use of the changed water right downstream of the instream flow reach as fully consumable reusable water, subject to such terms and conditions as the water court deems necessary to prevent injury to vested water rights or decreed conditional water rights.

**(3.5) Applications for a simple change in a surface point of diversion.** (a) For purposes of this subsection (3.5):

(I) "Intervening surface diversion point or inflow" means any ditch diversion or other point of diversion for a decreed surface water right, point of replacement or point of diversion by exchange that is part of an existing decreed exchange, well or well field that is decreed to operate as a surface diversion, or point of inflow from a tributary surface stream.

(II) "Simple change in a surface point of diversion" means a change in the point of diversion from a decreed surface diversion point to a new surface diversion point that is not combined with and does not include any other type of change of water right and for which there is no intervening surface diversion point or inflow between the new point of diversion and the diversion point from which a change is being made. "Simple change in a surface point of diversion" does not include a change of point of diversion from below or within a stream reach for which there is an intervening surface diversion point or inflow or decreed in-stream flow right to an upstream location within or above that reach.



(b) (I) An application for a simple change in a surface point of diversion is subject to all provisions of this article, including sections 37-92-302 to 37-92-305, except as specifically modified by this subsection (3.5).

(II) The procedures in this subsection (3.5) apply only to a simple change in a surface point of diversion and do not change the procedures or legal standards applicable to any other change of water right.

(III) An application for a simple change in a surface point of diversion may:

(A) Be made with respect to a change of point of diversion that has already been physically accomplished or with respect to a requested future change of point of diversion;

(B) Be made with respect to an absolute water right or a conditional water right; and

(C) Include one or more water rights that are to be diverted at the new point of diversion. The application must not include or be consolidated or joined with an action by the applicant seeking any other type of change of water right or diligence proceeding or application to make absolute with respect to the water right or rights included in the application.

(c) The applicant bears the initial burden in an application for a simple change in a surface point of diversion to prove, through the imposition of terms and conditions if necessary, that the simple change in a surface point of diversion will not:

(I) Result in diversion of a greater flow rate or amount of water than has been decreed to the water right and, without requantifying the water right, is physically and legally available at the diversion point from which a change is being made; or

(II) Injuriiously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right.

(d) If the applicant makes a prima facie showing with respect to the matters in paragraph (c) of this subsection (3.5), the case proceeds as a simple change in a surface point of diversion, the applicant has the burden of persuasion with respect to the elements of its case, including the matters in paragraph (c) of this subsection (3.5), and the standards of paragraph (e) of this subsection (3.5) apply. If the applicant does not make such a prima facie showing, the referee or water judge shall dismiss the application without prejudice to the applicant's filing an application for a change of water right that is not a simple change in a surface point of diversion.

(e) The following standards apply to a simple change in a surface point of diversion:

(I) There is a rebuttable presumption that a simple change in a surface point of diversion will not cause an enlargement of the historical use associated with the water rights being changed.

(II) The decree must not requantify the water rights for which the point of diversion is being changed.

(III) The applicant, in prosecuting the simple change in a surface point of diversion, is not required to:

(A) Prove that the water diverted at the new point of diversion can and will be diverted and put to use within a reasonable period of time;

(B) Prove compliance with the anti-speculation doctrine; or

(C) Provide or make a showing of future need imposed by the cases of *Pagosa Area Water and Sanitation District v. Trout Unlimited*, 219 P.3d 774 (Colo. 2009) or *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996); except that nothing in this subsection (3.5) relieves the applicant or its successors in any pending or future diligence application from any of the requirements for demonstrating diligence in the development of a conditional water right changed pursuant to this subsection (3.5).

(4) (a) Terms and conditions to prevent injury as specified in subsection (3) of this section may include:

(I) A limitation on the use of the water that is subject to the change, taking into consideration the historical use and the flexibility required by annual climatic differences;

(II) The relinquishment of part of the decree for which the change is sought or the relinquishment of other decrees owned by the applicant that are used by the applicant in conjunction with the decree for which the change has been requested, if necessary to prevent an enlargement upon the historical use or diminution of return flow to the detriment of other appropriators;

(III) A time limitation on the diversion of water for which the change is sought in terms of months per year;

(IV) If the application is for the implementation of a rotational crop management contract, separate annual historical consumptive use limits for the parcels to be rotated according to the historical consumptive use of such lands. To the extent that some or all of the water that is the subject of the contract is not utilized at a new place of use in a given year, such water may be utilized on the originally irrigated lands if so provided in the decree and contract and if the election to irrigate is made prior to the beginning of the irrigation season and applies to the entire irrigation season. A failure of a party to a rotational crop management contract who is not the owner of the irrigation water rights that are subject to the contract to put to beneficial use the full amount of water that was decreed pursuant to the application for approval of the contract shall not be deemed to reduce the amount of historical consumptive use that the owner of the water rights has made of the rights.

(V) A term or condition that addresses decreases in water quality caused by a change in the type of use and permanent removal from irrigation of more than one thousand acre-feet of consumptive use per year that includes a change in the point of diversion, if the change would cause an exceedance or contribute to an existing exceedance of water quality standards established by the water quality control commission pursuant to section 25-8-204, C.R.S., in effect at the time of the application, or, if ordered by the court, subsequently adopted by the commission prior to the entry of the decree, for the stream segment at the original point of diversion. Under any such term or condition, the applicant shall be responsible for only that portion of the exceedance attributable to the proposed change. Any such term or condition and any activity to be taken in fulfillment thereof shall not be inconsistent with the "Colorado Water Quality Control Act", article 8 of title 25, C.R.S., and rules promulgated pursuant to said act, and implementation of section 303 (d) of the "Federal Water Pollution Control Act" by the water quality control division. This subparagraph (V) shall not be interpreted to confer standing on any person to assert injury who would not otherwise have such standing.

(VI) Such other conditions as may be necessary to protect the vested rights of others.

(b) If the water judge approves the implementation of a rotational crop management contract, the rotational crop management contract shall be recorded with the clerk and recorder of the county in which the historically irrigated lands are located, and the water judge shall make affirmative findings that the implementation of the rotational crop management contract:

(I) Is capable of administration by the state and division engineers. In order to satisfy the requirement of this subparagraph (I), the water judge may require the applicant to provide signage and mapping of the lands not irrigated on an annual basis.

(II) Will neither expand the historical use of the original water rights nor change the return flow pattern from the historically irrigated land in a manner that will result in an injurious effect as specified in subsection (3) of this section; and

(III) Will comply with paragraph (a) of subsection (4.5) of this section with regard to potential soil erosion, revegetation, and weed management.

(4.5) (a) The terms and conditions applicable to changes of use of water rights from agricultural irrigation purposes to other beneficial uses shall include reasonable provisions designed to accomplish the revegetation and noxious weed management of lands from which irrigation water is removed. The applicant may, at any time, request a final determination under the court's retained jurisdiction that no further application of water will be necessary in order to satisfy the revegetation provisions. Dry land agriculture may not be subject to revegetation order of the court.

(b) (I) If article 65.1 of title 24, C.R.S., is not applicable to a significant water development activity, the court may utilize the methods specified in this section to mitigate certain potential effects of such activity. Subject to the provisions of this article, a court may impose the following mitigation payments upon any person who files an application for removal of water as part of a significant water development activity:

(A) **Transition mitigation payment.** A transition mitigation payment shall equal the amount of the reduction in property tax revenues for property that is subject to taxation by an entity listed in section 37-92-302 (3.5) that is attributable to a significant water



development activity. Such payment shall be made on an annual basis in accordance with the repayment schedule established by the court unless the applicant and the taxing entities mutually agree on an alternate payment schedule. The county shall certify, as appropriate, to the change applicant each year the amount of mitigation payment due under this subparagraph (I). Any moneys collected pursuant to this sub-subparagraph (A) shall be distributed by the board of county commissioners of the county from which water is removed among the entities in the county in proportion to the percentage of their share of the total of property taxes for nonbonded indebtedness purposes.

(B) **Bonded indebtedness payment.** A bonded indebtedness payment shall be made on an annual basis in the same manner as mitigation payments and shall be based on the bonded indebtedness on the property that is to be removed from irrigation at the time the decree is entered. The bonded indebtedness payment shall be equal to the reduction in bond repayment revenues that is attributable to the removal of water as part of a significant water development activity. The court may identify such mitigation payment as part of the decree. Whenever an application for determination with respect to a change of water rights requires a payment pursuant to this sub-subparagraph (B), the board of county commissioners of the county from which water is removed shall distribute any moneys collected among the entities in the county having bonded indebtedness in proportion to the percentage of their share of the total of such indebtedness.

(II) Unless the court determines that a greater or lesser period of time would be appropriate based upon the evidence of record, the amount of the transition mitigation and bonded indebtedness payments shall be equal to the total reduction in revenues for a period of thirty years commencing upon the date of initial reductions in such revenues as a consequence of the removal of water associated with the significant water development activity.

(III) To the extent that there is an increase in the property tax or bonded indebtedness revenues after the date of the commencement of the payment obligations identified under sub-subparagraphs (A) and (B) of subparagraph (I) of this paragraph (b) as a consequence of a change in land use and accompanying modification of the assessed valuation of the land, such payment obligations shall be correspondingly reduced.

(IV) When determining the amount to be paid pursuant to this paragraph (b), if any, the court shall take into consideration any evidence of a beneficial impact to the county from which the water is to be diverted and shall adjust the amount of the payment accordingly.

(c) Paragraph (b) of this subsection (4.5) shall not apply to:

(I) Any removal of water involving water rights owned by the applicant prior to August 6, 2003; any removal of water that was accomplished prior to August 6, 2003; any removal of water for which an application for a change of water rights was pending in the water court on such date; or any removal of water for which a decree has been entered that continues to be subject to the water court's retained jurisdiction;

(II) Any removal of water when:

(A) Such change is undertaken by a water conservancy district, water conservation district, special district, ditch company, other ditch organization, or municipality;

(B) The water was beneficially used within the boundaries or service area of such entity before the removal; and

(C) The water will continue to be beneficially used within such entity's boundaries or service area after the removal; or

(III) Any removal of water where the new place of use is within a twenty-mile radius of the historic place of use, even though such new place is located within a different county. For purposes of this subparagraph (III), the distance between the historic place of use and the proposed new place of use shall be measured between the most proximate points in the respective areas.

(5) In the case of plans for augmentation including exchange, the supplier may take an equivalent amount of water at his point of diversion or storage if such water is available without impairing the rights of others. Any substituted water shall be of a quality and quantity so as to meet the requirements for which the water of the senior appropriator has normally been used, and such substituted water shall be accepted by the senior appropriator in substitution for water derived by the exercise of his decreed rights.

(6) (a) In the case of an application for determination of a water right or a conditional water right, a determination with respect to a change of a water right or approval of a plan for augmentation, which requires construction of a well, other than a well described in section 37-90-137 (4), the referee or the water judge, as the case may be, shall consider the findings of the state engineer, made pursuant to section 37-90-137, which granted or denied the well permit and the consultation report of the state engineer or division engineer submitted pursuant to section 37-92-302 (2) (a). The referee or water judge may thereupon grant a final or conditional decree if the construction and use of any well proposed in the application will not injuriously affect the owner of, or persons entitled to use, water under a vested water right or decreed conditional water right. If the court grants a final or conditional decree, the state engineer shall issue a well permit. Except in cases in which the state engineer or division engineer is a party, all findings of fact contained in the consultation report concerning the presence or absence of injurious effect shall be presumptive as to such facts, subject to rebuttal by any party.

(b) In the case of wells described in section 37-90-137 (4), the referee or water judge shall consider the state engineer's determination as to such groundwater as described in section 37-92-302 (2) in lieu of findings made pursuant to section 37-90-137, and shall require evidence of compliance with the provisions of section 37-92-302 (2) regarding notice to persons with recorded interests in the overlying land. The state engineer's findings of fact contained within such determination shall be presumptive as to such facts, subject to rebuttal by any party.

(c) Any application in water division 3 that involves new withdrawals of groundwater that will affect the rate or direction of movement of water in the confined aquifer system referred to in section 37-90-102 (3) shall be permitted pursuant to a plan of augmentation that, in addition to all other lawful requirements for such plans, shall recognize that unappropriated water is not made available and injury is not prevented as a result of the reduction of water consumption by nonirrigated native vegetation. In any such augmentation plan decree, the court shall also retain jurisdiction for the purpose of revising such decree to comply with the rules and regulations promulgated by the state engineer pursuant to section 37-90-137 (12) (b) (I).

(7) Prior to the cancellation or expiration of a conditional water right granted pursuant to a conditional decree, the court wherein such decree was granted shall give notice, within not less than sixty-three days nor more than ninety-one days, by certified or registered mail to all persons to whom such conditional right was granted, at the last-known address appearing on the records of such court.

(8) (a) Except as specified in paragraph (b) of this subsection (8), in reviewing a proposed plan for augmentation and in considering terms and conditions that may be necessary to avoid injury, the referee or the water judge shall consider the depletions from an applicant's use or proposed use of water, in quantity and in time, the amount and timing of augmentation water that would be provided by the applicant, and the existence, if any, of injury to any owner of or persons entitled to use water under a vested water right or a decreed conditional water right.

(b) As to decrees for plans for augmentation entered in water division 1 on or after August 5, 2009, the plan shall not require the replacement of out-of-priority depletions currently affecting the river caused by pumping that occurred prior to March 15, 1974. In the case of an amended plan for augmentation applied for pursuant to this paragraph (b), the water judge may review all of the terms and conditions of the plan.

(c) A plan for augmentation shall be sufficient to permit the continuation of diversions when curtailment would otherwise be required to meet a valid senior call for water, to the extent that the applicant shall provide replacement water necessary to meet the lawful requirements of a senior diverter at the time and location and to the extent the senior would be deprived of his or her lawful entitlement by the applicant's diversion. A proposed plan for augmentation that relies upon a supply of augmentation water that, by contract or otherwise, is limited in duration shall not be denied solely upon the ground that the supply of augmentation water is limited in duration, if the terms and conditions of the plan prevent injury to vested water rights. Said terms and conditions shall require replacement of out-of-priority depletions that occur after any groundwater diversions cease. Decrees



approving plans for augmentation shall require that the state engineer curtail all out-of-priority diversions, the depletions from which are not so replaced as to prevent injury to vested water rights. A plan for augmentation may provide procedures to allow additional or alternative sources of replacement water, including water leased on a yearly or less frequent basis, to be used in the plan after the initial decree is entered if the use of said additional or alternative sources is part of a substitute water supply plan approved pursuant to section 37-92-308 or if such sources are decreed for such use.

(9) (a) No claim for a water right may be recognized or a decree therefor granted except to the extent that the waters have been diverted, stored, or otherwise captured, possessed, and controlled and have been applied to a beneficial use, but nothing in this section shall affect appropriations by the state of Colorado for minimum streamflows as described in section 37-92-103 (4).

(b) No claim for a conditional water right may be recognized or a decree therefor granted except to the extent that it is established that the waters can be and will be diverted, stored, or otherwise captured, possessed, and controlled and will be beneficially used and that the project can and will be completed with diligence and within a reasonable time.

(c) No water right or conditional water right for the storage of water in underground aquifers shall be recognized or decreed except to the extent water in such an aquifer has been placed there by other than natural means by a person having a conditional or decreed right to such water.

(10) If an application filed under section 37-92-302 for approval of an existing exchange of water is approved, the original priority date or priority dates of the exchange shall be recognized and preserved unless such recognition or preservation would be contrary to the manner in which such exchange has been administered.

(11) Nontributary groundwater shall not be administered in accordance with priority of appropriation, and determinations of rights to nontributary groundwater need not include a date of initiation of the withdrawal project. Such determinations shall not require subsequent showings or findings of reasonable diligence, and such determinations entered prior to July 1, 1985, which require such showings or findings shall not be enforced to the extent of such diligence requirements on or after said date. The water judge shall retain jurisdiction as to determinations of groundwater from wells described in section 37-90-137 (4) as necessary to provide for the adjustment of the annual amount of withdrawal allowed to conform to actual local aquifer characteristics from adequate information obtained from well drilling or test holes. Such decree shall then control the determination of the quantity of annual withdrawal allowed in the well permit as provided in section 37-90-137 (4). Rights to the use of groundwater from wells described in section 37-90-137 (4) pursuant to all such determinations shall be deemed to be vested property rights; except that nothing in this section shall preclude the general assembly from authorizing or imposing limitations on the exercise of such rights for preventing waste, promoting beneficial use, and requiring reasonable conservation of such groundwater.

(12) (a) In determining the quantity of water required in an augmentation plan to replace evaporation from groundwater exposed to the atmosphere in connection with the extraction of sand and gravel by open mining as defined in section 34-32-103 (9), C.R.S., there shall be no requirement to replace the amount of historic natural depletion to the waters of the state, if any, caused by the preexisting natural vegetative cover on the surface of the area which will be, or which has been, permanently replaced by an open water surface. The applicant shall bear the burden of proving the historic natural depletion.

(b) No person who obtains or operates a plan for augmentation or plan of substitute supply prior to July 1, 1989, shall be required to make replacement for the depletions from evaporation exempted in this subsection (12) or otherwise replace water for increased calls which may result therefrom.

(c) In determining the quantity of water required in an augmentation plan to replace stream depletions in connection with any mining operation as defined in section 34-32-103 (8), C.R.S., for which a reclamation permit has been obtained as set forth in section 34-32-109, C.R.S., there is no requirement to replace the amount of historic natural depletion to the waters of the state, if any, caused by the preexisting natural vegetative cover and evaporation on the surface of the area that will be, or that has been, eliminated or made

impermeable as part of the permitted mining operation. The applicant bears the burden of proving the historic natural depletion.

(13) (a) The water court shall consider the findings of fact made by the Colorado water conservation board pursuant to section 37-92-102 (6) (b) regarding a recreational in-channel diversion, which findings shall be presumptive as to such facts, subject to rebuttal by any party. In addition, the water court shall consider evidence and make affirmative findings that the recreational in-channel diversion will:

(I) Not materially impair the ability of Colorado to fully develop and place to consumptive beneficial use its compact entitlements;

(II) Promote maximum utilization of waters of the state;

(III) Include only that reach of stream that is appropriate for the intended use;

(IV) Be accessible to the public for the recreational in-channel use proposed; and

(V) Not cause material injury to instream flow water rights appropriated pursuant to section 37-92-102 (3) and (4).

(b) In determining whether the intended recreation experience is reasonable and the claimed amount is the appropriate flow for any period, the water court shall consider all of the factors that bear on the reasonableness of the claim, including the flow needed to accomplish the claimed recreational use, benefits to the community, the intent of the appropriator, stream size and characteristics, and total streamflow available at the control structures during the period or any subperiods for which the application is made.

(c) If a water court determines that a proposed recreational in-channel diversion would materially impair the ability of Colorado to fully develop and place to consumptive beneficial use its compact entitlements, the court shall deny the application.

(d) In addition to determining the minimum amount of stream flow to serve the applicant's intended and specified reasonable recreation experience, the water court shall make a finding in the decree as to the flow rate below which there is no longer any beneficial use of the water at the control structures for the decreed purposes.

(e) If the other elements of the appropriation are satisfied, the decree shall specify the total volume of water represented by the flow rates decreed for the recreational in-channel diversion. For purposes of this subsection (13), the "total volume of water represented by the flow rates decreed for the recreational in-channel diversion" means the sum of the flow rates claimed in cubic feet per second for each day on which a claim is made multiplied by 1.98.

(f) If the court determines that the total volume of water represented by the flow rates decreed for the recreational in-channel diversion exceeds fifty percent of the sum of the total average historical volume of water for the stream segment where the recreational in-channel diversion is located for each day on which a claim is made, the decree shall:

(I) Specify that the state engineer shall not administer a call for the recreational in-channel diversion unless the call would result in at least eighty-five percent of the decreed flow rate for the applicable time period;

(II) Limit the recreational in-channel diversion to no more than three time periods; and

(III) Specify that each time period is limited to one flow rate.

(14) No decree shall be entered adjudicating a change of conditional water rights to a recreational in-channel diversion.

(15) Water rights for recreational in-channel diversions, when held by a municipality or others, shall not constitute a use of water for domestic purposes as described in section 6 of article XVI of the state constitution.

(16) In the case of an application for recreational in-channel diversions filed by a county, municipality, city and county, water district, water and sanitation district, water conservation district, or water conservancy district filed on or after January 1, 2001, the applicant shall retain its original priority date for such a right, but shall submit a copy of the application to the Colorado water conservation board for review and recommendation as provided in section 37-92-102 (6). The board's recommendation shall become a part of the record to be considered by the water court as provided in subsection (13) of this section.

(17) (a) Applicants for approval of a rotational crop management contract shall pay the state engineer the following fees:

(I) An application fee of one thousand seven hundred thirty-four dollars;



(II) A fee of six hundred seventeen dollars that is due annually beginning one year after submittal of the application until the application has been decreed by the water judge pursuant to section 37-92-308 (4); and

(III) An annual fee of three hundred dollars per year after the application has been decreed.

(b) The state engineer shall transmit the fees to the state treasurer, who shall deposit them in the water resources cash fund created in section 37-80-111.7 (1).

**Source:** **L. 69:** p. 1211, § 1. **C.R.S. 1963:** § 148-21-21. **L. 71:** p. 1324, § 2. **L. 75:** (7) added, p. 1398, § 1, effective June 20. **L. 77:** (8) added, p. 1703, § 4, effective June 19. **L. 79:** (9) added, p. 1368, § 6, effective June 22. **L. 81:** (10) added, p. 1786, § 2, effective April 24. **L. 85:** (6) amended and (11) added, p. 1168, § 8, effective July 1. **L. 89:** (3) amended, p. 1431, § 1, effective April 20; (12) added, p. 1425, § 5, effective July 15. **L. 92:** (6) amended, p. 2312, § 3, effective March 20; (4.5) added, p. 2289, § 2, effective April 16. **L. 96:** (8) amended, p. 125, § 2, effective March 25; (6) amended, p. 327, § 3, effective April 16. **L. 98:** (6)(c) added, p. 853, § 3, effective May 26. **L. 2001:** (13), (14), (15), and (16) added, p. 1189, § 3, effective June 5. **L. 2003:** (8) amended, p. 1454, § 5, effective April 30; (4.5) amended, p. 882, § 4, effective August 6. **L. 2006:** (13) amended, p. 908, § 3, effective May 11; (3) and (4) amended and (17) added, p. 1000, § 3, effective May 25. **L. 2007:** (4)(a)(V) amended and (4)(a)(VI) added, p. 44, § 1, effective March 12. **L. 2008:** (3) amended, p. 589, § 3, effective August 5. **L. 2009:** (8) amended, (HB 09-1174), ch. 69, p. 237, § 1, effective August 5. **L. 2012:** (3.5) added, (SB 12-097), ch. 54, p. 199, § 1, effective March 22; (7) amended, (SB 12-175), ch. 208, p. 890, § 165, effective July 1; (17)(b) amended, (SB 12-009), ch. 197, p. 793, § 8, effective July 1; (12)(c) added, (HB 12-1022), ch. 15, p. 38, § 2, effective August 8.

**Editor's note:** (1) Section 4 of chapter 197, Session Laws of Colorado 2006, provides that the act amending subsection (13) applies only to applications for and the administration of new recreational in-channel diversions filed on or after May 11, 2006, and shall not apply to applications for reasonable diligence or to make absolute recreational in-channel diversions that were decreed or applied for prior to May 11, 2006.

(2) Section 2 of chapter 15, Session Laws of Colorado 2007, provides that the act amending subsection (4)(a)(V) and enacting subsection (4)(a)(VI) applies to water rights applications that are filed on or after March 12, 2007, and does not apply to water rights applications that were filed before March 12, 2007.

(3) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (7) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

(4) Section 2 of chapter 54, Session Laws of Colorado 2012, provides that the act adding subsection (3.5) applies to applications for simple changes in a surface point of diversion filed on or after March 22, 2012.

(5) Section 13 of chapter 197, Session Laws of Colorado 2012, provides that the act amending subsection (17)(b) applies to revenues credited on or after July 1, 2012.

(6) Section 3 of chapter 15, Session Laws of Colorado 2012, provides that the act adding subsection (12)(c) applies to substitute supply plans approved and augmentation plans decreed on or after August 8, 2012.

**Cross references:** For section 303(d) of the "Federal Water Pollution Control Act", see 33 U.S.C. § 1313.

## ANNOTATION

- I. General Consideration.
- II. Conditional Water Rights.
- III. Changing Point of Diversion.
- IV. Federal Reserved Water Rights.
- V. Recreational In-Channel Diversions.
- VI. Plans for Augmentation.

## I. GENERAL CONSIDERATION.

**Law reviews.** For comment on determining the priority of federal reserved rights relative to the water rights of state appropriators, see 48 U. Colo. L. Rev. 547 (1977). For comment, "Maximum Utilization Collides With Prior Appropri-

ation in *A-B Cattle Co. v. United States*", see 57 Den. L.J. 103 (1979). For article, "Recent Developments in Colorado Groundwater Law", see 58 Den. L.J. 801 (1981). For comment, "Town of De Beque v. Enewold: Conditional Water Rights and Statutory Water Law", see 58 Den. L.J. 837 (1981). For article, "The Emerging Relationship Between Environmental Regulations and Colorado Water Law", see 53 U. Colo. L. Rev. 597 (1982). For note, "Reinterpreting the Physical Act Requirement for Conditional Water Rights", see 53 U. Colo. L. Rev. 765 (1982). For article, "Conditions in a Water Rights Augmentation Plan or Change Case", see 13 Colo. Law. 2039 (1984). For article, "Developments in Conditional Water Rights Law", see 14 Colo. Law. 353 (1985). For article, "Principles and Law of Colorado's Nontributary Ground Water", see 62 Den. U. L. Rev. 809 (1985). For article, "The Continuing Groundwater Saga — Part I: Senate Bill 5", see 15 Colo. Law. 422 (1986). For article, "The Physical Solution in Western Water Law", see 57 U. Colo. L. Rev. 445 (1986). For article, "Quality Versus Quantity: The Continued Right to Appropriate — Part I", see 15 Colo. Law. 1035 (1986). For article, "Colorado's Law of 'Underground Water': A Look at the South Platte Basin and Beyond", see 59 U. Colo. L. Rev. 579 (1988). For article, "Abandonment of Water Rights: Is 'Use It or Lose It' the Law?", see 18 Colo. Law. 2125 (1989). For article, "Use of Colorado Water Rights in Secured Transactions", see 18 Colo. Law. 2307 (1989). For comment, "The Case for Private Instream Appropriations in Colorado", see 60 U. Colo. L. Rev. 1087 (1990). For article, "The Constitution, Property Rights and the Future of Water Law", see 61 U. Colo. L. Rev. 257 (1990). For article, "'Can and Will': The New Water Rights Battleground", see 20 Colo. Law. 727 (1991). For comment, "The 'Can and Will' Doctrine of Colorado Revised Statute Section 37-92-305 (9)(b): Changing the Nature of Conditional Water Rights in Colorado", see 65 U. Colo. L. Rev. 947 (1994). For article, "Requirements for Augmentation Plans After the Mountain Mutual Decision", see 38 Colo. Law. 81 (Sept. 2009). For comment, "Pagosa Area Water & Sanitation District v. Trout Unlimited and an Anti-Speculation Doctrine for a New Era of Water Supply Planning", see 82 U. Colo. L. Rev. 640 (2011).

**Annotator's note.** Since § 37-92-305 is similar to repealed §§ 148-9-10 and 148-9-22, C.R.S. 1963, §§ 147-9-22, 147-9-25, and 147-10-8, CRS 53, CSA. C. 90, §§ 189(22) and 190, and laws antecedent to CSA, C. 90, § 104, relevant cases construing those provisions have been included in the annotations to this section.

**Decree in water adjudication confirms that steps have been completed to effect appropriation.** *Weibert v. Rothe Bros.*, 200 Colo. 310, 618 P.2d 1367 (1980).

**The Water Right Determination and Administration Act creates two levels of adversary involvement** in a water adjudication involving a proposed plan for augmentation or a change of water right: (1) Permission to file a statement of opposition; and (2) standing to assert injury. The first is available to "any person" and allows such person to participate to the extent of holding the applicant to a standard of "strict proof". The second, however, requires the objector to show that he or she has a legally protected interest in a vested water right or conditional decree. *Application of Turkey Canon Ranch Ltd.*, 937 P.2d 739 (Colo. 1997).

**Exempt "602" wells are "vested water rights" for purposes of subsection (3).** *Application of Turkey Canon Ranch Ltd.*, 937 P.2d 739 (Colo. 1997).

**A homeowners association has standing to challenge the adequacy of an applicant's augmentation plan to protect its members' vested ground water rights against injury** because the association itself is a "person", its members have standing and some of them filed for adjudication of their domestic exempt wells, the interests the association seeks to protect are germane to the association's purpose, and the litigation does not require the participation of the individual homeowners. *Buffalo Park Dev. Co. v. Mtn. Mut. Reservoir Co.*, 195 P.3d 674 (Colo. 2008).

**Where an applicant's augmentation plan relied on precipitation recharge to avoid injury to well users**, the record showed declining aquifer levels and that the opposers had redrilled their wells to greater depths, and the applicant's own expert witness testified that if precipitation recharge was sufficient to exceed withdrawals then the aquifer level should not be falling, the record supported the water court's determination that the augmentation plan failed to prevent injury. *Buffalo Park Dev. Co. v. Mtn. Mut. Reservoir Co.*, 195 P.3d 674 (Colo. 2008).

**In adjudication and change of water rights, court applies subsection (3) standards.** There is a strong public interest in adjudication and change of water rights, and in such proceedings the court must apply the standards of subsection (3). *Town of Breckenridge v. City & County of Denver*, 620 P.2d 1048 (Colo. 1980).

**Court cannot reopen decree on predetermined "equitable" terms.** A trial court is not free to reopen a water decree on terms which the complainant itself predetermines to be "equitable". *Town of Breckenridge v. City & County of Denver*, 620 P.2d 1048 (Colo. 1980).

**While a decree that erroneously determined that the source of water was nontributary or independent of other priorities is protected by res judicata as long as the water right is operated in conformity with the decree, an application for a change of water right reopens the prior decree for determina-**



**tion of the true nature of the source of the water.** The applicant failed both to demonstrate that the water was developed rather than salvaged water and to quantify the historic consumptive use of the water, and so the application was properly dismissed. *Ready Mixed Concrete Co. v. Farmers Reservoir & Irrigation Co.*, 115 P.2d 638 (Colo. 2005).

**All appropriations of water, and all decrees determining the respective rights of users, regardless of whether specific mention be made therein,** are subject to all constitutional and statutory provisions and restrictions designed for the protection of junior appropriators from the same stream. *Green v. Chaffee Ditch Co.*, 150 Colo. 91, 371 P.2d 775 (1962).

**A junior appropriator may not divert the water to which he is entitled to any method or means the result of which will be to diminish or interfere with** the right of a senior appropriator to full use of this appropriation. *City of Colo. Springs v. Bender*, 148 Colo. 458, 366 P.2d 552 (1961).

**Junior appropriators with vested rights in underground water tributary to a natural stream are entitled to protection against injury resulting in another water user's change of rights.** *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

**In considering whether it is necessary for applicants to compensate vested rights for stream impacts,** a court must evaluate whether, in light of the proposed withdrawals, holders of other water rights will be protected from injury with respect to the amount of water they are entitled to receive and the location and time at which they are to receive it. *State Eng'r v. Castle Meadows, Inc.*, 856 P.2d 496 (Colo. 1993).

**Detailed findings of injury required.** Water court erred in failing to enter specific, detailed findings of injury to other appropriators, if any, caused by diminished return flows due to either a change in direct-flow or storage rights, and in failing to enter the additional modifications and conditions in the final decrees to prevent or compensate such injuries to other users. *S.E. Colo. Water Cons. v. Ft. Lyon Canal Co.*, 720 P.2d 133 (Colo. 1986).

**District court's failure to consider that because of the fluctuating and unpredictable nature of urban runoff, water may not be available at the times that senior users are affected by the depletions,** rendered inadequate its conclusion that the applicants' pumping of their decreed amounts of water from the aquifer will not be injurious after their withdrawals cease. *State Eng'r v. Castle Meadows, Inc.*, 856 P.2d 496 (Colo. 1993).

**Case remanded to the district court to consider whether holders of water rights will be injuriously affected by post-withdrawal stream depletions,** since existence of injury cannot be determined as a matter of law and the

issue of injurious effect is inherently fact specific and requires factual findings. *State Eng'r v. Castle Meadows, Inc.*, 856 P.2d 496 (Colo. 1993).

**State engineer's argument that the stream depletions caused by the applicants' withdrawals would be injurious as a matter of law rejected** since this is a question involving facts that must be determined by the district court. *State Eng'r v. Castle Meadows, Inc.*, 856 P.2d 496 (Colo. 1993).

**Burden of applicant to establish historical use.** Where expansion of a water use is the injury asserted, establishment of historical use is the burden of the applicant. *Weibert v. Rothe Bros.*, 200 Colo. 310, 618 P.2d 1367 (1980).

**The legal principles are the same whether appropriations are for underground or surface water.** *City of Colo. Springs v. Bender*, 148 Colo. 458, 366 P.2d 552 (1961).

**Foreign water is exempt from the restrictions of subsection (3).** Approval of the change of use of foreign water does not require compliance with the "no-injury" requirement. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

**To ensure the protection of vested water rights or a decreed conditional water right, the parties may suggest and the water court may impose conditions on the change in use of a water right, including the dry-up of previously irrigated lands.** However, the dry-up is required only to the extent that it is necessary to prevent injury to water rights. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

**Given the factual nature of the injury inquiry, the water court's factual determinations and conclusions based thereon cannot be disturbed on appeal if they are based on the record.** Accordingly, the appeals court affirmed the trial court's determination and declined to require any additional dry-up conditions. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

**Prior to the enactment of subsection (4.5), which provides that the terms and conditions applicable to changes of use of water rights from agricultural irrigation to other beneficial uses include reasonable provisions be made to accomplish the revegetation of lands from which irrigation water is removed, the water courts had the discretion to require revegetation.** Subsection (4.5) was intended to codify and institutionalize the use of revegetation conditions and did not represent the creation of a new form of condition on changes in use of water rights. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

**In addition to the dual focus on maximum beneficial use and the protection of water rights, water judges must give consideration to the potential impact of the utilization of water on other resources.** Maximum utilization

must be implemented so as to ensure that water resources are utilized in harmony with the protection of other valuable state resources. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

**An applicant must bear the initial burden of showing absence of injurious effect from a changed water right. Only if the applicant can make a prima facie showing of no injury does the burden of going forward shift to objectors to show evidence of potential injury.** *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

**All vested water rights affected by the proposed change in use must be protected against injury.** *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

**Water quality regulation that affects water rights without causing material injury or impairment is not necessarily prohibited.** *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

**Priority date of ultimate appropriation relates back to date of "first step" only if appropriation has been completed with reasonable diligence.** *Fort Lyon Canal Co. v. Amity Mut. Irr. Co.*, 688 P.2d 1110 (Colo. 1984); *Closed Basin Landowners Ass'n v. Rio Grande*, 734 P.2d 627 (Colo. 1987); *Bd. of Comm'rs v. Crystal Creek Homeowner's Ass'n*, 14 P.3d 325 (Colo. 2000).

**The priority date for an application for a 4.1 c.f.s. exchange cannot relate back to a date when the exchange was operated at 0.24 c.f.s. Because of the discrepancy between 0.24 c.f.s. and 4.1 c.f.s., the previous operation is contrary to the manner in which the exchange has been administered, and the operation failed to sufficiently notify third parties of the intent to appropriate.** *Colo. Water Conservation Bd. v. City of Central*, 125 P.3d 424 (Colo. 2005).

**Where changes in projected reservoir enlargement program are dictated for most part by finances and required engineering changes, changes are permissible providing overall plan is not drastically altered or abandoned; priority date is not affected by such changes.** *Colo. River Water Conservation Dist. v. Twin Lakes Reservoir & Canal Co.*, 181 Colo. 53, 506 P.2d 1226 (1973).

**Historical reservoir releases, rather than a pro rata share of a full reservoir fill, are the proper measure for changes of storage rights.** *Burlington Ditch, Reservoir & Land Co. v. Englewood*, 256 P.3d 645 (Colo. 2011).

**Where evidence shows and court finds that applicant demonstrated its intent to enlarge reservoir by its survey in 1930 and that intent was never abandoned, applicant's failure to include any mention of intent to enlarge in 1935 adjudication when it obtained absolute decree for diversion system did not indicate that its intent to complete enlargement of reservoir was**

nonexistent at that time. *Colo. River Water Conservation Dist. v. Twin Lakes Reservoir & Canal Co.*, 181 Colo. 53, 506 P.2d 1226 (1973).

**Water right is a property right.** *Weibert v. Rothe Bros.*, 200 Colo. 310, 618 P.2d 1367 (1980).

**Water rights governed by water deed.** Where a landowner's rights were determined by the terms of a water deed through and on which his claim for water is based, he had a right to use water at such times, manner, and place as is provided in the water deed, and his rights were governed by the water deed and not by subsection (3). *Merrick v. Fort Lyon Canal Co.*, 621 P.2d 952 (Colo. 1981).

**Effect of arguing pollution would be harmful to future lot owners.** Where the argument was that the pollution from a plan for augmentation would be harmful to the now unknown future owners of lots in the subdivisions, this issue did not affect the present parties and therefore did not come within the court's contemplation. *Kelly Ranch v. Southeastern Colo. Water Conservancy Dist.*, 191 Colo. 65, 550 P.2d 297 (1976).

**Presumption regarding historic use.** Applicants for a change of water rights are entitled to a presumption that water was historically used by shareholders on the basis to which they were legally entitled to use such water. *Matter of Application for Water Rights*, 688 P.2d 1102 (Colo. 1984).

**Applied in Twin Lakes Reservoir & Canal Co. v. City of Aspen**, 192 Colo. 209, 568 P.2d 45 (1977); *Kuiper v. Atchison, T. & S.F. Ry.*, 195 Colo. 557, 581 P.2d 293 (1978); *Town of De Beque v. Enewold*, 199 Colo. 110, 606 P.2d 48 (1980); *Broyles v. Fort Lyon Canal Co.*, 638 P.2d 244 (Colo. 1981); *Great Western Sugar v. Jackson Lake Reservoir*, 681 P.2d 484 (Colo. 1984); *FWS Land & Cattle Co. v. State Div. of Wildlife*, 795 P.2d 837 (Colo. 1990).

## II. CONDITIONAL WATER RIGHTS.

**Conditional water rights in nontributary ground water.** Language of subsection (11) authorizes water courts to limit the exercise of conditional water right decrees in nontributary ground water entered before July 1, 1985, by making the doctrine of prior appropriation inapplicable to such conditional water rights, as well as those entered thereafter, removing the reasonable diligence requirement associated with prior appropriation for such water rights, and allowing the water courts to retain jurisdiction over such rights to adjust withdrawal determinations based on local aquifer characteristics. The application of this subsection to conditional water rights entered prior to July 1, 1985, operates as a reasonable limitation on the exercise of a conditional water right and does not operate retrospectively in violation of article II, section



11, of the Colorado Constitution. Qualls, Inc. v. Berryman, 789 P.2d 1095 (Colo. 1990).

**Although legislature cannot prohibit appropriation or diversion of unappropriated water for useful purposes**, it may regulate manner in which appropriation or diversion is effected. Fox v. Division Eng. for Water Div. 5, 810 P.2d 644 (Colo. 1991).

**Consent decree requiring approval of secretary of interior as condition precedent to adjudication of exchange rights** did not violate Colorado water law. Application of City & County of Denver, 935 F.2d 1143 (10th Cir. 1991).

**Purpose of a conditional water decree** has always been to allow an ultimate appropriation of water to relate back to the time of the "first step" toward that appropriation. Rocky Mt. Power Co. v. Colo. River Water Conservation Dist., 646 P.2d 383 (Colo. 1982); Mun. Subdistrict v. Rifle Ski Corp., 726 P.2d 635 (Colo. 1986).

Conditional water decrees are designed to establish that the "first step" toward appropriation of certain amount of water has been taken and to allow the relation back to the ultimate appropriation to the date of that "first step". Fort Lyon Canal Co. v. Amity Mut. Irr. Co., 688 P.2d 1110 (Colo. 1984); Pub. Serv. Co. v. Bd. of Water Works, 831 P.2d 470 (Colo. 1992).

**Section plainly indicates legislative intent to require demonstration that decreed conditional appropriation is being pursued**, such as would justify a continued reservation of the antedated priority. Dallas Creek Water Co. v. Huey, 933 P.2d 27 (Colo. 1997).

**A conditional water decree requires** an intent to appropriate and an overt, physical act constituting the first step toward diversion and application to a beneficial use. Mun. Subdistrict v. Rifle Ski Corp., 726 P.2d 635 (Colo. 1986); Pub. Serv. Co. v. Bd. of Water Works, 831 P.2d 470 (Colo. 1992).

**The "first step" for relation back of conditional water decree requires** intent to appropriate a definite quantity for beneficial use and an overt manifestation of intent through physical acts constituting notice to third parties. Fort Lyon Canal Co. v. Amity Mut. Irr. Co., 688 P.2d 1110 (Colo. 1984); Pub. Serv. Co. v. Bd. of Water Works, 831 P.2d 470 (Colo. 1992).

To show the first step toward appropriation of water, the applicant must show the concurrence of intent and overt acts. The date on which the first step is taken determines the date of the appropriation. City of Thornton v. City of Fort Collins, 830 P.2d 915 (Colo. 1992).

**The overt acts required under the first step test must perform the following three functions:** (1) Manifest the necessary intent to appropriate water to beneficial use; (2) Demonstrate the taking of a substantial step toward the application of water to beneficial use; and (3)

Give notice to interested parties of the nature and extent of the proposed demand upon the water supply. City of Thornton v. City of Fort Collins, 830 P.2d 915 (Colo. 1992).

**Acts which demonstrate a substantial step toward application of water to a beneficial use and acts which constitute notice to third parties of the proposed demand upon the water supply may precede the formation of the intent to appropriate and an act manifesting such intent.** However, the appropriation date of a conditional water right cannot be set prior to the formation of the necessary intent to appropriate and completion of an act manifesting such intent. City of Thornton v. City of Fort Collins, 830 P.2d 915 (Colo. 1992).

**Filing of an application of a conditional water right may be evidence of an act manifesting the intent to appropriate and it may be deemed to constitute notice to third parties of the proposed demand upon the water supply**, but it is doubtful that filing of an application is, by itself, a substantial step toward application of water to a beneficial use. Other overt acts would normally be required. City of Thornton v. City of Fort Collins, 830 P.2d 915 (Colo. 1992).

**Relevant measures toward the application of water to beneficial use need not be physical acts. Such measures could be formal acts which perform one or more of the required functions.** Formal acts would include planning which is focused on appropriation of water, studies, expenditures of human and financial capital, applying for various water permits, other related legal or quasi-legal filings apart from the conditional water rights application, or passage of resolutions if the applicant is a public entity. City of Thornton v. City of Fort Collins, 830 P.2d 915 (Colo. 1992).

**"First step" toward a perfect appropriation not found where there is a lack of privity** between irrigation company and dam builder. Fort Lyon Canal Co. v. Amity Mut. Irr. Co., 688 P.2d 1110 (Colo. 1984).

**Making of a survey constitutes a sufficient first step in a major diversion project** for the award of a conditional decree. Oak Creek Power Co. v. Colo. River Water Conservation Dist., 182 Colo. 389, 514 P.2d 323 (1973).

**One who has taken the necessary first step to initiate an appropriation of waters and subsequent thereto has proceeded with diligence** to finance and construct the works necessary to make an application of water to beneficial use, is entitled to a conditional decree defining his rights as of the date of the first step taken. Rocky Mt. Power Co. v. White River Elec. Ass'n, 151 Colo. 45, 376 P.2d 158 (1962).

**In order to establish that water is to be diverted for beneficial use, applicant for conditional water rights must show that "first step" has been taken to apply water to a beneficial use and such first step may be taken**

by a physical act or a formal act such as planning or study. *City of Thornton v. City of Fort Collins*, 830 P.2d 915 (Colo. 1992).

**A project in which large amounts of water are proposed to be diverted and transported over long distances will require a greater demonstration of sufficient activity to demonstrate the “first step”** than a small project tapping a very limited water supply. Thus, in light of the limited scale of a proposed appropriation, where a decree for conditional water rights is sought for 0.01 cubic feet per second, the actions of digging around a spring and installing pipes and a barrel constitutes a first substantial act taken towards placing water to beneficial use. *Vought v. Stucker Mesa Domestic Pipeline Co.*, 76 P.3d 906 (Colo. 2003).

A second visit to the site of a proposed diversion and the use of a global positioning system to locate the point of a proposed diversion is not sufficient to place other appropriators on inquiry notice of the nature and scope of the proposed appropriation, thus the requisite inquiry notice required to show the “first step” was not provided until the time of filing the water court application. *Vought v. Stucker Mesa Domestic Pipeline Co.*, 76 P.3d 906 (Colo. 2003).

**Municipal use of water has always been deemed a beneficial use** and is given priority over other competing beneficial uses by the general assembly. *Matter of Bd. of County Comm’rs*, 891 P.2d 952 (Colo. 1995).

**One who is entitled to a conditional decree defining his rights to water for future application to use** has a vested right which he may protect in case of any action by others to destroy or injure that right. *Rocky Mt. Power Co. v. White River Elec. Ass’n*, 151 Colo. 45, 376 P.2d 158 (1962).

**A conditional surface decree will not result in injury to senior appropriators** if it does not authorize diversions out of priority, but such decree should not issue without a plan for augmentation. *Southeastern Colo. Water v. City of Florence*, 688 P.2d 715 (Colo. 1984).

**Finding that an application for a change of water right was noninjurious** where the application applied to same amount of water as was previously decreed in conditional water right was proper under this section. *City of Thornton v. Clear Creek Water Users Alliance*, 859 P.2d 1348 (Colo. 1993).

**Where record established that injury would result from proposed enlargement of reservoir**, a plan for augmentation for approval or evidence that the appellants had joined an organization which had an approved plan for augmentation must be submitted prior to an award of a conditional water storage right. *Lionelle v. S. E. Colo. Water Conservancy Dist.*, 676 P.2d 1162 (Colo. 1984).

**No showing of diversion and application to a beneficial use was necessary** prior to the

entry of conditional decrees. *Taussig v. Moffat Tunnel Water & Dev. Co.*, 106 Colo. 384, 106 P.2d 363 (1940).

**Subsection (9)(b) requires proof that water will be diverted and that the project will be completed with diligence** before a decree of conditional right is issued. *Southeastern Colo. Water v. City of Florence*, 688 P.2d 715 (Colo. 1984); *Pub. Serv. Co. v. Bd. of Water Works*, 831 P.2d 470 (Colo. 1992).

**By enacting the “can and will” requirement of subsection (9)(b)**, the general assembly intended to reduce speculation associated with claims for conditional decrees and to increase the certainty of the administration of water rights in Colorado. *In re Gibbs*, 856 P.2d 798 (Colo. 1993); *Matter of Bd. of County Comm’rs*, 891 P.2d 952 (Colo. 1995); *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

**An applicant may rely on the potential right of private condemnation in satisfying the “can and will” requirement** unless the record clearly indicates that there are no circumstances under which the applicant may obtain access to the property necessary to finalize the conditionally approved right. *In re Gibbs*, 856 P.2d 798 (Colo. 1993).

**A city council’s adoption of a non-binding general resolution to deny third parties access to the city’s real estate for water projects in which the city did not participate is not a final denial of access to a particular reservoir site with regard to a specific project**, and an applicant’s lack of current access to a reservoir site is not typically dispositive of whether the “can and will” test is satisfied. *City of Black Hawk v. City of Central*, 97 P.3d 951 (Colo. 2004).

**Where a third party had successfully decreed conditional water rights for three reservoir sites that significantly overlapped an applicant’s proposed reservoirs and the third party held a 99-year lease on the sites that left the lessor with no meaningful discretion to refuse to grant the third party a right of way for the reservoirs**, the water court properly dismissed the application for failure to satisfy the “can and will” test. Even though the third party’s lease was nonexclusive, the lessee had the right to control the stored water, which precluded the lessor from granting the applicant a lease for the storage sites because doing so would unreasonably interfere with the lessee’s rights. Lack of access to a reservoir site is not a technical ground in a rigid application of the can and will test; it is, rather, a substantial impediment. *City of Aurora v. ACJ P’ship*, 209 P.3d 1076 (Colo. 2009).

**Subsection (9)(b) requires proof that water will be diverted and that project will be completed with diligence** prior to issuance of conditional decree for water right, and decree was



properly denied due to lack of plan for augmentation which would have established such proof. *Fox v. Div. Eng'r for Water Div. 5*, 810 P.2d 644 (Colo. 1991).

**Court properly dismissed application for conditional exchange decree** upon finding that applicants had no present intent to build reservoir which was key to the exchange plan and, therefore, applicants did not satisfy "can and will" requirements of subsection (9)(b). Such finding is neither inconsistent with nor does it constitute a collateral attack on a 1987 storage decree obtained by applicants, as finding in 1987 that applicants had necessary intent when the storage decree was secured did not speak to applicants' subsequent actions and intent. *Pub. Serv. Co. v. Bd. of Water Works*, 831 P.2d 470 (Colo. 1992).

**An applicant for conditional appropriative rights of exchange need not currently own or control all sources of substitute water supply at the time the decree was entered**, and whether the applicant took the required first step toward acquiring control and whether it can and will acquire such control must be determined on a source-by-source rather than a project-wide basis. *Centennial Water & Sanitation Dist. v. City & County of Broomfield*, 256 P.3d 677 (Colo. 2011).

**The "can and will" requirement should be construed to require an applicant to show a substantive probability** that the facility will be completed with due diligence. *Matter of Bd. of County Comm'rs*, 891 P.2d 952 (Colo. 1995).

**"Can and will" test applies until a right matures into an absolute decree**, and thus the test must be met by an applicant for a finding of reasonable diligence. *Municipal Subdist., Northern Colo. Water Conservancy District v. OXY USA, Inc.*, 990 P.2d 701 (Colo. 1999).

**"Can and will" provision of the statute requires the applicant to establish a substantial probability** that, within a reasonable time the facilities necessary to effect the appropriation can and will be completed with diligence, and that as a result, waters will be applied to a beneficial use. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996); *W. Elk Ranch v. United States*, 65 P.3d 479 (Colo. 2002).

**Thornton established a nonspeculative intent to put the northern project water to beneficial use** and, through its substantial investment in the project, showed a commitment to completing the appropriations by application of water to a beneficial use. Thornton's evidence of factors supporting the substantial probability of future completion is sufficient to outweigh the presence of future contingencies. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

**The water court improperly approved speculative appropriations** of both direct flow and storage rights to address potential future

federal bypass flow requirements, recreational in-channel diversions, and instream flow rights where such potential is purely hypothetical. On remand, the district will also need to introduce additional evidence, including an analysis of projected land uses, to support its population projections and corresponding water demand assessment, which greatly exceed those in the Colorado water conservation board's statewide water supply study. *Pagosa Area Water & Sanitation Dist. v. Trout Unlimited*, 219 P.3d 774 (Colo. 2009).

**Firm contractual commitments to supply water are insufficient, in and of themselves, to support an application for a conditional water right even for a governmental applicant** where delivery of the water pursuant to the contracts has never been sought, there has been no showing of any specific plan to put the water to beneficial use, and the applicant already has sufficient water for its reasonably anticipated needs. *Upper Yampa Water Conserv. v. Dequine Family*, 249 P.3d 794 (Colo. 2011).

**Water court properly found that the county failed to prove that it "can and will" complete the Union Park project where it failed to prove that the United States would grant a permit for a pumping plant** because its proposed use would disrupt decreed rights and would require a major operational change of the Taylor Park reservoir to continue meeting its designed purposes. *Bd. of Comm'rs v. Crystal Creek Homeowner's Ass'n*, 14 P.3d 325 (Colo. 2000).

**To meet the water availability prong of the "can and will" test**, a junior in-basin appropriator in the Gunnison basin upstream from the Aspinall Unit need not prove a subordination contract with the federal bureau of reclamation, but rather must merely show that a sufficient portion of the original 60,000 acre-foot depletion allowance associated with the Aspinall Unit remains unused. *Mount Emmons Mining Co. v. Town of Crested Butte*, 40 P.3d 1255 (Colo. 2002).

**Where an applicant establishes that its system design can accommodate, through storage or other means, any differences between decreed flow rates and lesser carrying capacity** at points of ultimate delivery, the record does not establish a shortfall in the entire water system capacity and therefore does not act as a barrier to a finding that Thornton can and will divert at the decreed rate. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

**The "reality checks" imposed by the court on Thornton with regard to its existing water rights were correct** because Thornton's conduct with regard to its existing water rights may be indicative of the reality of the need for the newly decreed rights. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

**Actual good faith work on the overall facilities necessary to consummate the ultimate goal is a part of the diligence** required to continue a conditional decree and to have it ripen into an absolute decree. *Metro. Sub. Water Users Ass'n v. Colo. River Water Conservation Dist.*, 148 Colo. 173, 365 P.2d 273 (1961).

Work in one drainage basin cannot provide the necessary notice to initiate an appropriation of water out of a wholly separate drainage basin, no matter how integrated the proposed projects may be in theory and ultimate development. *Denver v. Colo. River Water Conservation Dist.*, 696 P.2d 730 (Colo. 1985).

**A statutory diligence determination is made solely on the basis of factual issues** as presented by the evidence, and where factual issues are involved, a trial court's findings are binding upon the appellate court if there is any competent evidence in the record to support that finding. *Mun. Subdistrict v. Rifle Ski Corp.*, 726 P.2d 635 (Colo. 1986).

**Applicant has the burden of proving reasonable diligence** by a preponderance of the evidence. *Mun. Subdistrict v. Rifle Ski Corp.*, 726 P.2d 635 (Colo. 1986).

**Party seeking to establish reasonable diligence** with respect to a conditional water right does not have the burden of proof regarding the economic feasibility of a particular project; rather such economic feasibility is one factor to be considered in a finding of reasonable diligence. *Pub. Serv. Co. v. Blue River Irr.*, 782 P.2d 792 (Colo. 1989); *Pub. Serv. Co. v. Bd. of Water Works*, 831 P.2d 470 (Colo. 1992).

**The statutory requisite of due diligence is met, during the period of the pendency of adjudication proceedings and until a conditional decree is awarded**, by diligent action of the claimant in seeking to have his claim allowed and opposing in good faith the allowance of other claims which would, if allowed, be senior in point of time. *Metro. Sub. Water Users Ass'n v. Colo. River Water Conservation Dist.*, 148 Colo. 173, 365 P.2d 273 (1961).

**Whether future work will satisfy future diligence is a matter to be determined in the future** at hearings provided for in this section. *Metro. Sub. Water Users Ass'n v. Colo. River Water Conservation Dist.*, 148 Colo. 173, 365 P.2d 273 (1961).

**Question of diligence must be determined in light of all factors present in particular case**, including size and complexity of project; extent of construction season; availability of materials, labor, and equipment; economic ability of claimant; and intervention of outside delaying factors such as wars, strikes, and litigation. *Colo. River Water Conservation Dist. v. Twin Lakes Reservoir & Canal Co.*, 181 Colo. 53, 506 P.2d 1226 (1973); *Mun. Subdistrict v. Rifle Ski Corp.*, 726 P.2d 635 (Colo. 1986).

**Where survey includes reservoir enlargement in question, it constitutes sufficient first step** for award of conditional decree. *Colo. River Water Conservation Dist. v. Twin Lakes Reservoir & Canal Co.*, 181 Colo. 53, 506 P.2d 1226 (1973).

**As long as water system as whole is being completed with due diligence**, fact that small part of it is slow to progress is inconsequential. *Colo. River Water Conservation Dist. v. Twin Lakes Reservoir & Canal Co.*, 181 Colo. 53, 506 P.2d 1226 (1973).

**Filing deadlines of § 37-92-301 (4) are not modified by this section.** *Bar 70 Enters. Inc. v. Highland Ditch Ass'n*, 694 P.2d 1253 (Colo. 1985).

**A water court's failure to give notice of a cancellation of a conditional water right** pursuant to subsection (7) of this section, when the holder of the right fails to file a due diligence application pursuant to § 37-92-301(4), extends the time period in which the due diligence application may be filed and does not result in the cancellation of such right. *Double RL Co. v. Telluray Ranch Props.*, 54 P.3d 908 (Colo. 2002).

**Applicant not entitled to notice pursuant to subsection (7)** when a stipulated decree provides a deadline for a filing to perfect conditional water rights and the remedy for failure to file is abandonment. *Cherokee Metro. Dist. v. Upper Black Squirrel Creek Designated Ground Water Mgmt. Dist.*, 247 P.3d 567 (Colo. 2011).

### III. CHANGING POINT OF DIVERSION.

**It is recognized that water is a property right, subject to sale and conveyance, and that under proper conditions** not only may the point of diversion be changed, but likewise the manner of use. *Green v. Chaffee Ditch Co.*, 150 Colo. 91, 371 P.2d 775 (1962).

**Language of this section encourages productive use of decreed rights.** If a holder of a decreed water right can put the water to better use by obtaining an amendment to the decree, such conduct should be encouraged if the proposed change will cause no injury to other users or owners of water rights. *Application for Water Rights*, 799 P.2d 33 (Colo. 1990).

**The water court may grant an application for a change in the point of diversion** only upon the applicant demonstrating that the proposed change will not injuriously affect the vested rights of other water users. *Orr v. Arapahoe Water & Sanitation Dist.*, 753 P.2d 1217 (Colo. 1988).

**Applicant has burden to show injury will not result.** It is the burden of the applicant desiring to change the point of diversion or place of use of a water right to show that injury will not result from a proposed change. *Weibert*



v. Rothe Bros., 200 Colo. 310, 618 P.2d 1367 (1980).

The burden of showing absence of injurious effect is upon the applicant. In re Rominiecki v. McIntyre Livestock Corp., 633 P.2d 1064 (Colo. 1981); S.E. Colo. Water Cons. v. Rich, 625 P.2d 977 (Colo. 1981); S.E. Colo. Water Cons. v. Ft. Lyon Canal Co., 720 P.2d 133 (Colo. 1986).

**Burden of proof.** Burden on applicants for a change in water rights to establish the lack of injurious results from proposed change, but once a prima facie case of no injury is made, burden shifts to objectors to show evidence of potential injury. Matter of Application for Water Rights, 688 P.2d 1102 (Colo. 1984).

**If injury will result from application, applicant may propose terms to prevent.** If the water judge determines that injury will result from a proposed change in the point of diversion or place of use of a water right, the applicant and the persons opposed to the application must be given an opportunity to propose terms or conditions which would prevent the injurious effect. Weibert v. Rothe Bros., 200 Colo. 310, 618 P.2d 1367 (1980).

**"Duty of water" limits right to change point of diversion.** The right to change a point of diversion or type of use with respect to water rights decreed for irrigation purposes is limited to the "duty of water" with respect to the decreed place of use. Weibert v. Rothe Bros., 200 Colo. 310, 618 P.2d 1367 (1980).

**One of incidents of water right is right to change point of diversion or place of use.** Weibert v. Rothe Bros., 200 Colo. 310, 618 P.2d 1367 (1980).

**Junior appropriators have a vested right to the continuation of stream conditions** as they existed at the time of their appropriations, with the result that an application for a change in the point of diversion is always subject to the limitation that such change not injure the rights of junior appropriators. Orr v. Arapahoe Water & Sanitation Dist., 753 P.2d 1217 (Colo. 1988).

**City has a right to change its point of diversion if it can do so without injury** to others or if reasonable conditions can be attached to prevent such an effect. Boulder & White Rock Ditch & Reservoir Co. v. City of Boulder, 157 Colo. 197, 402 P.2d 71 (1965).

**Change in water rights should be permitted where proposed conditions to request for a change will serve to prevent injury** to the water rights of other parties. Matter of Application for Water Rights, 688 P.2d 1102 (Colo. 1984).

**Change of right without injurious effect should be permitted.** If a proposed condition will permit a change of water right to be accomplished without injuriously affecting the owner of or persons entitled to use water under a vested water right or decreed conditional water right, the change should be permitted on that condi-

tion. In re Rominiecki v. McIntyre Livestock Corp., 633 P.2d 1064 (Colo. 1981).

A change in the place of use of a water right may be allowed only when the change will not cause unreasonable harm to a prior appropriator. Danielson v. Kerbs AG., Inc., 646 P.2d 363 (Colo. 1982).

**The right to have the change depends upon, and must be controlled by, the facts of each particular case.** Vogel v. Minnesota Canal & Reservoir Co., 47 Colo. 534, 107 P. 1108 (1910); New Cache La Poudre Irrigating Co. v. Water Supply & Storage Co., 49 Colo. 1, 111 P. 610 (1910); Farmers' Reservoir & Irrigation Co. v. Town of Lafayette, 93 Colo. 173, 24 P.2d 756 (1933); Flasche v. Westcolo Co., 112 Colo. 387, 149 P.2d 817 (1944).

**The question what will be the effect of the change, whether injurious or harmless, is the ultimate fact to be determined** from evidence of the conditions which have previously prevailed and the conditions which will ensue if the change is permitted. The opinions of witnesses not based upon any facts or conditions in evidence will not satisfy the rule nor make a prima facie case. Monte Vista Canal Co. v. Centennial Irrigating Ditch Co., 24 Colo. App. 496, 135 P. 981 (1913).

**It is not error to permit a change of the point of diversion, in an original proceeding for the adjudication of the water rights** upon a particular stream, all parties in interest being present, and no prejudice to those complaining being shown. Phillips Inv. Co. v. Cole, 27 Colo. App. 540, 150 P. 331 (1915).

**An appropriator may not change his point of diversion except upon conditions which eliminate injury** to other appropriators. Metro. Denver Sewage Disposal Dist. No. 1 v. Farmers Reservoir & Irrigation Co., 179 Colo. 36, 499 P.2d 1190 (1972).

**The cases contemplate a relative evaluation of rights with a view to protection of vested junior rights.** Hallenbeck v. Granby Ditch & Reservoir Co., 144 Colo. 485, 357 P.2d 358 (1960).

**Junior appropriators have vested rights in the continuation of stream conditions as they existed at the time of their respective appropriations,** and that subsequent to such appropriations they may successfully resist all proposed changes in points of diversion and use of water from that source which in any way materially injures or adversely affects their rights. Green v. Chaffee Ditch Co., 150 Colo. 91, 371 P.2d 775 (1962).

**Junior appropriator has a right to assume that these are fixed conditions and will so remain, at least without substantial change,** unless it appears that a proposed change will not work harm to his vested rights. Shawcroft v. Terrace Irrigation Co., 138 Colo. 343, 333 P.2d 1043 (1958).

**A third party's contractual agreement not to place a call is not a change of a water right,** and so a junior has no right to maintain stream conditions created by the historical use of the call, nor does a presumption of injury attach to an agreement not to place a call. *City of Englewood v. Burlington Ditch, Reservoir & Land Co.*, 235 P.3d 1061 (Colo. 2010).

**Automatic cessation of diversions by junior appropriator not contemplated.** Sections 37-92-501 and 37-92-502 do not contemplate automatic cessation of diversions by a junior appropriator in response to a river call. *S.E. Colo. Water Cons. v. Rich*, 625 P.2d 977 (Colo. 1981).

**Division engineer evaluates each junior appropriator's diversion to determine material injury caused.** The statutory plan in §§ 37-92-501 and 37-92-502 contemplates that the division engineer will evaluate each junior appropriator's diversion to determine whether it is causing material injury to water rights having senior priorities before ordering the discontinuance of the diversion by the junior appropriator. *S.E. Colo. Water Cons. v. Rich*, 625 P.2d 977 (Colo. 1981).

**Except on streams in which the appropriations have not exceeded the constant supply, few instances arise in which the change of place of diversion** of large quantities of water, for a long distance, can be made without substantial injury to juniors, and the utmost care and scrutiny should be exercised to guard against such injury. *Shawcroft v. Terrace Irrigation Co.*, 138 Colo. 343, 333 P.2d 1043 (1958).

**The inherent right to change the point of diversion includes not only the right to change without condition,** if such change can be made without substantial injury to the vested rights of others, but also the right to change subject to conditions, if injury to rights of others may thereby be avoided, and if such injury appear, the court shall decree the change only upon such terms and conditions as may be necessary to prevent such injurious effects; and, if impossible to make such terms and conditions, the application must be denied. The statute affirms that right. *City of Colo. Springs v. Yust*, 126 Colo. 289, 249 P.2d 151 (1952); *Green v. Chaffee Ditch Co.*, 150 Colo. 91, 371 P.2d 775 (1962).

**Where a trial court finds that if a change in the point of diversion of a water right be granted, the vested rights of others will be injured,** it has a duty, under this section, to also find that such injury cannot be prevented by the imposition of terms and conditions. *Means v. Pratt*, 138 Colo. 214, 331 P.2d 805 (1958).

**Where the trial court found that change of the point of diversion of petitioner's appropriation would result in some injury to junior appropriators,** it was incumbent upon that court to devise a method whereby such junior rights could be fully compensated for injuries

suffered, and if such relief could not be afforded, to deny the petition. *DeHerrera v. Manassa Land & Irrigation Co.*, 151 Colo. 528, 379 P.2d 405 (1963).

**One who asserts the right to a change in the place of diversion has the burden of proving** that the change will not injuriously affect the vested rights of others, although this may involve the proof of a negative. *New Cache La Poudre Irrigating Co. v. Water Supply & Storage Co.*, 49 Colo. 1, 111 P. 610 (1908); *Vogel v. Minnesota Canal & Reservoir Co.*, 47 Colo. 534, 107 P. 1108 (1910); *Farmers' High Line Canal & Reservoir Co. v. Wolff*, 23 Colo. App. 570, 131 P. 291 (1913); *Monte Vista Canal Co. v. Centennial Irrigating Ditch Co.*, 24 Colo. App. 496, 135 P. 981 (1913); *Baca Ditch Co. v. Coulson*, 70 Colo. 192, 198 P. 272 (1921); *Hoehne Ditch Co. v. Martinez*, 71 Colo. 428, 207 P. 859 (1922); *San Luis Valley Irrigation Dist. v. Carr*, 79 Colo. 340, 245 P. 705 (1926); *Trinchera Ranch Co. v. Trinchera Irrigation Dist.*, 83 Colo. 451, 266 P. 204 (1928); *In re Priority of Rights to Use of Water in Water Dist. No. 20*, 92 Colo. 407, 21 P.2d 177 (1933); *Farmers' Reservoir & Irrigation Co. v. Town of Lafayette*, 93 Colo. 173, 24 P.2d 756 (1933); *Shawcroft v. Terrace Irrigation Co.*, 138 Colo. 343, 333 P.2d 1043 (1958).

**In a proceeding by a water user to change the point of diversion and where protests have been made, the burden rests upon the petitioner to meet the grounds of injury** asserted by the protestants and produce evidence from which the court will be satisfied that injury to protestants can be avoided by the imposition of terms. *Terliamis v. Cerise*, 133 Colo. 329, 295 P.2d 224 (1956).

**Burden of proof on petitioner in a proceeding for change of point of diversion requires him to meet only the grounds of injury** to protestants asserted by them. *City of Colo. Springs v. Yust*, 126 Colo. 289, 249 P.2d 151 (1952).

**Actual impairment of irreparable injury to the rights of the junior appropriator must be demonstrated** by evidential facts and not by potentialities. *Cline v. McDowell*, 132 Colo. 37, 284 P.2d 1056 (1955).

**At his own point of diversion on a natural watercourse, each diverter must establish some reasonable means of effectuating his diversion;** he is not entitled to command the whole or a substantial flow of the stream merely to facilitate his taking the fraction of the whole flow to which he is entitled. *City of Colo. Springs v. Bender*, 148 Colo. 458, 366 P.2d 552 (1961).

**Priority of appropriation does not give a right to an inefficient means of diversion.** *City of Colo. Springs v. Bender*, 148 Colo. 458, 366 P.2d 552 (1961).



Once it is established that injury will result from change in the point of diversion, then the burden is upon petitioner to present a plan or program whereby junior appropriators would be fully compensated for their injuries. *DeHerrera v. Manassa Land & Irrigation Co.*, 151 Colo. 528, 379 P.2d 405 (1963).

**Presentation of a plan for the protection of the vested rights of junior appropriators.** *Hallenbeck v. Granby Ditch & Reservoir Co.*, 144 Colo. 485, 357 P.2d 358 (1960).

**Where petitioner fails to show its proposed change with particularity, the trial court is not in a position to determine whether junior rights would be prejudiced, because the court has no gauge before it upon which to form a basis for a judgment; theorization with reference to hypothetical conditions could not serve to protect the rights of junior appropriators.** *Hallenbeck v. Granby Ditch & Reservoir Co.*, 144 Colo. 485, 357 P.2d 358 (1960).

**The anti-speculation requirement of § 37-92-103 (3)(a) applies in a change proceeding; accordingly, the applicant must show a legally vested interest in the place to be served by the change of use and a specific plan and intent to use the water for specific purposes.** The proposed change, to any of over 50 proposed uses in any of 28 counties without a single agreement with any end user of the water, was properly dismissed. *High Plains A & M, Inc. v. S.E. Colo. Water Conservancy Dist.*, 120 P.3d 710 (Colo. 2005); *ISG, LLC v. Arkansas Valley Ditch Ass'n*, 120 P.3d 724 (Colo. 2005).

**Changes of points of return of waste water are not governed by the same rules as changes of points of diversion.** *Metro. Denver Sewage Disposal Dist. No. 1 v. Farmers Reservoir & Irrigation Co.*, 179 Colo. 36, 499 P.2d 1190 (1972).

**A decree giving a reservoir company a free hand to move its priorities, junior and senior, from one reservoir to another, without regard to the rights of junior appropriators, violates the basic and fundamental requirement of this section that a new point of diversion be specifically set forth.** *Hallenbeck v. Granby Ditch & Reservoir Co.*, 144 Colo. 485, 357 P.2d 358 (1960).

**The moving of priorities in a system from one reservoir to another resulting in less flow downstream, could result in prejudice to junior appropriators by delay in overflow and time of use.** *Hallenbeck v. Granby Ditch & Reservoir Co.*, 144 Colo. 485, 357 P.2d 358 (1960).

**An order permitting a change in point of diversion does not, and cannot, in any way, enlarge the right of its recipient by conferring upon him the power to divert a greater quantity of water from the stream than he theretofore took, nor permit him to use it for a longer length of time than he was previously entitled to.** *Larimer County Canal No. 2 Irrigating Co. v.*

*Poudre Valley Reservoir Co.*, 23 Colo. App. 249, 129 P. 248 (1913).

**Where a decree is sought for change of point of diversion, it is not a question of whether the amount of water decreed was adequate, but whether it was excessive.** *Green v. Chaffee Ditch Co.*, 150 Colo. 91, 371 P.2d 775 (1962).

**Diversions limited to those sufficient for purposes for which water appropriation made.** There is read into every decree awarding priorities in water rights the implied limitation that diversions are limited to those sufficient for the purposes for which the appropriation was made, regardless of the fact that such limitation may be less than the decreed rate of diversion. *Weibert v. Rothe Bros.*, 200 Colo. 310, 618 P.2d 1367 (1980); *In re Rominiecki v. McIntyre Livestock Corp.*, 633 P.2d 1064 (Colo. 1981); *Orr v. Arapahoe Water & Sanitation Dist.*, 753 P.2d 1217 (Colo. 1988).

**Water right owner has no right to waste water.** The owner of a water right has no right as against a junior appropriator to waste water, i.e., to divert more than can be used beneficially. *Weibert v. Rothe Bros.*, 200 Colo. 310, 618 P.2d 1367 (1980); *In re Rominiecki v. McIntyre Livestock Corp.*, 633 P.2d 1064 (Colo. 1981).

**Water right owner may not extend time of diversion.** The owner of a water right may not extend the time of diversion to enable him to irrigate lands in addition to those for which the water was appropriated. *Weibert v. Rothe Bros.*, 200 Colo. 310, 618 P.2d 1367 (1980); *In re Rominiecki v. McIntyre Livestock Corp.*, 633 P.2d 1064 (Colo. 1981); *Orr v. Arapahoe Water & Sanitation District*, 753 P.2d 1217 (Colo. 1988).

**Doctrine that it is entirely within the right of an appropriator of water to enlarge upon his use, even on behalf of an original appropriator, may be applied only to the extent of use contemplated at the time of appropriation.** *Green v. Chaffee Ditch Co.*, 150 Colo. 91, 371 P.2d 775 (1962).

**Where a decree is sought for change of point of diversion or use, the right is strictly limited to the extent of former actual usage.** *Green v. Chaffee Ditch Co.*, 150 Colo. 91, 371 P.2d 775 (1962).

**Historical use limits right to change point of diversion.** The right to change a point of diversion or place of use is limited in quantity and time by historical use. *Weibert v. Rothe Bros.*, 200 Colo. 310, 618 P.2d 1367 (1980); *Orr v. Arapahoe Water & Sanitation Dist.*, 753 P.2d 1217 (Colo. 1988).

**Right to change point of diversion is limited in quantity by historical use.** *Southeastern Colo. Water Conservancy Dist. v. Rich*, 625 P.2d 977 (Colo. 1981); *Orr v. Arapahoe Water & Sanitation Dist.*, 753 P.2d 1217 (Colo. 1988).

**Where an applicant sought to change the point of diversion of a well but failed to separately quantify the historic use of the well from the historic use of a surface water right on the same land,** the applicant failed to carry his burden of proving the feasibility of changing the point of diversion without injury to other vested users. *State Eng'r v. Bradley*, 53 P.3d 1165 (Colo. 2002).

**Diversions for undecreed uses cannot be the basis for a quantification of historical use** for purposes of a change application, regardless of whether the water commissioner knew of the diversions or failed to curtail them. *Santa Fe Ranches Prop. Owners Ass'n v. Simpson*, 990 P.2d 46 (Colo. 1999).

**"Historical use" defined.** "Historical use", as a limitation on the right to change a point of diversion, is considered to be an application of the principle that junior appropriators have vested rights in the continuation of stream conditions as they existed at the time of their respective appropriations. *Weibert v. Rothe Bros.*, 200 Colo. 310, 618 P.2d 1367 (1980); *Orr v. Arapahoe Water & Sanitation Dist.*, 753 P.2d 1217 (Colo. 1988).

**Res judicata does not prohibit the water court** from considering and determining the actual extent of historical use at the original decreed points of diversion in order to properly determine the nature and extent of the applicants' water rights under an earlier decree which modified the points of diversion from ditches to wells and which contained the implied limitation that the quantity of water to be used at the new points of diversion would not exceed the amount of water decreed to and historically used at the original decreed points of diversion. *Orr v. Arapahoe Water & Sanitation Dist.*, 753 P.2d 1217 (Colo. 1988).

**But claim preclusion does not prevent the water court from determining historical consumptive use when such has not been determined in a previous proceeding.** *Farmers High Line Canal and Reservoir Co. v. City of Golden*, 975 P.2d 189 (Colo. 1999); *Burlington Ditch, Reservoir & Land Co. v. Englewood*, 256 P.3d 645 (Colo. 2011).

**To avoid an injurious enlargement of a direct flow right, in its analysis of historic consumptive use, the water court correctly interpreted an irrigation decree as applying only to 12,000 acres between a ditch headgate and a reservoir** where the decree did not describe the land on which the water was to be beneficially used but incorporated the referee's findings that described both the 12,000 acres and an "unlimited" amount of land lying below the reservoir. Further, the court correctly determined that the amount of water that could be changed in points of diversion, storage, and use should be reduced from the decreed amount of 350 cubic feet per second to 200 cubic feet per

second, as that was the amount of water that the structures could actually transmit for 24 years after entry of the original decree. The water court also correctly excluded diversions made from previously undecreed points of diversion, including reservoir and ditch seepage and a diversion that was larger than the decreed point of diversion, and used appropriate study periods in the calculation of historic consumptive use. *Burlington Ditch, Reservoir & Land Co. v. Englewood*, 256 P.3d 645 (Colo. 2011).

**A senior appropriator is not entitled to enlarge the historical use of a water right** by changing the point of diversion and then diverting from the new location the full amount of water decreed to the original point of diversion, even though the historical use at the original point of diversion might have been less than the decreed rate of diversion. *Orr v. Arapahoe Water & Sanitation Dist.*, 753 P.2d 1217 (Colo. 1988).

**Additional limitations in mutual ditch company bylaw enforceable.** A mutual ditch company bylaw imposing reasonable limitations, additional to those contained in this section, upon the right of a stockholder to obtain a change in the point of diversion, can be enforced. *Fort Lyon Canal Co. v. Catlin Canal Co.*, 642 P.2d 501 (Colo. 1982); *Matter of Water Rights of Ft. Lyon Canal*, 762 P.2d 1375 (Colo. 1988).

**An application for change of point of diversion of water having been judicially determined,** may not again be litigated as to its injurious effects on the rights of others. *City of Colo. Springs v. Yust*, 126 Colo. 289, 249 P.2d 151 (1952).

**Decree allowing a change in the point of diversion was reviewable** by writ of error. *Ft. Collins Mining & Elevator Co. v. Larimer & Weld Irrigation Co.*, 58 Colo. 183, 143 P. 1091 (1914).

**A statutory proceeding for change of point of diversion has a limited scope** and an extraneous issue cannot be litigated therein. *Otto Lumber Co. v. Water Supply & Storage Co.*, 106 Colo. 546, 104 P.2d 605 (1940).

**The construction of a channel within a stream bed to conduct the water to a headgate did not require any proceeding** under the statute to authorize the change of point of diversion, and did not constitute a change of point of diversion, because plaintiffs' right to divert and use the water from the stream at the headgate of their ditch included the right to make and change the necessary dams, channels, or other diversion works within the stream bed which might be necessary to enable them to continue the diversion of water at their headgate, provided no additional burden was made upon defendants' lands thereby, and no claim is here asserted of any additional burden by virtue of the channel excavated in the stream bed, and, in any event, such claim would not be valid here,



for the reason that defendants with knowledge permitted plaintiffs to construct the channel without objection. *Downing v. Copeland*, 126 Colo. 373, 249 P.2d 539 (1952).

**In order to use an alternate point of diversion to make absolute a conditional water right at another location, there must first be a decree establishing the new source as an alternate point of diversion.** This process provides notice to interested persons of a proposed new diversion point and allows for the establishment of terms and conditions that will protect other water rights. *Northern Colo. Water v. Three Peaks Water*, 859 P.2d 836 (Colo. 1993).

#### IV. FEDERAL RESERVED WATER RIGHTS.

**Federal rights defined.** The United States possesses reserved rights for its federal reservations in Colorado in waters unappropriated upon the date of reservation of the federal lands from the public domain, and in the amount necessary to achieve the primary purposes of the reservations. *United States v. City & County of Denver*, 656 P.2d 1 (Colo. 1982).

**Federal rights to be determined by Colorado law.** Colorado law governing the determination of water rights is properly applied as the rule of decision by which the courts will determine the contours of the reserved rights asserted by the United States. *United States v. City & County of Denver*, 656 P.2d 1 (Colo. 1982).

**Federal reserved water rights take a priority equivalent to the date of the reservation.** *United States v. City & County of Denver*, 656 P.2d 1 (Colo. 1982).

**For extent of federal reserved water rights on different categories of public lands, see** *United States v. City & County of Denver*, 656 P.2d 1 (Colo. 1982).

#### V. RECREATIONAL IN-CHANNEL DIVERSIONS.

**A beneficial use of water is defined to include recreational in-channel diversions, but only those recreational in-channel diversions that are limited to the minimum stream flow for a reasonable recreation experience in and on the water.** The "minimum stream flow" means the least necessary stream flow to accomplish a given reasonable recreation experience in and on the water. The definition of a "reasonable recreation experience in and on the water" is ambiguous. Accordingly, the water court first must make a case-by-case determination of whether the appropriation sought by the applicant, viewed objectively, is for a reasonable recreation experience in and on the water and whether the requested flow amounts are reasonable on the particular stream. The water court then must determine the minimum amount of

stream flow necessary to accomplish that intended recreation experience; an applicant is not entitled to a decree merely upon a showing of water availability. *Colo. Water Conservation Bd. v. Upper Gunnison Water Conservancy Dist.*, 109 P.3d 585 (Colo. 2005).

**Only the findings of fact of the Colorado water conservation board regarding an application for a recreational in-channel diversion are to be given presumptive effect,** not the board's recommendation regarding whether the application ought to be granted, granted with conditions, or denied. The presumption creates a burden of production, which can be rebutted by the introduction of evidence. The water court then must weigh the preponderance of the evidence in evaluating the statutory factors. *Colo. Water Conservation Bd. v. Upper Gunnison Water Conservancy Dist.*, 109 P.3d 585 (Colo. 2005).

#### VI. PLANS FOR AUGMENTATION.

**Where an applicant's augmentation plan relied on precipitation recharge to avoid injury to well users,** the record showed declining aquifer levels and that the opposers had redrilled their wells to greater depths, and the applicant's own expert witness testified that if precipitation recharge was sufficient to exceed withdrawals then the aquifer level should not be falling, the record supported the water court's determination that the augmentation plan failed to prevent injury. *Buffalo Park Dev. Co. v. Mtn. Mut. Reservoir Co.*, 195 P.3d 674 (Colo. 2008).

**Augmentation plan evaluation involves same criterion as application for changing water right.** A plan for augmentation is to be approved by the water judge based on the same criterion involved in evaluating an application for a change of water right. *Weibert v. Rothe Bros.*, 200 Colo. 310, 618 P.2d 1367 (1980).

**Uncertainties are not fatal to a plan for augmentation.** *Cache La Poudre Water Users Ass'n v. Glacier View Meadows*, 550 P.2d 288 (Colo. 1976); *Kelly Ranch v. Se. Colo. Conservancy Dist.*, 550 P.2d 297 (Colo. 1976); *Pub. Serv. Co., v. Willows Water Dist.*, 856 P.2d 829 (Colo. 1993).

**Application for a change in use and plan of augmentation is denied when the proposal would injure vested rights of other appropriators.** *Matter of May*, 756 P.2d 362 (Colo. 1988).

**The legislative water quality scheme is not designed to protect against quality impacts unrelated to discharges or substitute water and specifically prohibits the water court from imposing the protective measures necessary to remedy depletive impacts of upstream appropriations on a downstream appropriator who is concerned that decreased water quantity caused by city's upstream appropriation will**

result in water quality problem. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

When actual operation of an augmentation plan supports a prima facie case that substituted water is not of a quality necessary to meet the requirements for which the water has normally been used, it was error for a water judge to refuse a senior appropriator's petition to either make a finding of injury or extend the period of retained jurisdiction without holding a hearing. *City of Thornton v. City & County of Denver*, 44 P.3d 1019 (Colo. 2002).

There was sufficient evidence to support the water court's decision to authorize a water district's augmentation plan to reuse water delivered to its customers for irrigation purposes. Sufficient evidence supported the water court's finding that a water district demonstrated that the water it intended to recapture was its non-tributary ground water and not water from the natural stream, and thereby proving non-injury to other holders of water rights. Despite questionable methods used by the water district to measure the water return flows, the challenging public service company did not demonstrate that the water district failed to produce sufficient evidence. *Pub. Serv. Co. v. Willows Water Dist.*, 856 P.2d 829 (Colo. 1993).

When a decreed plan for augmentation is required under this section, the state engineer does not have statutory authority to approve a substitute supply plan for out-of-priority diversions under § 37-80-120, which section merely gives the state engineer enforcement discretion, and an injunction against such diversions absent a decree is proper. *Empire Lodge Homeowners' Ass'n v. Moyer*, 39 P.3d 1139 (Colo. 2001).

A plan of augmentation for a tributary aquifer that would be used as a reservoir does not qualify for the exemption from the prohibition against crediting reductions in evapotranspiration, because the aquifer is not analogous to an unlined gravel pit, and exemptions should be narrowly construed. *In re Water Rights of Park County Sportsmen's Ranch*, 105 P.3d 595 (Colo. 2005).

Before an applicant for a plan of augmentation can establish an absence of injury to satisfy its prima facie case, it must first establish the timing and location of depletions and the availability of replacement to prevent injury from those depletions. Here, because the applicant's surface and groundwater models could not reliably predict the issue of injury, the applicant failed to establish its prima facie case, and the case was properly dismissed. *In re Water Rights of Park County Sportsmen's Ranch*, 105 P.3d 595 (Colo. 2005).

Determination of the timing and location of depletions is integral to and is intended as an aid to the determination of injury, not an independent query that can defeat the proposed augmentation plan. *Upper Eagle Reg'l Water Auth. v. Simpson*, 167 P.3d 729 (Colo. 2007).

A plan for augmentation must include terms and conditions to protect a junior instream flow water right against injury caused by all out-of-priority diversions. An adjudicated in-stream flow water right, just like any other junior water right, entitles its holder to preserve the stream conditions existing at the time of the appropriation. Any other result would frustrate the clear legislative intent to protect and preserve the natural habitat through minimum stream flows. *Colo. Water Conservation Bd. v. City of Central*, 125 P.3d 424 (Colo. 2005).

Plan for augmentation must replace all injurious depletions made by water rights covered by the plan, not merely the depletion caused by groundwater pumping that occurs after the filing of the application. *Well Augmentation Subdist. v. City of Aurora*, 221 P.3d 399 (Colo. 2009).

Replacement obligations must be determined based on surface water conditions that would exist absent groundwater pumping, and an applicant cannot avoid these obligations by presenting evidence that groundwater is nontributary due to artificial conditions such as groundwater pumping. *Well Augmentation Subdist. v. City of Aurora*, 221 P.3d 399 (Colo. 2009).

**37-92-306. Priorities junior to prior awards - when.** With respect to each division described in section 37-92-201, the priority date awarded for water rights or conditional water rights adjudged and decreed on applications for a determination of the amount and priority thereof filed in such division during each calendar year shall establish the relative priority among other water rights or conditional water rights awarded on such applications filed in that calendar year; but such water rights or conditional water rights shall be junior to all water rights or conditional water rights awarded on such applications filed in any previous calendar year and shall also be junior to all priorities awarded in decrees entered prior to June 7, 1969, or decrees entered in proceedings which were pending on such date; except that, with respect to water rights which are diverted by means of wells, the priorities for which have not been established or sought in any such decree or proceeding, if the person claiming such a water right files an application for determination of water right and priority not later than July 1, 1972, and such application is approved and confirmed, such



water right, subject to the provisions of section 37-92-305 (1), shall be given a priority date as of the date of actual appropriation and shall not be junior to other priorities by reason of the foregoing provision.

**Source:** L. 69: p. 1212, § 1. C.R.S. 1963: § 148-21-22. L. 71: p. 1333, § 1.

### ANNOTATION

**Law reviews.** For article, "Adjudication of Indian and Federal Water Rights in the Federal Courts", see 46 U. Colo. L. Rev. 555 (1974-75). For comment on determining the priority of federal reserved rights relative to the water rights of state appropriators, see 48 U. Colo. L. Rev. 547 (1977). For article, "The Effect of Water Law on the Development of Oil Shale", see 58 Den. L.J. 751 (1981). For article, "Water Rights — How to Avoid Getting in Over Your Head", see 11 Colo. Law. 2143 (1982). For article, "Colorado's Law of 'Underground Water': A Look at the South Platte Basin and Beyond", see 59 U. Colo. L. Rev. 579 (1988).

**Annotator's note.** Although there is no section similar to § 37-92-306 in the former Colorado codes, relevant cases construing repealed § 147-9-25, CRS 53, CSA, C. 90, §§ 189(24) and 195, and laws antecedent thereto, have been included in the annotations to this section.

**This section sets up the priority system of "first in time-first in right" in Colorado.** Southeastern Colo. Water Conservancy Dist. v. Shelton Farms, Inc., 187 Colo. 181, 529 P.2d 1321 (1974).

**Priority of appropriation shall give the better right as between those using the water for the same purpose.** City & County of Denver v. Northern Colo. Water Conservancy Dist., 130 Colo. 375, 276 P.2d 992 (1954).

**The rights of a prior appropriator from a stream cannot be impaired by subsequent appropriations from its tributaries.** Strickler v. City of Colo. Springs, 16 Colo. 61, 26 P. 313; McClellan v. Hurdle, 3 Colo. App. 430, 33 P. 280 (1893); Bruening v. Dorr, 23 Colo. 195, 47 P. 290 (1896); Platt Valley Irrigation Co. v. Buckers Irrigation, Milling & Imp. Co., 25 Colo. 77, 53 P. 334 (1898); Buckers Irrigation, Milling & Implement Co. v. Farmers' Independent Ditch Co., 31 Colo. 62, 72 P. 49 (1903); Clark v. Ashley, 34 Colo. 285, 82 P. 588 (1905); La Jara Creamery & Live Stock Ass'n v. Hansen, 35 Colo. 105, 83 P. 644 (1905); In re German Ditch & Reservoir Co., 56 Colo. 252, 139 P. 2 (1914).

**Postponement doctrine provides that water rights adjudicated in a previous decree are senior to water rights adjudicated in a subsequent decree on the same stream, regardless of their dates of appropriation.** Because the North and South Forks of the South Platte River are separated by a high mountain range, there can be no conflict between the North and South

Fork users, and therefore it would be improper to use the postponement doctrine to treat a 1913 adjudication of North Fork rights as supplemental to an 1889 adjudication of South Fork water rights. South Adams County v. Broe Land Co., 812 P.2d 1161 (Colo. 1991); City of Denver v. City of Englewood, 826 P.2d 1266 (Colo. 1992).

The postponement doctrine governs the administration of water rights adjudicated in different decrees or applied for in different years. The doctrine does not affect the actual priority dates of such water rights. City of Denver v. City of Englewood, 826 P.2d 1266 (Colo. 1992).

**Postponement doctrine does not apply to vested water rights in exempt "602" wells.** Application of Turkey Canon Ranch Ltd., 937 P.2d 739 (Colo. 1997).

**All water decrees of any kind are bound to the call of the river, subject to any specific exemptions found within the law.** Southeastern Colo. Water Conservancy Dist. v. Shelton Farms, Inc., 187 Colo. 181, 529 P.2d 1321 (1974).

**Salvaged waters are subject to call by prior appropriators.** Southeastern Colo. Water Conservancy Dist. v. Shelton Farms, Inc., 187 Colo. 181, 529 P.2d 1321 (1974).

**Developed waters are free from the river call and are not junior to prior decrees.** Southeastern Colo. Water Conservancy Dist. v. Shelton Farms, Inc., 187 Colo. 181, 529 P.2d 1321 (1974).

**By contract a person can make his priority inferior to another.** In re Application for Water Rights of Fort Lyon Canal Co., 184 Colo. 219, 519 P.2d 954 (1974).

**Valid adjudication decrees in the same water district take rank and precedence in order of time of rendition, the doctrine being, first in order of time, first in priority of right.** Huerfano Valley Ditch & Reservoir Co. v. Hinderlider, 81 Colo. 468, 256 P. 305 (1927).

**Water court properly considered the more than seventy years of consistent administration by state water officials of the North Fork of the South Platte River water rights according to their date of appropriation.** South Adams County v. Broe Land Co., 812 P.2d 1161 (Colo. 1991).

**Decreed well rights are superior to undecreed diversions of water as well as being superior to junior priority rights.** SRJ I Venture v. Smith Cattle, Inc., 820 P.2d 341 (Colo. 1991).

**A judicial decree confirming a conditional or absolute water right is not the source of the right** but simply a determination that the right has been established. Abandonment of a right precludes reliance on the acts and intent that gave rise to that right as a basis for establishing a new right. *Purgatoire River Water Conservancy v. Witte*, 859 P.2d 825 (Colo. 1993).

**Parties claiming priorities of right to the use of water under a decree which adopts and confirms an earlier decree may not assert superior rights to those awarded in the earlier decree.** *Huerfano Valley Ditch & Reservoir Co. v. Hinderlinder*, 81 Colo. 468, 256 P. 305 (1927).

**Under Colorado law there can be no apportionment of available supplies of water in times of short supply, instead, junior appropriators may be shut off if necessary to supply the priorities of senior appropriators, except where juniors who are so situated that shutting them down would not result in improving the water supply of senior appropriators.** *City of Colo. Springs v. Bender*, 148 Colo. 458, 366 P.2d 552 (1961).

**The right to use in times of scarcity a definite volume of water, in a fixed order or priority, from the natural streams, is one of the most valuable property rights known to the law of this state, which in no way depends on the place of its application, and is not confined to the land upon which the right came into existence; but may be sold separate from the land and changed from one place to another.** *City of Colo. Springs v. Yust*, 126 Colo. 289, 249 P.2d 151 (1952).

**A claim for mere speculative purposes by parties having no expectation themselves of actually constructing works and applying the waters to some useful purpose gives them no rights against subsequent appropriations made in good faith.** *City & County of Denver v. Northern Colo. Water Conservancy Dist.*, 130 Colo. 375, 276 P.2d 992 (1954).

**When an appropriation has been diverted, used, and returned, it becomes again a part of the stream in which junior appropriators below acquire a vested right.** *City & County of Denver v. Colo. Land & Live Stock Co.*, 86 Colo. 191, 279 P. 46 (1929).

**Withdrawal of water must be orderly, and to be orderly it must come under the priority**

system. *Southeastern Colo. Water Conservancy Dist. v. Shelton Farms, Inc.*, 187 Colo. 181, 529 P.2d 1321 (1974).

**Federal reserved water rights.** The United States possesses reserved rights for its federal reservations in Colorado in waters unappropriated upon the date of reservation of the federal lands from the public domain, and in the amount necessary to achieve the primary purposes of the reservations. *United States v. City & County of Denver*, 656 P.2d 1 (Colo. 1982); *Park Center Water Dist. v. United States*, 781 P.2d 90 (Colo. 1989).

**Federal rights determined by Colorado law.** Colorado law governing the determination of water rights is properly applied as the rule of decision by which the courts will determine the contours of the reserved rights asserted by the United States. *United States v. City & County of Denver*, 656 P.2d 1 (Colo. 1982); *United States v. Bell*, 724 P.2d 631 (Colo. 1986); *Park Center Water Dist. v. United States*, 781 P.2d 90 (Colo. 1989).

**Seniority of federal rights.** The federal government's position is similar to the holder of a conditional senior water right who can step ahead of junior appropriators causing a diminution of the amount of water available for diversion. *Navajo Dev. Co. v. Sanderson*, 655 P.2d 1374 (Colo. 1982).

**For extent of federal reserved water rights on different categories of public lands, see** *United States v. City & County of Denver*, 656 P.2d 1 (Colo. 1982).

**For effect of federal reserved water rights, see** *Navajo Dev. Co. v. Sanderson*, 655 P.2d 1374 (Colo. 1982).

**Postponement doctrine applied to United States reserved water right application amendment** claiming water from the mainstem of the Colorado River. *United States v. Bell*, 724 P.2d 631 (Colo. 1986).

**Applied in** *Kuiper v. Atchison, T&SF Ry.*, 195 Colo. 557, 581 P.2d 293 (1978); *State Dept. of Natural Res. v. Southwestern Colo. Water Conservation Dist.*, 671 P.2d 1294 (Colo. 1983), cert. denied, 466 U.S. 944, 104 S. Ct. 1929, 80 L.Ed.2d 474 (1984); *Bd. of Comm'rs v. Crystal Creek Homeowner's Ass'n*, 14 P.3d 325 (Colo. 2000).

**37-92-306.1. Relation back of priority date.** (1) Except in the case of applications for adjudication of groundwater, notwithstanding the provisions of section 37-92-306, the filing date of an application for a water right or conditional water right involving the same source of water and derived from the same point of diversion from the same stream as a prior application for a water right or conditional water right filed in the preceding year by a different applicant may relate back to the date of filing of that prior application if:

(a) The subsequent applicant timely filed a statement of opposition to the prior application; and

(b) The subsequent application was made within sixty days of the prior application.

**Source: L. 81:** Entire section added, p. 1789, § 3, effective July 1.



## ANNOTATION

**Law reviews.** For article, "Developments in Conditional Water Rights Law", see 14 Colo. Law. 353 (1985). For article, "Use of Colorado

Water Rights In Secured Transactions", see 18 Colo. Law. 2307 (1989).

**37-92-307. Special procedures with respect to plans for augmentation. (Repealed)**

**Source:** L. 69: p. 1212, § 1. C.R.S. 1963: § 148-21-23. L. 71: p. 1334, §§ 1, 2. L. 74: Entire section R&RE, p. 440, § 1, effective May 7. L. 77: Entire section repealed, p. 1704, § 6, effective June 19.

**37-92-308. Substitute water supply plans - special procedures for review - water adjudication cash fund - legislative declaration - repeal.** (1) The general assembly hereby finds, determines, and declares that:

(a) There are certain circumstances under which the time required to go through the water court adjudication process can be problematic for some water users. Prior to January 1, 2002, substitute water supply plans had come into common usage for a number of water users, and based on this precedent, it appears desirable to establish some additional authority for the state engineer to approve substitute water supply plans.

(b) Prior to January 1, 2002, the general assembly gave the state engineer certain authority to approve exchanges and substitute water supply plans, including substitute water supply plans involving sand and gravel mines approved pursuant to sections 37-90-137 (11) and 37-80-120 (5); exchanges pursuant to sections 37-80-120, 37-83-104, and 37-83-106, and other statutes authorizing exchanges; and water uses that are part of the Arkansas river water bank pilot program approved pursuant to article 80.5 of this title; and this section shall not apply to such plans and exchanges.

(c) (I) Prior to January 1, 2003, the general assembly gave the state engineer administrative authority to regulate wells upon promulgation of rules for a river basin or aquifer, subject to the review of the water judge as provided in section 37-92-501 (3). The general assembly hereby ratifies the amended rules governing the diversion and use of tributary groundwater in the Arkansas river basin of Colorado, as approved by the water judge for water division 2, that became effective on June 1, 1996.

(II) On and after January 1, 2003, the state engineer shall have the authority in water division 2 to promulgate and amend well administration rules pursuant to sections 37-80-104 and 37-92-501 that include the authority to approve replacement plans that allow the continuing operation of wells causing out-of-priority depletions without requiring a plan for augmentation approved by the water judge.

(III) On and after January 1, 2003, the state engineer shall not have any authority in water division 1 to approve plans for, or to otherwise allow, the operation of wells, including augmentation wells, that cause out-of-priority depletions unless the wells are operated in accordance with plans for augmentation approved by the water judge or as allowed in this section.

(2) In addition to the authority previously granted to the state engineer, listed in subsection (1) of this section, the state engineer is authorized to review and approve substitute water supply plans only under the circumstances and pursuant to the procedures set forth in this section.

(3) (a) To provide sufficient time to fully integrate certain wells into the water court adjudication process for augmentation plans, during 2003, 2004, and 2005, the state engineer may approve annual substitute water supply plans for wells operating in the South Platte river basin that have been operating pursuant to substitute water supply plans approved before 2003, or for augmentation wells, using the procedures and standards set forth in this subsection (3). After December 31, 2005, all such wells shall comply with the provisions of subsection (4) of this section in order to continue operation under a substitute water supply plan. The general assembly finds that this three-year period is a sufficient amount of time to develop augmentation plan applications for these wells, and there shall be no subsequent extensions of this deadline. Beginning January 1, 2006, groundwater

diversions from all such wells shall be continuously curtailed unless the wells are included in a plan for augmentation approved by the water judge for water division 1, are included in a substitute water supply plan approved pursuant to subsection (4) of this section, or can be operated under their own priorities without augmentation.

(b) Beginning January 1, 2003, the state engineer may approve the operation of a well described in paragraph (a) of this subsection (3) under a substitute water supply plan if the following conditions are met:

(I) The well is tributary to the South Platte river, has been included in a substitute water supply plan previously approved by the state engineer or is an augmentation well, and is included in a new written request for approval of a substitute water supply plan filed with the state engineer after January 1 of each calendar year from 2003 to 2005. The written request shall be signed by a person with legal authority to represent all of the owners of the wells subject to the request and shall contain acknowledgments that the operation of all wells in the substitute water supply plan pursuant to this subsection (3) shall cease no later than December 31, 2005, and that the wells shall be included in an application for approval of a plan for augmentation filed in the district court for water division 1 no later than December 31, 2005, in order to continue subsequent pumping, unless the wells can be operated under their own priorities without augmentation. The request shall also identify for each well, including any augmentation wells: The permit number and location; the projected use and volume of pumping; for all wells using the modified Blaney-Criddle method to determine consumptive use, the projected number of acres and crops to be irrigated; the anticipated stream depletions that affect the river after October 31, 2002, until eighteen months after the date of the request in time, location, and amount, including a detailed description of how such depletions were calculated, and shall list the identity, priority, location, and amount of all replacement water sources to be used to replace stream depletions, including both accretions and depletions attributable to any augmentation wells. Upon the request of any party who has subscribed to the substitute water supply plan notification list for water division 1, the applicant for a substitute water supply plan shall also provide the model used to calculate stream depletions and the assumptions, input data, and output data used by the applicant in such model.

(II) The applicant has provided written notice of the request for approval of the substitute water supply plan by first-class mail or electronic mail to all parties who have subscribed to the substitute water supply plan notification list for water division 1, and proof of such notice is filed with the state engineer. The applicant shall also provide a complete copy of the request and all accompanying information by e-mail to all parties that have provided e-mail addresses for said notification list.

(III) The state engineer has given the owners of water rights and decreed conditional water rights thirty-five days after the date of mailing of such notice to file comments on the substitute water supply plan. Such comments shall include any claim of injury, any terms and conditions that should be imposed upon the plan to prevent injury to a party's water rights or decreed conditional water rights, and any other information the opposer wishes the state engineer to consider in reviewing the substitute water supply plan request.

(IV) The state engineer, after consideration of the comments, has determined that the operation and administration of such plan will replace all out-of-priority stream depletions in time, location, and amount in a manner that will prevent injury to other water rights and decreed conditional water rights, including water quality and continuity to meet the requirements of use to which the senior appropriation has normally been put pursuant to section 37-80-120 (3), and will not impair compliance with the South Platte river compact. The state engineer shall impose such terms and conditions as are necessary to ensure that these standards are met. In making the determinations specified in this subparagraph (IV), the state engineer shall hold a public hearing to address the issues. The public hearing shall be held no sooner than thirty-five days and no later than forty-nine days after the date of mailing of notice of the request for approval of the substitute water supply plan. Notice of the time and place of the hearing shall be provided no later than twenty-one days prior to the hearing to all parties who have subscribed to the substitute water supply plan notification list for water division 1. At the hearing, every party shall be allotted a reasonable amount of time by the state engineer to present its case or defense by oral and documentary



evidence and to conduct cross examination. At its own expense, any party may cause the hearing to be recorded by a court reporter or by an electronic recording device. Additionally, in making the determinations specified in this subparagraph (IV), the state engineer shall use the standards listed in paragraph (c) of this subsection (3) for evaluating such plans. It is the legislative intent that the adoption of these standards is only an interim compromise, to give greater certainty to senior surface water users in Colorado than past practices of the state engineer have given, until augmentation plans for these wells have been approved by the water judge for water division 1 and final determinations about the methodologies for calculating the amount and timing of stream depletions have been made by the water judge. These interim standards shall not create any presumptions, shift the burden of proof, or serve as a defense in any application for approval of a plan for augmentation.

(c) (I) For those irrigation wells where diversions are actually measured using water meters or verified power conversion measurements, the presumed amount of consumptive use from wells used for flood irrigation shall not be less than fifty percent of diversions, and the presumed amount of consumptive use from wells used for sprinkler irrigation shall not be less than seventy-five percent of diversions. For those irrigation wells where diversions are not actually measured, the state engineer shall determine the amount of stream depletions using actual data for the crops grown, acres irrigated, surface water deliveries, and the modified Blaney-Criddle method.

(II) The state engineer shall determine the timing of all stream depletions caused by pumping wells included in the plan using the United States geological survey stream depletion factor method for all areas covered by such factors. In other areas, the state engineer shall use appropriate groundwater models or other methods acceptable to the state engineer, based on the location of the well, the rate of pumping, the use being made of the groundwater, and the aquifer characteristics.

(III) A substitute water supply plan approved pursuant to this subsection (3) shall require replacement of the following out-of-priority stream depletions that result from the pumping of wells in the plan: Out-of-priority stream depletions that affect the river after October 31, 2002, from pumping that took place after January 1, 1974, but before the date of the request; and those out-of-priority stream depletions that will affect the river for the eighteen months after the date of the request; except that out-of-priority stream depletions affecting the river from November 1, 2002, through June 15, 2003, may be remedied pursuant to agreements with all injured parties that are noticed in the request and approved as a part of the substitute water supply plan or an amendment thereto. The amount of such depletions shall be separately set forth in any plan approval issued by the state engineer. A substitute water supply plan approved pursuant to this subsection (3) shall require that the state engineer curtail all diversions, the out-of-priority depletions from which are not replaced as required by the plan.

(IV) Existing surface water rights may be used as a replacement water source in plans requested pursuant to this subsection (3), even if such rights have not been decreed for such use, but the substitute water supply plan shall prevent expanded use of such rights by imposing appropriate limitations, including, where appropriate, volumetric limitations on direct flow rights and shall require replacement of the historical return flows, including ditch seepage losses, from the use of such surface water rights in the time, location, and amount in which they occurred so that other water rights will not be injured. A request seeking to use existing surface water rights that have not been decreed for augmentation use shall include a calculation of the historical diversions and return flows, including estimated ditch seepage losses, attributable to such rights. The presumed amount of on-farm consumptive use from irrigation water rights shall not be more than fifty percent of the amount delivered to the farms; except that if a water court application has been filed and the proposed change of water right is approved as a separate substitute water supply plan pursuant to this section, such water rights shall be used in accordance with their own substitute water supply plan.

(V) Replacement water deliveries required by the substitute water supply plan shall be provided at the time and location necessary to satisfy the lawful requirements of a senior diverter. In determining the adequacy of the substitute water supply plan to prevent injury to water rights and decreed conditional water rights, the state engineer shall determine the

amount of replacement water required for and available to the plan based upon current and projected hydrologic conditions.

(VI) If a substitute water supply plan covers wells, including augmentation wells, that are also covered by a decreed plan for augmentation or a separate substitute water supply plan, the accounting methodologies required by the decree or the separate plan shall control.

(VII) Substitute water supply plans that include or allow the use of augmentation wells shall include the terms and conditions needed to account for and replace all out-of-priority stream depletions that will result from their use, including post-pumping depletions. Beginning January 1, 2006, groundwater diversions from all such augmentation wells shall be continuously curtailed unless the wells are included in a plan for augmentation approved by the water judge for water division 1, a substitute water supply plan approved pursuant to subsection (4) of this section, or can be operated under their own priorities without augmentation.

(VIII) If amendments, including but not limited to the addition of more wells or the addition of different replacement water sources, are proposed to a substitute water supply plan after the initial written notice of the plan was given, the notice, comment, and hearing process described in this paragraph (c) shall be repeated for such amendments. If, in the opinion of the state engineer, an amendment is necessary to prevent immediate injury to other water rights that will occur prior to the expiration of the thirty-five-day comment period provided in subparagraph (III) of paragraph (b) of this subsection (3), the thirty-five-day comment period shall be shortened to fourteen days, the public hearing shall be held no later than twenty-eight days after the date of the mailing of notice of the request for the amendment, and the amendment may be implemented before the comment deadline and the public hearing. For amendments implemented prior to a public hearing, the state engineer shall issue a decision approving or denying the amendment no later than seven days after the conclusion of the public hearing. The state engineer may revoke or further condition the approval of any amendment after the comment and hearing process.

(IX) A substitute water supply plan approved pursuant to this subsection (3) shall include a requirement for monthly accounting to be compiled for every month of each year. Such accounting shall state the amount and location of the calculated depletions from all wells included in the plan, the amount, location, and source of all replacement water actually provided, and shall describe any other plan operations for that month. After the end of the water year, and no later than December 31 of each calendar year of plan operation, an annual accounting of all actual plan operations for the previous water year shall be compiled. Copies of both the monthly and annual accounting shall be provided to all parties that filed written comments concerning the plan pursuant to subparagraph (II) of paragraph (b) of this subsection (3).

(d) A substitute water supply plan approved pursuant to this subsection (3) shall not be approved for a period of more than one year; except that an applicant may request the renewal of a plan by repeating the application process described in this subsection (3); except that in no case shall a plan approved pursuant to this subsection (3) be renewed beyond December 31, 2005.

(e) When the state engineer approves or denies a substitute water supply plan, the state engineer shall serve a copy of the decision on all parties to the application by first-class mail or, if such parties have so elected, by electronic mail. Every decision of the state engineer shall provide a detailed statement of the basis and rationale for the decision, including a complete explanation of how all stream depletions were calculated, the location where they occur, how all replacement water sources were quantified, and what terms and conditions were imposed to prevent injury to other water rights and why they were imposed. The decision shall also include a description of the consideration given to any written comments that were filed by other parties. Neither the approval nor the denial by the state engineer shall create any presumptions, shift the burden of proof, or serve as a defense in any legal action that may be initiated concerning the substitute water supply plan. Any appeal of a decision made by the state engineer concerning a substitute water supply plan pursuant to this subsection (3) shall be made to the water judge in water division 1 within thirty-five days after the date of service of the decision. The water judge shall hear and determine such appeal using the procedures and standards set forth in sections 37-92-304 and 37-92-305 for



determination of matters rereferred to the water judge by the referee. The proponent of the substitute water supply plan shall be deemed to be the applicant for purposes of application of such procedures and standards. The filing fee for the appeal shall be two hundred seventy-one dollars for the proponent of the substitute water supply plan and seventy dollars for any other party to the appeal. Moneys from such fee shall be transmitted to the state treasurer and deposited in the water adjudication cash fund, which fund is hereby created in the state treasury. The general assembly shall appropriate moneys in the fund for the judicial department's adjudications pursuant to this subsection (3).

(f) The state engineer may accept for filing and consideration a written request for approval of a substitute water supply plan prior to April 30, 2003, subject to such request meeting all requirements of this subsection (3) prior to the date of approval. No approval of such request may be issued prior to April 30, 2003.

(g) Repealed.

(4) (a) Beginning January 1, 2002, if an application for approval of a plan for augmentation, rotational crop management contract, or change of water right has been filed with a water court and the court has not issued a decree, the state engineer may approve the temporary operation of such plan, contract, or change of water right as a substitute water supply plan if the following conditions are met:

(I) The water court applicant has filed a request for approval of the substitute water supply plan with the state engineer;

(II) The applicant has provided written notice of the request for approval of the substitute water supply plan by first-class mail or electronic mail to all parties who have filed a statement of opposition to the plan in water court and proof of such notice is filed with the state engineer, or, if the deadline for filing a statement of opposition has not passed, the applicant has provided written notice of the request for approval of the substitute water supply plan by first-class mail or electronic mail to all parties who have subscribed to the substitute water supply plan notification list for the water division in which the proposed plan is located and proof of such notice is filed with the state engineer;

(III) The state engineer has given those to whom notice was provided thirty days after the date of mailing of such notice to file comments on the substitute water supply plan. Such comments shall include any claim of injury, any terms and conditions that should be imposed upon the plan to prevent injury to an opposer's water rights or decreed conditional water rights, and any other information an opposer wishes the state engineer to consider in reviewing the substitute water supply plan request.

(IV) The state engineer, after consideration of the comments received, has determined that the operation and administration of such plan will replace all out-of-priority depletions in time, location, and amount and will otherwise prevent injury to other water rights and decreed conditional water rights, including water quality and continuity to meet the requirements of use to which the senior appropriation has normally been put, pursuant to section 37-80-120 (3), and will not impair compliance with any interstate compacts. Notwithstanding any limitations regarding phreatophytes or impermeable surfaces that would otherwise apply pursuant to section 37-92-103 (9) or 37-92-501 (4) (b) (III), for any precipitation harvesting pilot project selected pursuant to section 37-60-115 (6) that has filed an application for a permanent augmentation plan in water court, the out-of-priority depletions shall be the net depletion as defined in section 37-60-115 (6) (c) (II) (B). As a condition of approving a substitute water supply plan for a pilot project pursuant to this subsection (4), the state engineer shall have the authority to require the project sponsor to replace any ongoing delayed depletions after the water use plan associated with a precipitation harvesting pilot project has ceased. The state engineer shall impose such terms and conditions as are necessary to ensure that these standards are met. In making such determinations, the state engineer shall not be required to hold any formal hearings or conduct any other formal proceedings, but may conduct a hearing or formal proceeding if the state engineer finds it necessary to address the issues.

(b) A substitute water supply plan approved pursuant to this subsection (4) shall not be approved for a period of more than one year; except that an applicant may request the renewal of a plan by repeating the application process described in this subsection (4). If an applicant requests a renewal of a plan that would extend the plan past three years from the

initial date of approval, the applicant shall demonstrate to the state engineer that the delay in obtaining a water court decree is justifiable and that not being able to continue operating under a substitute water supply plan until a decree is entered will cause undue hardship to the applicant. A project sponsor for a precipitation harvesting pilot project selected pursuant to section 37-60-115 (6) shall demonstrate to the state engineer that an additional year of operation under the plan is necessary to obtain sufficient data to meet the Colorado water conservation board's criteria for evaluating the pilot project. If an applicant requests renewal of a plan that would extend the plan past five years from the initial date of approval, the applicant shall demonstrate to the water judge in the applicable water division that the delay in obtaining a decree has been justifiable and that not being able to continue operating under a substitute water supply plan until a decree is entered will cause undue hardship to the applicant. Approval of a plan pursuant to subsection (5) of this section shall be deemed to be approval under this subsection (4) for purposes of calculating the number of years since the initial date of approval.

(c) When the state engineer approves or denies a substitute water supply plan, the state engineer shall serve a copy of the decision on all parties to the pending water court application by first-class mail. Neither the approval nor the denial by the state engineer shall create any presumptions, shift the burden of proof, or serve as a defense in the pending water court case or any other legal action that may be initiated concerning the substitute water supply plan. Any appeal of a decision made by the state engineer concerning a substitute water supply plan pursuant to this subsection (4) shall be to the water judge of the applicable water division within thirty days and shall be consolidated with the application for approval of the plan for augmentation.

(5) (a) Beginning January 1, 2002, for new water use plans involving out-of-priority diversions or a change of water right, if no application for approval of a plan for augmentation or a change of water right has been filed with a water court and the water use plan or change proposed and the depletions associated with such water use plan or change will be for a limited duration not to exceed five years, except as otherwise provided in subparagraph (II) of paragraph (b) of this subsection (5), the state engineer may approve such plan or change as a substitute water supply plan if the following conditions are met:

(I) The applicant has filed a request for approval of the substitute water supply plan with the state engineer;

(II) The applicant has provided written notice of the request for approval of the substitute water supply plan by first-class mail or electronic mail to all parties who have subscribed to the substitute water supply plan notification list for the water division in which the proposed plan is located and proof of such notice is filed with the state engineer;

(III) The state engineer has given the owners of water rights and decreed conditional water rights thirty-five days after the date of mailing of such notice to file comments on the substitute water supply plan. Such comments shall include any claim of injury or any terms and conditions that should be imposed upon the plan to prevent injury to a party's water rights or decreed conditional water rights and any other information the opposer wishes the state engineer to consider in reviewing the substitute water supply plan request.

(IV) The state engineer, after consideration of the comments received, has determined that the operation and administration of such plan will replace all out-of-priority depletions in time, location, and amount and will otherwise prevent injury to other water rights and decreed conditional water rights, including water quality and continuity to meet the requirements of use to which the senior appropriation has normally been put, pursuant to section 37-80-120 (3) and will not impair compliance with any interstate compacts. The state engineer shall impose such terms and conditions as are necessary to ensure that these standards are met. In making the determinations specified in this subparagraph (IV), the state engineer shall not be required to hold any formal hearings or conduct any other formal proceedings, but may conduct a hearing or formal proceeding if the state engineer finds it necessary to address the issues.

(b) (I) Except as otherwise provided in subparagraph (II) of this paragraph (b), a substitute water supply plan approved pursuant to this subsection (5) shall not be approved for a period of more than one year; except that an applicant may request the renewal of a plan by repeating the application process described in this subsection (5). However, in no



event shall any plan approved pursuant to this subsection (5) or any water use included in such plan be approved or renewed for more than five years.

(II) A project sponsor for a precipitation harvesting pilot project selected pursuant to section 37-60-115 (6) may request renewal of a plan that would extend the plan past five years from the initial date of approval if the project sponsor demonstrates to the state engineer that an additional year of operation under the plan is necessary to obtain sufficient data to meet the Colorado water conservation board's criteria for evaluating the pilot project or an application for a permanent augmentation plan is pending before the water court. As a condition of approving a substitute water supply plan for a pilot project pursuant to this subsection (5), the state engineer shall have the authority to require the project sponsor to replace any ongoing delayed depletions after the water use plan associated with a precipitation harvesting pilot project has ceased.

(c) When the state engineer approves or denies a substitute water supply plan, the state engineer shall serve a copy of the decision on all parties to the application by first-class mail or, if such parties have so elected, by electronic mail. Neither the approval nor the denial by the state engineer shall create any presumptions, shift the burden of proof, or serve as a defense in any legal action that may be initiated concerning the substitute water supply plan. Any appeal of a decision made by the state engineer concerning a substitute water supply plan pursuant to this subsection (5) shall be made to the water judge in the applicable water division within thirty days, who shall hear such appeal on an expedited basis.

(6) The state engineer shall establish a substitute water supply plan notification list for each water division for the purposes of notifying interested parties pursuant to subparagraph (II) of paragraph (b) of subsection (3) of this section and subparagraph (II) of paragraph (a) of subsection (5) of this section. Beginning in July 2002, and in January of each year thereafter, in order to establish such notification list, the water clerks in each division shall include in the water court resume an invitation to be included on such notification list for the applicable water division. Persons on the substitute water supply plan notification list shall receive notice of all substitute water supply plans filed in that water division pursuant to subsections (3) and (5) of this section by either first-class mail or, if a person so requests, by electronic mail. Persons may be required to pay a fee, not to exceed twelve dollars per year, to be placed on the notification list.

(7) Beginning January 1, 2002, the state engineer may approve a substitute water supply plan if the state engineer determines such plan is needed to address an emergency situation and that the plan will not cause injury to the vested water rights or decreed conditional water rights of others or impair compliance with any interstate compact. Such plan shall not be implemented for more than ninety-one days. For purposes of this section, "emergency situation" means a situation affecting public health or safety where a substitute water supply plan needs to be implemented more quickly than the other procedures set forth in this section allow. For 2003, an "emergency situation" may also mean an immediate need for the use of augmentation wells necessitated by extreme drought conditions if such augmentation wells are also included in a request filed previously, or filed simultaneously with a request under this subsection (7), for approval of a substitute water supply plan under subsection (3) or (4) of this section. Approval pursuant to this section of the use of augmentation wells shall include the terms and conditions needed to account for and replace all out-of-priority stream depletions that will result from such use, including post-pumping depletions. Within seven days after the date of approval of the use of an augmentation well under this subsection (7), the state engineer shall give notice of the approval to all parties who have subscribed to the substitute water supply plan notification list for water division 1. In all other situations, notice to other water users shall not be required. Neither the approval nor the denial by the state engineer shall create any presumptions, shift the burden of proof, or be a defense in any legal action that may be initiated concerning an emergency substitute water supply plan or in any proceedings under subsection (3) or (4) of this section.

(8) After July 1, 2002, water users requesting approval of a new plan or a substitute water supply plan pursuant to this section shall pay a fee of three hundred dollars. The state engineer shall collect the fees and transmit them to the state treasurer, who shall deposit them in the water resources cash fund created in section 37-80-111.7 (1).

(9) If an entity pays for repairs, maintenance, dredging, or other improvements, including capital improvements, that are necessary and effective in removing a storage restriction imposed by the state engineer pursuant to section 37-87-107 on a dam or reservoir owned by a third party, such entity may apply to the state engineer pursuant to subsection (5) of this section for approval of the use of some or all of such newly unrestricted storage as a substitute water supply plan, if the entity has a written agreement concerning such use with all the owners of the dam or reservoir and the associated water rights.

(10) (a) Beginning July 1, 2009, for plans for augmentation that are the subject of a final decree entered by the water court in water division 1, the state engineer may approve annual substitute water supply plans solely for the purpose of allowing the use of water supplies not identified as augmentation supplies in the decreed augmentation plan, not previously decreed for augmentation or replacement uses, and not included in a pending water court application for approval of a change of water right to augmentation and replacement uses to be used in the decreed augmentation plan for the replacement of out-of-priority depletions caused by pre-January 1, 2003, diversions from wells included in the decreed augmentation plan, subject to and in accordance with the terms and conditions of the decreed augmentation plan. No water supplies for which substitute water supply plan approval is requested pursuant to this subsection (10) shall be used by an applicant for augmentation purposes prior to the date on which the state engineer approves the substitute water supply plan or the date on which any appeal to the water court of the substitute water supply plan is finally decided in accordance with paragraph (d) of this subsection (10), whichever occurs later. The state engineer may approve a substitute water supply plan under this subsection (10) if the following conditions are met:

(I) The applicant has filed a request for approval of the substitute water supply plan with the state engineer, which request shall include, at a minimum, the following information:

(A) The name of the water rights to be used for augmentation in the decreed augmentation plan under the substitute water supply plan and a list of decrees associated with such rights;

(B) A copy of every agreement or other document that evidences the applicant's right to use the water rights for augmentation;

(C) For use of existing South Platte river basin surface water rights, an analysis of the historical use of the water rights, which analysis shall include, at a minimum, the location and number of acres historically irrigated by the rights, identification of the crops historically irrigated by the rights, a calculation of the historical diversions and return flows associated with historical use of the rights, a summary of average annual diversions and average and maximum monthly diversions and consumptive use associated with historical use of the rights, the field irrigation efficiency used in the historical use analysis, which shall not exceed fifty percent, and the identity of all other water rights used to irrigate the land historically irrigated by the water rights;

(D) The amount of water available from the water rights for replacement uses under the substitute water supply plan;

(E) The amount of return flows, if any, associated with the historical use of the water rights, including the amount and timing of such return flows that would occur after the end of the one-year substitute water supply plan approved under this subsection (10);

(F) The amount of depletions from pre-January 1, 2003, diversions to be replaced using the water rights;

(G) The source of water to be used to make required return flow replacements, which source shall not include water pumped from augmentation wells;

(H) The manner in which the applicant will incorporate the accounting for use of the water rights for augmentation uses into the accounting required by the augmentation plan decree and make any required return flow replacements under the substitute water supply plan; and

(I) For use of existing South Platte river basin surface water rights, an affidavit signed by the record owner of the water rights stating that, during the term of the substitute water



supply plan, the land historically irrigated by the water rights shall not be irrigated except with nontributary groundwater or potable water supplied by a municipality or water district;

(II) The applicant has provided written notice of the request for approval of the substitute water supply plan and has made available the information required in subparagraph (I) of this paragraph (a), by first-class mail or electronic mail, to all parties who have subscribed to the substitute water supply plan notification list for water division 1 and all parties to the water court case in which the plan for augmentation was decreed, and proof of such notice is filed with the state engineer;

(III) The state engineer has given the owners of water rights and decreed conditional water rights and the parties to the water court case in which the plan for augmentation was decreed thirty days after the date of mailing of such notice to file comments on the substitute water supply plan. Such comments shall include any claim of injury or any terms and conditions that should be imposed upon the plan to prevent injury to a party's water rights or decreed conditional water rights and any other information the opposer wishes the state engineer to consider in reviewing the substitute water supply plan request.

(IV) The state engineer, after consideration of the comments received, has determined that the operation and administration of such plan will, when combined with replacements under the decreed augmentation plan, replace all out-of-priority depletions caused by the pre-January 1, 2003, diversions from wells included in the decreed augmentation plan in time, location, and amount required by the decree, and will otherwise prevent injury to other water rights and decreed conditional water rights, including water quality and continuity to meet the requirements of use to which the senior appropriation has normally been put pursuant to section 37-80-120 (3), and will not impair compliance with any interstate compacts. The state engineer shall impose such terms and conditions as are necessary to ensure that these standards are met, including, but not limited to, the terms and conditions required by paragraph (b) of this subsection (10). In making the determinations specified in this subparagraph (IV), the state engineer shall not be required to hold any formal hearings or conduct any other formal proceedings, but may conduct a hearing or formal proceeding if the state engineer finds it necessary to address the issues.

(b) The following terms and conditions shall be included in any substitute water supply plan approved pursuant to this subsection (10):

(I) For use of existing South Platte river basin surface water rights, the land historically irrigated by such water rights shall not be irrigated during the term of the substitute water supply plan except with nontributary groundwater or potable water supplied by a municipality or water district. Where the historically irrigated crop is alfalfa, an appropriate reduction in the allowable consumptive use credit shall be imposed if the alfalfa has not been completely removed from the historically irrigated land during the term of the substitute water supply plan.

(II) For use of existing South Platte river basin surface water rights, an annual volumetric limit on diversions and a monthly volumetric limit on diversions, which shall not be greater than the average annual and maximum monthly historical diversions of the water rights.

(III) For use of existing South Platte river basin surface water rights, all return flows that would have accrued to the stream from the historical use of the water rights shall be replaced, including the return flows that would have occurred after the end of the one-year substitute water supply plan. All such return flows shall be deemed to be an obligation of the applicant for the substitute water supply plan and shall be included as a replacement obligation in any projection required by the augmentation plan decree in which such water is proposed to be used, and after the end of any approved substitute water supply plan, all continuing return flow obligations shall be enforceable in the same manner as all other terms and conditions of the augmentation plan decree under which the water rights in the substitute water supply plan were used.

(IV) For use of existing South Platte river basin surface water rights, no water pumped from augmentation wells, as such wells are defined in section 37-90-103 (21) (a), shall be used to replace return flows that would have accrued to the stream from the historical use of the water rights.

(V) The amount of water made available under the approved substitute water supply plan shall not be included as a source of water for replacement of depletions in any projection required by the augmentation plan decree in which such water is proposed to be used until the substitute water supply plan is approved, and then only for the term of the approved substitute water supply plan or the term of the agreement or other document which evidences the applicant's right to use the water rights for augmentation, whichever is shorter.

(VI) The accounting for the approved substitute water supply plan shall be incorporated into the accounting for the augmentation plan decree in which such water is proposed to be used and shall be shown in the accounting in separate line items. Such accounting and all supporting documents for such accounting shall be provided by the applicant to any party requesting such accounting and supporting documents in writing and upon payment of reasonable reproduction costs.

(VII) If any term or condition of the approved substitute water supply plan conflicts with any of the terms and conditions of the augmentation plan decree, the terms and conditions of the augmentation plan decree shall control.

(c) A substitute water supply plan approved pursuant to this subsection (10) shall not be approved for a period of more than one year; except that an applicant may request the renewal of a plan by repeating the application process described in this subsection (10). However, in no event shall an individual water right or source of water native to the South Platte river basin, including the pro rata portion of a water right represented by shares in a mutual ditch company, be approved for use in a substitute water supply plan approved pursuant to this subsection (10) for a total of more than five years.

(d) When the state engineer approves or denies a substitute water supply plan pursuant to this subsection (10), the state engineer shall serve a copy of the decision on all parties who have subscribed to the substitute water supply plan notification list for water division 1 and all parties to the water court case in which the plan for augmentation was decreed by first-class mail or, if such parties have so elected, by electronic mail. Neither the approval nor the denial by the state engineer shall create any presumptions, shift the burden of proof, or serve as a defense in any legal action involving the substitute water supply plan. Any appeal of a decision made by the state engineer concerning a substitute water supply plan approved or denied pursuant to this subsection (10) shall be made within thirty-five days after the date of service of the decision. Any such appeal shall be filed under the same case number as the decreed plan for augmentation and shall be heard under the retained jurisdiction of the water judge, using the procedures and standards set forth in sections 37-92-304 and 37-92-305, for determination of matters rereferred to the water judge by the referee. The water judge shall hear and determine any such appeal on an expedited basis. The applicant for the substitute water supply plan shall not use the proposed substitute water supply in the decreed plan for augmentation until any appeal under this paragraph (d) is decided by the water court. Following the determination on appeal by the water court, the applicant's use of water under the substitute water supply plan shall be governed by such water court determination, unless the terms of the augmentation plan decree provide otherwise.

(e) Nothing in this subsection (10) shall authorize or facilitate additional transbasin diversion of water from the Colorado river.

(f) (I) This subsection (10) is repealed, effective July 1, 2018.

(II) All approvals of substitute water supply plans under this subsection (10) shall expire on or before July 1, 2018.

(11) (a) (I) To provide sufficient time to integrate coal bed methane wells into the water court adjudication process for augmentation plans, during 2010, 2011, and 2012 the state engineer may approve annual substitute water supply plans for such wells using the procedures and standards set forth in this subsection (11). Until July 31, 2010, coal bed methane wells may continue to operate without a substitute water supply plan if the oil and gas operator submits a request for approval of a substitute water supply plan pursuant to this subsection (11) by April 30, 2010. Beginning August 1, 2010, and ending December 31, 2012, no coal bed methane well that withdraws tributary groundwater and impacts an over-appropriated stream shall operate unless:



- (A) Operation of the well is authorized pursuant to this section;
- (B) The well is included in a plan for augmentation approved by a water judge; or
- (C) The well is included in a substitute water supply plan approved pursuant to subsection (4) of this section.

(II) Beginning January 1, 2013, any coal bed methane well that withdraws tributary groundwater from a geologic formation in conjunction with the mining of minerals shall be continuously curtailed unless the well:

- (A) Is included in a plan for augmentation approved by a water judge;
- (B) Is included in a substitute water supply plan approved pursuant to subsection (4) of this section; or
- (C) Can be operated in priority without augmentation.

(III) The general assembly finds that the time period established in subparagraph (II) of paragraph (b) of this subsection (11) is sufficient to develop augmentation plan applications for these wells, and there shall be no subsequent extensions of this deadline.

(b) For a substitute water supply plan pursuant to this subsection (11), the state engineer may approve the temporary operation of a coal bed methane well that withdraws tributary groundwater only if the following conditions are met:

(I) The applicant has provided written notice of the request for approval of the substitute water supply plan by first-class mail or electronic mail to all parties who have subscribed to the substitute water supply plan notification list for the water division in which the proposed plan is located and proof of such notice is filed with the state engineer;

(II) All parties who have subscribed to the substitute water supply plan notification list for the water division in which the proposed plan is located have thirty-five days after the date of mailing of such notice to file comments on the substitute water supply plan. Such comments shall include any claim of injury, any terms and conditions that should be imposed upon the plan to prevent injury to a party's water rights or decreed conditional water rights, and any other information a party wishes the state engineer to consider in reviewing the substitute water supply plan request; and

(III) The state engineer, after consideration of the comments received, has determined that the operation and administration of such plan will: Replace all out-of-priority depletions occurring on or after June 2, 2009, in time, location, and amount, including delayed out-of-priority depletions that affect the stream system after expiration of the plan; otherwise prevent injury occurring on or after June 2, 2009, to other water rights and decreed conditional water rights, including water quality and continuity to meet the requirements of use to which the senior appropriation has normally been put pursuant to section 37-80-120 (3); and not impair compliance with any interstate compacts. The state engineer shall impose such terms and conditions as are necessary to ensure that these standards are met, which may include terms and conditions that remain in effect after expiration of the plan so as to require the proponent of the plan to replace delayed out-of-priority depletions occurring on or after June 2, 2009. In making such determinations, the state engineer shall not be required to hold any formal hearings or conduct any other formal proceedings, but may conduct a hearing or formal proceeding if the state engineer finds it necessary to address the issues.

(c) A substitute water supply plan approved pursuant to this subsection (11) shall not be approved for a period of more than one year; except that an applicant may request the renewal of a plan by repeating the application process described in this subsection (11). In no case shall a plan approved pursuant to this subsection (11) be renewed beyond December 31, 2012.

(d) When the state engineer approves or denies a substitute water supply plan, the state engineer shall serve a copy of the decision on all parties to the substitute water supply plan notification list for the water division in which the proposed plan is located by first-class mail or by electronic mail. Every decision of the state engineer shall provide a detailed statement of how all stream depletions were calculated, the location where they occur, how all replacement water sources were quantified, and what terms and conditions were imposed to prevent injury to other water rights and why they were imposed.

(e) Neither the approval nor the denial by the state engineer shall create any presumptions, shift the burden of proof, or serve as a defense in any legal action that may be initiated

concerning the substitute water supply plan. Any appeal of a decision made by the state engineer concerning a substitute water supply plan pursuant to this subsection (11) shall be to the water judge of the applicable water division within thirty-five days after the date of service of the decision. The water judge shall hear and determine such appeal on an expedited basis using the procedures and standards set forth in sections 37-92-304 and 37-92-305 for determination of matters referred to the water judge by the referee.

**Source:** **L. 2002:** Entire section added, p. 459, § 1, effective May 23. **L. 2003:** IP(4)(a), (4)(a)(II), (4)(a)(III), (4)(a)(IV), (4)(b), IP(5)(a), (5)(a)(IV), and (5)(b) amended and (9) added, p. 1368, § 5, effective April 25; (1)(c), (2), (3), (6), and (7) amended, p. 1446, § 1, effective April 30; (1)(b) amended, p. 2002, § 64, effective May 22. **L. 2004:** (3)(a) amended, p. 1205, § 80, effective August 4. **L. 2006:** IP(4)(a) amended, p. 1002, § 4, effective May 25. **L. 2008:** (3)(g) repealed, p. 1913, § 128, effective August 5. **L. 2009:** (10) added, (SB 09-147), ch. 108, p. 449, § 1, effective April 9; (4)(a)(IV), (4)(b), IP(5)(a), and (5)(b) amended, (HB 09-1129), ch. 389, p. 2104, § 2, effective June 2; (11) added, (HB 09-1303), ch. 390, p. 2110, § 6, effective June 2. **L. 2010:** IP(11)(a)(I) amended, (SB 10-165), ch. 31, p. 113, § 3, effective March 22. **L. 2012:** (3)(b)(III), (3)(b)(IV), (3)(c)(VIII), (3)(e), (5)(a)(III), (7), (10)(d), (11)(b)(II), and (11)(e) amended, (SB 12-175), ch. 208, p. 890, § 166, effective July 1; (8) amended, (SB 12-009), ch. 197, p. 793, § 9, effective July 1.

**Editor's note:** (1) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsections (3)(b)(III), (3)(b)(IV), (3)(c)(VIII), (3)(e), (5)(a)(III), (7), (10)(d), (11)(b)(II), and (11)(e) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

(2) Section 13 of chapter 197, Session Laws of Colorado 2012, provides that the act amending subsection (8) applies to revenues credited on or after July 1, 2012.

## ANNOTATION

**Law reviews.** For article, "Substitute Supply Plans: Recent Water Law Developments", see 31 Colo. Law. 67 (August 2002).

**State engineer's authority under this section is limited.** Legislative history demonstrates that the general assembly intended approval of all out-of-priority uses of water involving replacement water to be the sole province of the water courts, with the exception of the limited circumstances provided for in subsections (3), (4), (5), and (7) of this section and in §§ 37-80-120 (5) and 37-90-137 (11)(b). *Simpson v. Bijou Irrigation Co.*, 69 P.3d 50 (Colo. 2003).

**"Replacement plan" defined.** A "replacement plan", as used in this section and the state engineer's proposed rules, is the functional equivalent of a "substitute supply plan" and refers to the source of water that a junior or undecreed well user makes available to a senior appropriator to offset any injury caused to the senior by the junior's or undecreed well user's out-of-priority depletions. *Simpson v. Bijou Irrigation Co.*, 69 P.3d 50 (Colo. 2003).

**Augmentation plan defined.** An augmentation plan is the functional equivalent of a sub-

stitute supply plan or "replacement plan" but, significantly, has been sanctioned by court decree and thereby renders the out-of-priority diversion no longer susceptible to curtailment by the state engineer pursuant to §§ 37-92-501 (1) and 37-92-502 (2)(a), so long as the replacement water is supplied to avert injury to senior rights. *Simpson v. Bijou Irrigation Co.*, 69 P.3d 50 (Colo. 2003).

**Limitations in this section apply to rules adopted by the state engineer pursuant to the compact rule power granted by § 37-80-104, as well as to those adopted pursuant to the water rule power granted by § 37-92-501.** *Simpson v. Bijou Irrigation Co.*, 69 P.3d 50 (Colo. 2003).

**Standard of review for state engineer's determination of a substitute water supply plan application pursuant to subsection (4)(c) is that established in the Colorado Administrative Procedure Act, not de novo review as is specified for appeals of plans pursuant to subsections (3) and (11).** *Well Augmentation Subdist. v. City of Aurora*, 221 P.3d 399 (Colo. 2009).

**37-92-309. Interruptible water supply agreements - special review procedures - rules - water adjudication cash fund - legislative declaration.** (1) The general assembly hereby finds, determines, and declares that there are certain circumstances under which administrative approval of the use of interruptible water supply agreements can maximize



the beneficial use of Colorado water resources without the need for an adjudication and without injury to vested water rights or decreed conditional water rights. This section is intended to enable water users to transfer the historical consumptive use of an absolute water right for application to another type or place of use on a temporary basis without permanently changing the water right.

(2) For purposes of this section, "interruptible water supply agreement" means an option agreement between two or more water right owners whereby:

(a) The loaning water right owner agrees that, during the term of such agreement, it will stop its use of the loaned water right for a specified length of time if the option is exercised by the borrowing water right owner in accordance with the agreement; and

(b) The borrowing water right owner may divert the loaned water right for such owner's purposes, subject to the priority system and subject to temporary approval by the state engineer in accordance with this section.

(3) The state engineer is authorized to approve and administer interruptible water supply agreements that permit a temporary change in the point of diversion, location of use, and type of use of an absolute water right without the need for an adjudication pursuant to this article, subject to the following:

(a) The applicant for approval of an interruptible water supply agreement shall provide written notice of the application by first-class mail or electronic mail to all parties who have subscribed to the substitute water supply plan notification list, as described in section 37-92-308 (6), for the division or divisions in which the water right is located and in which it will be used, and proof of such notice shall be filed with the state engineer. The application shall be accompanied by a detailed written report, prepared by a professional engineer or other professional acceptable to the state engineer, that evaluates the historical consumptive use, return flows, and the potential for material injury to other water rights relating to the interruptible water supply agreement and that proposes conditions to prevent such injury. The state engineer shall give the owners of water rights thirty-five days after the date of mailing of such notice to file comments on the operation of the interruptible water supply agreement. Such comments shall include any claim of injury or any terms and conditions that should be imposed upon the agreement so that it will not cause injury to a party's water rights or decreed conditional water rights, if such conditional rights will be exercised during operation of the interruptible water supply agreement, and any other information the party wishes the state engineer to consider in reviewing the application.

(b) The state engineer, after consideration of the comments from any party submitting comments, shall make a determination of the operation and administration of the interruptible water supply agreement to assure that such operation and administration will effect only a temporary change in the historical consumptive use of the water right in a manner that will not cause injury to other water rights and decreed conditional water rights, if such conditional rights will be exercised during operation of the interruptible water supply agreement, and will not impair compliance with any interstate compact. The interruptible water supply agreement shall include, but shall not be limited to, a quantification of the historical consumptive use of the water right, an accurate description of the land where the water is decreed for use, and, if the loaned water right is being used for irrigation, a plan to prevent erosion and blowing soils and a description of compliance with local county noxious weed regulations and other land use provisions. The state engineer shall impose such terms and conditions as are necessary to ensure that these standards are met. In making the determinations specified in this paragraph (b), the state engineer shall not be required to hold any formal hearing or conduct any other formal proceedings, but may conduct a hearing or formal proceeding if the state engineer finds it necessary to address the issues.

(c) An interruptible water supply agreement approved pursuant to this section shall not be exercised for more than three years in a ten-year period for which only a single approval is required. The ten-year period shall begin with the granting of such approval. A water right subject to the agreement under this section may not use section 37-92-308 (5). An interruptible water supply agreement approved pursuant to this subsection (3) shall not be approved for another ten-year period; except that, if such agreement has not been exercised during the term of the agreement, an applicant may reapply one time by repeating the application process pursuant to this subsection (3).

(d) The applicant shall give notice by March 1 of any year that the option is to be exercised to all parties who filed comments with the state engineer pursuant to this section, unless earlier required in the agreement; except that the option may be exercised at any time during 2003.

(4) (a) When the state engineer approves or denies an interruptible water supply agreement, the state engineer shall serve a copy of the decision upon all parties to the application by first-class mail or, if such parties have so elected, by electronic mail. Neither the approval nor the denial of the agreement by the state engineer shall create any presumptions, shift the burden of proof, or serve as a defense in any legal action that may be initiated concerning the interruptible water supply agreement. Any appeal of a decision made by the state engineer concerning the operation of an interruptible water supply agreement pursuant to this section shall be expedited, shall be limited to the issue of injury, and shall be made within thirty-five days after mailing of the decision to the water judge in the applicable water division. All parties to the appeal shall pay to the water clerk a fee to cover the direct costs associated with the expedited appeal. The water judge shall hear and determine such appeal using the procedures and standards set forth in sections 37-92-304 and 37-92-305 for determination of matters rereferred to the water judge by the referee; except that the water judge shall not deem any failure to appeal all or any part of the decision of the state engineer or failure to state any grounds for appeal to preclude any party from raising any claims of injury in a future proceeding before the water judge. The proponent of the interruptible water supply agreement shall be deemed to be the applicant for purposes of application of such procedures and standards. Moneys from such fee shall be transmitted to the state treasurer and deposited in the water adjudication cash fund, which fund is hereby created in the state treasury. The general assembly shall appropriate moneys in the fund for the judicial department's expedited adjudications pursuant to this section.

(b) A party to the original application may file comments concerning potential injury to such party's water rights or decreed conditional water rights due to the operation of the interruptible water supply agreement with the state engineer by January 1 of the year following the first year that the interruptible water supply agreement has been exercised. The procedures of subsection (3) of this section regarding notice, opportunity to comment, and the state engineer's decision, and the procedures of this subsection (4) regarding an appeal of such decision, shall again be followed with regard to such party's comments.

(5) Applicants for approval of an interruptible water supply agreement pursuant to this section shall pay a fee established by the state engineer, pursuant to rules promulgated by the state engineer. The state engineer shall collect the fees and transmit them to the state treasurer, who shall deposit them in the water resources cash fund created in section 37-80-111.7 (1).

**Source:** L. 2003: Entire section added, p. 2400, § 1, effective June 5. L. 2004: (3)(c) and (4) amended, p. 1362, § 1, effective August 4. L. 2012: (3)(a) and (4)(a) amended, (SB 12-175), ch. 208, p. 893, § 167, effective July 1; (5) amended, (SB 12-009), ch. 197, p. 793, § 10, effective July 1.

**Editor's note:** (1) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsections (3)(a) and (4)(a) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

(2) Section 13 of chapter 197, Session Laws of Colorado 2012, provides that the act amending subsection (5) applies to revenues credited on or after July 1, 2012.

## PART 4

### PUBLICATION OF WATER RIGHTS PRIORITIES

**Cross references:** For the appointments and functions of water division engineers, see § 37-92-202.

#### **37-92-401. Biennial tabulations of priorities and decennial abandonment lists.**

(1) (a) No later than July 1, 1988, and each fourth anniversary thereafter, the division



engineer of each division with the approval of the state engineer shall prepare a quadrennial tabulation in order of seniority of all decreed water rights and conditional water rights in his division; except that a tabulation shall be prepared no later than July 1, 1994, and July 1 of every second year thereafter. Such biennial tabulations shall describe each water right and conditional water right by some appropriate means and shall set forth the priority and amount thereof as established by court decrees. In making such biennial tabulations, the division engineer may use such system of numbering and listing water rights and conditional water rights in order of seniority as is suited to the administrative needs of the particular division or portion thereof. He shall prepare separate priority lists so that only those water rights and conditional water rights which take or will take water from the same source and are in a position to affect one another will be on the same priority list. He shall also prepare decennially, no later than July 1, 1990, and each tenth anniversary thereafter, a separate abandonment list comprising all absolute water rights which he has determined to have been abandoned in whole or in part and which previously have not been adjudged to have been abandoned.

(a.5) The biennial tabulations required by this section shall reflect judgments and decrees determining, changing, or otherwise affecting water rights and conditional water rights, which judgments and decrees have been entered subsequent to those reflected in the immediately preceding tabulation authorized, as the case may be, by this section or by section 37-92-402. The biennial tabulations shall also reflect, as appropriate, any changes in earlier abandonment lists as have been ordered by the water judge or by the supreme court. Except as specified in this paragraph (a.5), the biennial tabulations shall make no changes in the listings from those reflected in the respective immediately preceding tabulation authorized, as the case may be, by this section or by section 37-92-402, other than changes to correct clerical errors.

(b) In determining the priority of a water right in relation to other water rights deriving their supply from the same common source, the following procedures and definitions shall apply:

(I) A common source means and includes all of those waters in a water division, either surface or underground, which if left in their natural state would join together to form a single natural watercourse prior to exit from the water division.

(II) As among water rights decreed in the same water district in the same adjudication suit, the historic date of initiation of appropriation shall determine the relative priorities, beginning with the earliest right.

(III) As among water rights decreed in the same water district in different adjudication suits, all water rights decreed in an adjudication suit shall be senior to all water rights decreed in any subsequent adjudication suit.

(IV) As among water rights decreed in the various original adjudication suits in the various water districts of the same water division, the decreed date of initiation of appropriation shall determine the relative priorities in numbered sequence, beginning with the earliest right.

(V) As among water rights decreed in the various supplemental adjudication suits in the various water districts of the same water division, the actual priority date of any decree in any district shall not extend back further than the day following the entry of the final decree in the preceding adjudication suit in such district.

(VI) If, in the preparation of the tabulations provided for in this section, the application of the preceding principles would cause in any particular case a substantial change in the priority of a particular water right to the extent theretofore lawfully enjoyed for a period of not less than eighteen years, then the division engineer shall designate the priority for that water right in accordance with historic practice. In no event shall the provisions of this subparagraph (VI) entitle a water right to a priority senior to its actual date of initial appropriation or to freedom from regulation and administration in the priority system.

(c) In making his determinations with respect to abandonment, the division engineer shall investigate the circumstances relating to each water right for which the available water has not been fully applied to a beneficial use and in such cases shall be guided by the criteria set out in section 37-92-402 (11). The decennial abandonment list, when concluded by

judgment and decree as provided in this section, shall be conclusive as to absolute water rights or portions thereof determined to have been abandoned.

(2) (a) No later than August 31, 1988, and every second anniversary thereafter, the water clerk, in cooperation with the division engineer, shall cause notice of the availability of the biennial tabulation to be included in the resume described in section 37-92-302 (3) of cases filed in the respective water divisions during the month of July. In addition, the water clerk shall cause such publication of the notice as is necessary to obtain general circulation once in each county or portion thereof in the division. A copy of such biennial tabulation shall be available for inspection in the offices of the state and respective division engineers and the respective water commissioners and water clerks at any time during regular office hours and shall be available for purchase from the office of the state engineer and respective division engineer by any person specifically requesting same upon the payment of a fee of ten dollars.

(b) No later than July 31, 1990, and every tenth anniversary thereafter, the division engineer shall mail a copy of the respective decennial abandonment list by certified mail, return receipt requested, to the owner or last-known owner or claimant, if known, of every absolute water right which the division engineer has found to have been abandoned in whole or in part. The division engineer shall make such examination as is reasonably appropriate to determine the owner or claimant of such absolute water rights. He shall also cause publication to be made of the respective portion of the decennial abandonment list in each county in which the points of diversion of any absolute water rights on the list are located. Such publication shall be made for four successive weeks and shall be published, if possible, in a newspaper published in the county where the decreed point of diversion of the water right is located. The publication and mailing requirements of this paragraph (b) shall apply only to absolute water rights or portions thereof which previously have not been adjudged to have been abandoned.

(3) Not later than July 1, 1989, and every second anniversary thereafter, any person wishing to object to the manner in which a water right or conditional water right is listed in the biennial tabulation or to the omission of a water right or conditional water right from such biennial tabulation, and not later than July 1, 1991, and every tenth anniversary thereafter, any person wishing to object to the inclusion of any absolute water right or portion thereof in the decennial abandonment list shall file a statement of objection in writing with the division engineer. A fee of ten dollars shall be paid with such filing; except that no fee shall be required for any such filing to correct any clerical error.

(4) (a) Not later than December 31, 1991, and every tenth anniversary thereafter, the division engineer shall make such revisions, if any, as he deems proper to the decennial abandonment list. In considering the matters raised by statements of objection, the division engineer may consult with any interested persons. The division engineer shall consult with the state engineer and shall make any revisions in the decennial abandonment list determined by the state engineer to be necessary or advisable.

(b) Repealed.

(c) The decennial abandonment list, together with any revisions, signed by the division engineer and the state engineer or his duly authorized deputy, shall be filed with the water clerk as promptly as possible, but not later than December 31, 1991, and every tenth anniversary thereafter. A copy of such decennial abandonment list, together with any revisions, shall be available in the office of each respective division engineer and the offices of each water commissioner, the state engineer, and the respective water clerk for inspection at any time during regular office hours, and the division engineer shall furnish or mail a copy to anyone requesting same upon payment of a fee of ten dollars.

(d) If the decennial abandonment list is revised, the water clerk, in cooperation with the division engineer, not later than January 31, 1992, and every tenth anniversary thereafter, shall cause notice of the availability of such revision to be included in the resume described in section 37-92-302 (3) of cases filed in the respective water divisions during said month of December stating that the revision may be inspected or a copy thereof obtained as specified in paragraph (c) of this subsection (4). In addition, the water clerk shall cause such publication of the notice as is necessary to obtain general circulation once in each county or portion thereof which is in the division.



(5) (a) Any person who wishes to protest the inclusion of any water right in a decennial abandonment list after its revision by the division engineer shall file a written protest with the water clerk and with the division engineer. All such protests to the decennial abandonment list shall be filed not later than June 30, 1992, or the respective tenth anniversary thereafter. Such protest shall set forth in detail the factual and legal basis therefor. Service of a copy of the protest or any other documents is not necessary for jurisdictional purposes, but the water judge may order service of a copy of the protest or any other document on any person and in any manner which he or she may deem appropriate. The fee for filing such protest with the water clerk shall be forty-five dollars.

(b) Fees collected pursuant to paragraph (a) of this subsection (5) shall be transmitted to the state treasurer and divided as follows:

(I) Twenty dollars shall be deposited in the general fund;

(II) Fifteen dollars shall be deposited in the judicial stabilization cash fund created in section 13-32-101 (6), C.R.S.; and

(III) Ten dollars shall be deposited in the justice center cash fund created in section 13-32-101 (7) (a), C.R.S.

(6) Commencing on the September or October term-day of 1992, as provided in section 37-92-304 (1), and every tenth anniversary thereafter, and continuing for as long as may be necessary, the water judge of each division shall conduct hearings on the decennial abandonment list filed by the division engineer and any protests that have been filed with respect thereto. The hearings shall be conducted in accordance with the Colorado rules of civil procedure, the Colorado rules of evidence, and any applicable local rules of court; except that no pleadings other than the protest shall be required. The protestant shall appear either in person or by counsel in support of the protest. The division engineer shall appear in support of the decennial abandonment list, and, if requested by the division engineer, the attorney general shall represent the division engineer. The water judges of the various divisions shall arrange their hearings, if necessary in their discretion, to accommodate counsel and other persons who may be involved in hearings in more than one division. Any person who may be affected by the subject matter of a protest or by any ruling thereon shall be permitted to participate in the hearings, either in person or by counsel, upon timely entry of appearance. Such entry of appearance shall identify the portion of the decennial abandonment list with respect to which the appearance is being made. The water judge may continue the hearings as required to insure that all parties may be heard and their interests adequately protected, and, in this connection, the water judge shall permit such additional protests and order such service of notice and such additional publication of the decennial abandonment list or portions thereof as will serve the ends of justice, it being the intent of the general assembly that the water judge shall have wide discretion in the conduct of such hearings so that the owners of water rights will be protected. After the hearings are concluded, the water judge shall enter a judgment and decree which shall either incorporate the abandonment list of the division engineer as filed or incorporate such list with such modifications and conditions as the water judge may determine proper after the hearings.

(7) If no protests have been filed, then promptly after July 1, 1992, and every tenth anniversary thereafter, the water judge shall enter a judgment and decree incorporating and confirming the decennial abandonment list of the division engineer without modification.

(8) A copy of the judgment and decree entered under subsection (6) or (7) of this section shall be filed with the state engineer and the division engineer and shall be provided by the water clerk to any other person requesting same upon payment of a fee of seventy-five cents per page. Promptly after receiving such judgment and decree, the division engineer and the state engineer shall enter in their records the determinations therein made as to the absolute water rights or portions thereof adjudged to have been abandoned and shall regulate the distribution of water accordingly.

(9) Appellate review shall be allowed to the judgment and decree entered under subsection (6) or (7) of this section or any part thereof as in other water matters, but no appellate review shall be allowed with respect to that part of such judgment or decree which confirms a portion of the decennial abandonment list with respect to which no protest was filed.

(10) Clerical mistakes in the judgment and decree entered under subsection (6) or (7) of this section may be corrected by the water judge on his own initiative or on the petition of any person, and substantive errors therein may be corrected by the water judge on the petition of any person whose rights have been adversely affected thereby and a showing satisfactory to the water judge that such person, due to mistake, inadvertence, or excusable neglect, failed to file a protest to the decennial abandonment list with the water clerk within the time specified in this section. Any such petition under this subsection (10) shall be filed with the water clerk within four years after the date of the entry of such judgment and decree. The water judge shall order such notice of any such correction proceedings as he determines to be appropriate to advise all persons who may be affected thereby. Any order of the water judge making such corrections shall be subject to appellate review as specified in subsection (9) of this section.

(11) The tabulations provided for in this part 4, and any revisions thereto, may be used by the division engineers, the state engineer, and their staffs for administrative purposes. The listing of the water rights in a tabulation shall not create any presumption against abandonment, and the relative listing of water rights in a tabulation shall not create any presumption of seniority. A tabulation shall not be construed to modify special provisions of court decrees adjudicating, changing, or otherwise affecting such water rights or to modify contractual arrangements governing the interrelationship of such water rights. For the purpose of identification and description only, the tabulation may include additional information regarding the water rights listed, but this additional information shall be neither conclusive nor presumptive of the truth or accuracy of the matters contained therein. Nothing in this section or in section 37-92-402, other than those specific provisions relating to the abandonment lists of the division engineers, shall ever be construed to have enhanced or diminished any cause of action or defense which might otherwise exist concerning the administration of water rights in any water division.

(12) Notwithstanding the amount specified for any fee in this section, the state engineer by rule or as otherwise provided by law may reduce the amount of one or more of the fees if necessary pursuant to section 24-75-402 (3), C.R.S., to reduce the uncommitted reserves of the fund to which all or any portion of one or more of the fees is credited. After the uncommitted reserves of the fund are sufficiently reduced, the state engineer by rule or as otherwise provided by law may increase the amount of one or more of the fees as provided in section 24-75-402 (4), C.R.S.

**Source:** L. 69: p. 1212, § 1. C.R.S. 1963: § 148-21-27. L. 71: p. 1335, § 1. L. 73: p. 1527, §§ 1, 2. L. 75: (5) amended, p. 1399, § 1, effective July 1. L. 79: (1)(b)(VI) amended, p. 1379, § 1, effective June 19. L. 83: (1)(a), (2), (3), (4)(a), (4)(c), and (4)(d) amended, (1)(a.5), (1)(c), (6) to (11) added, (5) R&RE, and (4)(b) repealed, pp. 1431, 1432, 1434, 1440, §§ 1, 2, 3, 4, 8, effective June 16. L. 93: (1)(a), (1)(a.5), (2)(a), (3), and (4) amended, p. 397, § 1, effective April 19. L. 98: (12) added, p. 1346, § 77, effective June 1. L. 2003: (5) amended, p. 574, § 7, effective March 18. L. 2007: (5) amended, p. 1539, § 32, effective May 31. L. 2008: (5) amended, p. 2145, § 15, effective June 4.

**Cross references:** (1) For water clerk preparing resume of applications for water rights each month, see § 37-92-302 (3).

(2) For the legislative declaration contained in the 2008 act amending subsection (5), see section 1 of chapter 417, Session Laws of Colorado 2008.

## ANNOTATION

**Law reviews.** For article, "Use of Colorado Water Rights In Secured Transactions", see 18 Colo. Law. 2307 (1989).

**Stream administration.** Streams independently appropriated remain independent under the doctrine of prior appropriation unless the water of those streams becomes subject to equitable apportionment by compact, in which

case the streams must be administered as mandated by the compact or statutory provisions for priority administration of water rights. Alamosa-La Jara Water Users Prot. Ass'n v. Gould, 674 P.2d 914 (Colo. 1983).

**Diversions made pursuant to water right considered historical use where not ordered discontinued.** Where the water commissioner



was aware of the landowners' diversions of water and had never ordered them to be discontinued or limited, the diversions made pursuant to a water right, though not in priority, could be considered as establishing an historical use for the purpose of the change of water right. *South-eastern Colo. Water Conservancy Dist. v. Rich*, 625 P.2d 977 (Colo. 1981).

**Effect of failure to comply with § 37-92-301(4).** The water court is not estopped from cancelling an 1889 conditional decree because that decree was included in a 1974 tabulation of water rights priorities prepared by the division engineer, if owners of the decree fail to comply with § 37-92-301(4). In *re Simineo v. Kelling*, 199 Colo. 225, 607 P.2d 1289 (1980).

**State engineer's authority to apply compact tributary rule.** A compact requiring administration of the Rio Grande mainstem and Conejos river according to delivery schedules

that did not include the contributions of three creeks as significant to the delivery obligation did away with the state engineer's authority to apply the tributary rule of the compact to the three creeks. *Alamosa-La Jara Water Users Prot. Ass'n v. Gould*, 674 P.2d 914 (Colo. 1983).

**Removal of water rights from the abandonment list alone is insufficient to rebut a presumption of an intent to abandon that is based upon substantial evidence;** rather, the list is simply evidence that the water court may consider and does not constitute a definitive decree or judgment on the water rights in question. *Haystack Ranch, LLC v. Fazzio*, 997 P.2d 548 (Colo. 2000).

**Applied in** *Kuiper v. Atchison, T&SF Ry.*, 195 Colo. 557, 581 P.2d 293 (1978); *Consolidated Home Supply v. Town of Berthoud*, 896 P.2d 260 (Colo. 1995).

### **37-92-402. Special procedures for the 1978 tabulation and abandonment list.**

(1) (a) No later than July 1, 1978, the division engineer, with the approval of the state engineer, shall prepare a new tabulation of all water rights and conditional water rights in his division. The 1978 tabulation shall reflect any changes in the 1974 tabulation previously authorized by statute which the division engineer and the state engineer determine to be advisable based on the principles set forth in section 37-92-401 (1) to reflect correctly the priority of water rights. The 1978 tabulation shall reflect judgments and decrees determining, changing, or otherwise affecting water rights and conditional water rights, which judgments and decrees have been entered subsequent to those reflected in the 1974 tabulation and prior to January 1, 1978, shall modify any water rights or conditional water rights which the division engineer determines to have been abandoned in part, and shall omit any water rights or conditional water rights which the division engineer determines have been totally abandoned. Except as specified in the preceding sentence, the tabulation pursuant to this section shall make no changes in the listings in the 1974 tabulation other than changes to correct clerical errors. The division engineer shall prepare a separate list tabulating the water rights which he determines to have been abandoned in whole or in part. In making his determination with respect to abandonment, the division engineer shall investigate the circumstances relating to each water right, the water available under which has not been fully applied to a beneficial use, and in such cases shall be guided by the criteria set forth in subsection (11) of this section. In making such 1978 tabulation, the division engineer shall apply the criteria set forth in section 37-92-401 (1).

(b) The abandonment list provided for in this section, when concluded by judgment and decree, shall be conclusive as to water rights determined to have been abandoned. The listing of the water rights in the 1978 tabulation shall not create any presumption against abandonment, and the relative listing of water rights in the 1978 tabulation shall not create any presumption of seniority. The tabulation shall not be construed to modify special provisions of court decrees adjudicating, changing, or otherwise affecting such water rights or to modify contractual arrangements governing the interrelationship of such water rights. For the purpose of identification and description only, the tabulation may include additional information regarding the water rights listed, but this additional information shall neither be conclusive nor be presumptive of the truth or accuracy of the matters contained therein.

(2) No later than July 10, 1978, the division engineer shall publish a notice that the 1978 tabulation has been made and that such tabulation may be inspected or a copy obtained as specified in this subsection (2), and the division engineer shall mail a copy of such tabulation to each person whose name is on the list specified in section 37-92-302 (3) (c) and shall mail a copy of such tabulation by registered mail to the owner or last-known owner or claimant, if known, of every water right or conditional water right which the division engineer has found to have been abandoned in whole or in part or which has been

changed adversely and shall publish the 1978 abandonment list. The division engineer shall make such examination as is reasonably appropriate to determine the owner or claimant of such water rights. The aforementioned publication shall be such as is necessary to obtain general circulation once in each county or portion thereof which is in the division by means of one or more newspapers which, if possible, are published in the division. A copy of such 1978 tabulation and abandonment list, together with any revisions, shall be available in the office of each division engineer and the offices of each water commissioner and each county clerk and recorder for inspection at any time during regular office hours, and the division engineer shall furnish or mail a copy to anyone requesting the same upon payment of a fee of five dollars.

(3) Not later than July 1, 1980, any person who wishes to object to the manner in which a water right or conditional water right is listed in the 1978 tabulation or abandonment list or to the omission of a water right or conditional water right from such tabulation shall file a statement of objection in writing with the division engineer. A fee of ten dollars shall be paid with such filing; except that no fee shall be required for any such filing to correct any clerical error.

(4) On or before July 1, 1984, the division engineer shall make such revisions, if any, as he deems proper in the 1978 tabulation and abandonment list. In considering the matters raised by statements of objections, the division engineer may consult with interested persons. The division engineer shall consult with the state engineer and shall make any revisions in the 1978 tabulation and abandonment list determined by the state engineer to be necessary or advisable. If the division engineer determines such to be advisable or if requested by the objector in the statement of objection, the division engineer shall hold an informal hearing on the subject matter contained in said statement of objection. The revised 1978 tabulation and abandonment list or, if there are no revisions, the original 1978 tabulation and abandonment list, signed by the division engineer and by the state engineer, shall be filed on or before July 1, 1984, with the water clerk. A copy of such 1978 tabulation and such abandonment list, together with any revisions, shall be available in the office of each division engineer and the offices of each water commissioner and each county clerk and recorder for inspection at any time during regular office hours, and the division engineer shall furnish or mail a copy to anyone requesting the same upon payment of a fee of five dollars. If the 1978 tabulation or the abandonment list is revised, the division engineer, on or before August 31, 1984, shall cause notice of such revisions to be included in the resume described in section 37-92-302 (3) of cases filed in the respective water divisions during the month of July, 1984, specifying that the revisions may be inspected or a copy thereof obtained as specified in this subsection (4). Such publication shall be made as is necessary to obtain general circulation once in each county or portion thereof which is in the division.

(5) The division engineer shall mail a copy of the abandonment list and any revisions thereto by registered mail to the owner or last-known owner or claimant, if known, of every water right which the division engineer has found to have been abandoned in whole or in part. The division engineer shall make such examination as is reasonably appropriate to determine the owner or claimant of such water rights. He shall also cause publication to be made of the abandonment list and any revisions thereto in each county in which water rights on the list are located. Such publication shall be made for four successive weeks and shall be published, if possible, in a newspaper published in the county where the water right is located. Any person who wishes to protest the inclusion of any water right on the abandonment list and any revisions thereto shall file a written protest in accordance with the procedures of section 37-92-401 (5); except that such protests shall be filed with the water clerk not later than December 31, 1984.

(6) Commencing on the March or April term-day of 1985, as the case may be in the respective divisions, pursuant to section 37-92-304 (1), and continuing for as long as may be necessary, the water judge of each division shall conduct hearings on the abandonment list and any revisions thereto filed by the division engineer and any protests that have been filed with respect thereto. The hearings shall be conducted in accordance with the provisions of section 37-92-401 (6).

(7) If no protests have been filed, then not later than July 1, 1985, the water judge shall enter a judgment and decree incorporating and confirming the abandonment list and any revisions thereto of the division engineer without modification.



(8) A copy of the judgment and decree entered pursuant to subsection (6) or (7) of this section shall be filed with the state engineer and the division engineer and shall be provided by the water clerk to any other person requesting same upon payment of a fee of seventy-five cents per page. Promptly after receiving such judgment and decree, the division engineer and the state engineer shall enter in their records the determinations therein made as to date of priority, date of adjudication, and volume and amount of the water rights and conditional water rights adjudged to have been abandoned and shall regulate the distribution of water accordingly.

(9) Appellate review shall be allowed to the judgment and decree entered pursuant to subsection (6) or (7) of this section or any part thereof as in other water matters, but no appellate review shall be allowed with respect to that part of such judgment or decree which confirms a portion of the abandonment list and any revisions thereto with respect to which no protest was filed.

(10) Clerical mistakes in the judgment and decree entered pursuant to subsection (6) or (7) of this section may be corrected by the water judge on his own initiative or on the petition of any person, and substantive errors therein may be corrected by the water judge on the petition of any person whose rights have been adversely affected thereby and a showing satisfactory to the water judge that such person, due to mistake, inadvertence, or excusable neglect, failed to file a protest to the abandonment list and any revisions thereto with the water clerk within the time specified in this section. Any petition referred to in the preceding sentence shall be filed with the water clerk within four years after the date of the entry of said judgment and decree. The water judge shall order such notice of any such correction proceedings as he determines to be appropriate to advise all persons who may be affected thereby. Any order of the water judge making such corrections shall be subject to appellate review as specified in subsection (9) of this section.

(11) For the purpose of procedures under this section, failure for a period of ten years or more to apply to a beneficial use the water available under a water right when needed by the person entitled to use same shall create a rebuttable presumption of abandonment of a water right with respect to the amount of such available water which has not been so used; except that such presumption may be waived by the division engineer or the state engineer if special circumstances negate an intent to abandon.

(12) No proceeding previously initiated before the water judge pertaining to the 1974 tabulation referred to in previous statutes shall be maintained; except that the dismissal of any such proceeding shall be without prejudice with respect to any substantive matters alleged therein.

(13) The use and effect of the 1978 tabulation, as distinguished from the abandonment list, shall be governed by the provisions of section 37-92-401 (11).

(14) The provisions of this section shall apply only to the 1978 tabulation and abandonment list authorized by this section.

(15) Notwithstanding the amount specified for any fee in this section, the state engineer by rule or as otherwise provided by law may reduce the amount of one or more of the fees if necessary pursuant to section 24-75-402 (3), C.R.S., to reduce the uncommitted reserves of the fund to which all or any portion of one or more of the fees is credited. After the uncommitted reserves of the fund are sufficiently reduced, the state engineer by rule or as otherwise provided by law may increase the amount of one or more of the fees as provided in section 24-75-402 (4), C.R.S.

**Source:** L. 69: p. 1214, § 1. C.R.S. 1963: § 148-21-28. L. 73: p. 1528, §§ 3, 4. L. 75: Entire section amended, p. 1399, § 2, effective July 1. L. 79: (1)(b) amended, p. 1380, § 1, effective May 18. L. 81: (4) to (7) amended, p. 1789, § 4, effective July 1. L. 83: (1) to (4) and (6) to (10) amended, (13) and (14) added, and (5) R&RE, pp. 1436, 1438, 1439, §§ 5-7, effective June 16; (8) amended, p. 1429, § 4, effective July 1. L. 98: (15) added, p. 1346, § 78, effective June 1.

**Editor's note:** Amendments to subsection (8) by Senate Bill 83-90 and House Bill 83-1255 were harmonized.

**Cross references:** For publication of legal notices, see part 1 of article 70 of title 24; for water clerk preparing resume of applications for water rights each month, see § 37-92-302 (3).

## ANNOTATION

**Law reviews.** For comment, "Maximum Utilization Collides With Prior Appropriation in A-B Cattle Co. v. United States", see 57 Den. L.J. 103 (1979). For comment, "Town of De Beque v. Enewold: Conditional Water Rights and Statutory Water Law", see 58 Den. L.J. 837 (1981).

**Annotator's note.** Since § 37-92-402 is similar to repealed C.R.C.P. 99, relevant cases construing that provision have been included in the annotations to this section.

**Under former C.R.C.P. 99, abandonment of a priority in an irrigation ditch was a matter that properly may be litigated** in a suit to change the point of diversion of water. *Flasche v. Westcolo Co.*, 112 Colo. 387, 149 P.2d 817 (1944).

**When water is abandoned it is abandoned to the stream.** *City & County of Denver v. Just*, 175 Colo. 260, 487 P.2d 367 (1971).

**An asserted water right which never comes into being cannot be "abandoned".** *Green v. Chaffee Ditch Co.*, 150 Colo. 91, 371 P.2d 775 (1962).

**It is not reasonable to suppose that priority of right to water, where water is scarce, or likely to become so, will be lightly sacrificed or surrendered by its owner, nor shall the owner of a right be held to have surrendered it (or merged it) except on reasonably clear and satisfactory evidence.** *Saunders v. Spina*, 140 Colo. 317, 344 P.2d 469 (1959).

**Abandonment of water right must be proven by preponderance of evidence.** *Denver v. Snake River Water Dist.*, 788 P.2d 772 (Colo. 1990).

**Where there was evidence to support the water court's finding that there was no intent to abandon a water right, the appellate court must affirm that finding since this is largely a fact question.** *In re Orr v. City & County of Denver*, 194 Colo. 125, 572 P.2d 805 (1977); *Masters Inv. Co. v. Irrigationists Ass'n*, 702 P.2d 268 (Colo. 1985); *Denver v. Snake River Water Dist.*, 788 P.2d 772 (Colo. 1990).

**Diligent efforts to sell water rights shows an intent not to abandon such rights.** *Denver v. Snake River Water Dist.*, 778 P.2d 772 (Colo. 1990).

**Testimony of owner regarding desire to place a water right on the market for sale, absent other consistent and competent rebuttal evidence, will not defeat presumption of abandonment.** *People v. City of Thornton*, 775 P.2d 11 (Colo. 1989).

**A court will require clear and convincing proof before concluding that a person aban-**

**doned an 1885 water right**, one of the oldest on a river in an arid or semiarid area. *Lengel v. Davis*, 141 Colo. 94, 347 P.2d 142 (1959).

**"Unreasonable" period of nonuse is prima facie case of abandonment.** Upon a showing that there has been an "unreasonable" period of nonuse, a prima facie case of abandonment is made, which in turn shifts the burden of going forward to the water rights' owner, who may then introduce evidence sufficient to rebut the presumption established by nonuse. *Beaver Park Water, Inc. v. City of Victor*, 649 P.2d 300 (Colo. 1982); *Masters Inv. Co. v. Irrigationists Ass'n*, 702 P.2d 268 (Colo. 1985); *SE Colo. Water Cons. v. Twin Lakes Assoc.*, 770 P.2d 1231 (Colo. 1989); *People v. City of Thornton*, 775 P.2d 11 (Colo. 1989); *Denver v. Snake River Water Dist.*, 788 P.2d 772 (Colo. 1990).

**Abandonment of a water right requires a concurrence of nonuse and intent to abandon.** *Beaver Park Water, Inc. v. City of Victor*, 649 P.2d 300 (Colo. 1982); *People v. City of Thornton*, 775 P.2d 11 (Colo. 1989).

**Intent is the very essence of abandonment.** *Beaver Park Water, Inc. v. City of Victor*, 649 P.2d 300 (Colo. 1982); *Masters Inv. Co. v. Irrigationists Ass'n*, 702 P.2d 268 (Colo. 1985); *People v. City of Thornton*, 775 P.2d 11 (Colo. 1989); *Denver v. Snake River Water Dist.*, 788 P.2d 772 (Colo. 1990).

**Evidence that water rights were not used because they were not needed is probative of the question of intent.** *Masters Inv. Co. v. Irrigationists Ass'n*, 702 P.2d 268 (Colo. 1985).

**As long as an appropriator continues the use of his rights without an unreasonable period of voluntary cessation, abandonment will not be presumed against him.** *Saunders v. Spina*, 140 Colo. 317, 344 P.2d 469 (1959).

**Nonuse alone will not establish abandonment where the owner introduces sufficient evidence to show that during the period of nonuse there never was any intention to permanently discontinue the use of the water.** *Beaver Park Water, Inc. v. City of Victor*, 649 P.2d 300 (Colo. 1982); *People v. City of Thornton*, 775 P.2d 11 (Colo. 1989).

**Intent may be shown either expressly or by implication, with nonuse for a long period of time being evidence of an intent to abandon.** *Beaver Park Water, Inc. v. City of Victor*, 649 P.2d 300 (Colo. 1982); *Masters Inv. Co. v. Irrigationists Ass'n*, 702 P.2d 268 (Colo. 1985); *SE Colo. Water Cons. v. Twin Lakes Assoc.*, 770 P.2d 1231 (Colo. 1989); *Denver v. Snake River Water Dist.*, 788 P.2d 772 (Colo. 1990).

**Acceptable justifications for nonuse are limited.** While reasonable justification may ex-



ist for excusing a period of nonuse, acceptable justifications are extremely limited. *Beaver Park Water, Inc. v. City of Victor*, 649 P.2d 300 (Colo. 1982); *People v. City of Thornton*, 775 P.2d 11 (Colo. 1989).

Self-serving statements of intent by the owner of the water rights are insufficient by themselves to rebut a presumption of abandonment. *Beaver Park Water, Inc. v. City of Victor*, 649 P.2d 300 (Colo. 1982); *SE Colo. Water Cons. v. Twin Lakes Assoc.*, 770 P.2d 1231 (Colo. 1989); *Denver v. Snake River Water Dist.*, 788 P.2d 772 (Colo. 1990).

**Subsection (11) sets forth that 10 years will be deemed an unreasonable period of nonuse for purposes of the abandonment list.** *People v. City of Thornton*, 775 P.2d 11 (Colo. 1989).

**Where plaintiffs claim right to prior use of water, the burden is upon them to show a better record title than defendants,** or that defendants have abandoned or waived their prior rights. *Saunders v. Spina*, 140 Colo. 317, 344 P.2d 469 (1959).

**A party alleging abandonment, thereby assumes the burden of definitely proving abandonment** as a fact by clear and convincing evidence. *Cline v. McDowell*, 132 Colo. 37, 284 P.2d 1056 (1955); *Pouchoulou v. Heath*, 137 Colo. 462, 326 P. 656 (1958); *Means v. Pratt*, 138 Colo. 214, 331 P.2d 805 (1958).

**Abandonment is question of fact** and water court's determination will not be disturbed on appeal unless the evidence is wholly insufficient to support the decision. *People v. City of Thornton*, 775 P.2d 11 (Colo. 1989).

**The water judge correctly found that the presumption of abandonment created by the failure to put a water right to beneficial use for approximately 30 years was rebutted by an abundance of objective evidence regarding actions taken by the water right owner that are inconsistent with an intent to abandon,** including attempts to repair the ditch and divert water, the filing of legal documents with regard to the water right, the fact that the water right never appeared on the state engineer's abandonment list, the lease of the water right, diligent efforts to sell the water right along with the ranch, and financial obstacles to exercising the water right. *E. Twin Lakes Ditches & Water Works, Inc. v. Bd. of County Comm'rs*, 76 P.3d 918 (Colo. 2003).

**Mere failure to pay taxes on property does not constitute abandonment.** *Bd. of County Comm'rs v. Blanning*, 29 Colo. App. 61, 479 P.2d 404 (1970).

**A change in the method or means of conveying appropriated water from the source of supply to the point of beneficial use is not evidence of abandonment,** likewise the unauthorized, unprotested change of the point of diversion is not evidence of abandonment; on the other hand, it is evidence of nonabandonment. *Lengel v. Davis*, 141 Colo. 94, 347 P.2d 142 (1959).

**Where the evidence disclosed that a water user intended to and thought he was diverting water under a decreed priority of a ditch,** and had so diverted and used such water for many years, no intention to abandon could be inferred. *Means v. Pratt*, 138 Colo. 214, 331 P.2d 805 (1958).

**Where designated fractional amounts of a water priority are conveyed to grantees,** the use by one user in the ditch of water to which another user is entitled does not prevent abandonment by the second user. *City & County of Denver v. Just*, 175 Colo. 260, 487 P.2d 367 (1971).

**Where holders of a designated fractional amount of water priority made no use of it for at least 34 years** and there was not a shred of evidence to negate abandonment, the court must rule that there was abandonment. *City & County of Denver v. Just*, 175 Colo. 260, 487 P.2d 367 (1971).

**Where water rights appropriated for use on plaintiffs' land had not been used thereon for more than 18 years,** a finding by the trial court that such right had long been abandoned, was not error. *Kaess v. Wilson*, 132 Colo. 443, 289 P.2d 636 (1955).

And, where the evidence established that a headgate had not been replaced in at least fifty years, and that a ditch was in disrepair a finding by the water court that abandonment had occurred was not error. *Masters Inv. Co. v. Irrigationists Ass'n*, 702 P.2d 268 (Colo. 1985).

**Federal reserved water rights are immune from Colorado's nonuse requirement** to the extent necessary to fulfill the purposes of the reservation. *United States v. City & County of Denver*, 656 P.2d 1 (Colo. 1982).

**Seniority of federal reserved water rights.** The federal government's position is similar to the holder of a conditional senior water right who can step ahead of junior appropriators causing a diminution of the amount of water available for diversion. *Navajo Dev. Co. v. Sanderson*, 655 P.2d 1374 (Colo. 1982).

**For effect of federal reserved water rights,** see *Navajo Dev. Co. v. Sanderson*, 655 P.2d 1374 (Colo. 1982).

## PART 5

### REGULATION OF WATER - VIOLATIONS

**Cross references:** For the appointments and functions of water division engineers, see § 37-92-202.

**37-92-501. Jurisdiction over water - rules and regulations.** (1) The state engineer and the division engineers shall administer, distribute, and regulate the waters of the state in accordance with the constitution of the state of Colorado, the provisions of this article and other applicable laws, and written instructions and orders of the state engineer, in conformity with such constitution and laws, and no other official, board, commission, department, or agency, except as provided in this article and article 8 of title 25, C.R.S., has jurisdiction and authority with respect to said administration, distribution, and regulation. It is the legislative intent that the operation of this section shall not be used to allow groundwater withdrawal which would deprive senior surface rights of the amount of water to which said surface rights would have been entitled in the absence of such groundwater withdrawal and that groundwater diversions shall not be curtailed nor required to replace water withdrawn, for the benefit of surface right priorities, even though such surface right priorities be senior in priority date, when, assuming the absence of groundwater withdrawal by junior priorities, water would not have been available for diversion by such surface right under the priority system. The state engineer may adopt rules and regulations to assist in, but not as a prerequisite to, the performance of the foregoing duties.

(2) In the adoption of such rules and regulations the state engineer shall be guided by the principles set forth in section 37-92-502 (2) and by the following:

(a) Recognition that each water basin is a separate entity, that aquifers are geologic entities and different aquifers possess different hydraulic characteristics even though such aquifers be on the same river in the same division, and that rules applicable to one type of aquifer need not apply to another type. All other factors being the same, aquifers of the same type in the same water division shall be governed by the same rules regardless of where situate.

(b) Consideration of all the particular qualities and conditions of the aquifer;

(c) Consideration of the relative priorities and quantities of all water rights and the anticipated times of year when demands will be made by the owners of such rights for waters to supply the same;

(d) Recognition that one owner may own both surface and subsurface water rights;

(e) That all rules and regulations shall have as their objective the optimum use of water consistent with preservation of the priority system of water rights;

(f) That rules and regulations may be amended or changed from time to time within the same aquifer dependent upon the then existing and forecast conditions, facts and conditions as then known, and as knowledge of the aquifer is enlarged by operating experience;

(g) That time being of the essence, rules and regulations and changes thereof proposed for an aquifer shall be published once in the county or counties where such aquifer exists not less than sixty days prior to the proposed adoption of such rules and regulations, and copies shall be mailed by the water clerk of the division to all persons who are on the mailing list of such division. Copies of such proposed regulations shall be available without charge to any owner of a water right at the office of the water clerk.

(3) (a) Any person desiring to protest a proposed rule and regulation may do so in the same manner as provided in section 37-92-304 for the protest of a ruling of a referee, and the water judge shall hear and dispose of the same as promptly as possible.

(b) Any such protest must be filed by the end of the month following the month in which such proposed rules and regulations are published.

(4) (a) In addition to the provisions of subsection (2) of this section, when adopting rules governing the use of underground water in division 3, and in recognition of the unique geologic and hydrologic conditions and the conjunctive use practices prevailing in division 3, the state engineer shall have wide discretion to permit the continued use of underground water consistent with preventing material injury to senior surface water rights. Any reduction in underground water usage required by such rules shall be the minimum necessary to meet the standards of this subsection (4). In regulating an aquifer or system of aquifers in division 3, the state engineer shall apply the following principles:

(I) Use of the confined and unconfined aquifers shall be regulated so as to maintain a sustainable water supply in each aquifer system, with due regard for the daily, seasonal, and long-term demand for underground water;



(II) Unconfined aquifers serve as valuable underground water storage reservoirs with water levels that fluctuate in response to climatic conditions, water supply, and water demands, and such fluctuations shall be allowed to continue;

(III) Fluctuations in the artesian pressure in the confined aquifer system have occurred and will continue to occur in response to climatic conditions, water supply, and water demands. Subject to subparagraph (IV) of this paragraph (a), such pressure fluctuations shall be allowed with the ranges that occurred during the period of 1978 through 2000. Artesian pressures shall be allowed to increase in periods of greater water supply and shall be allowed to decline in periods of lower water supply in much the same manner and within the same ranges of fluctuation as occurred during the period of 1978 through 2000, while maintaining average levels similar to those that occurred in 1978 through 2000.

(IV) Nothing in subparagraph (I) or (II) of this paragraph (a) shall be construed either to relieve wells from the obligation to replace injurious stream depletions in accordance with the rules adopted by the state engineer or to permit the expanded use of underground water; and

(V) Underground water use shall not unreasonably interfere with the state's ability to fulfill its obligations under the Rio Grande compact, codified in article 66 of this title, with due regard for the right to accrue credits and debits under the compact.

(b) In adopting rules pursuant to paragraph (a) of this subsection (4), the state engineer shall:

(I) Recognize contractual arrangements among water users, water user associations, water conservancy districts, ground water management subdistricts, and the Rio Grande water conservation district, pursuant to which:

(A) Water is added to the stream system to assist in meeting the Rio Grande compact delivery schedules or to replace depletions to stream flows resulting from the use of underground water; or

(B) Subject to subparagraphs (I), (II), and (III) of paragraph (a) of this subsection (4), injury to senior surface water rights resulting from the use of underground water is remedied by means other than providing water to replace stream depletions;

(II) Establish criteria for the beginning and end of the division 3 irrigation season for all irrigation water rights;

(III) Not recognize the reduction of water consumption by phreatophytes as a source of replacement water for new water uses or to replace existing depletions, or as a means to prevent injury from new water uses; and

(IV) Not require senior surface water right holders with reasonable means of surface diversions to rely on underground water to satisfy their appropriate water right.

(c) The state engineer shall not curtail underground water withdrawals from aquifers in division 3 that are included in a ground water management subdistrict created pursuant to section 37-45-120 or 37-48-108 if the withdrawals are made pursuant to a groundwater management plan adopted by the subdistrict that meets the requirements of paragraphs (a) and (b) of this subsection (4). The state engineer shall publish notice of the approval of any groundwater management plan in the same manner as provided for rules under paragraph (g) of subsection (2) of this section, and judicial review of such approval shall be pursuant to paragraph (a) of subsection (3) of this section. The water judge shall retain jurisdiction over the water management plan for the purpose of ensuring the plan is operated, and injury is prevented, in conformity with the terms of the court's decree approving the water management plan.

**Source:** L. 69: p. 1216, § 1. C.R.S. 1963: § 148-21-34. L. 71: p. 1331, § 2. L. 2004: (4) added, p. 777, § 1, effective May 20.

**Cross references:** For the "Colorado Water Quality Control Act", see article 8 of title 25; for the proceedings by the water judge, see § 37-92-304.

## ANNOTATION

**Law reviews.** For article, "Adjudication of Indian and Federal Water Rights in the Federal Courts", see 46 U. Colo. L. Rev. 555 (1974-75). For article, "Recent Developments in Colorado Groundwater Law", see 58 Den. L.J. 801 (1981). For comment, "Bubb v. Christensen: The Rights of the Private Landowner Yield to the Rights of the Water Appropriator Under the Colorado Doctrine", see 58 Den. L.J. (1981). For article, "The Physical Solution in Western Water Law", see 57 U. Colo. L. Rev. 445 (1986). For article, "Colorado's Law of 'Underground Water': A Look at the South Platte Basin and Beyond", see 59 U. Colo. L. Rev. 579 (1988). For article, "The Constitution, Property Rights and the Future of Water Law", see 61 U. Colo. L. Rev. 257 (1990).

**Division engineer evaluates each junior appropriator's diversion to determine material injury caused.** The statutory plan in this section and § 37-92-502 contemplates that the division engineer will evaluate each junior appropriator's diversion to determine whether it is causing material injury to water rights having senior priorities before ordering the discontinuance of the diversion by the junior appropriator. *South-eastern Colo. Water conservancy Dist. v. Rich*, 625 P.2d 977 (Colo. 1981).

**Since the language in this statute on regulations by the state engineer is permissive, it does not require a surface appropriator to apply ground water to his decree before making a call.** *Kuiper v. Well Owners Conservation Ass'n*, 176 Colo. 119, 490 P.2d 268 (1971).

**Stream administration.** Streams independently appropriated remain independent under the doctrine of prior appropriation unless the water of those streams becomes subject to equitable apportionment by compact, in which case the streams must be administered as mandated by the compact or statutory provisions for priority administration of water rights. *Alamosa-La Jara Water Users Prot. Ass'n v. Gould*, 674 P.2d 914 (Colo. 1983).

**State engineer may promulgate and enforce appropriate rules.** In order to promulgate and enforce rules for compliance with Rio Grande river compact commitments, the state engineer may promulgate and enforce appropriate rules for the administration of water rights. *In re Rules & Regulations Governing Water Rights*, 196 Colo. 197, 583 P.2d 910 (1978).

Given an irreconcilable conflict between intrastate priority administration and compliance with an interstate compact, it is compact compliance that must take precedence. *Simpson v. Bijou Irrigation Co.*, 69 P.3d 50 (Colo. 2003).

**Burden of proof to support amendment to rules.** The state engineer has the burden of proof, by a preponderance of the evidence, in a proceeding to determine the validity of a pro-

posed amendment to rules, adopted pursuant to this section, governing the use of ground water. *Kuiper v. Atchison, T. & S.F. Ry.*, 195 Colo. 557, 581 P.2d 293 (1978).

**State engineer's authority to apply compact tributary rule.** A compact requiring administration of the Rio Grande mainstem and Conejos river according to delivery schedules that did not include the contributions of three creeks as significant to the delivery obligation did away with the state engineer's authority to apply the tributary rule of the compact to the three creeks. *Alamosa-La Jara Water Users Prot. Ass'n v. Gould*, 674 P.2d 914 (Colo. 1983).

**Regulations of the state engineer are presumed to be valid until shown otherwise by a preponderance of the evidence.** *Kuiper v. Well Owners Conservation Ass'n*, 176 Colo. 119, 490 P.2d 268 (1971).

**Regulations need not be uniform throughout the state.** *Kuiper v. Well Owners Conservation Ass'n*, 176 Colo. 119, 490 P.2d 268 (1971).

**Rules may take effect only after all protests have been heard and resolved by the water court.** *Simpson v. Bijou Irrigation Co.*, 69 P.3d 50 (Colo. 2003).

**The procedural requirements specified in this section for the promulgation of rules control over conflicting portions of the state Administrative Procedure Act.** *Simpson v. Cotton Creek Circles, LLC*, 181 P.3d 252 (Colo. 2008).

**Water judge may award costs to the prevailing party,** which may include a private party who supported the rule. The statute specifies that the procedures are "the same" as for a protest of a ruling of the referee pursuant to § 37-92-304 and are therefore sufficiently trial-like to justify the authority to award costs. *Cotton Creek Circles v. Rio Grande Water Conservation Dist.*, 218 P.3d 1098 (Colo. 2009).

**When adjudicated priorities are not being filled as a result of pumping unappropriated ground water,** it cannot be said that this ground water is unappropriated. *Kuiper v. Well Owners Conservation Ass'n*, 176 Colo. 119, 490 P.2d 268 (1971).

**If the regulation of wells which are inferior in priority will reasonably contribute to the satisfaction of earlier priorities,** the owners of the wells cannot be heard to say that they have a right to continue the use thereof. *Kuiper v. Well Owners Conservation Ass'n*, 176 Colo. 119, 490 P.2d 268 (1971).

**Automatic cessation of diversions by junior appropriator not contemplated.** This section and § 37-92-502 do not contemplate automatic cessation of diversions by a junior appropriator in response to a river call. *Southeastern Colo.*



Water Conservancy Dist. v. Rich, 625 P.2d 977 (Colo. 1981).

**This section does not authorize a water judge to approve the use of salvaged water for augmentation credits free of the call of the river;** rather, it merely gives administrative discretion to the state engineer. In re Water Rights of Park County Sportsmen's Ranch, 105 P.3d 595 (Colo. 2005).

**Diversions made pursuant to water right considered** historical use where not ordered discontinued. Where the water commissioner was aware of the landowners' diversions of water and had never ordered them to be discontinued or limited, the diversions made pursuant to a water right, though not in priority, could be considered as establishing an historical use for the purpose of the change of water right. South-eastern Colo. Water Conservancy Dist. v. Rich, 625 P.2d 977 (Colo. 1981).

**Regulations found to promote development and use of underground water.** Kuiper v. Well Owners Conservation Ass'n, 176 Colo. 119, 490 P.2d 268 (1971).

**Maximum utilization of an aquifer** is not license to get all the water from it, but rather the objective of "maximum use" administration is "optimum use" which can only be achieved with proper regard for all significant factors, including economic and environmental concerns. Alamosa-La Jara Water Users Prot. Ass'n v. Gould, 674 P.2d 914 (Colo. 1983).

**Aquifer-wide determination of material injury.** Under rules proposed by the state engineer, individuals retained the right in "each case" to challenge the application of an aquifer-wide determination of material injury to "each diversion", but since the streams were over-appropriated and underground water diversions from the aquifer were found to significantly affect stream flow, it was presumed that each underground water diversion materially injured senior appropriators; therefore, the state engineer was not required to repeat for every well the analysis which lead to the aquifer-wide determination of material injury. Alamosa-La Jara Water Users Prot. Ass'n v. Gould, 674 P.2d 914 (Colo. 1983).

**Because the confined aquifer is overappropriated, the requirement that the state engineer allow the confined aquifer's artesian pressure to fluctuate only within a stated historic range** does not violate the constitutional right to divert unappropriated water. Simpson v. Cotton Creek Circles, LLC, 181 P.3d 252 (Colo. 2008).

**The state engineer's rules that specify that unappropriated water is not made available as a result of the reduction of water consumption by "nonirrigated native vegetation" are valid even though the statute prohibits the rules from recognizing the reduction of water consumption by "phreatophytes".** Because

the rules mirror statutory law, they do not exceed the scope of the statutory authority. Simpson v. Cotton Creek Circles, LLC, 181 P.3d 252 (Colo. 2008).

**The subdistrict's ground water management plan is sufficiently comprehensive and detailed to permit the continued use of ground water consistent with preventing material injury to senior surface water rights.** It accomplishes this by being able to reliably estimate annual depletions in time, amount, and location and by having adequate financial mechanisms in place to either acquire the necessary replacement water, reduce depletions, or both. One permissible mechanism is the option of entering into contracts with non-subdistrict well owners for replacement water. The ground water model incorporated into the plan may not account for changes in evapotranspiration caused by the eradication of phreatophytes, but may account for changes in evapotranspiration caused by fluctuations in the ground water table as contemplated by the statute. If the subdistrict does not comply with its approved plan, or if the plan as implemented does not actually prevent material injury, the state engineer must curtail ground water diversions to protect senior surface water rights. In re Subdistrict No. 1, 270 P.3d 927 (Colo. 2011).

**Although this section directs the state engineer to regulate state waters,** it does not exempt all water projects from local regulation. Denver v. Bd. of County Comm'rs, 782 P.2d 753 (Colo. 1989).

**Regulations found not to be fatally vague, unenforceable, or unreasonable.** Kuiper v. Well Owners Conservation Ass'n, 176 Colo. 119, 490 P.2d 268 (1971).

**Federal reserved water rights.** The United States possesses reserved rights for its federal reservations in Colorado in waters unappropriated upon the date of reservation of the federal lands from the public domain, and in the amount necessary to achieve the primary purposes of the reservations. United States v. City & County of Denver, 656 P.2d 1 (Colo. 1982).

**Reserved rights determined by Colorado law.** Colorado law governing the determination of water rights is properly applied as the rule of decision by which the courts will determine the contours of the reserved rights asserted by the United States. United States v. City & County of Denver, 656 P.2d 1 (Colo. 1982).

**Administration by state engineer.** Federal reserved water rights ultimately adjudicated to the United States are subject to administration by the state engineer. United States v. City & County of Denver, 656 P.2d 1 (Colo. 1982).

**For extent of federal reserved water rights on different categories of public lands,** see United States v. City & County of Denver, 656 P.2d 1 (Colo. 1982).

**The state engineer has authority under this section to determine how to administer the one-fill rule** when a storage decree does not address how diversions are to be accounted for.

N. Sterling Irrig. Dist. v. Simpson, 202 P.3d 1207 (Colo. 2009).

**Applied in** Pioneer Irrigation Dists. v. Danielson, 658 P.2d 842 (Colo. 1983).

**37-92-501.5. Special procedures with respect to plans for augmentation.** Consistent with the decisions of the water judges establishing the basis for approval for plans for augmentation and for the administration of groundwater, the state engineer and division engineers shall exercise the broadest latitude possible in the administration of waters under their jurisdiction to encourage and develop augmentation plans and voluntary exchanges of water and may make such rules and regulations and shall take such other reasonable action as may be necessary in order to allow continuance of existing uses and to assure maximum beneficial utilization of the waters of this state. In so doing, the state engineer shall curtail all out-of-priority diversions, the depletions from which are not so replaced as to prevent injury to vested water rights.

**Source:** L. 77: Entire section added, p. 1704, § 5, effective June 19.

#### ANNOTATION

**Law reviews.** For article, "Recent Developments in Colorado Groundwater Law", see 58 Den. L.J. 801 (1981). For article, "The Physical Solution in Western Water Law", see 57 U. Colo. L. Rev. 445 (1986). For article, "Water Banking: A New Tool For Water Management", see 23 Colo. Law. 595 (1994).

**Approval by water courts required.** This section does not delegate to the state engineer independent authority to approve out-of-priority diversions and the replacement water used in augmentation plans. Simpson v. Bijou Irrigation Co., 69 P.3d 50 (Colo. 2003).

**37-92-502. Orders as to waste, diversions, distribution of water.** (1) The state engineer or the division engineers shall issue to the owners or users of water rights and to the users of waters of the state such orders as are necessary to implement the provisions of section 37-92-501, including, but not limited to, the orders specified in subsections (2) to (7) of this section. If such orders are given orally, they shall be confirmed promptly in writing.

(2) (a) Each division engineer shall order the total or partial discontinuance of any diversion in his division to the extent that the water being diverted is not necessary for application to a beneficial use; and he shall also order the total or partial discontinuance of any diversion in his division to the extent that the water being diverted is required by persons entitled to use water under water rights having senior priorities, but no such discontinuance shall be ordered unless the diversion is causing or will cause material injury to such water rights having senior priorities. In making his decision as to the discontinuance of a diversion to satisfy senior priorities, the division engineer shall be governed by the following: The materiality of injury depends on all factors which will determine in each case the amount of water such discontinuance will make available to such senior priorities at the time and place of their need. Such factors include the current and prospective volumes of water in and tributary to the stream from which the diversion is being made; distance and type of stream bed between the diversion points; the various velocities of this water, both surface and underground; the probable duration of the available flow; and the predictable return flow to the affected stream. Each diversion shall be evaluated and administered on the basis of the circumstances relating to it and in accordance with provisions of this article and the court decrees adjudicating and confirming water rights. In the event that a discontinuance has been ordered pursuant to the provisions of this paragraph (a), and nevertheless such discontinuance does not cause water to become available to such senior priorities at the time and place of their need, then such discontinuance order shall be rescinded. If a well has been approved as an alternate means of diversion for a water right for which a surface means of diversion is decreed, such well and such surface means must be utilized to the extent feasible and permissible under this article to satisfy said water right before diversions



under junior water rights are ordered discontinued. In addition to any other methods of giving notice, the posting of a written order, in plain sight, at the place of diversion shall be considered sufficient notice of the order of the division engineer; and, when so posted, such order shall be effective from the time of posting:

(b) If any groundwater was exposed to the atmosphere in connection with the extraction of sand and gravel by open mining as defined in section 34-32-103 (9), C.R.S., prior to January 1, 1981, the division engineer shall not order the curtailment of diversions which were attributable solely to evaporation from such exposed groundwater.

(3) Each division engineer shall order the release from storage of any water he finds to have been illegally or improperly stored and shall make such orders as are necessary to insure that such released waters are delivered to those owners or users of water rights who are entitled to the same and to insure that the release will not cause damage.

(4) Each division engineer with the approval of the state engineer shall administer the movement of water involved in any plan for augmentation or water use project which is in effect in his division. If any such plan or project involves the movement of water from one division to another, then the administration of such movement shall be the direct responsibility of the state engineer, but he may act through the appropriate division engineers. In such administration the division engineers and the state engineer shall issue such orders as are necessary and appropriate and may utilize any funds, public or private, and any other resources made available to them. Each plan for augmentation shall be administered to accomplish the maximum economic use of and benefit from the water which may be available or developed for such administration if persons owning, or entitled to use water under, water rights or conditional water rights will not be injuriously affected thereby.

(5) (a) The state engineer and the division engineers have authority to order any owner or user of a water right to install and maintain at such owner's or user's expense necessary meters, gauges, or other measuring devices and to report at reasonable times to the appropriate division engineer the readings of such meters, gauges, or other measuring devices.

(b) The state engineer and the division engineers have authority to order any person or company supplying energy used to pump groundwater to provide, at reasonable times to the appropriate division engineer, records of energy used to pump groundwater. Nothing contained in this paragraph (b) shall affect any reporting requirements of the public utilities commission pursuant to section 40-3-110, C.R.S.

(c) By June 30, 2004, the state engineer and the division engineers shall refund all amounts collected through assessment of the water administration fee established in section 37-80-121. The amount refunded shall not include interest, legal fees, or costs incurred by water users in protests or appeals of such assessment or any other costs associated with section 37-80-121.

(6) The state engineer and the division engineers and their duly authorized assistants and staff have the authority and duty to enter upon, and to order any person to permit the entry upon, private property at any reasonable time to inspect the various means or proposed means of diversion, transportation, and storage and the uses to which water is being, or is proposed to be, put and to read meters, gauges, and other measuring devices.

(7) The state engineer, division engineer, and their duly authorized assistants have the power and duty to issue orders so that the streams of the state may be kept clear of unnecessary dams or other obstructions which may restrict or impede the flow of water to the water users of the state.

**Source:** L. 69: p. 1217, § 1. C.R.S. 1963: § 148-21-35. L. 71: p. 1337, § 1. L. 83: (2) amended, p. 1430, § 5, effective July 1. L. 89: (2) amended, p. 1426, § 6, effective July 15. L. 96: (5) amended, p. 21, § 3, effective March 1. L. 2003: (5)(c) added, p. 1511, § 2, effective May 1. L. 2004: (5)(c) amended, p. 361, § 3, effective April 7.

#### ANNOTATION

**Law reviews.** For article, "Recent Developments in Colorado Groundwater Law", see 58

Den. L.J. 801 (1981). For article, "The Emerging Relationship Between Environmental Regu-

lations and Colorado Water Law”, see 53 U. Colo. L. Rev. 597 (1982). For article, “The Physical Solution in Western Water Law”, see 57 U. Colo. L. Rev. 445 (1986). For comment, “Water Use Efficiency and Appropriation in Colorado: Salvaging Incentives for Maximum Beneficial Use”, see 58 U. Colo. L. Rev. 657 (1988). For article, “Colorado’s Law of ‘Underground Water’: A Look at the South Platte Basin and Beyond”, see 59 U. Colo. L. Rev. 579 (1988). For article, “When Worlds Collide — The Gravel Pit Evaporation Conflict”, see 18 Colo. Law. 237 (1989).

**Although a junior well operator’s ultimate ability to divert return flows may be subject to a call by a more senior appropriator with surface rights downstream**, the administration of these competing priorities is vested in the state and division engineers. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

**The trial court exceeded its authority when it decreed that the state engineer petition the court to have Thornton pay the cost of administrative assistance from the state engineer’s office for the administration of the northern project.** This statute merely authorized the state engineer and division engineer to utilize private funds that may be available to them, not to impose obligations on private parties to provide such funds. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

**Automatic cessation of diversions by junior appropriator not contemplated.** This section and § 37-92-501 do not contemplate automatic cessation of diversions by junior appropriator in response to a river call. *Southeastern Colo. Water Conservancy Dist. v. Rich*, 625 P.2d 977 (Colo. 1981).

**Division engineer evaluates each junior appropriator’s diversion to determine material injury caused.** The statutory plan in this section and § 37-92-501 contemplates that the division engineer will evaluate each junior appropriator’s diversion to determine whether it is causing material injury to water rights having senior priorities before ordering the discontinuance of the diversion by the junior appropriator. *Southeastern Colo. Water Conservancy Dist. v. Rich*, 625 P.2d 977 (Colo. 1981).

**Adequacy of replacement water not an issue.** The state engineer’s material injury analysis under this section is limited to a determination, based on consideration of the factors expressly listed, of whether curtailment of an out-of-priority use will make water available to

fulfill senior priorities at the time and place of need. *Simpson v. Bijou Irrigation Co.*, 69 P.3d 50 (Colo. 2003).

**Order for discontinuation justified** where diversion caused by construction of gravel pits will result in material injury to senior water rights. *Zigan Sand & Gravel v. Cache La Poudre*, 758 P.2d 175 (Colo. 1988).

**Trial court properly applied the relevant materiality of injury test** in finding that junior diversion was not harming senior priority rights. *SRJ I Venture v. Smith Cattle, Inc.*, 820 P.2d 341 (Colo. 1991).

**Diversions made pursuant to water right considered historical use where not ordered discontinued.** Where the water commissioner was aware of the landowners’ diversions of water and had never ordered them to be discontinued or limited, the diversions made pursuant to a water right, though not in priority, could be considered as establishing an historical use for the purpose of the change of water right. *Southeastern Colo. Water Conservancy Dist. v. Rich*, 625 P.2d 977 (Colo. 1981).

**Out-of-priority, undetected diversions** made by appropriator’s predecessor in interest should not be considered in establishment of historical use of water right. *Pueblo West Metro. Dist. v. S.E. Colo. Water Cons. Dist.*, 717 P.2d 955 (Colo. 1986).

**Aquifer-wide determination of material injury.** Under rules proposed by the state engineer, individuals retained the right in “each case” to challenge the application of an aquifer-wide determination of material injury to “each diversion”, but since the streams were over-appropriated and underground water diversions from the aquifer were found to significantly affect stream flow, it was presumed that each underground water diversion materially injured senior appropriators; therefore, the state engineer was not required to repeat for every well the analysis which led to the aquifer-wide determination of material injury. *Alamosa-La Jara Water Users Prot. Ass’n v. Gould*, 674 P.2d 914 (Colo. 1983).

**The state engineer has authority under this section to determine how to administer the one-fill rule** when a storage decree does not address how diversions are to be accounted for. *N. Sterling Irrig. Dist. v. Simpson*, 202 P.3d 1207 (Colo. 2009).

**Applied in Purgatoire River Water Conservancy Dist. v. Kuiper**, 197 Colo. 200, 593 P.2d 333 (1979).

**37-92-503. Enforcement - injunction.** (1) (a) In the event an order of a division engineer or the state engineer issued pursuant to section 37-92-502 is not complied with, the state engineer and the particular division engineer in the name of the people of the state of Colorado, through the attorney general, shall apply to the water judge of the particular division for an injunction enjoining the person to whom such order was directed from continuing to violate same. The term “injunction” includes mandatory relief.



(b) In such proceeding, if the court upholds the order of the state engineer, the person against whom such order was issued shall pay the costs of the proceeding, including the allowance of reasonable attorney fees.

(c) Any proceeding brought by the state engineer or a division engineer to enforce an order to curtail the diversion of surface water or groundwater to comply with an interstate compact shall be accelerated on the court's calendar pursuant to section 37-92-203 (2), shall take priority over other water matters, and shall be determined immediately upon the conclusion of such proceeding.

(2) In the case of an order with respect to the diversion of water or the release of water from reservoirs, the water judge in ruling upon such injunction shall consider, depending on the basis for the order, whether or not the water is being applied to a beneficial use; whether or not the diversion is causing or will cause injury to persons owning, or entitled to use water under, water rights having senior decreed priorities; and whether or not the release of improperly stored water would benefit other water users.

(3) Any person who has an interest in the subject matter of such proceedings may intervene, if such intervention is timely and will not cause undue delay.

(4) In the case of a violation of an injunction issued under the provisions of this section, the water judge shall try and punish the offender for contempt of court.

(5) Such proceedings shall be in addition to, and not in lieu of, any other penalties and remedies, public or private, provided by law.

(6) (a) (I) Any person who diverts groundwater contrary to a valid order of the state engineer or a division engineer issued pursuant to section 37-92-502, in violation of a plan approved pursuant to rules adopted by the state engineer, or otherwise in violation of rules adopted by the state engineer to regulate or measure diversions of groundwater shall forfeit and pay a sum not to exceed five hundred dollars for each day such violation continues.

(II) Any person who diverts surface water contrary to a valid order of the state engineer or a division engineer issued pursuant to section 37-92-502 shall forfeit and pay a sum not to exceed five hundred dollars for each day such violation continues.

(b) Any person who, when required to do so by rules and regulations adopted by the state engineer, fails to submit data as to amounts of water pumped from a well, makes a false or fictitious report of the amounts of water pumped from a well, falsifies any data as to amounts pumped from a well, makes a false or fictitious report of a power coefficient for a well, or falsifies any power coefficient test shall forfeit and pay a sum not to exceed five hundred dollars for each violation.

(c) It is unlawful for any person not authorized by the well owner or the state engineer to willfully interfere with any power meter, totalizing flow meter, or other device used to measure groundwater diversions. Any person who willfully injures or destroys a power meter, totalizing flow meter, or other device used to measure groundwater diversions or who tampers with or falsifies any record made or being made by any such power meter, totalizing flow meter, or other device shall forfeit and pay a sum not to exceed five hundred dollars for each violation.

(d) Any fine collected for violations of the provisions of this subsection (6) shall be transmitted to the state treasurer, who shall credit the same to the general fund.

(e) The state engineer and the particular division engineer in the name of the people of the state of Colorado, through the attorney general, shall apply to the water judge of the particular division to recover the civil penalties specified in paragraphs (a), (b), and (c) of this subsection (6) or for a temporary restraining order, preliminary injunction, or permanent injunction, as appropriate, enjoining further violations of this subsection (6). If the state engineer and the division engineer prevail, the court shall also award the costs of the proceeding including the allowance of reasonable attorney fees.

(7) Any person required by a valid order of the state engineer or division engineer, or by existing rules of the state engineer, to replace depletions caused by diversions of groundwater or surface water and whose failure to replace such depletions results in the violation of an interstate compact shall be liable for all direct, actual, and necessary expenses incurred by the state of Colorado in performing any action, including the purchase of water or payment of damages, necessary for the state of Colorado to remedy the violation of such compact. The state engineer and the particular division engineer in the name of the

people of the state of Colorado, through the attorney general, shall apply to the water judge of the particular division to recover such expenses. If the state engineer and the division engineer prevail, the court shall also award the costs of the proceeding including the allowance of reasonable attorney fees.

(8) Repealed.

**Source:** L. 69: p. 1218, § 1. C.R.S. 1963: § 148-21-36. L. 71: p. 1337, § 2. L. 96: (1)(c), (6), and (7) added, p. 21, §§ 4, 5, effective March 1. L. 2003: (8) added, p. 1511, § 3, effective May 1. L. 2004: (8) repealed, p. 362, § 4, effective April 7. L. 2010: (6)(a) amended, (SB 10-027), ch. 86, p. 289, § 1, effective April 14.

## ANNOTATION

**Subsection (1)(b) held constitutional** because it is reasonably related to a legitimate governmental interest, has a rational basis, and does not violate the constitutional equal protection of the laws requirement. *People ex rel. Danielson v. Plank*, 765 P.2d 570 (Colo. 1988).

**Defendants in suit for injunction under this section have standing to assert affirmative defense that curtailment order is invalid as a violation of the terms of the Arkansas river compact.** A defendant's affirmative defense does not constitute an independent cause of action; therefore, the rules for whether a plaintiff has standing are inapplicable to defendant under

these circumstances (distinguishing standing cases involving criminal defendants). *People ex rel. Simpson v. Highland Irr.*, 893 P.2d 122 (Colo. 1995), *aff'd*, 917 P.2d 1242 (Colo. 1996).

**Where the circumstances clearly show that water from a well that was subject to a valid curtailment order was used to irrigate the well owner's alfalfa crop**, subsection (6) imposes liability on the well owner despite the owner's defense that he personally did not turn on the well pump because the well was being used illegally with his authorization. *Vaughn v. People ex rel. Simpson*, 135 P.3d 721 (Colo. 2006).

**37-92-504. Treble damages.** Any person who is damaged in his business or property by reason of the violation of an order issued pursuant to section 37-92-502, the violation of which has been properly enjoined pursuant to section 37-92-503, may bring an action against any person who has violated said order in any district court of competent jurisdiction and recover threefold the damages sustained and the cost of suit, including reasonable attorney fees.

**Source:** L. 69: p. 1218, § 1. C.R.S. 1963: § 148-21-37.

## PART 6

### APPLICATION OF ARTICLE

**Cross references:** For the appointments and functions of water division engineers, see § 37-92-202.

**37-92-601. Disposition of pending proceedings - showings of reasonable diligence.** All proceedings pending on June 7, 1969, for the adjudication of water rights, for a change of water rights, or for the disposition of other matters which are of the type to be handled by proceedings provided for in this article shall be concluded by June 1, 1972, in accordance with the provisions of the statute under which they are instituted, and priorities and changes of water rights which are determined in such pending proceedings shall be integrated by the various division engineers in their current records and shall be included in tabulations prepared by the division engineers pursuant to the provisions of this article. Any such proceedings which are not concluded by June 1, 1972, shall be heard from that time on to completion by the water judge for the division in which the proceedings are pending, under procedures provided for in this article; except that the chief justice of the supreme court may provide that a judge, other than the water judge, shall complete proceedings in specific cases. Persons who have filed statements of claim in such pending proceedings may withdraw therefrom at any time and file applications or otherwise proceed



in accordance with this article. Showings of reasonable diligence under existing conditional decrees or conditional decrees entered in such pending proceedings shall be made in accordance with the provisions of this article, but the time shall be tolled during any period in which the water judge finds the applicant was prevented from filing by reason of conditions beyond his control. Applications for findings of reasonable diligence shall be filed with the water clerk pursuant to the terms of this article. When and if a conditional water right awarded in any such conditional decree becomes a water right pursuant to the procedures in this article, the priority awarded such water right shall be the same as if the proceedings in which the conditional decree was entered had remained open until the final determination with respect to such water right.

**Source:** L. 69: p. 1218, § 1. C.R.S. 1963: § 148-21-44. L. 70: p. 433, § 5. L. 71: p. 1339, § 1. L. 73: p. 1523, § 3. L. 90: Entire section amended, p. 1626, § 3, effective April 13.

**Cross references:** For making application for the determination of a water right, see § 37-92-302 (1).

### ANNOTATION

**Law reviews.** For article, "Oil Shale and Water Quality: The Colorado Prospectus Under Federal, State, and International Law", see 58 Den. L.J. 715 (1981). For comment, "Town of De Beque v. Enewold: Conditional Water Rights and Statutory Water Law", see 58 Den. L.J. 837 (1981).

**The 1969 act provides that pending adjudications under the 1943 act shall be completed under the provisions of that act until a designated time.** Larrick v. District Court, 177 Colo. 237, 493 P.2d 647 (1972).

**The clear implication from this section is that supplemental adjudications initiated under the 1943 act and completed before July 1, 1972, would continue to be governed by the**

1943 act, provided a claimant did not elect to proceed under the 1969 act, for such a construction is the only reasonable one that can be assigned this section. In re Water Dist. No. 11, Water Div. No. 2, 178 Colo. 160, 496 P.2d 311 (1972).

**Owner or user of conditional decree of water rights must comply with § 37-92-301(4) and this section** and the failure to do so results in the loss of his conditional water rights. Town of De Beque v. Enewold, 199 Colo. 110, 606 P.2d 48 (1980).

**Applied in** In re Water Rights in Water Dist. No. 19, 194 Colo. 510, 574 P.2d 83 (1978); In re Simineo v. Kelling, 199 Colo. 225, 607 P.2d 1289 (1980).

**37-92-602. Exemptions - presumptions - legislative declaration.** (1) This article, except for sections 37-92-201 and 37-92-202, does not apply to:

- (a) Designated groundwater basins as defined and established by article 90 of this title;
- (b) Wells not exceeding fifteen gallons per minute of production and used for ordinary household purposes, fire protection, the watering of poultry, domestic animals, and livestock on farms and ranches and for the irrigation of not over one acre of home gardens and lawns but not used for more than three single-family dwellings;
- (c) Wells not exceeding fifteen gallons per minute of production and used for drinking and sanitary facilities in individual commercial businesses;
- (d) Wells to be used exclusively for fire-fighting purposes if said wells are capped, locked, and available for use only in fighting fires;
- (e) Wells not exceeding fifty gallons per minute that are in production as of May 22, 1971, and were and are used for ordinary household purposes for not more than three single-family dwellings, fire protection, the watering of poultry, domestic animals, and livestock on farms and ranches, and for the irrigation of not over one acre of gardens and lawns;
- (f) Wells to be used exclusively for monitoring and observation purposes if said wells are capped and locked and used only to monitor water levels or for water quality sampling; and
- (g) (I) Any system or method of collecting precipitation from the roof of a building that is used primarily as a residence and is not served by, whether or not connected to, a

domestic water system that serves more than three single-family dwellings, but only if the use of the water thus collected is limited to one or more of the following:

- (A) Ordinary household purposes;
- (B) Fire protection;
- (C) The watering of poultry, domestic animals, and livestock on farms and ranches; or
- (D) The irrigation of not more than one acre of gardens and lawns.

(II) As used in subparagraph (I) of this paragraph (g), "a building that is used primarily as a residence" may include, but is not limited to, any structure used for habitation, regardless of whether the structure is operated commercially or inhabited intermittently.

(III) On and after July 1, 2009, any person wishing to use a system or method of rooftop precipitation capture that qualifies as exempt under subparagraph (I) of this paragraph (g) shall comply with one of the following provisions of sub-subparagraph (A), (B), or (C) of this subparagraph (III):

(A) A person who has a well permit issued or recorded pursuant to this section and who intends to use a system or method of rooftop precipitation capture that qualifies as exempt under subparagraph (I) of this paragraph (g) shall file, on a form prescribed by the state engineer and consistent with this section, a notice and description of the system or method of rooftop precipitation capture to be used in conjunction with the well. No fee shall be charged for the filing of this form.

(B) A person who applies for a new well permit pursuant to this section and who intends to use a system or method of rooftop precipitation capture that qualifies as exempt under subparagraph (I) of this paragraph (g) shall include on the well permit application a description of the system or method of rooftop precipitation capture to be used in conjunction with the well. An applicant under this sub-subparagraph (B) shall pay the well permit application fee pursuant to subparagraph (II) of paragraph (a) of subsection (3) of this section; however, such applicant shall not be required to pay any additional application fee for the rooftop precipitation collection system.

(C) A person who does not intend to construct and use a well, but would otherwise be entitled to the issuance of a well permit pursuant to this section, including the provisions of subsection (6) of this section, shall submit an application in the form and manner designated by the state engineer for a permit to install and use a system or method of rooftop precipitation capture and pay a fee in an amount to be determined by the state engineer. If the state engineer determines that the proposed system or method of rooftop precipitation capture meets the requirements of this paragraph (g), the state engineer shall issue a permit for the system or method, but not otherwise. The state engineer shall enforce the provisions of the permit in the same manner as the enforcement of any well permit issued under this section.

(IV) A person using or legally entitled to use a well pursuant to this section, including the provisions of subsection (6) of this section, shall be allowed to collect rooftop precipitation pursuant to this paragraph (g) only for use by the same dwellings that are or would be served by the well and subject to all of the limitations on use contained in the well permit or, in the absence of a well permit, the well permit to which the person would be legally entitled, as determined by the state engineer.

(V) (A) The state engineer or the division engineers may issue, to the users of methods or systems of rooftop precipitation collection, orders necessary to implement the provisions of this paragraph (g). If such orders are given orally, they shall be confirmed promptly in writing.

(B) In the event that an order of a division engineer or the state engineer issued pursuant to sub-subparagraph (A) of this subparagraph (V) is not complied with, the state engineer, in the name of the people of the state of Colorado, through the attorney general, shall apply to the water judge of the particular division for an injunction enjoining the person from committing the violation. In such proceeding, if the court upholds the order of the state engineer, the person against whom such order was issued shall pay the costs of the proceeding, including reasonable attorney fees.

(C) Any person who violates an order issued by the state engineer pursuant to sub-subparagraph (A) of this subparagraph (V) shall forfeit and pay a sum not to exceed five hundred dollars for each violation. Any fine collected for violations of this paragraph (g)



shall be transmitted to the state treasurer, who shall credit the same to the water resources cash fund created in section 37-80-111.7 (1).

(2) With respect to applications filed prior to May 8, 1972, the state engineer shall issue a permit for the construction of wells specified in subsection (1) of this section without regard to the provisions of section 37-90-137 (2) and (3) upon submission of an application which shall be accompanied by a fee of five dollars. It is the legislative intent that the exemption in subsection (1) of this section is for an applicant to obtain a water supply for his own use.

(3) (a) (I) Repealed.

(II) Effective July 1, 2006, wells of the type described in paragraphs (b) to (d) of subsection (1) of this section may be constructed only upon the issuance of a permit in accordance with the provisions of this subsection (3). A person desiring to use such a well shall submit an application for a permit accompanied by a fee of sixty dollars for an application under paragraph (c) of this subsection (3) and a fee of one hundred dollars for an application under paragraph (b) of this subsection (3).

(b) (I) With respect to applications filed on and after May 8, 1972, the state engineer shall first make a determination as to whether or not the exercise of the requested permit will materially injure the vested water rights of others or any other existing well, subject to the provisions of subparagraph (II) of this paragraph (b). If the state engineer finds that the vested water rights of others or any other existing well will be materially injured, he shall deny the permit. Otherwise, the permit shall be issued, and it shall set forth such conditions for drilling, casing, equipping, and using the well as are reasonably necessary to prevent waste, pollution, or material injury to existing rights. The state engineer shall endorse upon the application the date of its receipt, file and preserve such application, and make a record of such receipt and the issuance of the permit in his office, so indexed as to be useful in determining the extent of the uses made from various groundwater sources.

(II) (A) If a permit is sought by a user for a well exempted under paragraph (b) of subsection (1) of this section which will be the only well on a residential site, which well will be used solely for ordinary household purposes inside a single-family dwelling and will not be used for irrigation or will be the only well on a tract of land of thirty-five acres or more or will be the only well on a cluster development lot, serving one single-family residence, where the ratio of water usage in the cluster development does not exceed one acre-foot of annual withdrawals for each thirty-five acres within the cluster development and will be used solely for the purposes specified in paragraph (b) of subsection (1) of this section, and the return flow from such uses shall be returned to the same stream system in which the well is located, there shall be a presumption that there will not be material injury to the vested water rights of others or to any other existing well resulting from such well, which presumption may be rebutted by evidence sufficient to show such material injury.

(B) and (C) (Deleted by amendment, L. 93, p. 2100, § 1, effective July 1, 1993.)

(D) Nothing in this section shall be construed to preclude the state engineer from requiring metering of withdrawals, periodic reporting of such withdrawals, and cessation of withdrawals that exceed one acre-foot of water for each thirty-five acres within a cluster development.

(III) If the application is for a well, as defined in subparagraph (II) of this paragraph (b), which will be located in a subdivision, as defined in section 30-28-101 (10), C.R.S., and approved on or after June 1, 1972, pursuant to article 28 of title 30, C.R.S., for which the water supply plan has not been recommended for approval by the state engineer, the cumulative effect of all such wells in the subdivision shall be considered in determining material injury.

(c) (I) If any person wishes to relocate an existing well of the type specified in paragraphs (b) to (e) of subsection (1) of this section, such person shall file an application pursuant to this subsection (3) for the construction of a well and shall state in such application such person's intent to abandon the existing well which is to be relocated.

(II) (A) If such relocated well will not change substantially the usage of water which can lawfully be made by means of the existing well, a permit to construct and use the relocated well shall be issued, and the existing well shall be abandoned within ninety-one days after the completion of the relocated well.

(B) For purposes of this subparagraph (II), absent a showing by a preponderance of the evidence, a relocated well will be presumed not to change substantially the usage of water if the existing well was constructed pursuant to a permit issued by the state engineer, the location of the relocated well will be within two hundred feet of the existing well, the well will be constructed into the same aquifer, the historical use of water from the well will not change, the annual volume of use of the relocated well will be the same as or less than the annual permitted volume of use of the existing well, and the gallons per minute flow of the relocated well will be the same as or less than the permitted gallons per minute flow of the existing well.

(d) (I) Repealed.

(II) Effective July 1, 2006, wells for which permits have been granted or may be granted shall be constructed within two years after the permit is issued, which time may be extended for successive years at the discretion of the state engineer for good cause shown.

(e) The state engineer shall act upon an application filed under this subsection (3) within forty-nine days after such filing and shall support his or her ruling with a written statement of the basis therefor, and the provisions of article 4 of title 24, C.R.S., shall apply.

(f) Any person aggrieved by a decision of the state engineer granting or denying an application filed under this subsection (3) may within thirty-five days after such decision file a petition for review with the water clerk of the water division in which the well is located. Upon receipt of such petition, the water judge of said water division shall promptly conduct such hearings as are necessary to determine whether or not the decision of the state engineer shall be upheld. In any case in which the state engineer's decision is reversed, the water judge shall order the state engineer to grant or to deny the application, as such reversal may require, and may specify such terms and conditions as are appropriate. Appeals from any decision of the water judge shall be made as in other civil actions.

(4) Notwithstanding the provisions of the introductory portion of subsection (1) of this section, water rights for wells of the type specified in paragraphs (b) to (e) of said subsection (1) may be determined pursuant to sections 37-92-302 to 37-92-306; except that the original priority date of any such well may be awarded regardless of the date of application therefor.

(5) (a) Repealed.

(b) Effective July 1, 2006, any wells exempted by this section that were put to beneficial use prior to May 8, 1972, and any wells that were used exclusively for monitoring and observation purposes prior to August 1, 1988, not of record in the office of the state engineer may be recorded in that office upon written application, payment of a processing fee of one hundred dollars, and permit approval. The record shall include the date the water is claimed to have been appropriated or first put to beneficial use.

(6) It is hereby declared to be the policy of the state of Colorado that the exemptions set forth in this section are intended to allow citizens to obtain a water supply in less densely populated areas for in-house and domestic animal uses where other water supplies are not available. It is not the intent that these wells be used to cause material injury to prior vested water rights, and, wherever possible, persons seeking the use of such individual wells may be required to develop plans for augmentation pursuant to section 37-92-302 or to develop other replacement plans acceptable to the state engineer.

(7) Notwithstanding the amount specified for any fee in this section, the state engineer by rule or as otherwise provided by law may reduce the amount of one or more of the fees if necessary pursuant to section 24-75-402 (3), C.R.S., to reduce the uncommitted reserves of the fund to which all or any portion of one or more of the fees is credited. After the uncommitted reserves of the fund are sufficiently reduced, the state engineer by rule or as otherwise provided by law may increase the amount of one or more of the fees as provided in section 24-75-402 (4), C.R.S.

**Source:** L. 69: p. 1219, § 1. C.R.S. 1963; § 148-21-45. L. 71: p. 1341, § 1. L. 72: pp. 629-631, §§ 1, 2. L. 73: p. 1530, § 1. L. 75: (3)(b)(III) added, p. 1003, § 2, effective July 18. L. 87: (3)(a), (3)(e), and (5) amended, p. 1303, § 8, effective July 2. L. 88: (3)(b)(II) amended and (6) added, pp. 1243, 1244, §§ 1, 2, 3, effective May 17. L. 90: (3)(b)(II) amended, p. 1628, § 1, effective April 10. L. 91: (3)(b)(II) amended, p. 2021, § 1, effective March 27. L. 92: (1)(f) added and (5) amended, pp. 2300, 2301, §§ 7, 8, effective March



19. **L. 93:** (3)(b)(II) amended, p. 2100, § 1, effective July 1. **L. 94:** (3)(c) amended, p. 336, § 1, effective March 29. **L. 96:** (3)(b)(II)(A) amended and (3)(b)(II)(D) added, p. 1882, § 3, effective June 6. **L. 98:** (7) added, p. 1346, § 79, effective June 1; (5) amended, p. 1224, § 15, effective August 5. **L. 2003:** (3)(a), (3)(d), and (5) amended, p. 47, § 8, effective March 1; (3)(a)(I)(A), (3)(a)(II), (5)(a)(I), and (5)(b) amended, p. 1685, § 18, effective May 14. **L. 2009:** (1)(e) and (1)(f) amended and (1)(g) added, (SB 09-080), ch. 179, p. 791, § 3, effective July 1. **L. 2012:** IP(1) and (1)(g)(V)(C) amended, (SB 12-009), ch. 197, p. 793, § 11, effective July 1; (3)(c)(II)(A), (3)(e), and (3)(f) amended, (SB 12-175), ch. 208, p. 894, § 168, effective July 1.

**Editor's note:** (1) Section 10 of chapter 7, Session Laws of Colorado 2003, provides for an effective date of March 1, 2003; however, the Governor did not sign the act until March 5, 2003.

(2) Subsection (3)(a)(I)(B) provided for the repeal of subsection (3)(a)(I), subsection (3)(d)(I)(B) provided for the repeal of subsection (3)(d)(I), and subsection (5)(a)(II) provided for the repeal of subsection (5)(a), effective July 1, 2006. (See L. 2003, p. 47.)

(3) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsections (3)(c)(II)(A), (3)(e), and (3)(f) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

(4) Section 13 of chapter 197, Session Laws of Colorado 2012, provides that the act amending the introductory portion to subsection (1) and subsection (1)(g)(V)(C) applies to revenues credited on or after July 1, 2012.

**Cross references:** (1) For rule-making and licensing procedures of state agencies, see article 4 of title 24; for the "Colorado Ground Water Management Act", see article 90 of this title; for water divisions, see § 37-92-201; for division engineers, see § 37-92-202; for applications for water rights, see § 37-92-302; for rulings by the referee, see § 37-92-303; for proceedings by the water judge, see § 37-92-304; for standards with respect to rulings of the referee and decisions of the water judge, see § 37-92-305; for when priorities junior to prior awards, see § 37-92-306.

(2) For the legislative declaration contained in the 2003 act amending subsections (3)(a), (3)(d), and (5), see section 1 of chapter 7, Session Laws of Colorado 2003.

## ANNOTATION

**Law reviews.** For article, "Synthetic Fuels — Policy and Regulation", see 51 U. Colo. L. Rev. 465 (1981). For article, "Recent Developments in Colorado Groundwater Law", see 58 Den. L.J. 801 (1981). For article, "Water Rights — How to Avoid Getting in Over Your Head", see 11 Colo. Law. 2143 (1982).

**All wells involved in a plan for augmentation must be treated as if they were nonexempt.** *Kelly Ranch v. Southeastern Colo. Water Conservancy Dist.*, 191 Colo. 65, 550 P.2d 297 (1976); *Application of Turkey Canon Ranch Ltd.*, 937 P.2d 739 (Colo. 1997).

**Owners of unadjudicated wells exempted under subsection (4) have vested water rights and may assert injury to their water rights in water court once they have filed for adjudication of those rights.** However, the priority of such a right is not enforceable until an application for adjudication has been filed. Once the exempt well owner files, he or she has a statutorily guaranteed expectation of the original priority date of the well regardless of the date of application. *Application of Turkey Canon Ranch Ltd.*, 937 P.2d 739 (Colo. 1997).

Actual entry of a decree is not a condition precedent to an appearance by an exempt well owner in an augmentation proceeding. Once the exempt well owner has filed for adjudication,

any uncertainty in the award of a priority date is statutorily resolved. *Application of Turkey Canon Ranch Ltd.*, 937 P.2d 739 (Colo. 1997).

Findings by the state engineer were held not to be a condition precedent to a water court ruling in the context of an augmentation proceeding where objectors were not permitted to assert injury to their exempt wells. *Application of Turkey Canon Ranch Ltd.*, 937 P.2d 739 (Colo. 1997).

Under a plan for augmentation, wells, which might be exempt otherwise, must be treated as nonexempt. *Cache La Poudre Water Users Ass'n v. Glacier View Meadows*, 191 Colo. 53, 550 P.2d 288 (1976); *Application of Turkey Canon Ranch Ltd.*, 937 P.2d 739 (Colo. 1997).

Of necessity, the issuance of well permits, the adjudication of a plan for augmentation involving wells, and the enforcement of that plan and regulations involving wells must relate to wells which are subject to administration. *Cache La Poudre Water Users Ass'n v. Glacier View Meadows*, 191 Colo. 53, 550 P.2d 288 (1976).

Under the act, an exempt well, standing alone, was and is free from regulation by either a water court or the state engineer. When, however, one studies § 37-92-302, relating to a plan for augmentation, the conclusion is inescapable that all wells involved in the plan must be treated as if

they were nonexempt. Cache La Poudre Water Users Ass'n v. Glacier View Meadows, 191 Colo. 53, 550 P.2d 288 (1976).

Postponement doctrine does not apply to vested water rights in exempt wells. Application of Turkey Canon Ranch Ltd., 937 P.2d 739 (Colo. 1997).

Adjudication of priorities of small well owners permitted before this statute. Davis v. Conour, 178 Colo. 376, 497 P.2d 1015 (1972).  
Applied in Southeastern Colo. Water Conservancy Dist. v. Rich, 625 P.2d 977 (Colo. 1981).

River Basin Authorities

ARTICLE 93

River Basin Authorities

37-93-101 to 37-93-108. (Repealed)

Source: L. 87: Entire article repealed, p. 1307, § 1, effective May 20.

Editor's note: This article was numbered as article 22 of chapter 148, C.R.S. 1963. For amendments to this article prior to its repeal in 1987, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

WATER RESOURCES AND POWER DEVELOPMENT

ARTICLE 95

Colorado Water Resources and  
Power Development Authority

37-95-101.	Short title.		tion of public utility facilities on a project.
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37-95-120.	Agreements with governmental agencies or persons.	37-95-122.	adopted thereunder. Severability.
37-95-121.	Effect on inconsistent acts and rules and regulations	37-95-123.	Construction of article.

**37-95-101. Short title.** This article shall be known and may be cited as the “Colorado Water Resources and Power Development Authority Act”.

**Source: L. 81:** Entire article added, p. 1794, § 1, effective July 1.

**37-95-102. Legislative declaration.** (1) It is hereby declared to be the public policy of the state to preserve, protect, upgrade, conserve, develop, utilize, and manage the water resources of the state, to promote the beneficial use of waters of the state for the protection and preservation of the public health, safety, convenience, and welfare, to create or preserve jobs and employment opportunities or to improve the economic welfare of the people of the state, and to assist and cooperate with governmental agencies in achieving such purposes. In furtherance of such public policy, the Colorado water resources and power development authority is created in this article to initiate, acquire, construct, maintain, repair, and operate projects or cause the same to be operated pursuant to a lease, sublease, or other agreement with any person or governmental agency and may issue its bonds and notes payable solely from revenues to pay the cost of such projects.

(2) The general assembly finds and declares that the authority and powers conferred under this article and the expenditures of public moneys pursuant thereto constitute a serving of a valid public purpose and that the enactment of the provisions set forth in this article is in the public interest and is hereby so declared to be such as a matter of express legislative determination.

**Source: L. 81:** Entire article added, p. 1794, § 1, effective July 1.

**37-95-103. Definitions.** As used in this article:

(1) “Authority” means the Colorado water resources and power development authority created by this article.

(2) “Beneficial use” means a use of water, including the method of diversion, storage, transportation, treatment, and application, that is reasonable and consistent with the public interest in the proper utilization of water resources, including, but not limited to, domestic, agricultural, industrial, power, municipal navigational, fish and wildlife, and recreational uses.

(3) “Board” means the board of directors of the authority.

(4) “Bonds” means bonds, notes, or other obligations issued by the authority pursuant to this article.

(4.5) “Clean water act” means the “Federal Water Pollution Control Act Amendments of 1972”, Pub.L. 92-500, and any act amendatory or supplemental thereto as of April 4, 1988.

(4.7) (Deleted by amendment, L. 2003, p. 2410, § 4, effective June 5, 2003.)

(4.8) “Drinking water project eligibility list” means the list of projects eligible for financial assistance from the authority through the drinking water revolving fund or its other bonding capabilities, as adopted and from time to time modified in accordance with section 37-95-107.8 (4). The list shall consist of new or existing water management facilities that extend, protect, improve, or replace domestic drinking water supplies in the state of Colorado and may include any domestic drinking water supply projects eligible for financial assistance through a state revolving fund pursuant to the terms of the “Safe Drinking Water act”, as defined in subsection (12.2) of this section.

(4.9) “Forest health project” means an undertaking that improves the health of a forest, including, but not limited to:

(a) Reducing the threat of uncharacteristically large or intense insect diseases and epidemics;

- (b) Reducing the impact of uncharacteristically large or high-intensity wildfires;
- (c) Reducing the impact of undesirable nonnative species;
- (d) Replanting trees in deforested areas; or
- (e) Improving the use of, or adding value to, small diameter trees.

(5) (a) "Governmental agencies" means departments, divisions, or other units of state government, special districts, water conservation districts, metropolitan water districts, conservancy districts, irrigation districts, municipal corporations, counties, cities, and other political subdivisions, and the United States or any agency thereof.

(b) "Governmental agencies" also includes enterprises and any entity, agency, commission, or authority established by any governmental agency specified in paragraph (a) of this subsection (5), including, without limitation, those established pursuant to an interstate compact or other intergovernmental compact or agreement.

(6) "Hydroelectric facilities" means facilities for the hydrogeneration or transmission of electric power and energy.

(7) "Notes" means notes issued by the authority pursuant to this article.

(8) "Owner" includes all individuals, copartnerships, associations, corporations, or governmental agencies having any title or interest in any property rights, easements, and interests authorized to be acquired by this article.

(9) "Person" means any individual, firm, partnership, association, or corporation, or two or more or any combination thereof.

(10) "Project" means any water management facility or hydroelectric facility, including undivided or other interests therein, acquired or constructed or to be acquired or constructed by the authority under this article, including all buildings and facilities that the authority deems necessary for the operation of the project, together with all property rights, water rights, easements, and interests, including gathering, storage, treatment, and transmission facilities, unless adequate transmission capacity is available from any existing public utility, which may be required for such operation. "Project" also includes any water management facility, hydroelectric facility, or watershed protection projects and forest health projects financed in whole or in part by the authority.

(10.5) (Deleted by amendment, L. 2005, p. 38, § 1, effective March 23, 2005.)

(11) "Public roads" includes all public highways, roads, railroads, and streets in the state, whether maintained by the state, a county, a city, or any other political subdivision.

(12) "Public utility facilities" includes tracks, pipes, mains, conduits, cables, wires, towers, poles, and other equipment and appliances of any public utility.

(12.2) "Safe drinking water act" means the federal "Safe Drinking Water Act", 42 U.S.C. sec. 300f et seq., as amended or supplemented.

(12.5) (a) (I) "Small water resources project" means any water management facility or hydroelectric facility that is or will be financed in whole or in part by the authority and in which the total amount of financing provided by the authority to any participating governmental agency does not exceed five hundred million dollars.

(II) (Deleted by amendment, L. 2002, p. 78, § 1, effective March 22, 2002.)

(b) and (c) (Deleted by amendment, L. 98, p. 142, § 1, effective April 2, 1998.)

(13) "Water management facilities" means facilities for the purpose of the development, use, and protection of water resources, including, without limiting the generality of the foregoing, facilities for water supply and treatment, facilities for streamflow improvement, dams, reservoirs, and other impoundments, water transmission lines, sewerage facilities, water wells and well fields, pumping stations and works for underground water recharge, stream-monitoring systems, and facilities for the stabilization of stream and river banks.

(13.5) "Water pollution control project eligibility list" means the list of projects eligible for financial assistance from the authority through the water pollution control revolving fund or its other bonding capabilities, as adopted and from time to time modified in accordance with section 37-95-107.6 (4). The list shall consist of a project or projects from the project priority list for federal funds adopted by the Colorado water quality control commission for publicly owned treatment works as defined in section 212 of the clean water act and nonpoint source management program projects pursuant to section 319 of the clean water act.



(14) "Water resources" means all waters in or arising from rivers, streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, underground aquifers, and other bodies, geologic formations, or accumulations of water, either natural or artificial, which are situated wholly or partly within, or which border upon, this state.

(15) "Watershed protection project" means an undertaking to improve or protect a domestic or agricultural supply watershed, including, but not limited to, activities to achieve fire prevention or wildfire hazard reduction or post-fire remediation, soil stabilization, water supply continuance, or water quality maintenance or improvement within the watershed. A watershed protection project does not include undertakings where the purpose is to materially increase water quantity.

**Source:** L. 81: Entire article added, p. 1795, § 1, effective July 1. L. 82: (4) amended, p. 542, § 1, effective April 2. L. 83: (10) amended, p. 1441, § 1, effective June 10. L. 88: (4.5) and (10.5) added, p. 1246, § 2, effective April 4. L. 89: (12.5) added, p. 1432, § 2, effective April 18. L. 94: (4.7) added, p. 1373, § 2, effective May 25. L. 95: (4.8) and (12.2) added, p. 937, § 1, effective May 25. L. 98: (5), (6), and (12.5) amended, p. 142, § 1, effective April 2. L. 2002: (12.5)(a) and (13) amended, p. 78, § 1, effective March 22. L. 2003: (4.7) and (12.5)(a)(I) amended, p. 2410, § 4, effective June 5. L. 2005: (10.5) amended and (13.5) added, p. 38, § 1, effective March 23. L. 2008: (4.9) and (15) added and (10) amended, p. 1537, § 1, effective July 1.

**37-95-104. Establishment of authority - board of directors - removal - organization - compensation - dissolution.** (1) There is hereby created the Colorado water resources and power development authority, which shall be a body corporate and a political subdivision of the state. The authority shall not be an agency of state government, nor shall it be subject to administrative direction by any department, commission, board, bureau, or agency of the state, except to the extent provided by this article.

(2) (a) The powers of the authority shall be vested in the governing body of the authority which shall be a board of directors consisting of nine members who shall be appointed by the governor, with the consent of the senate, as follows:

- (I) One member from the Rio Grande drainage basin;
- (II) One member from the North Platte drainage basin;
- (III) One member from the Arkansas drainage basin;
- (IV) One member from the South Platte drainage basin outside the city and county of Denver;

(V) One member from the city and county of Denver who is familiar with its water problems;

- (VI) One member from the Yampa-White drainage basins;
- (VII) One member from the main Colorado drainage basin;
- (VIII) One member from the Gunnison-Uncompahgre drainage basins;
- (IX) One member from the San Miguel-Dolores-San Juan drainage basins.

(b) Appointments to the board shall be made so as to include one member who shall be experienced in water project financing, one member who shall be experienced in the engineering aspects of water projects, one member who shall be experienced in the planning and developing of water projects, one member who shall be experienced in public health issues related to drinking water or water quality matters, and one member who shall be experienced in water law. Members of the board shall be representative of the water districts from which they are appointed.

(c) No more than five members of the board shall be members of the same major political party.

(3) Members of the board shall be appointed for terms of four years; except that, of the original terms commencing October 1, 1981, three members shall be appointed for terms of one year, two members shall be appointed for terms of two years, two members for terms of three years, and two members for terms of four years, at the governor's discretion. Each member shall hold office for the term of his appointment and until his successor has been appointed and has qualified. A member shall be eligible for reappointment. Any vacancy in

the membership occurring other than by expiration of term shall be filled in the same manner as the original appointment but for the unexpired term only.

(4) Each member may be removed from office by the governor for cause, after a public hearing, and may be suspended by the governor pending the completion of such hearing. Each member, before entering upon his duties, shall take and subscribe an oath to perform the duties of his office faithfully, impartially, and justly to the best of his ability. A record of all such oaths shall be filed in the office of the secretary of state.

(5) The members of the board shall elect a chairman and a vice-chairman. The members of the board shall also elect a secretary and a treasurer who need not be members, and the same person may be elected to serve as both secretary and treasurer. The powers of the board shall be vested in the members thereof in office from time to time, and five members of the board shall constitute a quorum at any meeting thereof. Action may be taken and motions and resolutions adopted by the board at any meeting thereof by the affirmative vote of at least five members of the authority. No vacancy in the membership of the board shall impair the right of a quorum of the members to exercise all the powers and perform all the duties of the board.

(6) Each member of the board not otherwise in full-time employment of the state shall receive a per diem of one hundred dollars for each day actually and necessarily spent in the discharge of official duties, and all members shall receive traveling and other necessary expenses actually incurred in the performance of official duties.

(7) The authority may be dissolved by an act passed by the general assembly on condition that the authority has no debts or obligations outstanding or that provision has been made for the payment or retirement of such debts or obligations. Upon any such dissolution of the authority, all property, funds, and assets thereof shall be vested in the state.

**Source:** L. 81: Entire article added, p. 1796, § 1, effective July 1. L. 2006: (2)(b) amended, p. 151, § 1, effective March 31. L. 2008: (6) amended, p. 43, § 1, effective August 5.

**Cross references:** For the provisions which designate the Colorado water resources and power development authority as a "special purpose authority" for the purposes of section 20 of article X of the Colorado constitution, see § 24-77-102 (15).

### **37-95-105. Records and meetings of board - disclosure of interests required.**

(1) All resolutions and orders shall be recorded and authenticated by the signature of the chairman and the secretary of the board. Every legislative act of the board of a general or permanent nature shall be by resolution. The book of resolutions, corporate acts, and orders shall be a public record. A public record shall also be made of all other proceedings of the board, minutes of the meetings, annual reports, certificates, contracts, and bonds given by officers, employees, and any other agents of the authority. The account of all moneys received by and disbursed on behalf of the authority shall also be a public record. Any public record of the authority shall be open for inspection by any citizen. All records shall be subject to uniform budget and audit laws, as set forth in article 1 of title 29, C.R.S., and shall be subject to regular audits, as provided therein.

(2) All meetings of the board shall be open to the public. No business of the board shall be transacted except at a regular or special meeting at which a quorum is present. One or more members of the board may participate in any meeting and may vote through the use of telecommunications devices, including, but not limited to, a conference telephone or similar communications equipment. Such participation through telecommunications devices shall constitute presence in person at such meeting. Such use of telecommunications shall not supersede any requirements for public hearing otherwise provided by law.

(3) Any board member, employee, or other agent or adviser of the board who has a direct or indirect interest in any contract or transaction with the authority shall disclose this interest to the board. This interest shall be set forth in the minutes of the board, and no board member, employee, or other agent or adviser having such interest shall participate on behalf of the board in the authentication of any such contract or transaction.



**Source:** L. 81: Entire article added, p. 1797, § 1, effective July 1. L. 91: (2) amended, p. 902, § 3, effective April 19. L. 2008: (2) amended, p. 43, § 2, effective August 5.

**37-95-106. Authority - powers.** (1) Except as otherwise limited by this article, the authority, acting through the board, has the power:

(a) To have the duties, privileges, immunities, rights, liabilities, and disabilities of a body corporate and political subdivision of the state;

(b) To sue and be sued;

(c) To have an official seal and to alter the same at pleasure;

(d) To make and alter bylaws for its organization and internal management and for the conduct of its affairs and business;

(e) To maintain an office at such place or places within the state as it may determine;

(f) To acquire, hold, use, and dispose of its income, revenues, funds, and moneys;

(g) To charge, alter, and collect rentals or other charges for the use or services of any project, to contract in the manner provided in this article with one or more persons or governmental agencies or combinations thereof desiring the use or services thereof, and to fix the terms, conditions, rentals, or other charges for such use or services;

(h) To acquire, lease as lessee or lessor, rent, hold, use, and dispose of real or personal property, including water rights, for its purposes; except that the acquisition by the authority of existing decreed water rights of a governmental agency shall not occur without the consent of the affected governmental agency and that negotiation by the authority for the purchase of water rights shall not proceed without first notifying any affected agency when an existing governmental agency has initiated negotiations for the purchase of such rights. The submission of a bona fide offer by a governmental agency for the purchase of such water rights shall be deemed evidence of such initiated negotiations.

(i) To deposit any moneys of the authority in any banking institution within or outside the state;

(j) To fix the time and place or places at which its regular and special meetings are to be held;

(k) (I) To plan, design, develop, acquire, construct, reconstruct, enlarge, extend, improve, furnish, equip, maintain, repair, manage, operate, dispose of, and participate in one or more projects within or without the state and to appropriate water for said projects;

(II) To designate the Colorado water conservation board or, with said board's permission, one or more other persons or governmental agencies participating in a project to act as its agent, in connection with the planning, designing, development, acquisition, construction, reconstruction, enlargement, extension, improvement, furnishing, equipping, maintenance, repair, management, operation, disposition of, or participation in such projects;

(III) To establish rules and regulations for the use of such projects; and

(IV) To finance or participate in the financing of a project, or any interest therein, acquired or constructed or to be acquired or constructed by any governmental agency;

(l) To make available the use or services of any project to one or more persons, one or more governmental agencies, or any combination thereof;

(m) To borrow money and to issue its negotiable bonds or notes in furtherance of its purposes and to provide for the rights of the holders thereof;

(n) To have and exercise the power of eminent domain and, in general, to have and exercise rights and powers of eminent domain conferred upon other agencies as provided in articles 1 to 7 of title 38, C.R.S.; but the authority shall neither have nor exercise the power of eminent domain against the state nor acquire thereby any electric generation facilities, electric distribution lines, or any conditional or absolute water rights;

(o) To contract with any person or governmental agency within or without the state for the construction of any project, or for the sale of the output of any project, or for any interest therein or any right to capacity thereof, on such terms and for such period of time as the board shall determine;

(p) To purchase, sell, exchange, transmit, or distribute the power generated by any project within or without the state, in such amounts as it shall determine to be necessary and appropriate to make the most effective use of its powers and to meet its responsibilities, and

to enter into agreements with any person or governmental agency with respect to such purchase, sale, exchange, transmission, or distribution on such terms and for such period of time as the board shall determine;

(q) To purchase, sell, exchange, transmit, or distribute the water of any project within or without the state, subject to the limitation that the waters of the project shall not be delivered outside of the state for purposes other than meeting Colorado compact commitments, in such amounts as it shall determine to be necessary and appropriate to make the most effective use of its powers and to meet its responsibilities; and to enter into agreements with any person or governmental agency with respect to such purchase, sale, exchange, transmission, or distribution on such terms and for such period of time as the board shall determine; except that such action shall not interrupt the development, completion, or operation of existing water projects, nor shall the action adversely affect the ability of a district or governmental agency from fulfilling its contractual commitments associated with such projects;

(r) To make loans to any governmental agency for the planning, designing, acquiring, constructing, reconstructing, improving, equipping, and furnishing of a project, which loans may be secured by loan and security agreements, leases, or any other instruments, upon such terms and conditions as the board shall deem reasonable, including provisions for the establishment and maintenance of reserve and insurance funds, and to require the inclusion, in any lease, contract, loan and security agreement, or other instrument, of such provisions for the construction, use, operation, maintenance, and financing of a project as the board may deem necessary or desirable;

(s) To make and enter into all contracts, leases, and agreements which are necessary or incidental to the performance of its duties and the exercise of its powers under this article;

(t) To sell, convey, or lease to any person or governmental agency all or any portion of a project for such consideration and upon such terms as the board may determine to be reasonable;

(u) To make or cause to be made surveys, maps, and plans for, and estimates of the cost of, any project;

(v) (I) To acquire, in the name of the authority:

(A) Any land or other real or personal property, including water rights, which the authority determines is reasonably necessary for a project or for the relocation or reconstruction of any public road by the authority;

(B) Any and all right, title, and interest to and in such land and other real or personal property, including public lands, reservations, public roads, or parkways owned by or in which the state or any county, municipality, city and county, public corporation, or other political subdivision of the state has any right, title, or interest;

(C) Any fee simple absolute or any lesser interest in private property; and

(D) Any fee simple absolute in, or easements upon, or the benefit of restrictions upon abutting property to preserve and protect the project; except that the authority shall not acquire by purchase or condemnation land, an interest in land, or a right-of-way for the change of location of any portion of any public road, railroad, point of diversion, or public utility facility which is not needed for the construction of a project pursuant to this article.

(II) Acquisitions by the authority pursuant to this paragraph (v) may be made by purchase or otherwise, on such terms and conditions, and in such manner as the authority deems appropriate or may be made through the exercise of the power of eminent domain pursuant to, and subject to the limitations of, paragraph (n) of this subsection (1).

(w) To adopt rules and regulations for the use, management, and operation of the hydroelectric facilities and water management facilities financed by the authority;

(x) Subject to any agreement with bondholders or noteholders, to invest moneys of the authority not required for immediate use, including proceeds from the sale of any bonds or notes, in such obligations, securities, and other investments as the authority deems prudent;

(y) To contract for and to accept any gifts or grants or loans of funds or property or financial or other aid in any form from the United States or any agency or instrumentality thereof, or from the state or any governmental agency thereof, or from any other source and to comply, subject to the provisions of this article, with the terms and conditions thereof;



(z) Subject to any agreements with bondholders or noteholders, to purchase bonds or notes of the authority out of any funds or moneys of the authority available therefor and to hold, cancel, or resell such bonds or notes;

(aa) To employ accountants, attorneys, financial advisers, underwriters, and other experts and such other persons to act as agents and employees as may be required and to determine their qualifications, terms of office, duties, and compensation, all without regard to the provisions of the state personnel system; except that the authority may utilize the services of the officers, personnel, and consultants of the Colorado water conservation board to perform any or all activities specified in paragraphs (k) and (u) of this subsection (1);

(bb) To do and perform any acts authorized by this article under, through, or by means of its officers, agents, or employees or by contracts with any person, firm, or corporation;

(cc) To procure insurance against any losses in connection with its property, operations, personal liability, or assets in such amounts and from such insurers as it deems desirable;

(dd) To do any and all things necessary or convenient to carry out its purposes and exercise the powers given and granted in this article;

(ee) To purchase or refinance all or any portion of principal and interest on, and to purchase insurance or other credit-enhancement for the payment of, bonds, notes, or other obligations issued by the authority or any governmental agency to finance any project;

(ff) To charge to and collect from governmental agencies and persons fees and charges in connection with the authority's loans or other services, including, but not limited to, fees and charges sufficient to reimburse the authority for all reasonable costs necessarily incurred by the authority in connection with its financing and administration thereof and the establishment and maintenance of reserves or other funds, as the authority may determine to be reasonable;

(gg) Repealed.

(hh) To enter into one or more agreements with the Colorado water conservation board and any other governmental agencies to assist in the development of the water resources of the state.

**Source:** L. 81: Entire article added, p. 1798, § 1, effective July 1. L. 83: (1)(k) amended, p. 1441, § 2, effective June 10. L. 89: (1)(ee) and (1)(ff) added, p. 1433, § 3, effective April 18. L. 98: (1)(gg) added, p. 1003, § 2, effective May 27. L. 2003: (1)(hh) added, p. 2410, § 3, effective June 5.

**Editor's note:** Subsection (1)(gg)(II) provided for the repeal of subsection (1)(gg), effective July 1, 1999. (See L. 98, p. 1003.)

## ANNOTATION

**Law reviews.** For article, "Plans and Studies: of Colorado's Water Resources", see 55 U. The Recent Quest for a Utopia in the Utilization Colo. L. Rev. 391 (1984).

**37-95-107. Feasibility studies - repayment of costs.** (1) (a) (I) Before any proposed project can receive consideration for construction funding by the authority, the Colorado water conservation board must first review the feasibility study of any such proposed project, and the general assembly must authorize the authority to proceed to consider the construction of any proposed project.

(II) (A) Upon receipt of a feasibility study by the Colorado water conservation board, said board shall review such study and forward the study to the general assembly together with its recommendation as to whether or not the proposed project should be authorized by the general assembly.

(B) Upon receipt of a feasibility study from the Colorado water conservation board, the general assembly may authorize the authority, by means of a joint resolution signed by the governor, to proceed with the consideration of any project that the general assembly deems to be in the interests of and to the advantage of the people of this state. However, such joint resolution shall in no way require or compel the authority to fund or in any way finance and proceed with the development, acquisition, construction, reconstruction, enlargement,

extension, improvement, furnishing, equipping, maintenance, repair, management, operation, or disposition of, or participation in any proposed project. A decision to proceed, when made subsequent to such joint resolution, shall be entirely within the discretion of the authority.

(C) Should the authority choose to proceed with a project, then the authority shall make, or cause to be made, the necessary final designs and specifications for such project; except that the final project location, operation, and purposes must be in substantial compliance with the feasibility study for a project that was reviewed by the Colorado water conservation board. The authority shall also develop and implement detailed plans for the financing of projects with which it chooses to proceed. The terms and conditions of such financing shall be at the sole discretion of the authority.

(III) The provisions of this subsection (1) shall not apply to any small water resources project; except that, in the case of any small water resources project that consists of or includes raw water diversion or storage facilities, the board shall promptly forward a copy of the project loan application to the Colorado water conservation board for informational purposes.

(b) The state engineer shall not issue a permit or license or approve plans, pursuant to any law or rule governing such actions, for construction of any water management facility or hydroelectric power facility for which the authority has paid in whole or in part for a feasibility study or an environmental assessment or environmental impact study without a written resolution or written statement by the authority notifying the state engineer that the applicant has reimbursed the authority for its expenditures for the conduct of such studies.

(2) If the Colorado water conservation board enters into a contract for the performance of a feasibility study for a proposed raw water project with a governmental agency and incurs expenses in performing such feasibility study, then the authority shall provide for the reimbursement of such expenses out of its financing contract with the governmental agency for such project prior to the start of construction only when:

(a) The Colorado water conservation board's contract with the governmental agency sponsoring the project unconditionally requires the repayment of all of the expenses associated with the feasibility study prior to the start of construction, regardless of the funding source for such construction; and

(b) Such governmental agency obtains financing from the authority.

(3) The reimbursement obligation of the authority pursuant to subsection (2) of this section shall not apply:

(a) To the expenses of any feasibility study commenced or initiated by the Colorado water conservation board prior to June 5, 2003;

(b) To the expenses of any full or partial stream-wide, basin-wide, or statewide feasibility study that is not focused on a single discrete raw water supply project;

(c) To the expenses of any feasibility study identified and authorized or directed by law to be performed by the Colorado water conservation board without a contract with another governmental agency for such study;

(d) To the study of any domestic water supply project;

(e) If the Colorado water conservation board waives the obligation of the governmental agency to make such repayment or if the Colorado water conservation board releases, in whole or in part, such governmental agency from its obligation to make such repayment; and

(f) If otherwise agreed to by the authority and the Colorado water conservation board in an agreement entered into pursuant to section 37-60-106 (1) (t).

**Source:** L. 81: Entire article added, p. 1801, § 1, effective July 1. L. 83: (1) and (7) amended, p. 1442, § 3, effective June 10. L. 85: (5) amended, p. 1191, § 2, effective June 13. L. 89: (8) added, p. 1433, § 4, effective April 18. L. 98: (8) amended, p. 143, § 2, effective April 2. L. 2003: Entire section R&RE, p. 2411, § 5, effective June 5.

**37-95-107.5. Legislative declaration - specific project authorizations.** (1) It is hereby declared to be the policy of the general assembly to protect and foster the full utilization of Colorado's limited surface water resources by allocation thereof through the



operation of the appropriation system as provided by sections 5 and 6 of article XVI of the state constitution. Any judicial interpretation or other law to the contrary notwithstanding, the water rights appropriation and adjudication system of the state of Colorado shall continue to be utilized to establish priority of right to the use of the natural streams within the state which include groundwater tributary thereto.

(2) It is the recognition and intent of the general assembly that investment in the state's water resources for future generations must be made from state funds, from private capital, or from other moneys available to the authority. Major Colorado water projects should be developed as soon as possible in anticipation of demand and revenues.

(3) Several compacts relating to interstate streams have been entered into by the state on behalf of the people of the state of Colorado to reserve for the people the right to the use of such waters under the appropriation doctrine. It is hereby declared to be the policy of the general assembly to fully utilize, for the maximum benefit of all the people, said natural stream resources. To achieve such utilization, the general assembly hereby directs the authority to proceed with project development and financing in accordance with agreements between the project sponsor and the authority, and consistent with the provisions of this article, such projects as the Colorado water conservation board identifies in statewide water supply initiatives and associated feasibility studies and other projects identified by the authority.

(4) (Deleted by amendment, L. 2003, p. 2412, § 6, effective June 5, 2003.)

(5) The provisions of this section shall not be applicable to the financing of any small water resources project.

**Source:** L. 85: Entire section added, p. 1190, § 1, effective June 13. L. 89: (5) added, p. 1433, § 5, effective April 18. L. 2003: (2), (3), and (4) amended, p. 2412, § 6, effective June 5.

**37-95-107.6. Creation and administration of water pollution control revolving fund.** (1) There is hereby created in the authority the water pollution control revolving fund, which shall be maintained and administered by the authority and be available in perpetuity for the purposes stated in this section. The authority is authorized to establish such procedures as may be required to administer the water pollution control revolving fund in accordance with the clean water act and state law. The authority may create separate accounts in the water pollution control revolving fund, which accounts may be pledged and assigned as security for the payment of the bonds of the authority.

(2) (a) Subject to the provisions of the clean water act and agreements with the holders of bonds of the authority, the authority shall deposit in the water pollution control revolving fund grants from the federal government or its agencies allocated to the state for deposit in said fund; state matching funds where required; loan principal, interest, and penalty payments; and other moneys determined by the authority to be deposited therein.

(b) Moneys in the water pollution control revolving fund shall be expended in a manner consistent with terms and conditions of the clean water act and may be used to provide assistance to governmental agencies for the construction of publicly owned wastewater treatment plants that appear on the priority list under section 216 of the clean water act and as are defined in section 212 of the clean water act; for implementation of a nonpoint source pollution management program under section 319 of the clean water act; and for any other purposes permitted by the clean water act.

(c) Moneys on deposit in the water pollution control revolving fund may be used by the authority for wastewater treatment facilities through the making of loans to governmental agencies; purchasing or refinancing debt obligations of governmental agencies where the debt obligations were incurred after March 7, 1985; purchasing insurance for debt obligations of governmental agencies; securing or providing revenues for payment of the principal and interest on bonds of the authority; providing for the costs of administering the water pollution control revolving fund, including the administrative costs of state agencies; and providing for any other expenditure consistent with the clean water act and state law. Money not currently needed for the operation of the water pollution control revolving fund may be

invested, and all interest earned on such investments shall be credited to the specific account, if any, in the water pollution control revolving fund.

(3) (a) The authority may make and contract to make loans to governmental agencies in accordance with and subject to the provisions of this section to finance the cost of wastewater treatment system projects that are on the water pollution control project eligibility list established pursuant to subsection (4) of this section and any other projects authorized under the clean water act and that the governmental agencies may lawfully undertake or acquire under state law, including, but not limited to, applicable provisions of the "Colorado Water Quality Control Act", article 8 of title 25, C.R.S., and for which the governmental agencies are authorized by law to borrow money. The loans may be made subject to such terms and conditions as the authority shall determine to be consistent with the purposes thereof. Each loan by the authority and the terms and conditions thereof shall be subject to financial analysis by the division of local government of the department of local affairs. Such financial analysis shall include an analysis of the capacity to repay a loan and the need for financial assistance. Each loan to a local governmental agency shall be evidenced by notes, bonds, or other obligations thereof issued to the authority. In the case of each governmental agency, notes and bonds to be issued to the authority by the local governmental agency shall be authorized and issued as provided by law for the issuance of notes and bonds by the governmental agency, may be sold at private sale to the authority at any price, whether or not less than par value, and shall be subject to redemption prior to maturity at such times and at such prices as the authority and governmental agency may agree. Each loan to a local governmental agency and the notes, bonds, or other obligations thereby issued shall bear interest at such rate or rates per annum at or below market interest rate and shall be for such terms not to exceed twenty years after project completion as the authority and the governmental agency may agree.

(b) The authority is authorized, from moneys in the water pollution control revolving fund, to purchase or refinance or purchase insurance for the payment of all or any portion of the principal and interest on bonds, notes, or other obligations issued by a governmental agency to finance the cost of any wastewater treatment system project which the governmental agency may lawfully undertake or acquire under state law, including, but not limited to, applicable provisions of the "Colorado Water Quality Control Act", article 8 of title 25, C.R.S., and for which the governmental agency is authorized by law to borrow money. Each purchase or refinancing or purchase of insurance by the authority shall be subject to financial analysis by the division of local government in the department of local affairs. Such financial analysis shall include an analysis of the capacity to repay a loan and the need for financial assistance.

(c) The authority may charge to and collect from governmental agencies fees and charges in connection with the authority's loans or other services, including, but not limited to, fees and charges sufficient to reimburse the authority for all reasonable costs necessarily incurred by it in connection with its financing and the establishment and maintenance of reserves or other funds, as the authority may determine to be reasonable.

(4) (a) The initial water pollution control project eligibility list shall consist of those projects ranked one through thirty on the construction grant project priority list for federal funds adopted by the water quality control commission effective January 30, 1988.

(b) Additions or modifications to the water pollution control project eligibility list that have been developed by the water quality control commission shall be submitted to the general assembly on or before January 15 of each year. The additions and modifications shall be in conformance with applicable provisions of the clean water act and state law. On or before April 1 of each year, the additions or modifications shall be approved by a joint resolution presented to the governor in accordance with section 39 of article V of the state constitution.

(c) No funds may be expended from the water pollution control revolving fund or bonds issued by the authority pursuant to subsection (6) of this section for any wastewater treatment system project unless the wastewater treatment system project is on the water pollution control project eligibility list approved by the general assembly or is an emergency project in accordance with paragraph (d) of this subsection (4). Financial assistance



for a project pursuant to this section may be provided regardless of the rank of such project on the eligibility list.

(d) The Colorado water quality control commission may amend the water pollution control project eligibility list at any time, in accordance with its regular procedures, to include wastewater treatment system projects that it determines and declares to be emergency projects needed to prevent or address threats to the public health or environment. No later than January 15 of each year, the authority shall provide to the general assembly a listing of all emergency projects for which moneys from the water pollution control revolving fund have been expended in the preceding calendar year.

(5) The division of local government in the department of local affairs, the division of administration in the department of health, and the authority shall develop an intended use plan in compliance with the clean water act.

(6) In order to finance the cost of making loans to governmental agencies and provide reserves therefor pursuant to paragraph (a) of subsection (3) of this section, the authority is authorized to issue bonds pursuant to the provisions of this article.

(7) The authority, on behalf of the state, with the written approval of the department of health, is authorized to enter into such agreements with the United States as may be necessary to comply with the provisions of the federal "Water Quality Act of 1987" (Pub.L. 100-4) and as otherwise may be required to provide for the capitalization of the water pollution control revolving fund from federal grant moneys.

(8) The provisions of sections 37-95-107 and 37-95-107.5 shall not be applicable to any wastewater treatment system project on the project eligibility list approved by the general assembly pursuant to subsection (4) of this section.

(9) Notwithstanding anything to the contrary in any other provision of this article, moneys on deposit in the water pollution control revolving fund may, if permitted by applicable federal law and the terms of any agreement between the state and the United States relating to the water pollution control revolving fund, be deposited by the authority, in its discretion, into one or more funds or accounts created or pledged to secure the payments of bonds issued by the authority in connection with the drinking water revolving fund created and administered under section 37-95-107.8. Any moneys transferred under this subsection (9) from the water pollution control revolving fund into or for the benefit of the drinking water revolving fund shall be repaid into the water pollution control revolving fund as soon as practicable.

(10) The authority may, acting in its discretion and with the approval of the governor, transfer moneys from the water pollution control revolving fund to the drinking water revolving fund created and administered pursuant to section 37-95-107.8, if the transfer of such moneys is permitted by applicable federal law and the terms of any agreement between the state and the United States relating to the water pollution control revolving fund.

**Source:** L. 88: Entire section added, p. 1246, § 3, effective April 4. L. 95: (9) added, p. 942, § 3, effective May 25. L. 2002: (4)(c) amended and (4)(d) and (10) added, p. 79, §§ 2, 3, effective March 22. L. 2004: (4)(b) amended, p. 691, § 1, effective April 28. L. 2005: (3)(a), (4), and (5) amended, p. 39, § 2, effective March 23; (4)(b) amended, p. 306, § 1, effective January 1, 2006.

**Editor's note:** Amendments to subsection (4)(b) by Senate Bill 05-033 and Senate Bill 05-011 were harmonized.

### **37-95-107.7. Creation and administration of domestic water supply project revolving fund - repeal. (Repealed)**

**Source:** L. 94: Entire section added, p. 1374, § 3, effective May 25; (3)(b) amended, p. 2620, § 34, effective July 1. L. 95: (5) and (6) added, p. 942, § 4, effective May 25.

**Editor's note:** Subsection (6)(b) provided for the repeal of this section effective on the date the revisor of statutes receives notice that the domestic water supply project revolving fund has been depleted. (See L. 95, p. 942.) The state treasurer sent such notice in a letter dated April 24, 1999.

**37-95-107.8. Creation and administration of drinking water revolving fund.**

(1) There is hereby created in the authority the drinking water revolving fund that the authority shall maintain and administer for the purposes stated in this section. The authority may:

(a) Establish procedures to administer the drinking water revolving fund in accordance with the safe drinking water act and state law;

(b) Create separate accounts in the drinking water revolving fund and pledge and assign the accounts as security for the payment of the bonds of the authority;

(c) To the extent permitted by the safe drinking water act, transfer moneys to and divide moneys between the drinking water revolving fund and the water pollution control revolving fund created in section 37-95-107.6.

(2) (a) Subject to any applicable provisions of the safe drinking water act and agreements with the holders of bonds of the authority, the authority shall deposit in the drinking water revolving fund:

(I) Any grants from the federal government or its agencies allocated to the state for deposit in said fund;

(II) State matching funds, if required;

(III) Loan principal, interest, and penalty payments received with respect to loans made from the drinking water revolving fund; and

(IV) and (V) (Deleted by amendment, L. 2001, p. 1279, § 52, effective June 5, 2001.)

(VI) Any other moneys as determined by the authority.

(b) Moneys in the drinking water revolving fund shall be spent in a manner consistent with the terms and conditions of any state revolving program fund established by the safe drinking water act and may be used:

(I) To provide assistance to governmental agencies for projects that appear on the drinking water project eligibility list, referred to in this section as "eligible projects"; and

(II) For any other purposes permitted by the safe drinking water act.

(c) The authority may spend moneys in the drinking water revolving fund for financial assistance to governmental agencies for eligible projects, including expenditures by any of the following means:

(I) Any means specified in the safe drinking water act;

(II) Making loans to governmental agencies;

(III) Purchasing or refinancing obligations of governmental agencies if the debt obligations were incurred after October 14, 1993, or for a project to comply with amendments to regulations enacted by the 1986 amendments to the safe drinking water act;

(IV) Securing or purchasing insurance for debt obligations;

(V) Securing or providing moneys for payment of the principal and interest on bonds of the authority;

(VI) Securing or providing moneys for payment of the principal and interest on other bonds issued to finance eligible projects;

(VII) Providing for the costs of administering the drinking water revolving fund, including the administrative costs of state agencies;

(VIII) Investing money that is not currently needed for the operation of the drinking water revolving fund in the manner determined by the authority. All interest earned on these investments shall be credited to the specified account, if any, in the drinking water revolving fund.

(IX) Providing for any other expenditure that is consistent with the safe drinking water act and state law.

(3) (a) The authority may make and contract to make loans to governmental agencies in accordance with and subject to this section to finance the cost of eligible projects that the governmental agency may lawfully undertake or acquire under state law and for which the governmental agency is entitled by law to borrow money. The authority may make the loans subject to terms and conditions determined by the authority to be consistent with the purposes of the loans, and, to the extent that moneys originating in grants from the federal government are the source of the loans, consistent with the provisions of the safe drinking water act. Loans by the authority and the terms and conditions of the loans are subject to financial analysis by the division of local government in the department of local affairs. The



financial analysis shall include an analysis of the capacity to repay a loan and the need for financial assistance. The loans shall be evidenced by notes, bonds, or other obligations of the borrower that are issued to the authority. In the case of a governmental agency, notes and bonds to be issued to the authority shall be authorized and issued pursuant to this paragraph (a). All notes, bonds, or other obligations evidencing a loan from the authority may be sold at private sale to the authority at any price, whether or not less than par value. The denominations, the times for payment of principal and interest, and the provisions for redemption prior to maturity of such notes, bonds, or other obligations shall be as the authority and the borrower agree. Each loan to a governmental agency and the notes, bonds, or other obligations thereby issued shall bear interest at such rate or rates per annum at or below market interest rate and shall be for such terms not to exceed twenty years after project completion as the authority and the borrower may agree; except that, if the source of the loaned funds is a grant from the United States, the loan term may be extended in accordance with the terms of the safe drinking water act providing for extended loan terms.

(b) From moneys in the drinking water revolving fund, the authority may purchase or refinance or purchase insurance for the payment of all or any portion of the principal and interest on bonds, notes, or other obligations issued by a governmental agency to finance an eligible project that the governmental agency may lawfully undertake or acquire under state law and for which the governmental agency is authorized by law to borrow money. The purchase or refinancing or purchase of insurance by the authority is subject to financial analysis by the division of local government in the department of local affairs. The financial analysis shall include an analysis of the capacity to repay a loan and the need for financial assistance.

(c) The authority may charge to and collect from governmental agencies provided financial assistance from the drinking water revolving fund fees and charges in connection with the authority's loans or other services, including, but not limited to, fees and charges sufficient to reimburse the authority for all reasonable costs it necessarily incurred in providing financial assistance from the drinking water revolving fund, including, but not limited to, costs of financing and the establishment and maintenance of reserves or other funds as the authority may determine is reasonable.

(4) (a) The initial drinking water project eligibility list shall be developed by the division of administration in the department of public health and environment.

(b) Additions or modifications to the drinking water project eligibility list shall be developed by the water quality control commission and shall be submitted to the general assembly on or before January 15 of each year. The additions or modifications shall conform to applicable provisions of the safe drinking water act and state law. On or before April 1 of each year, the additions or modifications shall be adopted by the passage of a joint resolution that is approved by a majority vote of both houses of the general assembly and that is presented to the governor in accordance with section 39 of article V of the state constitution.

(c) Moneys shall not be spent from the drinking water revolving fund or bonds issued by the authority pursuant to subsection (6) of this section for any project unless the project is on the drinking water project eligibility list approved in accordance with this subsection (4) or is an emergency project in accordance with paragraph (d) of this subsection (4). Financial assistance for a project pursuant to this section may be provided regardless of the rank, if any, of the project on the eligibility list; except that any priority for eligible projects established or required by the safe drinking water act shall apply in the issuance of financial assistance if the source of the financial assistance is grant moneys from the federal government.

(d) The water quality control commission may amend the drinking water project eligibility list at any time, pursuant to its regular procedures, to include drinking water projects that it determines and declares to be emergency projects needed to prevent or address threats to the public health or environment. No later than January 15 of each year, the authority shall provide to the general assembly a listing of all emergency projects for which moneys from the drinking water revolving fund have been expended in the preceding calendar year.

(5) (a) The division of local government in the department of local affairs, the division of administration in the department of public health and environment, and the authority shall develop an intended use plan that complies with the safe drinking water act.

(b) (Deleted by amendment, L. 2005, p. 40, § 3, effective March 23, 2005.)

(6) The authority may issue bonds pursuant to this article to finance the cost of providing financial assistance from the drinking water revolving fund and to provide reserves therefor pursuant to subsection (3) of this section.

(7) On behalf of the state and with the written approval of the water quality control commission, the authority may enter into any agreements with the federal government as necessary to comply with any provisions of the safe drinking water act and if otherwise required to provide for any capitalization of the drinking water revolving fund from federal grant moneys.

(8) Sections 37-95-107 and 37-95-107.5 shall not apply to any project on the drinking water project eligibility list approved in accordance with subsection (4) of this section.

(9) The authority may, acting in its discretion and with the approval of the governor, transfer moneys from the drinking water revolving fund to the water pollution control revolving fund created and administered pursuant to section 37-95-107.6, if the transfer of such moneys is permitted by applicable federal law and the terms of any agreement between the state and the United States relating to the drinking water revolving fund.

**Source:** L. 95: Entire section added, p. 938, § 2, effective May 25. L. 96: (4)(a) amended, p. 1224, § 29, effective August 7. L. 2001: (2)(a)(III), (2)(a)(IV), and (2)(a)(V) amended, p. 1279, § 52, effective June 5. L. 2002: (4)(c) amended and (4)(d) and (9) added, p. 80, §§ 4, 5, effective March 22. L. 2004: (4)(b) amended, p. 691, § 2, effective April 28. L. 2005: (5) amended, p. 40, § 3, effective March 23; (4)(b) amended, p. 306, § 2, effective January 1, 2006. L. 2006: (4)(b), (4)(d), and (7) amended, p. 1137, § 24, effective July 1.

**Cross references:** For the legislative declaration contained in the 1996 act amending subsection (4)(a), see section 1 of chapter 237, Session Laws of Colorado 1996.

### **37-95-108. Acquisition and disposition of property - change of location of highways, railroad, or public utilities - regulation of public utility facilities on a project.**

(1) When the authority, or the person or governmental agency with which the authority contracts, finds it necessary to change the location of any portion of any public road, state highway, railroad, point of diversion, or public utility facility in connection with the construction of a project, it shall cause the same to be reconstructed at such location as the other person owning or the unit of government having jurisdiction over such road, highway, railroad, or public utility facility deems most favorable. Such construction shall be of substantially the same type and in as good condition as the original road, highway, railroad, or public utility facility. The cost of such reconstruction, relocation, or removal and any damage incurred in changing the location of any such road, highway, railroad, or public utility facility shall be paid by the authority, or the person or governmental agency responsible to the authority for repayment of bonds or notes in conjunction with any project authorized by the authority, as a part of the cost of such project.

(2) If the authority finds it necessary in connection with the undertaking of any project to change the location of any portion of any public highway or road, it may contract with any governmental agency or any public or private corporation which may have jurisdiction over said public highway or road to cause said public highway or road to be constructed. The cost of such reconstruction and any damage incurred in changing the location of any such highway shall be ascertained and paid by the authority, or the person or governmental agency with which the authority contracts, as a part of the cost of the project. Any public highway affected by the construction of the project may be vacated or relocated by the authority in the manner now provided by law for the vacation or relocation of public roads, and any damages awarded on account thereof shall be paid by the authority as a part of the cost of the project. In all undertakings authorized by this subsection (2), the authority shall consult with and obtain the approval of the department of transportation.



(3) The authority and its authorized agents and employees may enter upon any lands and premises for the purpose of making such surveys, soundings, drillings, and examinations as it may deem necessary or convenient for the purposes of this section, all in accordance with due process of law, and such entry shall not be deemed a trespass nor shall an entry for such purpose be deemed an entry under any condemnation proceedings which may be then pending. The authority shall make reimbursement for any actual damages resulting to such lands and premises as a result of such activities.

(4) The authority also has the power to make reasonable regulations for the installation, construction, maintenance, repair, renewal, relocation, and removal of railroad and public utility facilities in, on, along, over, or under any of its projects. Whenever the authority determines that it is necessary that any such public utility and railroad facilities which now are, or hereafter may be, located in, on, along, over, or under any project be relocated in any project or should be removed therefrom, the public utility or railroad owning or operating such facilities shall relocate or remove the same in accordance with the order of the authority, but the cost and expenses of such relocation or removal, including the cost of installing such facilities in a new location, and the cost of any lands, or any rights or interests in lands, and any other rights acquired to accomplish such relocation or removal shall be ascertained and paid by the authority, or the person or governmental agency with which the authority contracts, as a part of the cost of the project. In the case of any such relocation or removal of facilities, the public utility or railroad owning or operating the same or its successors or assigns may maintain and operate such facilities, with the necessary appurtenances, in the new location for as long a period and upon the same terms and conditions as it had to maintain and operate such facilities in their former location.

**Source:** L. 81: Entire article added, p. 1802, § 1, effective July 1. L. 91: (2) amended, p. 1075, § 59, effective July 1.

**37-95-109. Bonds or notes - issuance - terms.** (1) The authority has the power and is hereby authorized from time to time to issue its bonds or notes in such principal amounts as in the opinion of the board are necessary to provide sufficient funds for any of its corporate purposes, including the payment, funding, or refunding of the principal of, or interest or redemption premiums on, any bonds or notes issued by it, whether the bonds or notes or interest to be funded or refunded have or have not become due, and including the establishment or increase of such reserves to secure or to pay such bonds or notes or interest thereon and all other costs or expenses of the authority incident to and necessary to carry out its corporate purposes and powers. The authority shall subsidize some or all of the cost of issuance of bonds and notes pursuant to this article for projects, including small water resources projects, to build water management facilities that are raw water diversion or storage projects that are jointly sponsored by two or more governmental agencies that do not share the same governing body.

(2) Except as may be otherwise expressly provided in this article or by the authority, every issue of bonds or notes shall be special obligations payable out of any revenues or funds of the authority, subject only to any agreements with the holders of particular bonds or notes pledging any particular revenues or funds. The authority may issue such types of bonds or notes as it may determine, including, without limiting the generality of the foregoing, bonds or notes as to which the principal and interest are payable:

(a) Exclusively from the revenues and receipts of the part of the project financed with the proceeds of such bonds or notes;

(b) Exclusively from the revenues and receipts of certain designated parts of the project, whether or not the same are financed in whole or in part from the proceeds of such bonds or notes; or

(c) From its revenues and receipts generally.

(3) Any such bonds or notes may be additionally secured by a pledge of any grant, subsidy, or contribution from the United States or any agency or instrumentality thereof, or the state or any governmental agency thereof, or any person, firm, or corporation or by a pledge of any income or revenues, funds, or moneys of the authority from any source whatsoever.

(4) Whether or not the bonds and notes are of such form and character as to be negotiable instruments under the terms of the "Uniform Commercial Code", title 4, C.R.S., the bonds and notes are hereby made negotiable instruments within the meaning of and for all the purposes of said title 4, subject only to the provisions of the bonds and notes for registration.

(5) Bonds or notes of the authority shall be authorized by a resolution or resolutions of the board, and may be issued in one or more series, and shall bear such date or dates, mature at such time or times, bear interest at such rate or rates of interest per annum, be in such denomination or denominations, be in such form, either coupon or registered, carry such conversion or registration privileges, have such rank or priority, be executed in such manner, be payable from such sources in such medium of payment at such place or places within or without the state, and be subject to such terms of redemption (with or without premium) as such resolution or resolutions may provide.

(6) Bonds or notes of the authority may be sold at public or private sale at such price or prices and in such manner as the board shall determine.

(7) Bonds or notes may be issued under the provisions of this article without obtaining the consent of any department, division, commission, board, bureau, or agency of the state and without any other proceeding or the happening of any other conditions or other things than those proceedings, conditions, or things which are specifically required by this article.

(8) Bonds and notes of the authority issued under the provisions of this article shall not be in any way a debt or liability of the state or of any political subdivision thereof other than the authority and shall not create or constitute any indebtedness, liability, or obligation of the state or of any such political subdivision or be or constitute a pledge of the faith and credit of the state or of any such political subdivision, but all such bonds and notes, unless funded or refunded by bonds or notes of the authority, shall be payable solely from revenues or funds pledged or available for their payment as authorized in this article. Each bond and note shall contain on its face a statement to the effect that the authority is obligated to pay the principal thereof or the interest thereon only from revenues or funds of the authority and that neither the state nor any political subdivision thereof is obligated to pay such principal or interest and that neither the faith and credit nor the taxing power of the state or any political subdivision thereof is pledged to the payment of the principal of or the interest on such bonds or notes.

(9) All expenses incurred in carrying out the provisions of this article shall be payable solely from revenues or funds provided or to be provided under the provisions of this article, and nothing in this article shall be construed to authorize the authority to incur any indebtedness or liability on behalf of or payable by the state or any political subdivision thereof.

**Source: L. 81:** Entire article added, p. 1803, § 1, effective July 1. **L. 2003:** (1) amended, p. 1367, § 1, effective April 25.

**37-95-110. Power to make covenants to secure payment.** (1) In any resolution of the board authorizing or relating to the issuance of any bonds or notes, the authority, in order to secure the payment of such bonds or notes and in addition to its other powers, has the power by provisions therein which shall constitute covenants by the authority and contracts with the holders of such bonds or notes:

(a) To pledge all or any part of its rents, fees, revenues, or receipts to which its right then exists or may thereafter come into existence, and the moneys derived therefrom, and the proceeds of any bonds or notes;

(b) To pledge any lease or other agreement or the rents or other revenues thereunder and the proceeds thereof;

(c) To covenant against pledging all or any part of its rents, fees, revenues, or receipts, or its leases or agreements or rents or other revenues thereunder, or the proceeds thereof; or against mortgaging all or any part of its real or personal property then owned or thereafter acquired; or against permitting or suffering any lien on any of the foregoing;

(d) To covenant with respect to limitations on any right to sell, lease, or otherwise dispose of any project or any part thereof or any property of any kind;



(e) To covenant as to any bonds and notes to be issued and the limitations thereon and the terms and conditions thereof and as to the custody, application, investment, and disposition of the proceeds thereof;

(f) To covenant as to the issuance of additional bonds or notes or as to limitations on the issuance of additional bonds or notes and on the incurring of other debts by it;

(g) To covenant as to the payment of the principal of or interest on the bonds or notes, or any other obligations, as to the courses and methods of such payment, as to the rank or priority of any such bonds, notes, or obligations with respect to any lien or security, or as to the acceleration of the maturity of any such bonds, notes, or obligations;

(h) To provide for the replacement of lost, stolen, destroyed, or mutilated bonds or notes;

(i) To covenant against extending the time for the payment of bonds or notes or interest thereon;

(j) To covenant as to the redemption of bonds or notes and privileges of exchange thereof for other bonds or notes of the authority;

(k) To covenant as to the rates to be established and charged and the amount to be raised each year or other period of time by such charges and as to the use and disposition to be made thereof;

(l) To covenant to create or authorize the creation of special funds or moneys to be held in pledge or otherwise for construction, operating expenses, payment or redemption of bonds or notes, reserves, or other purposes and as to the use, investment, and disposition of the moneys held in such funds;

(m) To establish the procedure, if any, by which the terms of any contract or covenant with or for the benefit of the holders of bonds or notes may be amended or abrogated, the amount of bonds or notes the holders of which must consent thereto, and the manner in which such consent may be given;

(n) To covenant as to the construction, improvement, operation, or maintenance of its real and personal property, the replacement thereof, the insurance to be carried thereon, and the use and disposition of insurance moneys;

(o) To provide for the release of property, leases, or other agreements;

(p) To provide for the rights and liabilities and the powers and duties arising upon the breach of any covenant, condition, or obligation and to prescribe the events of default and the terms and conditions upon which any or all of the bonds, notes, or other obligations of the authority shall become or may be declared due and payable before maturity and the terms and conditions upon which any such declaration and its consequences may be waived;

(q) To vest in a trustee or trustees within or without the state such property, rights, powers, and duties in trust as the authority may determine, including the right to foreclose any mortgage, and to limit the rights, duties, and powers of such trustee;

(r) To execute all bills of sale, conveyances, deeds of trust, and other instruments necessary or convenient in the exercise of its powers or in the performance of its covenants or duties;

(s) To pay the costs or expenses incident to the enforcement of such bonds or notes or of the provisions of such resolution or of any covenant or agreement of the authority with the holders of its bonds or notes;

(t) To limit the powers of the authority to construct, acquire, or operate any structures, facilities, or properties which may compete or tend to compete with the project;

(u) To limit the rights of the holders of any bonds or notes to enforce any pledge or covenant securing bonds or notes; and

(v) To make covenants other than those expressly authorized in this section, of like or different character, and to make such covenants to do or refrain from doing such acts and things as may be necessary, or convenient and desirable, in order to better secure bonds or notes or which, in the absolute discretion of the authority, will tend to make bonds or notes more marketable, notwithstanding that such covenants, acts, or things may not be enumerated in this section.

**37-95-111. Pledge of revenues, moneys, funds, or other property - lien.** Any pledge of revenues, moneys, funds, or other property made by the authority shall be valid and binding from the time when the pledge is made; the revenues, moneys, funds, or other property so pledged and thereafter received by the authority shall immediately be subject to the lien of such pledge without any physical delivery thereof or further act, and the lien of any such pledge shall be valid and binding as against all parties having claims of any kind in tort, contract, or otherwise against the authority, irrespective of whether such parties have notice thereof. Neither the resolution nor any other instrument by which a pledge of revenues, moneys, or funds is created need be filed or recorded, except in the records of the authority.

**Source: L. 81:** Entire article added, p. 1807, § 1, effective July 1.

**37-95-112. Personal liability.** Neither the members of the board nor any person executing bonds or notes issued pursuant to this article shall be liable personally on such bonds or notes by reason of the issuance thereof.

**Source: L. 81:** Entire article added, p. 1807, § 1, effective July 1.

**37-95-112.5. Watershed protection and forest health projects - repeal.** (1) The authority is hereby authorized to issue bonds, in an amount not to exceed fifty million dollars, for the purposes of funding watershed protection projects and forest health projects of governmental agencies.

(2) The authority may make and contract to make loans with the proceeds of the bonds authorized by this section to governmental agencies pursuant to this section to finance the cost of watershed protection projects and forest health projects if the authority or the governmental agency has entered into an agreement with the Colorado clean energy development authority, as it existed prior to July 1, 2012, or the Colorado state forest service with respect to the application of proceeds of such bonds. The authority may make the loans subject to terms and conditions that are determined by the authority to be consistent with the purposes of the loans. The loans shall be evidenced by notes, bonds, or other obligations of the governmental agency that are issued to the authority, and the governmental agencies are authorized to issue such notes, bonds, or other obligations for such purposes. All notes, bonds, or other obligations evidencing a loan from the authority may be sold at a private sale to the authority at any price, whether or not less than par value. The denominations, times for payment of principal and interest, and provisions for redemption prior to maturity of such bonds, notes, or other obligations shall be as the authority and the governmental agency agree. Each loan to a governmental agency and the notes, bonds, or other obligations issued to evidence the same shall bear interest at the rate or rates and have the maturities as the authority and the governmental agency agree. The authority may charge and collect from governmental agencies fees and charges in connection with the loans or other services from the authority, including, but not limited to, fees and charges sufficient to reimburse the authority for all reasonable costs that it necessarily incurred in providing such loans. All watershed protection projects and forest health projects funded with moneys made available pursuant to this section shall comply with all applicable federal and state laws, such as best management practices for water quality established by the Colorado state forest service pursuant to section 24-33-201, C.R.S.

(3) Governmental agencies participating in watershed protection projects and forest health projects shall specify how the moneys made available pursuant to financing by the authority are to be allocated in a memorandum of understanding with the authority, subject to the following limitations:

(a) Up to twenty percent of the proceeds of bonds issued by the authority may be distributed for watershed protection projects and forest health projects, including the establishment of incentives for use of beetle-infested lumber.

(b) The remaining proceeds shall be applied to watershed protection projects and forest health projects identified, in consultation with the governmental agencies participating in such projects, by the Colorado state forest service pursuant to section 23-31-311, C.R.S.



- (4) For purposes of this section, "governmental agencies" means:
- (a) Any political subdivision of the state, including, but not limited to, cities, counties, cities and counties, municipalities, water conservation districts, water conservancy districts, special districts, water authorities, government-owned public utilities, and state agencies;
- (b) The United States and any agency thereof, including the United States forest service and the bureau of land management; and
- (c) Any enterprise, entity, agency, commission, or authority established by a governmental agency, including, without limitation, those established pursuant to an interstate compact or other intergovernmental compact or agreement.
- (5) This section is repealed, effective July 1, 2013. Such repeal shall not nullify, abrogate, alter, or otherwise affect any extant obligations under this article at the time of the repeal.

**Source:** L. 2008: Entire section added, p. 1538, § 2, effective July 1. L. 2012: (2) and (3)(a) amended, (HB 12-1315), ch. 224, p. 976, § 42, effective July 1.

**37-95-113. Debt service reserve funds for watershed protection projects and forest health projects.** (1) In addition to any other funds it may establish, the board may, by resolution, establish one or more special funds pursuant to this section, referred to in this section as "debt service reserve funds", for bonds issued to finance watershed protection projects and forest health projects pursuant to section 37-95-112.5, and may pay into such debt service reserve funds:

- (a) Any moneys appropriated and made available by the state for the purposes of such debt service reserve funds;
- (b) Any proceeds from the sale of bonds to the extent provided in the resolutions of the board authorizing the issuance thereof; and
- (c) Any moneys that may be made available to the authority from any other sources for the purposes of such debt service reserve funds.

(2) So long as there are bonds outstanding secured by a debt service reserve fund created by this section, all moneys held in any debt service reserve fund, except as otherwise required in this section, shall be used solely for the payment of the principal of the bonds or of the sinking fund payments referred to in this section with respect to such bonds, the purchase or redemption of such bonds, the payment of interest on such bonds, or the payment of any redemption premium required to be paid when such bonds are redeemed prior to maturity; except that moneys in any such fund shall not be withdrawn at any time in such amount as would reduce such fund to less than the debt service reserve fund requirement, except for the purpose of making, with respect to such bonds, principal, interest, redemption premium, and sinking fund payments for the payment of which other moneys of the authority are not available. So long as there are no bonds issued and outstanding secured by a debt service reserve fund created by this section, the amounts on deposit in such debt service reserve fund shall be used for watershed protection projects and forest health projects funded pursuant to section 37-95-112.5.

(3) Any income or interest earned by, or increment to, any debt service reserve fund due to the investment thereof may be transferred to other funds or accounts of the authority to the extent it does not reduce the amount of such debt service reserve fund below the debt service reserve fund requirement.

(4) The authority may provide by resolution for the establishment of a debt service reserve fund requirement for any debt service reserve fund established pursuant to this section.

(5) The chair of the authority shall, on or before January 1 of each year, make and deliver to the governor a certificate, stating the sum, if any, required to restore each debt service reserve fund to the debt service reserve fund requirement. The governor may transmit to the general assembly a request for the amount, if any, required to restore each debt service reserve fund to the debt service reserve fund requirement. The general assembly may, but shall not be required to, make any such appropriations so requested. All sums appropriated and paid by the general assembly for such restoration shall be deposited by the authority in each such debt service reserve fund. If, in its sole discretion, the general

assembly appropriates any moneys for such purpose, the aggregate outstanding principal amount of bonds for which moneys may be appropriated shall not exceed fifty million dollars. Nothing in this section shall create or constitute a debt or liability of the state.

(6) Any moneys appropriated by the general assembly for the purposes of any of the debt service reserve funds established pursuant to this section shall not revert to the general fund of the state at the end of any fiscal year.

(7) If, by virtue of a decision of the Colorado supreme court or any federal court, portions of this article are held unconstitutional and the authority is thereby rendered incapable of performing all of the purposes for which it is hereby created, then, subject to the provisions of section 37-95-114, any moneys appropriated by the general assembly for the purposes of any of the debt service reserve funds established by the authority remaining on deposit therein shall be transferred to the Colorado water conservation board construction fund established pursuant to section 37-60-121, such transfer to take effect on the day after such decision becomes final and no longer appealable.

**Source:** L. 81: Entire article added, p. 1807, § 1, effective July 1. L. 82: IP(1), (2), (8), and (10) amended, (4) R&RE, and (5) and (6) repealed, pp. 542, 543, §§ 2-4, effective April 2. L. 2002: Entire section repealed, p. 80, § 6, effective March 22. L. 2008: Entire section RC&RE, p. 1539, § 3, effective July 1.

**37-95-114. Guarantee by state not to limit or alter rights or powers vested in authority.** The state of Colorado does hereby pledge to and covenant and agree with the holders of any bonds or notes issued pursuant to the powers set forth in this article that the state will not limit or alter the rights or powers vested by this article in the authority to acquire, construct, maintain, improve, repair, and operate the project in any way that would jeopardize the interest of such holders, or to perform and fulfill the terms of any agreement made with the holders of such bonds or notes, or to fix, establish, charge, and collect such rents, fees, rates, or other charges as may be convenient or necessary to produce sufficient revenues to meet all expenses of the authority and fulfill the terms of any agreement made with the holders of such bonds and notes, together with interest thereon, with interest on any unpaid installments of interest, and all costs and expenses in connection with any action or proceedings by or on behalf of such holders, until the bonds, together with interest thereon, are fully met and discharged or provided for.

**Source:** L. 81: Entire article added, p. 1809, § 1, effective July 1.

**37-95-115. Exemption of bonds from taxation.** Any bonds issued by the authority under the provisions of this article, their transfer, and the income therefrom (including any profit made on the sale thereof) shall at all times be free from taxation by the state or any political subdivision or other instrumentality of the state.

**Source:** L. 81: Entire article added, p. 1809, § 1, effective July 1.

**37-95-116. Annual report - annual audit - annual budget.** (1) On or before April 30 of each year, the authority shall make an annual report of its activities for the preceding fiscal year to the governor and the joint agriculture and natural resource committee of the house of representatives and the senate. Each such report shall set forth a complete operating and financial statement covering its operations during the year. Included within such report shall be detailed financial data setting forth the manner in which any previously appropriated state funds have been used. The authority, no later than November 30 of each year, shall report to the governor any requests for state funds for the upcoming state fiscal year, detailing the purposes for which said funds are to be utilized.

(2) The authority shall cause an audit of its books and accounts to be made at least once in each year by certified public accountants, and the cost thereof shall be considered as expenses of the authority, and a copy thereof shall be filed with the state treasurer.



(3) The authority shall develop and adopt an annual administrative operating budget and submit such budget on a timely basis to each district, governmental entity, and other entity participating in projects, so as to permit such districts and entities to make necessary adjustments in their respective budgets, fees, and charges.

**Source:** L. 81: Entire article added, p. 1809, § 1, effective July 1. L. 83: Entire section amended, p. 1442, § 4, effective June 10. L. 98: (1) amended, p. 144, § 3, effective April 2. L. 2001: (1) amended, p. 1181, § 22, effective August 8. L. 2003: (1) amended, p. 2413, § 7, effective June 5.

**37-95-117. Services by state officers, departments, boards, agencies, divisions, and commissions.** All officers, departments, boards, agencies, divisions, and commissions of the state are hereby authorized and empowered to render any and all of such services to the authority as may be within the area of their respective governmental functions as fixed or established by law and as may be requested by the authority. The cost and expense of any such services shall be met and provided for by the authority.

**Source:** L. 81: Entire article added, p. 1809, § 1, effective July 1.

**37-95-118. Bonds eligible for investment.** Bonds issued under the provisions of this article are hereby made securities in which all insurance companies, trust companies, banking associations, savings and loan associations, investment companies, executors, administrators, trustees, and other fiduciaries may properly and legally invest funds, including capital, in their control or belonging to them. Public entities, as defined in section 24-75-601 (1), C.R.S., may invest public funds in such bonds only if said bonds satisfy the investment requirements established in part 6 of article 75 of title 24, C.R.S. Such bonds are hereby made securities which may properly and legally be deposited with and received by any public entity for any purpose for which the deposit of bonds, notes, or obligations of the state is authorized by law.

**Source:** L. 81: Entire article added, p. 1810, § 1, effective July 1. L. 89: Entire section amended, p. 1132, § 75, effective July 1.

**37-95-119. Charges for use of service of projects.** Rentals or other charges with respect to a project shall not be subject to supervision or regulation by any other authority, commission, board, bureau, or agency of the state, and such contract with respect to a project may provide for acquisition by such person or governmental agency of all or any part of such project for such consideration, payable over the period of the contract or otherwise, as the authority in its sole discretion determines to be appropriate, but subject to the provisions of any resolution authorizing the issuance of bonds or notes of the authority or any trust agreement securing the same.

**Source:** L. 81: Entire article added, p. 1810, § 1, effective July 1.

**37-95-120. Agreements with governmental agencies or persons.** (1) Governmental agencies or persons may enter into lease, sale, or loan agreements with the authority with respect to any project, and governmental agencies or persons may also enter into purchase agreements with the authority for the purchase of the capacity use or service of any project. Such lease, sale, loan, or purchase agreements may be for a term covering the life of a project, or for any other term, or for an indefinite period. Pursuant to any such agreements, such governmental agencies or persons may obligate themselves to make payments in amounts which shall be sufficient to enable the authority to meet its expenses, the interest and principal payments (whether at maturity or upon sinking fund redemption) for its bonds, its reasonable reserves for debt service, operation and maintenance, and renewals and replacements, and the requirements of any rate covenant with respect to debt service coverage contained in any resolution, trust indenture, or other security instrument.

(2) Purchase agreements between the authority and any governmental agency or persons may contain such other terms and conditions as the authority and the purchasers may determine, including provisions whereby the purchaser is obligated to pay for the output, capacity, or use of any project irrespective of whether such output, capacity, or use is produced or delivered to the purchaser or whether any water development project contemplated by any such agreement is completed, operable, or operating, and notwithstanding suspension, interruption, interference, reduction, or curtailment of the output, use, or service of such project. Subject to local charter and state constitutional limitations, such purchase agreements may also provide that if one or more of the purchasers defaults in the payment of its obligations under any such purchase agreement, the remaining purchasers which also have such agreements shall be required to accept and pay for, and shall be entitled proportionately to use or otherwise dispose of, the output, capacity, or use of the project contracted for by the defaulting purchaser.

(3) The obligations of a governmental agency or persons under an agreement with the authority or arising out of the default by any other purchaser with respect to such an agreement shall not, unless otherwise lawful, be construed to constitute a debt of the governmental agency or persons. To the extent provided in agreements with the authority, such obligations shall constitute special obligations of the governmental agency or persons, payable solely from the revenues and other moneys derived by the governmental agency or persons from their utility systems, and shall be treated as expenses of operating such systems.

**Source:** L. 81: Entire article added, p. 1810, § 1, effective July 1. L. 83: (3) amended, p. 1443, § 5, effective June 10.

**37-95-121. Effect on inconsistent acts and rules and regulations adopted thereunder.** It is the intent of the general assembly that, in the event of any conflict or inconsistency in the provisions of this article and any other statutes pertaining to matters established or provided for in this article or in any rules and regulations adopted under this article or under said other statutes, to the extent of such conflict or inconsistency, the provisions of this article and the rules and regulations adopted under this article shall be enforced, and the provisions of such other statutes and rules and regulations adopted thereunder shall be of no force and effect; except that nothing in this article shall be construed to amend or affect any existing water law.

**Source:** L. 81: Entire article added, p. 1811, § 1, effective July 1.

**37-95-122. Severability.** If any provision of this article or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the article which can be given effect without the invalid provision or application, and to this end the provisions of this article are declared to be severable.

**Source:** L. 81: Entire article added, p. 1811, § 1, effective July 1.

**37-95-123. Construction of article.** This article shall be construed liberally to effectuate the legislative intent and the purposes of this article as the complete and independent authority for the performance of each and every act and thing authorized in this article, and all the powers granted in this article shall be broadly interpreted to effectuate such intent and purposes and shall not be interpreted as a limitation of such powers; except that it is hereby recognized that the primary purpose of this article relates to the development of water resources of the state of Colorado as set forth in section 37-95-102 (1), and that the only generation of electric energy authorized hereunder is generation from hydroelectric facilities. This article shall not be construed to authorize the board to generate electric energy by fossil fuel or other nonhydroelectric methods.

**Source:** L. 81: Entire article added, p. 1811, § 1, effective July 1. L. 98: Entire section amended, p. 144, § 4, effective April 2.



**WATER CONSERVATION****ARTICLE 96****Water Conservation in State Landscaping**

37-96-101.	Short title.	37-96-103.	Requirement of water conservation in landscaping for certain public projects.
37-96-102.	Legislative declaration.		

**37-96-101. Short title.** This article shall be known and may be cited as the "State Projects Water Conservation in Landscaping Act".

**Source: L. 89:** Entire article added, p. 1435, § 1, effective April 19.

**37-96-102. Legislative declaration.** (1) The general assembly hereby finds, determines, and declares that:

(a) The waters of the state are of limited supply and are subject to ever increasing demands;

(b) The continuation of Colorado's economic prosperity is dependent on adequate supplies of water being available for future uses;

(c) It is the policy of the state to promote the conservation and efficient use of water and to prevent the waste of this valuable resource;

(d) It is further the policy of the state to conserve water used for public projects;

(e) Landscaping with plants that conserve water has an additional benefit of reducing ongoing maintenance of public projects or facilities and costs associated therewith.

**Source: L. 89:** Entire article added, p. 1435, § 1, effective April 19.

**37-96-103. Requirement of water conservation in landscaping for certain public projects.** (1) For purposes of this article, unless the context otherwise requires:

(a) (I) "Public project or facility" means any new construction or renovation financed wholly or in part by the state, including, but not limited to, any road or highway construction project and facility connected therewith, any public building or facility constructed or renovated by a public entity, and any project, building, or facility constructed or renovated by a public entity with funding from the Colorado lottery.

(II) "Public entity" means any governmental or quasi-governmental agency of the state as well as any political subdivision of the state if that political subdivision receives financing from the state for a public project or facility, as defined in this subsection (1).

(b) "Public project or facility" does not include any public project or facility which disturbs less than two hundred square feet of ground space or any project or facility which is not irrigated; except that any public project or facility which is subsequently irrigated shall comply with this article.

(c) "Renovation" includes external improvements to the project or facility that affect at least thirty-five percent of the covered landscaped area.

(2) On and after January 1, 1990, when the public entity responsible for landscaping and maintaining any public project or facility constructed or renovated by the public entity develops a landscaping plan, the plan shall seek to conserve water in the landscaping of such public project or facility. Any such landscaping plan shall consider, but need not be limited to:

(a) Depending upon the use of the public project or facility, limiting the area on which frequently irrigated and mowed turf is to be maintained to functional areas or areas proximal to entryways and restricting turf use from median strip plantings;

(b) Insuring the use of efficient irrigation techniques, including, but not limited to, water reuse, wherever possible and the use of seasonally variable irrigation schedules which match the evapotranspiration needs of the plants being irrigated;

- (c) Analyzing and improving soil on the site to maximize moisture availability for plant intake and to increase soil moisture penetration and retention;
  - (d) Using mulches to reduce water needs and weed growth and to check soil erosion;
  - (e) Using lower-water demand plants, ground cover, and grass species to conserve water; and
  - (f) Planning for routine maintenance such as weed control, pruning, and irrigation system adjustments to reduce water usage.
- (3) Any public entity which constructs or renovates a public project or facility to which the provisions of this article apply may develop a water use analysis, a water use projection, and a landscaping water plan to guide and regulate water used for maintenance of any such landscaping.
- (4) The state of Colorado shall develop and implement a plan to enhance water use efficiency with respect to any state project or facility the construction or renovation of which commences after January 1, 1993.
- (5) If the state facility or project involves landscaping or maintenance of existing landscaping to enhance water use efficiency, a landscaping plan shall be developed and implemented using best management practices which shall include, but not be limited to:
- (a) Limiting to functional areas of heavy pedestrian traffic, such as ballfields or areas proximal to entryways, the locations on which frequently irrigated and mowed turf such as bluegrass is to be maintained, and restricting the use of turf in median strips;
  - (b) Ensuring the use of efficient irrigation techniques and systems, including prohibiting landscape irrigation between the hours of 11 a.m. and 3 p.m.; employing the use of nonpotable water supplies and water reuse, where such supplies and water reuse are available, for irrigation of areas exceeding ten acres; and using seasonally variable irrigation schedules which match the evapotranspiration needs of the plants being irrigated;
  - (c) Analyzing and improving soil on the site to maximize moisture availability for plant intake and to increase soil moisture penetration and retention;
  - (d) Using mulches to reduce water needs and weed growth and to check soil erosion;
  - (e) Using lower water-demand plants, ground cover, and grass species to reduce water usage;
  - (f) Planning for routine maintenance such as weed control, pruning, and irrigation system adjustments so as to reduce water usage; and
  - (g) Using evapotranspiration data, when available, to determine water needs.
- (6) After January 1, 1992, the state of Colorado shall subject all state buildings to evaluation through water audits in those areas in which such audits are available from the local water supply entity.
- (7) In all state-owned buildings the construction or renovation of which commences after January 1, 1992, water-efficient plumbing devices shall be installed in accordance with article 1.3 of title 9, C.R.S.; except that:
- (a) Where tank-type water closets are installed, such water closets shall flush with a maximum of one and six-tenths gallons of water.
  - (b) Where flushometer valves are used, such flushometer valves shall be the least water-using type found to be safe and reliable.
- (8) Repealed.

**Source:** L. 89: Entire article added, p. 1436, § 1, effective April 19. L. 91: (4) to (8) added, p. 2028, § 5, effective June 4. L. 99: (8) repealed, p. 26, § 5, effective March 5.

**Cross references:** In 1991, subsections (4), (5), (6), (7), and (8) were added by the "Water Conservation Act of 1991". For the short title and the legislative declaration, see sections 1 and 2 of chapter 328, Session Laws of Colorado 1991.



**ARTICLE 97****Water Metering Act**

37-97-101.	Short title.	37-97-103.	Mandatory use of metered
37-97-102.	Definitions.		water delivery and billing
37-97-102.5.	Exemptions.		systems.

**37-97-101. Short title.** This article shall be known and may be cited as the “Water Metering Act”.

**Source: L. 90:** Entire article added, p. 1630, § 1, effective July 1.

**37-97-102. Definitions.** As used in this article, unless the context otherwise requires:

(1) “Water service supplier” means any person who, for compensation, provides water for human consumption or for household use through a system of pipes, structures, or other facilities if such system has at least six hundred unmetered taps.

**Source: L. 90:** Entire article added, p. 1630, § 1, effective July 1.

**37-97-102.5. Exemptions.** (1) Communities receiving their water supply from free-flowing springs shall be exempt from this article.

(2) Raw water piped irrigation systems in communities that have separate raw water piped irrigation systems and domestic water systems shall be exempt from this article.

(3) Communities under sanction by the department of public health and environment for water quality standards shall be exempt from this article.

**Source: L. 90:** Entire article added, p. 1630, § 1, effective July 1. **L. 94:** (3) amended, p. 2805, § 576, effective July 1.

**Cross references:** For an additional exemption, see § 37-97-103 (6).

**37-97-103. Mandatory use of metered water delivery and billing systems.** (1) Every water service supplier providing water in this state shall provide a metered water delivery and billing service to its customers according to the following schedule:

(a) For any new construction serviced by such water service supplier, including but not limited to construction for residential, commercial, or industrial use, meters shall be installed at the time of such construction.

(b) For any existing construction with unmetered taps, meters shall be installed on fifty percent of such taps on or before January 1, 2000. For any taps remaining unmetered as of January 1, 2000, meters shall be installed on fifty percent of such taps on or before January 1, 2005, and on all remaining unmetered taps on or before January 1, 2009.

(2) Billing of such water services based on the metered service shall begin no later than ninety days from the date of the installation of the meter.

(3) Any increase in the rates charged for such water service attributed to such installation and billing service requirements shall be based upon the actual costs of such installation and billing service. Such increase may recover the total cost of providing such service to the customers of the water service provider.

(4) Nothing in this section shall preclude a water service supplier from providing such metered water delivery and billing service prior to the dates specified in subsections (1) and (2) of this section or from seeking a corresponding rate increase necessitated by the provision of such service prior to those dates.

(5) Within an industrial customer operation, multiple water uses shall not be considered separate service connections. Deliveries to any customer other than a detached single family residential customer who may be subject to this article may be metered by the use of a single meter for the entire customer or operation.

(6) A mobile home park, as defined in section 38-12-201.5 (3), C.R.S., which makes water service available to tenants but does not bill such tenants for water as a separate item is exempt from the provisions of this article.

**Source: L. 90:** Entire article added, p. 1630, § 1, effective July 1.

**Cross references:** For additional exemptions, see § 37-97-102.5.

## ARTICLE 98

### Water Resources Review Committee

37-98-101.	Legislative declaration.	bill limitation - deadlines
37-98-102.	Water resources review committee - creation.	for introduction - repeal.
37-98-103.	Annual recommendations -	37-98-104. Repeal of article. (Repealed)

**37-98-101. Legislative declaration.** (1) The general assembly finds, determines, and declares that the purpose of this article is to provide an interim committee as a forum through which the general assembly shall review the administration and monitoring of Colorado's water resources. The general assembly recognizes its mandate to vigorously protect and defend Colorado's finite supply of water. The general assembly further recognizes the need to ensure that water issues receive sufficient legislative scrutiny and public input:

(a) To maximize the benefit derived from Colorado's surface water and groundwater resources;

(b) To evaluate the present and future water needs of the state;

(c) To ensure effective water rights administration;

(d) To protect water quality and water quantity;

(e) To ensure that Colorado's interstate water compact agreements are met and, in relation thereto, that Colorado's water resources are protected against unwarranted claims; and

(f) To continue the studies of the special water committee pursuant to Senate Bill 96-074.

**Source: L. 2001:** Entire article added, p. 725, § 1, effective July 1.

**37-98-102. Water resources review committee - creation.** (1) (a) For the purposes of contributing to and monitoring the conservation, use, development, and financing of the water resources of Colorado for the general welfare of its inhabitants and to review and propose water resources legislation, there is hereby created the water resources review committee, referred to in this article as the committee. The committee shall meet at the call of the chair as often as six times during even-numbered years and eight times during odd-numbered years to review and to propose water resources legislation and matters relating thereto. No more than two of such meetings may occur during periods other than the interim period; except that the committee shall not meet during the 2010 interim period. In connection with such review, except during the 2010 interim period, the committee may take up to two field trips per year in connection with its mandate and shall consult with experts in the field of water conservation, quality, use, finance, and development. The department of natural resources, the state engineer, and the attorney general, together with the members and staff of the Colorado water conservation board, the Colorado water resources and power development authority, the Colorado water quality control commission, the department of public health and environment, the department of agriculture, and the great outdoors Colorado program, shall cooperate with the committee and with any persons assisting the committee in pursuing its responsibilities pursuant to this section. Further, the committee may utilize the legislative council staff to assist its members in researching any matters.



(b) (Deleted by amendment, L. 2003, p. 718, § 2, effective March 20, 2003.)

(2) (a) The committee shall consist of ten members of the general assembly to be selected as follows:

(I) Five members of the committee shall be from the senate, three appointed by the president of the senate and two appointed by the minority party leader; and

(II) Five members of the committee shall be from the house of representatives, appointed by the speaker of the house of representatives after consultation with the minority leader of the house of representatives.

(b) At least four members of the committee shall either:

(I) Reside in that portion of the state that is west of the continental divide; or

(II) Represent a legislative district the majority of the population of which lies west of the continental divide.

(c) To the extent possible, the members shall be selected so as to achieve representation from each water division as defined in section 37-92-201.

(d) (I) Except as provided in subparagraph (II) of this paragraph (d), members' terms shall extend from January 1 of an odd-numbered year to December 31 of the following even-numbered year.

(II) The terms of the members appointed by the speaker of the house of representatives, the president of the senate, and the minority leader of the senate and who are serving on March 22, 2007, shall be extended to and expire on or shall terminate on the convening date of the first regular session of the sixty-seventh general assembly. As soon as practicable after such convening date, the speaker, the president, and the minority leader of the senate shall appoint or reappoint members in the same manner as provided in paragraph (a) of this subsection (2). Thereafter, the terms of members appointed or reappointed by the speaker, the president, and the minority leader of the senate shall expire on the convening date of the first regular session of each general assembly, and all subsequent appointments and reappointments by the speaker, the president, and the minority leader of the senate shall be made as soon as practicable after such convening date. The person making the original appointment or reappointment shall fill any vacancy by appointment for the remainder of an unexpired term. Members shall serve at the pleasure of the appointing authority and shall continue in office until the member's successor is appointed.

(3) The president of the senate and the speaker of the house of representatives shall coordinate their appointments to the extent practicable.

(4) Members of the committee shall serve without compensation; except that each member shall receive the sums specified in section 2-2-307 (3) (a) and (3) (b), C.R.S., for attendance at meetings of the committee when the general assembly is in recess for more than three days or is not in session.

(5) During odd-numbered years, the president of the senate shall appoint the chair and the speaker of the house of representatives shall appoint the vice-chair, and during even-numbered years, the speaker of the house of representatives shall appoint the chair and the president of the senate shall appoint the vice-chair.

(6) (Deleted by amendment, L. 2002, p. 1099, § 1, effective June 3, 2002.)

**Source:** L. 2001: Entire article added, p. 726, § 1, effective July 1. L. 2002: (1), (2)(b), and (6) amended, p. 1099, § 1, effective June 3. L. 2003: (1) and (5) amended, p. 718, § 2, effective March 20. L. 2004: (2)(d) added, p. 162, § 1, effective March 17. L. 2007: (2)(d) amended, p. 190, § 28, effective March 22. L. 2010: (1)(a) amended, (SB 10-213), ch. 375, p. 1764, § 11, effective June 7.

**37-98-103. Annual recommendations - bill limitation - deadlines for introduction - repeal.** (1) The committee may report no more than three bills or other measures to the legislative council created in section 2-3-301, C.R.S., unless a two-thirds majority of the members of the committee vote to report a greater number; except that the committee shall not report any bills to the legislative council in 2010. No bill shall be reported to the legislative council unless a two-thirds majority of the appointed members of the committee vote to report such bill to the legislative council. Such greater number shall not exceed one bill or other measure per member. These bills shall be exempt from any applicable bill limit

imposed on the individual committee members sponsoring such bills if the bills have been approved by the legislative council no later than October 15 in even-numbered years and November 15 in odd-numbered years.

(2) to (4) Repealed.

**Source:** L. 2001: Entire article added, p. 727, § 1, effective July 1. L. 2002: Entire section amended, p. 1100, § 2, effective June 3. L. 2003: (2) repealed, p. 718, § 1, effective March 20. L. 2008: (4) added, p. 1638, § 1, effective May 29; (3) added, p. 1038, § 1, effective August 5. L. 2010: (1) amended, (SB 10-213), ch. 375, p. 1764, § 12, effective June 7.

**Editor's note:** Subsections (3)(b) and (4)(b) provided for the repeal of subsections (3) and (4), respectively, effective July 1, 2009. (See L. 2008, pp. 1038, 1638.)

### **37-98-104. Repeal of article. (Repealed)**

**Source:** L. 2001: Entire article added, p. 727, § 1, effective July 1. L. 2002: Entire section repealed, p. 1100, § 3, effective June 3.





## **TITLE 38**

# **PROPERTY - REAL AND PERSONAL**



1911

PROPERTY OF THE UNIVERSITY OF CHICAGO

# **TITLE 38**

## **PROPERTY - REAL AND PERSONAL**

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## EMINENT DOMAIN

### ARTICLE 1

#### Proceedings

**Cross references:** For right-of-way for ditches and flumes, see § 7 of art. XVI, Colo. Const.; for the taking of property, see §§ 14 and 15 of art. II, Colo. Const.; for payment of fees for land subject to the Torrens title system, see § 38-36-180.

**Law reviews:** For article, "Access at Last: The Use of Private Condemnation", see 29 Colo. Law. 77 (February 2000); for article, "Resolving Access Disputes with Conservation Tools", see 30 Colo. Law. 71 (December 2001); for article, "Eminent Domain Law in Colorado—Part II: Just Compensation", see 35 Colo. Law. 47 (November 2006); for article, "Kelo Confined—Colorado Safeguards Against Condemnation for Public-Private Transportation Projects", see 37 Colo. Law. 39 (March 2008).

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		38-1-120.	Acquisition of state lands - department of natural resources.
38-1-101.5.	Necessity of taking land for pipelines.	38-1-121.	Appraisals - negotiations.
38-1-101.7.	Limitations on the use of right-of-way.	38-1-122.	Attorney fees.
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#### PART 2

#### GOVERNMENTAL ENTITIES, INDIVIDUALS, AND CORPORATIONS AUTHORIZED TO EXERCISE THE POWER OF EMINENT DOMAIN

### PART 1

#### PROCEEDINGS - REQUIREMENTS AND LIMITATIONS - DETERMINATION OF JUST COMPENSATION

**38-1-101. Compensation - public use - commission - jury - court - prohibition on elimination of nonconforming uses or nonconforming property design by amortization - limitation on extraterritorial condemnation by municipalities - definitions.** (1) (a) Notwithstanding any other provision of law, in order to protect property rights, without the consent of the owner of the property, private property shall not be taken or damaged by the state or any political subdivision for a public or private use without just



compensation.

(b) (I) For purposes of satisfying the requirements of this section, "public use" shall not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenue. Private property may otherwise be taken solely for the purpose of furthering a public use.

(II) By enacting subparagraph (I) of this paragraph (b), the general assembly does not intend to create a new procedural mechanism to bring about the condemnation of private property. By enacting subparagraph (I) of this paragraph (b), the general assembly intends to limit only as provided in subparagraph (I) of this paragraph (b), and not expand, the definition of "public use".

(c) Nothing in this section shall affect the right of a private party to condemn property as otherwise provided by law.

(2) (a) In all cases in which compensation is not made by the state in its corporate capacity, such compensation shall be ascertained by a board of commissioners of not less than three disinterested and impartial freeholders pursuant to section 38-1-105 (1) or by a jury when required by the owner of the property as prescribed in section 38-1-106. All questions and issues, except the amount of compensation, shall be determined by the court unless all parties interested in the action stipulate and agree that the compensation may be so ascertained by the court. In the event of such stipulation and agreement, the court shall proceed as provided in this article for the trial of such causes by a board of commissioners or jury.

(b) Notwithstanding any other provision of law, in any condemnation action, without the consent of the owner of the property, the burden of proof is on the condemning entity to demonstrate, by a preponderance of the evidence, that the taking of private property is for a public use, unless the condemnation action involves a taking for the eradication of blight, in which case the burden of proof is on the condemning entity to demonstrate, by clear and convincing evidence, that the taking of the property is necessary for the eradication of blight.

(3) (a) Notwithstanding any other provision of law to the contrary, a local government shall not enact or enforce an ordinance, resolution, or regulation that requires a nonconforming property use that was lawful at the time of its inception to be terminated or eliminated by amortization.

(b) (Deleted by amendment, L. 2006, p. 1749, § 1, effective June 6, 2006.)

(4) (a) The general assembly hereby finds and declares that:

(I) The acquisition by condemnation by a home rule or statutory municipality of property outside of its territorial boundaries involves matters of both statewide and local concern because such acquisition by condemnation may interfere with the plans and operations of other local governments and of the state.

(II) In order that each local government and the state enjoy the greatest flexibility with respect to the planning and development of land within its territorial boundaries, it is necessary that the powers of a home rule or statutory municipality to acquire by condemnation property outside of its territorial boundaries be limited to the narrowest extent permitted by article XX of the state constitution.

(b) (I) Effective January 1, 2004, no home rule or statutory municipality shall either acquire by condemnation property located outside of its territorial boundaries nor provide any funding, in whole or in part, for the acquisition by condemnation by any other public or private party of property located outside of its territorial boundaries; except that the requirements of this paragraph (b) shall not apply to condemnation for water works, light plants, power plants, transportation systems, heating plants, any other public utilities or public works, or for any purposes necessary for such uses.

(II) Effective January 1, 2004, no home rule or statutory municipality shall either acquire by condemnation property located outside of its territorial boundaries for the purpose of parks, recreation, open space, conservation, preservation of views or scenic vistas, or for similar purposes, nor provide any funding, in whole or in part, for the acquisition by condemnation by any other private or public party of property located outside of its territorial boundaries for the purpose of parks, recreation, open space, conservation, preservation of views or scenic vistas, or for similar purposes except where the municipality

has obtained the consent of both the owner of the property to be acquired by condemnation and the governing body of the local government in which territorial boundaries the property is located.

(c) Effective January 1, 2004, the provisions of this subsection (4) shall supersede any inconsistent statutory provisions whether contained in this title or any other title of the Colorado Revised Statutes.

(5) For purposes of this section, unless the context otherwise requires:

(a) "Local government" means a county, city and county, town, or home rule or statutory city.

(b) "Political subdivision" means a county; city and county; city; town; service authority; school district; local improvement district; law enforcement authority; urban renewal authority; city or county housing authority; water, sanitation, fire protection, metropolitan, irrigation, drainage, or other special district; or any other kind of municipal, quasi-municipal, or public corporation organized pursuant to law.

**Source:** G.L. § 1058. G.S. C. § 237. R.S. 08: § 2415. C.L. § 6311. CSA: C. 61, § 1. CRS 53: § 50-1-1. L. 61: p. 370, § 1. C.R.S. 1963: § 50-1-1. L. 84: Entire section amended, p. 972, § 1, effective February 17. L. 2003: Entire section amended, p. 2667, § 2, effective June 6. L. 2004: (4) added, p. 1747, § 6, effective June 4. L. 2006: (1), (2), and (3) amended and (5) added, p. 1749, § 1, effective June 6.

**Cross references:** (1) For jurisdiction of federal court, when properly invoked, see *County of Allegheny v. Frank Mashuda Company*, 360 U.S. 185, 79 S. Ct. 1060, 3 L. Ed. 2d 1163 (1959), and *Louisiana Power and Light Company v. City of Thibodaux*, 360 U.S. 25, 79 S. Ct. 1070, 3 L. Ed. 2d 1058 (1959); for taking private property for private use, see § 14 of art. II, Colo. Const.; for taking property for public use, see § 15 of art. II, Colo. Const.

(2) For the legislative declaration in the 2003 act amending this section, see section 1 of chapter 420, Session Laws of Colorado 2003.

## ANNOTATION

- I. General Consideration.
- II. Jurisdiction and Procedure in Condemnation.
  - A. In General.
  - B. Question of Necessity.
- III. Defenses and Remedies.
- IV. Abandonment of Proceeding.
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- VI. Specific Types of Property Subject to Condemnation.
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### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "Appropriations of Water for a Preferred Purpose", see 22 *Rocky Mt. L. Rev.* 422 (1950). For article, "Eminent Domain in Colorado", see 29 *Dicta* 313 (1952). For article, "Proposed Eminent Domain Law for Colorado", see 29 *Dicta* 332 (1952). For note, "Expenses of Moving in Eminent Domain Cases", see 30 *Dicta* 269 (1953). For article, "Recent Development in Colorado Eminent Domain", see 27 *Rocky Mt. L. Rev.* 23 (1954). For comment on *Russel Coal Co. v. Bd. of Comm'rs*, 129 Colo. 330, 270 P.2d 772 (1954), appearing below, see 27 *Rocky Mt. L. Rev.* 234

(1955). For comment discussing church condemnation, see 46 *U. Colo. L. Rev.* 43 (1974). For article, "Inverse Condemnation — A Viable Alternative", see 51 *Den. L.J.* 529 (1974). For comment examining factors to be considered in making an election between trespass and inverse condemnation as remedies for uncompensated appropriation of land, see 52 *Den. L.J.* 645 (1975). For comment, "Water: Statewide or Local Concern? *City of Thornton v. Farmers Reservoir & Irrigation Co.*", 194 Colo. 526, 575 P.2d 382 (1978)", see 56 *Den. L. J.* 625 (1979). For comment, "People v. Emmert, 198 Colo. 137, 597 P.2d 1025 (1979): A Step Backward for Recreational Water Use in Colorado", see 52 *U. Colo. L. Rev.* 247 (1981). For comment, "Bubb v. Christensen: The Rights of the Private Landowner Yield to the Rights of the Water Appropriator Under the Colorado Doctrine", see 58 *Den. L.J.* 825 (1981). For article, "Assemblage, Design and Construction for Real Estate Developments", see 11 *Colo. Law.* 2297 (1982). For article, "Introduction to a Condemnation Case", see 13 *Colo. Law.* 420 (1984). For article, "Mineral Ownership Under Highways, Streets, Alleys and Ditches", see 17 *Colo. Law.* 43 (1988). For comment, "Eminent Domain: A Case Comment — *Mountain States Legal Foundation v. Hodel*", see 65 *Den. U. L. Rev.* 581 (1988). For



article, "Home Rule, Extraterritorial Impact, and the Region", see 86 Den. U.L. Rev. 1271 (2009). For article, "Town of Telluride v. San Miguel Valley Corp.: Extraterritoriality and Local Autonomy", see 86 Den. U.L. Rev. 1311 (2009). For article, "Constitutional Home Rule and Judicial Scrutiny", see 86 Den. U.L. Rev. 1337 (2009). For article, "Telluride's Tale of Eminent Domain, Home Rule, and Retroactivity", see 86 Den. U.L. Rev. 1433 (2009). For comment, "Minority Interests, Majority Politics: A Comment on Richard Collins' 'Telluride's Tale of Eminent Domain, Home Rule, and Retroactivity'", see 86 Den. U.L. Rev. 1459 (2009).

**Eminent domain provisions not in conflict with federal constitution.** The eminent domain provisions of this state are not in conflict with the fourteenth amendment of the federal constitution. *Pine Martin Mining Co. v. Empire Zinc Co.*, 90 Colo. 529, 11 P.2d 221 (1932).

**Each landowner holds his estate subject to the public necessity** for the exercise of the right of eminent domain for public purposes, and he cannot evade this by any agreement with his neighbor, nor can his neighbor acquire a right from a private individual which imposes a new burden upon the public in the exercise of the right of eminent domain. *Smith v. Clifton San. Dist.*, 134 Colo. 116, 300 P.2d 548 (1956).

The authority to exercise the right of eminent domain for public uses is based upon the theory that property is granted the subject upon condition that it may be retaken to serve the necessities of the sovereign power. *Tanner v. Treasury Tunnel Mining & Reduction Co.*, 35 Colo. 593, 83 P. 464 (1906); *People ex rel. Watrous v. District Court*, 207 F.2d 50 (10th Cir. 1953).

**Right of condemnation has been restrained by constitutional limitations** in the protection of individual property rights. *Potashnik v. Pub. Serv. Co.*, 126 Colo. 98, 247 P.2d 137 (1952); *Beth Medrosh Hagodol v. City of Aurora*, 126 Colo. 267, 248 P.2d 732 (1952).

**Both § 15 of art. II, Colo. Const., and this section protect** an individual's vested rights and prohibit the taking thereof for public or private use without condemnation under proper proceedings and just compensation given therefor. *Stuart v. County Comm'rs*, 25 Colo. App. 568, 139 P. 577 (1914).

**Condemnation right exists only under powers specifically granted** by the general assembly or, in some cases, where the power to condemn specific property is provided by home-rule cities to which the general assembly has delegated its power in such matters. *Colo. Cent. R.R. v. Allen*, 13 Colo. 229, 22 P. 604 (1889); *Potashnik v. Pub. Serv. Co.*, 126 Colo. 98, 247 P.2d 137 (1952); *Beth Medrosh Hagodol v. City of Aurora*, 126 Colo. 267, 248 P.2d 732 (1952).

**Power is vested in state.** It is fundamental that the power of eminent domain is vested in

the state of Colorado. Such power may not be exercised by a governmental subdivision or other entity unless the power has been delegated to it by the general assembly. *Bd. of County Comm'rs v. Intermountain Rural Elec. Ass'n*, 655 P.2d 831 (Colo. 1982).

That the state constitution permits private property to be taken for certain specified uses is an implied declaration that such uses are so closely connected with the public interest as to be at least quasi public or, in a modified sense, affected with a public interest. *Lamborn v. Bell*, 18 Colo. 346, 32 P. 989 (1893); *Gibson v. Cann*, 28 Colo. 499, 66 P. 879 (1901); *Ortiz v. Hansen*, 35 Colo. 100, 83 P. 964 (1905); *Kaschke v. Camfield*, 46 Colo. 60, 102 P. 1061 (1909); *Pine Martin Mining Co. v. Empire Zinc Co.*, 90 Colo. 529, 11 P.2d 221 (1932).

**Private property cannot be taken by government, except for public purposes.** *Pine Martin Mining Co. v. Empire Zinc Co.*, 90 Colo. 529, 11 P.2d 221 (1932).

**Taking of private property to be accompanied by compensation to owner.** *Pine Martin Mining Co. v. Empire Zinc Co.*, 90 Colo. 529, 11 P.2d 221 (1932).

**Effect of state agency's entry upon land without paying just compensation.** When a state agency enters upon land or injures land without paying just compensation therefor, or without having commenced condemnation proceedings to ascertain the compensation due for the taking or injury, the act of the state agency is unauthorized and unlawful and is not the act of the state of Colorado. *People ex rel. Watrous v. District Court*, 207 F.2d 50 (10th Cir. 1953).

**Remedy against state officer.** The remedy for an unauthorized and unlawful taking of or injury to private land for public use without compensation by a state agency is against the state officer, individually, to prevent his unlawful act or for appropriate redress if it has been consummated. *People ex rel. Watrous v. District Court*, 207 F.2d 50 (10th Cir. 1953).

**Municipal ordinance which imposed reasonable limitations on billboards** on private property, thereby requiring modification of said billboards, did not constitute a taking for which just compensation must be paid. *Nat'l Adver. v. Bd. of Adjustment of City & County of Denver*, 800 P.2d 1349 (Colo. App. 1990).

**"Private use" construed.** The words "private use" do not mean a strictly private use, that is to say, one having no relation to the public interest. *Lamborn v. Bell*, 18 Colo. 346, 32 P. 989, 20 L.R.A. 241 (1893); *Gibson v. Cann*, 28 Colo. 499, 66 P. 879 (1901); *Ortiz v. Hansen*, 35 Colo. 100, 83 P. 964 (1905); *Kaschke v. Camfield*, 46 Colo. 60, 102 P. 1061 (1909); *Pine Martin Mining Co. v. Empire Zinc Co.*, 90 Colo. 529, 11 P.2d 221 (1932).

**Exercise of eminent domain unrestricted by contract.** Parties may not by contract be-

tween themselves restrict the exercise of the power of eminent domain. *Smith v. Clifton San. Dist.*, 134 Colo. 116, 300 P.2d 548 (1956).

Property owners of adjacent property cannot thwart a public improvement by the execution of restrictive covenants. *Smith v. Clifton San. Dist.*, 134 Colo. 116, 300 P.2d 548 (1956).

**Public service company is authorized to acquire by condemnation interests in real property from private owners, provided, inter alia, that the purpose for which the condemned property is sought is determined to be a public purpose.** *Shaklee v. District Court*, 636 P.2d 715 (Colo. 1981).

**Sanitation district empowered to condemn lands.** A sanitation district is a body politic or corporate with power to condemn lands for proper purposes. *Smith v. Clifton San. Dist.*, 134 Colo. 116, 300 P.2d 548 (1956).

**Landowner has right to sue trespasser with power of eminent domain.** A landowner has a right to sue in trespass even though the trespasser may have the statutory power of eminent domain with respect to the land on which the trespass occurs. *Ossman v. Mountain States Tel. & Tel. Co.*, 184 Colo. 360, 520 P.2d 738 (1974).

**Inverse condemnation tried as if eminent domain proceeding.** An inverse condemnation action is based on § 15 of art. II, Colo. Const. Since it is based on the "takings" clause of the state constitution, it is to be tried as if it were an eminent domain proceeding. *Ossman v. Mountain States Tel. & Tel. Co.*, 184 Colo. 360, 520 P.2d 738 (1974); *Hayden v. Bd. of County Comm'rs*, 41 Colo. App. 102, 580 P.2d 830 (1978); *Linnebur v. Pub. Serv. Co. of Colo.*, 716 P.2d 1120 (Colo. 1986).

**Mandamus.** Mandamus cannot be used to compel the state to bring and prosecute proceedings in condemnation because mandamus would require affirmative action by the state in the exercise of its sovereign power of eminent domain. *People ex rel. Watrous v. District Court*, 207 F.2d 50 (10th Cir. 1953).

**Doctrine of inseparability does not apply.** If the legislature wanted to recognize the doctrine of inseparability, which is an exception to the general rule of recovery, it would have amended the statute to allow for the exception. *Dept. of Transp. v. Marilyn Hickey Ministries*, 129 P.3d 1068 (Colo. App. 2005), rev'd on other grounds, 159 P.3d 111 (Colo. 2007).

**General assembly enacted subsection (3)(a) to restrict the abilities of local governments to unjustly deprive property owners of their inalienable rights.** *JAM Rest., Inc. v. City of Longmont*, 140 P.3d 192 (Colo. App. 2006).

**Subsection (3)(a) is constitutional, does not violate the home rule amendment to the Colorado Constitution, and prevails over municipality's zoning ordinance as applied to landowner.** Subsection (3)(a) enforces constitutionally protected property rights and

prohibits the unconstitutional taking of private property without just compensation. Constitutionally protected property interests are a matter of statewide concern and must be treated uniformly throughout the state. While zoning regulations are typically a matter of local concern, subsection (3)(a) is not a zoning regulation. Rather, it prohibits the unconstitutional taking of property without just compensation. *JAM Rest., Inc. v. City of Longmont*, 140 P.3d 192 (Colo. App. 2006).

**Because inalienable property rights are involved, both local and state concerns are implicated, and the constitution cannot be read to dictate the matter at issue as one of exclusively local concern.** Although the amortization of sexually oriented businesses in a municipality may result in those businesses relocating to neighboring municipalities, there is no showing that this possibility will seriously impact residents outside the municipality. Thus, extraterritorial impact of zoning ordinance is not substantial. Although zoning regulations generally have little extraterritorial impact and are traditionally a matter of local concern, in consideration of the legislative declaration respecting subsection (3)(a) and the importance of protecting constitutionally based property rights, preventing the taking of private property without just compensation is a matter of statewide or, at least, mixed concern. *JAM Rest., Inc. v. City of Longmont*, 140 P.3d 192 (Colo. App. 2006).

**To enforce property rights as mandated in the Colorado Constitution, statute prohibits local government from eliminating or terminating nonconforming uses that were lawful at their inception by amortization.** Statute does not address whether amortization periods are reasonable. *JAM Rest., Inc. v. City of Longmont*, 140 P.3d 192 (Colo. App. 2006).

**Subsection (3)(a) cannot be applied retroactively to negate a municipal ordinance that required a licensee to operate in an appropriately zoned area of the city.** Absent legislative intent to the contrary, a statute is presumed to operate prospectively on transactions occurring after its effective date, rather than retroactively on transactions that have already occurred or on rights and obligations that existed before its effective date. *Z.J. Gifts D-2, L.L.C. v. City of Aurora*, 93 P.3d 633 (Colo. App. 2004).

Subsection (3)(a) applies to injunctions sought after its effective date. Because municipality did not seek to enforce zoning provisions of ordinance until after statute became effective, no retroactive application of statute occurred. *JAM Rest., Inc. v. City of Longmont*, 140 P.3d 192 (Colo. App. 2006).

Since the language in subsection (3)(a) does not specify an intent of the general assembly to apply the provision retroactively, the court will not attribute an intent to the general assembly to enact a statutory amendment controlling amor-



tization of nonconforming uses that took place before the amendment was enacted. *Z.J. Gifts D-2, L.L.C. v. City of Aurora*, 93 P.3d 633 (Colo. App. 2004).

**Giving the word “affect” its plain and ordinary meaning, § 18-4-515 does not change, alter, or lessen the requirements of articles 1 through 7 of this title in condemnation actions.** *San Miguel County Bd. of County Comm’rs v. Roberts*, 159 P.3d 800 (Colo. App. 2006).

**Giving the word “supersede” its plain and ordinary meaning, § 18-4-515 does not void, replace, supplant, or make unnecessary any provisions or requirements of articles 1 through 7 of this title in condemnation actions.** *San Miguel County Bd. of County Comm’rs v. Roberts*, 159 P.3d 800 (Colo. App. 2006).

**Section 18-4-515 may not be used in place of applicable condemnation procedures. There is no basis to conclude, however, that it does not apply or may not be used in support of or in conjunction with a contemplated condemnation proceeding.** *San Miguel County Bd. of County Comm’rs v. Roberts*, 159 P.3d 800 (Colo. App. 2006).

**The condemnation by a home rule municipality of property outside its territorial boundaries for open space and park purposes falls within the scope of the eminent domain power granted to such municipalities in this article.** The eminent domain power granted to home rule municipalities in this article is not limited to the purposes specified in this section nor is the eminent domain power circumscribed when exercised extraterritorially. Rather, this article grants home rule municipalities the power to condemn property, within or outside of territorial limits, for any lawful, public, local, and municipal purpose. The extraterritorial condemnation of property need not be pursuant to a purpose that is purely local and municipal. As long as the condemnation is based on a lawful, public, local, and municipal purpose, it does not fall outside of the scope of this article merely because it potentially implicates competing state interests. Based upon statutory provisions authorizing statutory localities to condemn land for open space, parks, and recreation, as well as the traditional exercise of this power by the state’s statutory and home rule municipalities, the extraterritorial condemnation of property for open space and parks is a lawful, public, local, and municipal purpose within the scope of this article. The condemnation of the landowner’s property outside the territorial boundaries of the municipality was, therefore, lawful. *Town of Telluride v. San Miguel Valley Corp.*, 185 P.3d 161 (Colo. 2008).

**Subsection (4)(b) abrogates constitutional powers granted to home rule municipalities by this article.** Accordingly, the statutory pro-

vision is unconstitutional with respect to home rule municipalities. Court’s inquiry need not extend beyond the question of whether the statute purports to deny home rule municipalities powers specifically granted by the constitution. No analysis of competing state and local interests is necessary where a statute purports to take away home rule powers granted by the constitution. The legislature cannot prohibit the exercise of constitutional home rule powers regardless of the state interests that may be implicated by the exercise of those powers. *Town of Telluride v. San Miguel Valley Corp.*, 185 P.3d 161 (Colo. 2008).

**Subsection (4)(b) prohibits home rule municipalities from condemning property for parks and open space, thus denying them their constitutional power to condemn for any lawful, public, local, and municipal purpose.** Subsection (4)(b) curtails the condemnation power in this article by limiting it to the enumerated purposes in this section and also by removing certain enumerated purposes from the list. Accordingly, subsection (4)(b) is an unconstitutional abrogation of the powers granted to home rule municipalities under this article. The general assembly has no power to enact a law that denies a right specifically granted by the constitution. *Town of Telluride v. San Miguel Valley Corp.*, 185 P.3d 161 (Colo. 2008).

**Applied** in *City of Englewood v. Weist*, 184 Colo. 325, 520 P.2d 120 (1974); *City of Boulder v. Kahn’s, Inc.*, 190 Colo. 90, 543 P.2d 711 (1975).

## II. JURISDICTION AND PROCEDURE IN CONDEMNATION.

### A. In General.

**Proceedings conducted strictly according to procedures in statute.** Eminent domain proceedings are special statutory proceedings and are to be conducted strictly according to the procedures set out in the eminent domain statute. *Bd. of Comm’rs v. Poundstone*, 74 Colo. 191, 220 P. 234 (1923); *Ossman v. Mountain States Tel. & Tel. Co.*, 184 Colo. 360, 520 P.2d 738 (1974); *Denver Urban Renewal Auth. v. Marshall Mfg. Co.*, 35 Colo. App. 227, 532 P.2d 746 (1975).

**A federal district court with diversity jurisdiction can consider an inverse condemnation claim arising under the Colorado constitution and statutes providing a special judicial procedure for condemnation claims.** *SK Fin. SA v. La Plata County, Bd. of Comm’rs*, 126 F.3d 1272 (10th Cir. 1997).

**Statutory authority required.** Even though the purpose for which the property is sought to be condemned is a “public use” within the meaning of Colo. Const., art. II, § 15, in the absence of express or necessarily implied statu-

tory condemnation authority, private property may not be condemned. *Bd. of County Comm'rs v. Intermountain Rural Elec. Ass'n*, 655 P.2d 831 (Colo. 1982).

**Colorado rules of civil procedure applicable to this article.** The Colorado rules of civil procedure apply to actions brought under the provisions of this article. *Stalford v. Bd. of County Comm'rs*, 128 Colo. 441, 263 P.2d 436 (1953).

**Constitutional objections to eminent domain proceedings should be raised in those proceedings** and should be determined by the court in limine; not by way of a collateral injunction proceeding. *Auraria Businessmen Against Confiscation, Inc. v. Denver Urban Renewal Auth.*, 183 Colo. 441, 517 P.2d 845 (1974).

**Matters which cannot be asserted in collateral suit.** Matters which cannot be raised in an original condemnation proceeding cannot be asserted in a collateral suit. *Ambrosio v. Baker Metro. Water & San. Dist.*, 139 Colo. 437, 340 P.2d 872 (1959).

**Names and addresses of appraisers to remain unknown to landowner.** The owner of property sought to be condemned is not entitled to know the names and addresses of persons who made appraisals at the request of the condemning agency. *Epstein v. City & County of Denver*, 133 Colo. 104, 293 P.2d 308 (1956).

**Disclosure of appraisals could prejudice owners not parties to suit.** Disclosure of appraisal values obtained by private owners not parties to the suit whose property has not yet been condemned could work to the prejudice of substantial rights of those private owners, since should parties who obtained independent appraisal reports reject the government's settlement offer and opt for trial, disclosure could be prejudicial to their rights. *United States v. 25.02 Acres of Land, More or Less*, 495 F.2d 1398 (10th Cir. 1974).

**A condemning authority may exercise the power of eminent domain provided that the taking is necessary and the purpose for the condemnation is judicially determined to be a public use.** Colorado law does not require a condemning authority to obtain development permits or approvals as a condition precedent to going forward with a condemnation proceeding; nor does it require the condemning authority to prove that immediate possession will not lead to irreparable damage to natural resources if permits and environmental impact statement (EIS) approval are denied and the project is not completed. *Silver Dollar Metro. Dist. v. Goltra*, 66 P.3d 170 (Colo. App. 2002).

**In reviewing the condemning authority's finding that a proposed taking is for public use, the court's role is to determine whether the essential purpose of the condemnation is to obtain a public benefit, and the court must**

consider the physical conditions of the country, the needs of the community, and the character of the benefit that the projected improvement may confer upon the locality as well as the necessities for such improvement in the development of the resources of the state. *Silver Dollar Metro. Dist. v. Goltra*, 66 P.3d 170 (Colo. App. 2002).

**The owners of the property to be condemned have the burden of proving that the taking is not for a public purpose.** *Silver Dollar Metro. Dist. v. Goltra*, 66 P.3d 170 (Colo. App. 2002).

Where a taking would be to determine if it is possible that the condemned property could be used for a public use in the future, the taking is not for a public purpose. *Silver Dollar Metro. Dist. v. Goltra*, 66 P.3d 170 (Colo. App. 2002).

**Trial court properly dismissed petition by county to condemn a portion of owner's property for use as a public road because county presented no valid public purpose for its condemnation of owner's property.** Here, public purpose is to benefit private parties; a few, select members of the public will gain access to a private cemetery. Such a private benefit does not constitute a valid public purpose. *Bd. of County Comm'rs v. Kobobel*, 176 P.3d 860 (Colo. App. 2007).

#### B. Question of Necessity.

**Trial court's findings that corporation's 10-inch pipeline would serve a public purpose is supported by evidence in the record.** Trial court's finding was based on testimony of corporation's counsel that pipeline was necessary to provide an adequate supply of oil products to meet the increased demand of the customers in the greater Denver metropolitan area. Evidence in the record indicates that the pipeline would permit continuous service to the corporation's existing Colorado customers as well as its out-of-state customers. *Sinclair Transp. Co. v. Sandberg*, 228 P.3d 198 (Colo. App. 2009).

**Issue of necessity.** The threshold issue of necessity, when properly raised in the pleadings, should be resolved before there is any trial as to the value of the land to be taken. *Colo. State Bd. of Land Comm'rs v. District Court*, 163 Colo. 338, 430 P.2d 617 (1967).

**Matter of necessity cannot be raised by merely denying allegation** that the taking is necessary. *Colo. State Bd. of Land Comm'rs v. District Court*, 163 Colo. 338, 430 P.2d 617 (1967).

**As must plead facts evidencing fraud or bad faith.** The matter of necessity cannot be raised by any conclusory pleading of fraud and bad faith, but only by pleading facts which, if true, would amount to fraud or bad faith. *Colo. State Bd. of Land Comm'rs v. District Court*, 163 Colo. 338, 430 P.2d 617 (1967).



**Proper matters for consideration in determining necessity of taking vary** according to the circumstances of each particular case. *Mortensen v. Mortensen*, 135 Colo. 167, 309 P.2d 197 (1957).

**Matter of necessity of taking in condemnation is to be determined by court.** *Larson v. Chase Pipe Line Co.*, 183 Colo. 76, 514 P.2d 1316 (1973).

**Necessity involves taking property for intended purpose.** The question of necessity involves the necessity of having the property taken for the purpose intended. *Mortensen v. Mortensen*, 135 Colo. 167, 309 P.2d 197 (1957); *Silver Dollar Metro. Dist. v. Goltra*, 66 P.3d 170 (Colo. App. 2002).

**Feasibility or financial success of enterprise precluded from inquiry of necessity.** Whether or not an enterprise is feasible or practicable, and whether or not it will be a financial success, cannot be inquired into even by commissioners charged with the duty of determining the question of necessity; such questions are not for the determination of the court. *Mortensen v. Mortensen*, 135 Colo. 167, 309 P.2d 197 (1957); *Silver Dollar Metro. Dist. v. Goltra*, 66 P.3d 170 (Colo. App. 2002).

**Public agency's determination of necessity, absent fraud, is final.** In the absence of fraud or bad faith, the determination by a public agency as to the need, necessity, and location of highways, or other public improvements, is final and conclusive and will not be disturbed by the courts. *Colo. State Bd. of Land Comm'rs v. District Court*, 163 Colo. 338, 430 P.2d 617 (1967); *Silver Dollar Metro. Dist. v. Goltra*, 66 P.3d 170 (Colo. App. 2002).

The determination by the state of the necessity for a particular taking in the absence of a showing of bad faith is final and conclusive. *Mack v. Bd. of County Comm'rs*, 152 Colo. 300, 381 P.2d 987 (1963); *Arizona-Colorado Land & Cattle Co. v. District Court*, 182 Colo. 44, 511 P.2d 23 (1973).

**Causing of greater than necessary loss evidence of bad faith.** Where the taking of a particular easement by a private corporation would entail a great loss to the landowner which might readily be avoided, the court in limine may consider this factor in determining whether the corporation is acting in bad faith. *Arizona-Colorado Land & Cattle Co. v. District Court*, 182 Colo. 44, 511 P.2d 23 (1973).

**Easement serves public purpose** by providing access to property in the state and therefore may be the subject of a condemnation. *Bear Creek Dev. Corp. v. Dyer*, 790 P.2d 897 (Colo. App. 1990).

**No trial on compensation if necessity not shown.** If the petitioner cannot establish necessity, there will then be no need for a trial on the issue of compensation. *Colo. State Bd. of Land*

*Comm'rs v. District Court*, 163 Colo. 338, 430 P.2d 617 (1967).

**Duties of trial court, in absence of jury, include** appointing the commissioners, administering the oath of office to them, fixing the time and place of their first meeting, instructing them in writing as to their duties, and, at the conclusion of the testimony, instructing them in writing as to the applicable and proper law to be followed by them in arriving at their ascertainment. *Bd. of County Comm'rs v. Vail Assocs.*, 171 Colo. 381, 468 P.2d 842 (1970).

**Court shall upon request make rulings upon propriety of proofs and objections of the parties.** *Bd. of County Comm'rs v. Vail Assocs.*, 171 Colo. 381, 468 P.2d 842 (1970).

**Judge not to preside as in jury trial.** The judge of the trial court shall not preside over the commission proceedings in the same manner as he is required to do in a jury trial. *Bd. of County Comm'rs v. Vail Assocs.*, 171 Colo. 381, 468 P.2d 842 (1970).

**Unsupported report of commissioners not binding on court.** A report of commissioners in eminent domain proceedings, unsupported by any findings and based on undisputed evidence, does not bind the court. *Mortensen v. Mortensen*, 135 Colo. 167, 309 P.2d 197 (1957).

**Award of expert witness fees.** In eminent domain actions, the awarding of expert witness fees is a matter within the discretion of the trial court. *City of Lakewood v. DeRoos*, 631 P.2d 1140 (Colo. App. 1981).

### III. DEFENSES AND REMEDIES.

**Matters considered inappropriate for defense.** In a condemnation proceeding, the expediency of the project or that condemnation might proceed in a way other than that proposed are not appropriate matters of defense. *Ambrosio v. Baker Metro. Water & San. Dist.*, 139 Colo. 437, 340 P.2d 872 (1959).

**Injunction is not proper remedy** to be accorded a defendant in a proceeding in eminent domain. *Town of Glendale v. City & County of Denver*, 137 Colo. 188, 322 P.2d 1053 (1958); *Ambrosio v. Baker Metro. Water & San. Dist.*, 139 Colo. 437, 340 P.2d 872 (1959); *Dunham v. City of Golden*, 31 Colo. App. 433, 504 P.2d 360 (1972).

**Doctrine of laches** does not provide relief where defendant failed to show that improvements would be impacted by the easement or that the defendant suffered prejudice not covered by the compensation award. *Minto v. Lambert*, 870 P.2d 572 (Colo. App. 1993).

### IV. ABANDONMENT OF PROCEEDING.

**When condemnor may abandon action.** Where a property owner has not changed his position in good faith reliance on a condemna-

tion suit, the condemnor may abandon the action at any time prior to the time the rights of the parties are reciprocally vested. *Piz v. Hous. Auth.*, 132 Colo. 457, 289 P.2d 905 (1955).

**Right to abandon condemnation proceedings may be relinquished or lost.** The right to abandon condemnation proceedings may be relinquished by agreement or lost by estoppel. *Piz v. Hous. Auth.*, 132 Colo. 457, 289 P.2d 905 (1955).

## V. JUST COMPENSATION.

### A. Right to Compensation.

**Basis for compensation is fairness.** The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness as it does from technical concepts of property law. *Upper Eagle Valley San. Dist. v. Carnie*, 634 P.2d 1008 (Colo. App. 1981).

**Right to compensation belongs to owner.** The right to compensation for the value of land taken and damages to the residue occasioned by the taking is a personal one which belongs to the owner. *Enke v. City of Greeley*, 31 Colo. App. 337, 504 P.2d 1112 (1972); *Upper Eagle Valley San. Dist. v. Carnie*, 634 P.2d 1008 (Colo. App. 1981); *Direct Mail Servs., Inc. v. Colo.*, 557 F. Supp. 851 (D. Colo. 1983), *aff'd*, 729 F.2d 672 (10th Cir. 1984).

**Lessee not entitled to separate award for value of leasehold.** Lessee is not entitled in the initial condemnation proceedings to establish the value of its leasehold interest independently of the value of the entire property and is not entitled to a separate award by the state for the value of its leasehold. *City of Sterling v. Plains Inv. Co.*, 32 Colo. App. 115, 511 P.2d 512 (1973), *rev'd* on other grounds, 185 Colo. 238, 523 P.2d 465 (1974); *Direct Mail Servs., Inc. v. Colo.*, 557 F. Supp. 851 (D. Colo. 1983), *aff'd*, 729 F.2d 672 (10th Cir. 1984).

**Property owners are not entitled to obtain the highest and best use of their property or to gain maximum profits from its use.** *Van Sickle v. Boyes*, 797 P.2d 1267 (Colo. 1990); *Nat'l Adver. v. Bd. of Adjustment of City & County of Denver*, 800 P.2d 1349 (Colo. App. 1990).

### B. Amount of Compensation.

**Landowner is entitled to be compensated for costs reasonably incurred by him in condemnation proceedings** since to require a landowner to pay such costs would reduce the just compensation guaranteed by section 15 of art. II, Colo. Const. *Dept. of Hwys. v. Kelley*, 151 Colo. 517, 379 P.2d 386 (1963).

**"Just compensation" includes payment of costs.** In condemnation proceedings, the land-

owner is entitled to compensation for all reasonable costs incurred. Expenses necessarily incurred by reason of the litigation are correctly viewed as such costs. *City of Colo. Springs v. Berl*, 658 P.2d 280 (Colo. App. 1982).

**Property damage must affect some right or interest** which the landowner enjoys and which is not shared or enjoyed by the public generally, in order to be compensable; the damage must be different in kind, not merely in degree, from that suffered by the public in general. *Troiano v. Colo. Dept. of Hwys.*, 170 Colo. 484, 463 P.2d 448 (1969); *City of Lakewood v. DeRoos*, 631 P.2d 1140 (Colo. App. 1981).

**Owner must establish right to substantial compensation.** Burden rests upon owner to establish by competent evidence his right to substantial compensation. *Troiano v. Colo. Dept. of Hwys.*, 170 Colo. 484, 463 P.2d 448 (1969); *United States v. 25.02 Acres of Land, More or Less*, 495 F.2d 1398 (10th Cir. 1974).

**No vested right in public highway maintenance.** No person has a vested right in the maintenance of the public highway in any particular place. *Troiano v. Colo. Dept. of Hwys.*, 170 Colo. 484, 463 P.2d 448 (1969).

**Award includes damages that are incident of improvement.** An award in an eminent domain proceeding includes all damages, present and prospective, that are the natural, necessary, or reasonable incident of the improvement, but an award does not include such damages as may arise from negligent or unskillful construction or use thereof. *Ruth v. Dept. of Hwys.*, 153 Colo. 226, 385 P.2d 410 (1963); *Linnebur v. Pub. Serv. Co. of Colo.*, 716 P.2d 1120 (Colo. 1986).

**Right to compensation unchanged by nature of business.** The nature of the business, which is situated upon land subject to condemnation, does not change the right of an individual to compensation. *Troiano v. Colo. Dept. of Hwys.*, 170 Colo. 484, 463 P.2d 448 (1969).

**Factors considered in determining compensable taking of access rights.** Factors to consider in determining whether or not there has been a compensable taking of access rights to a highway include whether the property is a single economic unit or consists of separate units with particular access needs, the use of the property, the location of improvements, the contiguity to the highway, the land's topography, and all pertinent characteristics of the property which may be relevant to its access needs. *Shaklee v. Bd. of County Comm'rs*, 176 Colo. 559, 491 P.2d 1366 (1971).

**Loss of view from property not compensable.** Since a property owner has no right to have the traveling public pass his property, he has no right to have the traveling public afforded a clear view of his property, and loss of view from the property caused by the construction of a viaduct is not compensable. *Troiano v. Colo. Dept. of Hwys.*, 170 Colo. 484, 463 P.2d 448 (1969).



**Goodwill and profits are not regarded as elements of just compensation** under either the due process or just compensation clauses of the federal and state constitutions. *Auraria Businessmen Against Confiscation, Inc. v. Denver Urban Renewal Auth.*, 183 Colo. 441, 517 P.2d 845 (1974).

**Owner compensated only for actual taking in pipeline condemnation.** The rule in condemnation cases concerning pipelines is that the owner of the land will be compensated only to the actual extent of the estate taken. *W. Slope Gas Co. v. Lake Eldora Corp.*, 32 Colo. App. 293, 512 P.2d 641 (1973).

**Limitation on compensation for loss of access.** An abutting landowner is entitled to compensation for limitation or loss of access only if the limitation or loss substantially interferes with his means of ingress and egress to and from his property. *State Dept. of Hwys. v. Davis*, 626 P.2d 661 (Colo. 1981).

So long as the landowner retains a reasonable means of access to and from his property partial loss of access is not compensable. *Troiano v. Colo. Dept. of Hwys.*, 170 Colo. 484, 463 P.2d 448 (1969); *Shaklee v. Bd. of County Comm'rs*, 176 Colo. 559, 491 P.2d 1366 (1971).

There is no taking of private property which would be subject to compensation when a landowner's access rights to a state highway are limited to two access points of his own choosing. *Shaklee v. Bd. of County Comm'rs*, 176 Colo. 559, 491 P.2d 1366 (1971).

**Inconvenience is not substantial impairment of access.** Inconvenience caused by the required use of a more circuitous route to gain access to property does not constitute substantial impairment of access. *State Dept. of Hwys. v. Davis*, 626 P.2d 661 (Colo. 1981).

**Compensation is not permitted for damage caused by circuity of route** where the properties involved were used for business purposes such as motels, restaurants, and gas stations, and where the inability of the traveling public to get to the property conveniently had, in effect, diminished the value of the business property. *Troiano v. Colo. Dept. of Hwys.*, 170 Colo. 484, 463 P.2d 448 (1969).

The diversion of traffic away from the property is a factor hardly separable from circuity of route since the diversion of traffic will inevitably have as its result circuity of route. *Troiano v. Colo. Dept. of Hwys.*, 170 Colo. 484, 463 P.2d 448 (1969).

**Proof required for landowner's compensation for loss of access.** In order for plaintiff to be compensated for loss of access it is incumbent upon her to establish to the satisfaction of the trial court that she no longer retains a reasonable means of access to and from her property and the general system of public streets. *Troiano v. Colo. Dept. of Hwys.*, 170 Colo. 484, 463 P.2d 448 (1969).

**Trial judge determines reasonableness of landowner's access.** The trial judge must determine in the first instance whether a landowner's right of access has been subjected to unreasonable control or limitation. *Shaklee v. Bd. of County Comm'rs*, 176 Colo. 559, 491 P.2d 1366 (1971).

**Fair market value of property taken is sole question** in determining the value of property in an eminent domain action. *Dillinger v. North Sterling Irrigation Dist.*, 135 Colo. 95, 308 P.2d 606 (1957).

**In the case of a temporary taking, landowner is entitled to just compensation for fair rental value of property** at its highest and best use, taking into consideration any existing land use restrictions, during the period of temporary taking. In determining fair rental value, the trial court and the jury must assume a free bargaining transaction between a hypothetical lessor and lessee. Changes in land use restrictions may only be considered if they probably could have occurred during the temporary taking period. *Fowler Irrevocable Trust 1992-1 v. City of Boulder*, 17 P.3d 797 (Colo. 2001).

**Market value means** the price property would bring if sold in the open market under ordinary and usual circumstances for cash, assuming that the owner is willing to sell and the purchaser willing to buy, but neither under any obligation to do so. *Epstein v. City & County of Denver*, 133 Colo. 104, 293 P.2d 308, 55 A.L.R.2d 783 (1956).

Reasonable market value means the fair, actual cash market value of the property. It is the price the property could have been sold for on the open market, for cash under the usual and ordinary circumstances where the owner was willing to sell and the purchaser was willing to buy, but neither was under an obligation to do so. *Goldstein v. Denver Urban Renewal Auth.*, 192 Colo. 422, 560 P.2d 80 (1977); *City of Aurora v. Webb*, 41 Colo. App. 11, 585 P.2d 288 (1978).

**Assessment of present market value.** The present market value must be assessed in light of the most advantageous use to which the property may reasonably be applied. *Goldstein v. Denver Urban Renewal Auth.*, 192 Colo. 422, 560 P.2d 80 (1977).

**Major factors for consideration in determining market value of real estate** in condemnation proceedings are: (1) A view of the premises and their surroundings; (2) a description of the physical characteristics of the property and its situation in relation to points of importance in the neighborhood; (3) the price at which the land was bought, if sufficiently recent to throw light on present value; (4) the price at which similar neighboring land has sold at about the time of the taking; (5) the opinion of competent experts; (6) a consideration of the uses for which the land is adapted and for

which it is available; (7) the cost of the improvements if they are such as to increase the value of the land; and (8) the net income from the land, if the property is devoted to one of the uses to which it could be most advantageously and profitably applied. *United States v. 25.02 Acres of Land, More or Less*, 495 F.2d 1398 (10th Cir. 1974).

**Board is entitled to consider any competent evidence**, apart from certain factors arising from the very fact of condemnation, which would be considered by a prospective seller or buyer as tending to affect the present market value of the land. *Goldstein v. Denver Urban Renewal Auth.*, 192 Colo. 422, 560 P.2d 80 (1977); *City of Aurora v. Webb*, 41 Colo. App. 11, 585 P.2d 288 (1978).

**If sale not too remote.** If not too remote in point of time, and if neither economic nor physical conditions have changed, voluntary prior sales of the subject property may be shown in evidence in eminent domain proceedings. *Epstein v. City & County of Denver*, 133 Colo. 104, 293 P.2d 308, 55 A.L.R.2d 783 (1956).

Evidence of the price paid for similar property in a voluntary sale is admissible on the question of value of the property condemned, provided the properties sold are similar in locality and character to the property in question and not so far removed in point of time to make a comparison unjust or impossible. *W. Slope Gas Co. v. Lake Eldora Corp.*, 32 Colo. App. 293, 512 P.2d 641 (1973).

**Root consideration is whether comparable sale is sufficiently similar**, in one or more aspects, to be probative of the fair market value of the property under consideration by the commission. *Goldstein v. Denver Urban Renewal Auth.*, 192 Colo. 422, 560 P.2d 80 (1977).

**Best evidence of market value found in comparable sales.** While the best evidence of market value is found in sales of comparable property. The determination is not limited to that consideration and other substantial facts and circumstances may have probative value. *United States v. 25.02 Acres of Land, More or Less*, 495 F.2d 1398 (10th Cir. 1974).

**Determination of market value not limited to consideration of comparable sales;** other substantial facts and circumstances may have probative value. *United States v. 25.02 Acres of Land, More or Less*, 495 F.2d 1398 (10th Cir. 1974).

**In eminent domain proceeding, in calculating value of subject property as a waste transfer station, trial court correctly admitted evidence based upon the land residual method instead of the comparable sales method.** Whether a comparable sale is sufficiently similar to be of probative value in determining the value of land taken is for the trial court or commission to determine in its discretion. Here, considering both parties' expert tes-

timony, there was sufficient evidence in the record to support landowner's position that there were not sufficient comparable sales and that, in the absence of such sales, the only way to calculate the added value of the planned unit development and waste transfer permit approvals was to use the land residual method. The record also supports a finding that criteria outlined by the American institute of real estate appraisers for use of the land residual method were met. In upholding the use of the land residual method, court of appeals rejected city's arguments that use of this method impermissibly considers a speculative or prospective value, that income and profits from a waste transfer station could not be considered in valuing the land, and that use of this method violated the undivided basis rule. *City of Englewood v. Denver Waste Transfer, L.L.C.*, 55 P.3d 191 (Colo. App. 2002).

**Unexecuted written contract for sale of adjacent land inadmissible.** Just as a mere offer to buy or sell property is not a measure of the market value of a similar property, so, too, a written contract for the sale of adjacent land has been held inadmissible, if the sale did not take place. *United States v. 25.02 Acres of Land, More or Less*, 495 F.2d 1398 (10th Cir. 1974).

**Where compensation for less than value of fee simple held proper.** Where pipeline company did not take fee title to property containing its easement, and the surface land remained unaffected, useful, and of substantial value, the compensation was properly less than the value for fee simple title to the entire area within which the pipe was located. *W. Slope Gas Co. v. Lake Eldora Corp.*, 32 Colo. App. 293, 512 P.2d 641 (1973).

**When purchaser confined to damages for subsequent taking.** Where land is already burdened by an easement when a purchaser acquires title, he takes that land in that condition when he acquires title and is confined to damages for subsequent takings. *Upper Eagle Valley San. Dist. v. Carnie*, 634 P.2d 1008 (Colo. App. 1981).

**Demolition costs.** In determining the present market value of unimproved property, as reflected by a comparable sale, the addition of demolition costs to the purchase price of a comparable property which had improvements but which was purchased for use as undeveloped land is permissible. *Goldstein v. Denver Urban Renewal Auth.*, 192 Colo. 422, 560 P.2d 80 (1977).

**Fixtures included in determination of landowner's compensation.** Fixtures are a part of the realty for which compensation must be paid to the owner by the condemning authority. *Denver Urban Renewal Auth. v. Steiner Am. Corp.*, 31 Colo. App. 125, 500 P.2d 983 (1972).

**Reservations in deeds admissible to show value of condemned property.** In an eminent



domain proceeding, the trial court committed prejudicial error when it refused to allow a city to introduce into evidence certain reservations in deeds through which landowners acquired their record title in order to show diminution in value of the property taken, since actually, the deeds in question should have been admitted into evidence on the question of the value of the landowners' interest. *City of Englewood v. Reffel*, 173 Colo. 203, 477 P.2d 361 (1970); *E-470 Pub. Hwy. Auth. v. Jagow*, 30 P.3d 798 (Colo. App. 2001), *aff'd* on other grounds, 49 P.3d 1151 (Colo. 2002).

**When nonexpert witness competent to testify as to value.** A nonexpert witness called to testify as to value is said to have sufficient qualification if a resident, landowner, or farmer in the neighborhood. *Baker Metro. Water & San. Dist. v. Baca*, 138 Colo. 239, 331 P.2d 511 (1958).

**Defendant failed to show the easement causes significant damage** because of depreciation of the value of property due to the impact on the property's "pristine" character. *Minto v. Lambert*, 870 P.2d 572 (Colo. App. 1993).

**All evidence relevant to the determination of the present market value of condemned property is admissible**, including evidence of the most advantageous potential future use of the entire property, even if the condemned property would need to be dedicated as part of annexation and rezoning of the entire property in the future. *Palizzi v. City of Brighton*, 228 P.3d 957 (Colo. 2010).

Evidence of the value of the condemned portion as a part of the whole is admissible and should be evaluated by the fact finder when determining just compensation. *Palizzi v. City of Brighton*, 228 P.3d 957 (Colo. 2010).

## VI. SPECIFIC TYPES OF PROPERTY SUBJECT TO CONDEMNATION.

**Types of property subject to condemnation unlimited.** There are no limitations on the type of property that may be acquired by the state through condemnation proceedings for highway purposes. *Mack v. Bd. of County Comm'rs*, 152 Colo. 300, 381 P.2d 987 (1963).

**Using or enlarging ditch without owner's consent considered taking.** Using or enlarging a ditch, without the owner's consent, was a taking or damaging of private property as would be appropriating the right-of-way therefor, in the first instance, but such taking or damaging could not be tolerated except upon payment, in a constitutional manner, of just compensation. *Trippe v. Overacker*, 7 Colo. 72, 1 P. 695 (1883).

**Cemetery lands subject to condemnation.** Cemetery lands, by virtue of their sacred nature, are not placed beyond the reach of the power of eminent domain; however, in the case of public

cemeteries, such power to condemn must be given expressly or by necessary and reasonable implication. *Beth Medrosh Hagodol v. City of Aurora*, 126 Colo. 267, 248 P.2d 732 (1952).

**Church property can be taken by eminent domain** for paramount public use. *Pillar of Fire v. Denver Urban Renewal Auth.*, 181 Colo. 411, 509 P.2d 1250 (1973).

**Condemnation of flowage easements permitted.** Denver is vested with ample authority to condemn flowage easements and channel improvement rights for transportation of diverted water to storage facilities. *Toll v. City & County of Denver*, 139 Colo. 462, 340 P.2d 862 (1959).

**Condemnor acquires surface and support of surface.** When land is acquired by condemnation for a highway, the condemnor acquires not only what is understandably known as just the surface, but, by virtue of such condemnation, it acquires whatever is necessary for the support of that surface. *Russel Coal Co. v. Bd. of County Comm'rs*, 129 Colo. 330, 270 P.2d 772 (1954).

**Property already subject to existing public use can be condemned.** *Mack v. Bd. of County Comm'rs*, 152 Colo. 300, 381 P.2d 987 (1963).

**Where overwhelming necessity shown.** Where land is already devoted to a public use, it would be wholly unreasonable to permit it to be taken for another public use which would nullify and defeat the one to which it is already devoted, except in cases where the overwhelming necessities of the public were such that in order to serve their needs or supply their necessities, the taking of such property became necessary. *Beth Medrosh Hagodol v. City of Aurora*, 126 Colo. 267, 248 P.2d 732 (1952).

**Public waters, etc., not condemnable for sewage purposes.** Public waters or beds or channels of public streams cannot be condemned for sewage purposes. *City & County of Denver v. District Court*, 140 Colo. 1, 342 P.2d 648 (1959).

**Counties lack authority to condemn for office space.** The general assembly has not impliedly delegated the power of eminent domain to counties for the purpose of acquiring office space for authorized county purposes. *Bd. of County Comm'rs v. Intermountain Rural Elec. Ass'n*, 655 P.2d 831 (Colo. 1982) (decided prior to enactment of § 30-11-104 (2)).

## VII. REVIEW BY SUPREME COURT.

**Property owners may file writ of certiorari during stay of execution.** Within a period of a stay of execution granted by a trial court, the owners of property being condemned, not having the right of review of an interlocutory order upon writ of error, may file an original action, by way of certiorari, in the supreme court, alleging that otherwise they were without remedy whatsoever to protect their property from seizure

under an order of a district court, which they v. District Court, 140 Colo. 510, 345 P.2d 1064  
contended was without lawful authority. Lucas (1959).

**38-1-101.5. Necessity of taking land for pipelines.** (1) When a court is determining the necessity of taking private land or nonfederal public land for the installation of a pipeline, the court shall require the pipeline company:

(a) To show that the particular land lies within a route which is the most direct route practicable;

(b) To post a bond with the court equal to double the amount which the court determines to be the estimated cost of restoring the affected land to the same or as good a condition as it was in prior to the installation of the pipeline; except that the pipeline company may elect to deposit cash, negotiable bonds of the United States government or any political subdivision of this state, or negotiable certificates of deposit of any bank or other savings institution organized or transacting business in the United States equal to double such cost. Said bond shall not be released until the court is satisfied that the condemned land has been restored to the same or as good a condition as existed prior to the installation of the pipeline, and, if the affected land is productive agricultural land, that the soil which sustains the agricultural activity has been restored so as to provide for the continuation of such agricultural activity, and that any damages awarded by the court have been paid. If the condemned land is adjacent to or in proximity of the boundary of federal land of comparable use, such bond shall not be released until the company has restored the land to at least the same reclamation standards and meets such other standards and requirements for such federal land as required by the laws, rules, and regulations of the federal government.

(c) To consider existing utility rights-of-way before any new routes are taken if the land to be condemned is adjacent to existing utility rights-of-way.

(2) When land is condemned for a pipeline, the determination of the amount of compensation to be received by the landowner shall reflect consideration of the fact that the condemned land is to be restored as required in this section.

**Source:** L. 83: Entire section added, p. 1444, § 1, effective June 3. L. 84: (1)(b) amended, p. 974, § 1, effective April 12.

#### ANNOTATION

**Trial court did not abuse its discretion in excluding evidence relating to safety issues.** Landowners failed to cite any authority that supports the proposition that a court must con-

sider safety issues in pipeline condemnation cases. Sinclair Transp. Co. v. Sandberg, 228 P.3d 198 (Colo. App. 2009).

**38-1-101.7. Limitations on the use of right-of-way.** (1) No easement or right-of-way for pipelines shall be used by the owner thereof or employees of such owner for any purpose other than to construct, lay, install, replace, operate, inspect, maintain, repair, renew, substitute, monitor, change the size of, and remove certain facilities placed within the easement by such owner.

(2) The owner of an easement or right-of-way shall mitigate any erosion of the land within the easement or right-of-way caused by the owner of such easement.

**Source:** L. 84: Entire section added, p. 975, § 2, effective April 12.

**38-1-102. Petition - contents - parties.** (1) In all cases where the right to take private property for public or private use without the owner's consent or the right to construct or maintain any railroad, spur or side track, public road, toll road, ditch, bridge, ferry, telegraph, flume, or other public or private work or improvement which may damage property not actually taken is conferred by general laws or special charter upon any corporate or municipal authority, public body, officer or agent, person, commissioner, or corporation and the compensation to be paid for, in respect of property sought to be



appropriated or damaged for the purposes mentioned, cannot be agreed upon by the parties interested; or, in case the owner of the property is incapable of consenting, or his name or residence is unknown, or he is a nonresident of the state, it is lawful for the party authorized to take or damage the property so required to apply to the judge of the district court where the property or any part thereof is situate by filing with the clerk a petition, setting forth, by reference, his authority in the premises, the purpose for which said property is sought to be taken or damaged, a description of the property, the names of all persons interested as owners or otherwise, as appearing of record, if known, or, if not known, stating that fact, and praying such judge to cause the compensation to be paid to the owner to be assessed. If the proceedings seek to affect the property of persons under guardianship, the guardians or conservators of persons having conservators shall be made parties defendant. Persons interested whose names are unknown may be made parties defendant by the description of the unknown owners. In all such cases an affidavit shall be filed by or on behalf of the petitioner, setting forth that the names of such persons are unknown.

(2) In cases where the property is sought to be taken or damaged by the state for the purpose of establishing, operating, or maintaining any state house or charitable or other state institution or improvement, the petition shall be signed by the governor or such other person as he directs or as is provided by law.

(3) Under the provisions of this section, private property may be taken for private use, for private ways of necessity, and for reservoirs, drains, flumes, or ditches on or across the lands of others for agricultural, mining, milling, domestic, or sanitary purposes.

**Source:** G.L. § 1059. G.S. C. § 238. L. 1885: p. 200, § 1. L. 01: p. 173, § 1. R.S. 08: § 2416. C.L. § 6312. CSA: C. 61, § 2. CRS 53: § 50-1-2. L. 55: p. 368, § 1. C.R.S. 1963: § 50-1-2. L. 64: p. 265, § 154.

**Cross references:** For condemnation by tax exempt agency, see § 39-3-134; for taking private property for private use, see § 14 of art. II, Colo. Const.; for taking property for public use, see § 15 of art. II, Colo. Const.; for the right-of-way for ditches and flumes, see § 7 of art. XVI, Colo. Const.

## ANNOTATION

- I. General Consideration.
- II. Property Subject to Eminent Domain.
  - A. Private Property.
  - B. Way of Necessity.
  - C. Property Devoted to Public Use.
- III. The Petition.
  - A. Contents.
  - B. Sufficiency.
  - C. Parties.

### I. GENERAL CONSIDERATION.

**Law reviews.** For comment on *City of Thornton v. Farmers Reservoir & Irrigation Co.*, 194 Colo. 526, 575 P.2d 382 (1978), appearing below, see 56 Den L. J. 625 (1979). For article, "Access to Mineral Lands in Colorado", see 11 Colo. Law. 870 (1982).

**Principal object of condemnation proceedings** is to ascertain the price which a petitioner must pay for the land which he desires to acquire, and, until that determination is made by a board or jury and the same has been approved by a court, it cannot be said that the rights of the parties have become fixed or determined. *Town of Glendale v. City & County of Denver*, 137 Colo. 188, 322 P.2d 1053 (1958).

**Proceedings can only be instituted under particular statutes** which warrant them. *Colo. Midland Ry. v. Ruedi*, 2 Colo. App. 202, 29 P. 1034 (1892).

**This section contemplates institution of proceedings by one corporation against another** as well as by a corporation of a public character against the property of a private individual. *San Luis Land, Canal & Imp. Co. v. Kenilworth Canal Co.*, 3 Colo. App. 244, 32 P. 860 (1893).

**Power not assertable by federal oil and gas lessee.** The power of condemnation prescribed by this section may not be asserted by a federal oil and gas lessee. *Coquina Oil Corp. v. Harry Kourlis Ranch*, 643 P.2d 519 (Colo. 1982).

**Power not assertable by owner of unpatented mining claim.** *Precious Offer. Mineral Exch. v. McLain*, 194 P.3d 455 (Colo. App. 2008).

**Good faith offer prerequisite to failure to agree upon purchase price.** The prerequisite of a failure to agree upon the purchase price for the property sought to be condemned generally requires only that the condemning authority make a reasonable good faith offer to reach an agreement with the owner of the property for its purchase. *City of Thornton v. Farmers Reservoir*

& Irrigation Co., 194 Colo. 526, 575 P.2d 382 (1978); Bd. of County Comm'rs, v. Blecha, 697 P.2d 416 (Colo. App. 1985); City of Holyoke v. Schlachter Farms R.L.L.P., 22 P.3d 960 (Colo. App. 2001).

Where the negotiator for the plaintiff stated a price for land to the president of defendant association, who informed board of directors of offered price and all refused to accept it, this constituted failure to agree which was a condition precedent to jurisdiction of the trial court in a condemnation proceeding brought pursuant to this section. *Old Timers Baseball Ass'n v. Hous. Auth.*, 122 Colo. 597, 224 P.2d 219 (1950).

**Requirement of good faith negotiations** under this section is not a restriction on the court's subject matter jurisdiction but is merely an element of the claim for relief. *Minto v. Lambert*, 870 P.2d 572 (Colo. App. 1993).

**Trial court did not err in finding that the good faith negotiation requirement under subsection (1) was satisfied.** Here, record supports trial court's determination because: (1) Petitioner made two separate offers, both of which exceeded the appraisal, (2) respondents declined to accept either offer, although they had been afforded a reasonable time in which to do so, and (3) their only counteroffer was substantially greater than either of petitioner's offers and the only appraisal. *Sheridan Redev. Agency v. Knightsbridge Land Co.*, 166 P.3d 259 (Colo. App. 2007).

**Property owner has privilege of controverting petitioner's right to condemn.** *Kaschke v. Camfield*, 46 Colo. 60, 102 P. 1061 (1909).

**Thereafter, petitioner has burden to maintain right by proper proofs.** When property owner controverts petitioner's right to condemn, the burden is upon the petitioner to maintain his right by proper proofs. *Kaschke v. Camfield*, 46 Colo. 60, 102 P. 1061 (1909).

**Where owner fails to make contest, petitioner's right to condemn deemed admitted.** Where the owner fails to make a contest, in the proper manner and at the proper time, the right in the petitioner to condemn will be deemed admitted, leaving the amount of damages to be awarded as the sole matter in dispute. *Kaschke v. Camfield*, 46 Colo. 60, 102 P. 1061 (1909).

**Petitioner must prove failure to agree upon compensation for land taken.** The burden of proof is upon the petitioner in a condemnation action to establish by competent evidence that there was a failure to agree upon the compensation to be paid for land sought to be taken or damaged. *Stalford v. Bd. of County Comm'rs*, 128 Colo. 441, 263 P.2d 436 (1953); *City of Thornton v. Farmers Reservoir & Irrigation Co.*, 194 Colo. 526, 575 P.2d 382 (1978).

**Failure to agree on compensation prerequisite to institution of proceedings.** Failure to agree upon compensation to be paid for land

sought to be taken or damaged is a condition precedent to the right to institute and maintain proceedings at all and is clearly jurisdictional. *Mulford v. Farmers Reservoir & Irrigation Co.*, 62 Colo. 167, 161 P. 301 (1916); *Stalford v. Bd. of County Comm'rs*, 128 Colo. 441, 263 P.2d 436 (1953); *Welch v. City & County of Denver*, 141 Colo. 587, 349 P.2d 352 (1960).

**Effect of owner's silence or failure to propose counter offer.** If the property owner remains silent or rejects the offer without making an acceptable counter-offer, a condemnation action may be instituted. *City of Thornton v. Farmers Reservoir & Irrigation Co.*, 194 Colo. 526, 575 P.2d 382 (1978).

**Agreement precludes institution of proceedings.** Where an agreement was reached between the state, which was the condemnor, and the city, which was the landowner, the state is not compelled to institute condemnation proceedings because, by enacting an ordinance authorizing the use of park lands for highway purposes, all was accomplished by condemnation proceedings. *Welch v. City & County of Denver*, 141 Colo. 587, 349 P.2d 352 (1960).

**Order for temporary possession not reviewable by writ of error.** An order for temporary possession is interlocutory and not a final judgment or final determination of the action; thus are not reviewable by writ of error. *Town of Glendale v. City & County of Denver*, 137 Colo. 188, 322 P.2d 1053 (1958).

**Doctrines of claim preclusion and issue preclusion apply, and condemnees cannot revisit the valuation of the property acquired as determined in earlier condemnation proceedings in a subsequent civil action claiming a taking without just compensation.** The issue of damages for the taking of the acquired property was actually and necessarily adjudicated in the prior condemnation proceeding where the condemnees had a full and fair opportunity to litigate the issue. *Wall v. City of Aurora*, 172 P.3d 934 (Colo. App. 2007).

**Record supports trial court's determination that corporation engaged in good faith negotiations.** Requirement of good faith negotiation under subsection (1) satisfied where condemning authority makes a reasonable good faith offer to reach an agreement with property owner and allows owner sufficient time to respond. Here, condemning authority made several offers, some of which exceeded properties' appraised values, landowners did not accept offers, although they had a reasonable time to do so, and landowners' counteroffers demanded substantially more than condemning authority's offers and properties' appraised values. *Sinclair Transp. Co. v. Sandberg*, 228 P.3d 198 (Colo. App. 2009).

**Applied in** *Colo. Midlands Ry. v. Croman*, 16 Colo. 381, 27 P. 256 (1891); *Town of Lyons v. City of Longmont*, 54 Colo. 112, 129 P. 198



(1912); Otero Irrigation Dist. v. Enderud, 122 Colo. 136, 220 P.2d 862 (1950); Rabinoff v. District Court, 145 Colo. 225, 360 P.2d 114 (1961); Buck v. District Court, 199 Colo. 344, 608 P.2d 350 (1980); Direct Mail Servs., Inc. v. Colo., 557 F. Supp. 851 (D. Colo. 1983), *aff'd*, 729 F.2d 672 (10th Cir. 1984); Thornton Dev. Auth. v. Upah, 640 F. Supp. 1071 (D. Colo. 1986).

## II. PROPERTY SUBJECT TO EMINENT DOMAIN.

### A. Private Property.

**Property held by corporation deemed private.** Property held by public corporation which is not devoted to, or needed for, a public use, is as much private property as though held by an individual. Denver Power & Irrigation Co. v. Denver & R.G.R.R., 30 Colo. 204, 69 P. 568 (1902).

### B. Way of Necessity.

**Common-law way of necessity is easement founded upon implied grant.** Where one party conveys property, he also conveys whatever is necessary to the beneficial use of that property by which it is assumed that, when a party conveys property, he also conveys whatever is necessary to the beneficial use of that property. Crystal Park Co. v. Morton, 27 Colo. App. 74, 146 P. 566 (1915); Minto v. Lambert, 870 P.2d 572 (Colo. App. 1993).

**Way of necessity arises only in favor of grantee over grantor's land,** and not over the lands of a stranger. Crystal Park Co. v. Morton, 27 Colo. App. 74, 146 P. 566 (1915).

**Necessity does not create right,** as it always originates in some grant or change of ownership. Crystal Park Co. v. Morton, 27 Colo. App. 74, 146 P. 566 (1915).

**Private and public ways of necessity distinguished.** Private ways of necessity differ from public ways of necessity only in the fact that they are private; private ways of necessity refer particularly to, and include, passageways or roadways which are indispensable to the practical use of the property for which they are claimed. Crystal Park Co. v. Morton, 27 Colo. App. 74, 146 P. 566 (1915).

**Private ways of necessity are not limited to ways desired for agricultural, mining, milling, domestic, or sanitary purposes,** as are those for reservoirs, drains, flumes, and ditches. Crystal Park Co. v. Morton, 27 Colo. App. 74, 146 P. 566 (1915); Childers v. Quartz Creek Land Co., 946 P.2d 534 (Colo. App. 1997), *cert. dismissed*, 964 P.2d 509 (Colo. 1998).

**When private corporation may condemn land for private way of necessity.** A private corporation may condemn land for a private way

of necessity where the nature of its business and the situation of its property require the way, and where, under like conditions, other persons not corporate may condemn. Crystal Park Co. v. Morton, 27 Colo. App. 74, 146 P. 566 (1915).

**Courts may determine what constitutes private way of necessity** in any particular case, unless restrained by the general assembly. Crystal Park Co. v. Morton, 27 Colo. App. 74, 146 P. 566 (1915).

**Private way of necessity may be condemned** when the need is reasonably necessary and the common law or other legal remedy does not provide a present enforceable legal right to an alternate mode of access that is reasonable and practical. Minto v. Lambert, 870 P.2d 572 (Colo. App. 1993).

**State highway department cannot condemn property for a private way of necessity.** Although state highway department has express statutory authority to condemn property for local service roads and for highway construction, the department has no statutory authority to "stand in the shoes" of a private landowner and condemn a private way of necessity which the landowner has the right to assert under this section. Dept. of Hwys. v. Denver & Rio Grande W.R., 789 P.2d 1088 (Colo. 1990).

**The phrase "private ways of necessity" in subsection (3) does not include natural gas pipelines.** Phrase is limited to passageways, such as paths, bridges, and tunnels, and roadways that provide legal access connecting landlocked property to a public road. Petitioners do not seek to condemn an easement to provide such access but rather to construct and maintain an underground natural gas pipeline and related equipment and facilities. As such, petition did not identify a purpose for which taking property is permitted under this section and section 14 of article II of the state constitution. Akin v. Four Corners Encampment, 179 P.3d 139 (Colo. App. 2007).

**If the defendant pleads the existence of an alternate route of private access across property not owned by the defendant,** defendant has the burden of establishing the existence of an acceptable alternate route and of proving that plaintiffs have the present enforceable legal right to use it. West v. Hinksmon, 857 P.2d 483 (Colo. App. 1992).

**Defendant should be permitted to show that an alternate route across defendant's property exists that would be less damaging than that proposed by plaintiff.** West v. Hinksmon, 857 P.2d 483 (Colo. App. 1992).

**When a petitioner seeks to condemn private way of necessity for access to property it wishes to develop in the future, it must demonstrate a purpose for the condemnation that enables the trial court to examine both the scope of and necessity for the proposed condemnation,** so that the burden to be imposed

upon the condemnee's property may be ascertained and circumscribed through the trial court's condemnation order. *Glenelk Ass'n v. Lewis*, 260 P.3d 1117 (Colo. App. 2011).

Condemnor failed to articulate a concrete development proposal for the subject property nor did he sufficiently engage the county's land use approval process prior to initiating the condemnation proceeding. Record fails to clarify condemnor's intended use of the property or size of the planned road with sufficient specificity to allow trial court to analyze necessity of requested easement. Condemnor's failure to sufficiently articulate development plan prevented trial court from determining scope of proposed condemnation sufficiently to determine scope of burden to be imposed upon the property to be condemned. Given evidentiary shortcomings in the record, trial court correctly concluded that it could not determine whether particular way of necessity requested by condemnor was indispensable and, therefore, trial court correctly denied condemnor's request for immediate possession and dismissed the condemnation petition. *Glenelk Ass'n v. Lewis*, 260 P.3d 1117 (Colo. App. 2011).

**Trial court's determination in declaratory judgment action brought under constitutional counterpart of subsection (3) of this section, § 14 of article II of the state constitution, that defendants failed to rebut plaintiff's showing of an entitlement to a private way of necessity is not clearly erroneous.** Trial court held plaintiff may condemn private way of necessity across defendants' property pursuant to constitutional section. Trial court's determinations that plaintiff proved that a way of necessity is reasonably necessary and that defendants did not prove, in any concrete fashion, that plaintiff has either an alternate route of access or a present enforceable legal right to use one are not clearly erroneous. *Tieze v. Killam*, 179 P.3d 10 (Colo. App. 2007).

### C. Property Devoted to Public Use.

**Condemnation of property already devoted to public use limited.** Property already devoted to a public use cannot be taken for another in such manner or to such an extent that the use to which it is devoted will be wholly defeated or superseded, except where a public exigency requires that it be taken. *Denver Power & Irrigation Co. v. Denver & R.G.R.R.*, 30 Colo. 204, 69 P. 568 (1902); *Beth Medrosh Hagodol v. City of Aurora*, 126 Colo. 267, 248 P.2d 732 (1932).

Land already appropriated as a right-of-way by a railroad company cannot be taken for a reservoir site to an extent which would totally deprive the railroad company of its use, unless a public necessity requires that it be taken. *Denver*

*Power & Irrigation Co. v. Denver & R.G.R.R.*, 30 Colo. 204, 69 P. 568 (1902).

Property held for a public use may be taken under the exercise of the right of eminent domain for the same or a different public use, when such taking does not materially interfere with the uses for which it is already held. *Colo. E. Ry. v. Union Pac. Ry.*, 41 F. 293 (D. Colo. 1890), writ of error dismissed, 54 F. 22 (8th Cir. 1893), writ of error dismissed, 163 U.S. 708, 16 S. Ct. 1207, 41 L. Ed. 310 (1895); *Union P. R. R. v. Colo. Postal Tel. Cable Co.*, 30 Colo. 133, 69 P. 564 (1902), appeal dismissed, 191 U.S. 577, 24 S. Ct. 861, 48 L. Ed. 309 (1903).

**City may not condemn property already dedicated to public use.** *Beth Medrosh Hagodol v. City of Aurora*, 126 Colo. 267, 248 P.2d 732 (1952).

## III. THE PETITION.

### A. Contents.

**Petition to reflect property value or amount in controversy.** The petition should show the value of the property sought to be taken or the amount involved in the proceeding. *Colo. Cent. R.R. v. Allen*, 13 Colo. 229, 22 P. 605 (1889).

**Authority to condemn need not appear in petition.** *Kaschke v. Camfield*, 46 Colo. 60, 102 P. 1061 (1909).

**Definiteness required in description of condemned property.** A petition that describes the right-of-way sought to be condemned with sufficient definiteness that any one versed in the nomenclature employed for the description of lands could locate it without any trouble, contains a sufficient description. *Colo. Fuel & Iron Co. v. Four Mile Ry.*, 29 Colo. 90, 66 P. 902 (1901).

**Nothing in this section requires a petition to include a legal description.** *Story v. Bly*, 217 P.3d 872 (Colo. App. 2008), *aff'd*, 241 P.3d 529 (Colo. 2010).

**Averments of shortest route practicable, etc., unnecessary.** The petition for a way for an irrigating ditch, over the cultivated lands of another, need not aver that the way sought is the shortest and most direct route practicable, etc. *Mulford v. Farmers' Reservoir & Irrigation Co.*, 62 Colo. 167, 161 P. 301 (1916).

**Deficient petition to be dismissed.** If the petitioner is unable to bring himself within the descriptio personae of some act from which he derives his rights, or if he fails to show that he is seeking to take private property and desires to ascertain its value in that proceeding, his petition must be dismissed. *Colo. Midland Ry. v. Ruedi*, 2 Colo. App. 202, 29 P. 1034 (1892).

**Nature of easement.** Unless the exact nature of an easement sought to be taken is fixed by law, petition must describe in detail the nature of



the use to be made of the land so that the burden on the landowner can be accurately evaluated. *State Dept. of Hwys. v. Woolley*, 696 P.2d 828 (Colo. App. 1984).

**Slope easement defined** in *State Dept. of Highways v. Woolley*, 696 P.2d 828 (Colo. App. 1984).

#### B. Sufficiency.

**Sufficient showing of public purpose in petition.** In a proceeding to condemn a right-of-way for a telegraph line, a petition which alleges that petitioner is a corporation organized for the purpose of erecting and maintaining lines of magnetic telegraph in this state is sufficient to show that the line to be established is for public use. *Union P.R.R. v. Colo. Postal Tel. Cable Co.*, 30 Colo. 133, 69 P. 564 (1902), appeal dismissed, 191 U.S. 577, 24 S. Ct. 861, 48 L. Ed. 309 (1903).

**38-1-103. Summons - return - publication.** (1) A summons shall be issued and served and proof of service shall be made in accordance with the Colorado rules of civil procedure. The contents of such summons shall be in conformity with said rules; except that it shall notify the respondent or defendant that, upon failure to appear and defend, the court, without further notice, shall cause the compensation to be determined and title vested in the petitioner according to law. When it appears that the owners of the property sought to be condemned cannot be personally served as provided by the Colorado rules of civil procedure, an affidavit shall be filed in said cause by the petitioner or his attorney, setting forth that the person making such affidavit has made diligent inquiry and has been unable to learn the whereabouts of such owners.

(2) The court shall then order a notice to be published in some newspaper published in said county, addressed to such owners, in which notice shall be stated the name of the petitioner, a full and accurate description of the property sought to be taken or condemned, the purpose for which such condemnation is asked, the time and place at which such owners are required to appear, and the title of the court or name of the judge before whom said application is to be heard. The court shall also fix and determine when said notice shall be made returnable, but in no case shall it be made returnable in less than thirty days. The same shall be published at least four times in some weekly newspaper before the return day thereof. If there is no weekly newspaper published in the county in which such proceedings are had, the court shall direct that said notice be published in some newspaper, named by him, published in the nearest convenient place to such county.

**Source:** G.L. § 1061. L. 1879: p. 58, § 1. G.S. C. § 240. R.S. 08: § 2418. C.L. § 6314. CSA: C. 61, § 4. CRS 53: § 50-1-4. L. 55: p. 369, § 2. L. 61: p. 370, § 2. C.R.S. 1963: § 50-1-4.

**Cross references:** For publication of legal notices, see part 1 of article 70 of title 24; for contents of a summons, see C.R.C.P. 4(c); for personal service in state, see C.R.C.P. 4(e); for manner of proof of service, see C.R.C.P. 4(h).

#### C. Parties.

**Unknown, interested parties.** Where the names of interested parties are unknown, this section authorizes the institution of proceedings against the owner appearing of record or, if not known stating that fact; but this section does not and could not lawfully undertake to conclude the rights and transmute the title of the real owner without notice and having his day in court. *Colo. E.R.R. v. Chicago, B. & Q. Ry.*, 141 F. 898 (8th Cir. 1905).

**Shareholders necessary parties in mutual ditch corporation action.** Pursuant to Rule 19, C.R.C.P. the district court should join as parties to a condemnation action those shareholders in a mutual ditch corporation whose water rights would be affected by the condemnation action of the defendant as of the date of the initiation of the condemnation action and all parties in interest. *Jacobucci v. District Court*, 189 Colo. 380, 541 P.2d 667 (1975).

#### ANNOTATION

**Failure to answer summons waives all issues except compensation.** Where the summons is returnable at a certain day and hour, no answer being interposed at the hour appointed,

the court can proceed at once to the appointment of commissioners to ascertain the compensation to be made because failing to answer at the time specified is a waiver of all questions as to the

necessity for the taking and the attempt to agree. *Kaschke v. Camfield*, 46 Colo. 60, 102 P. 1061 (1909); *Williams v. Bd. of Comm'rs*, 48 Colo. 541, 111 P. 71 (1910).

**Applied** in *Sand Creek Lateral Irrigation Co. v. Davis*, 17 Colo. 326, 29 P. 742 (1892); *Colo. Midland Ry. v. Ruedi*, 2 Colo. App. 202, 29 P. 1034 (1892); *Siedler v. Seely*, 8 Colo. App. 499,

46 P. 848 (1896); *Thompson v. De Weese-Dye Ditch & Reservoir Co.*, 25 Colo. 243, 53 P. 507 (1898); *Colo. Fuel & Iron Co. v. Four Mile Ry.*, 29 Colo. 90, 66 P. 902 (1901); *Union P.R.R. v. Colo. Postal Tel. Cable Co.*, 30 Colo. 133, 69 P. 564 (1902); *Goodman v. City of Ft. Collins*, 164 F. 970 (8th Cir. 1908).

**38-1-104. Trial - amendments - rules.** No cause shall be heard earlier than thirty days after service upon the defendant or upon due publication as provided in section 38-1-103. Any number of separate parcels of property situate in the same county may be included in one petition, and the compensation for each shall be assessed separately by the same or different commissions or juries, as the court may direct. Amendment to the petition or to any paper or record in the cause may be permitted whenever necessary to a fair trial and final determination of the questions involved. Should it become necessary at any stage of the proceeding to bring a new party before the court, the court has the power to make such rule or order in relation thereto as may be deemed reasonable and proper, and also has the power to make all necessary rules and orders for notice to parties of the pendency of the proceeding and to issue all process necessary to the execution of orders and judgments as they may be entered.

**Source:** G.L. § 1062. G.S. C. § 241. R.S. 08: § 2419. C.L. § 6315. CSA: C. 61, § 5. CRS 53: § 50-1-5. L. 55: p. 370, § 3. C.R.S. 1963: § 50-1-5. L. 85: Entire section amended, p. 1194, § 2, effective June 6.

#### ANNOTATION

**Provisions relating to amendment of petition to be accorded liberal interpretation.** *Lebanon Mining Co. v. Consol. Republican Mining Co.*, 6 Colo. 371 (1882); *Archibald v. Thompson*, 2 Colo. 388 (1892); *Sw. Land Co. v. Hickory Jackson Ditch Co.*, 18 Colo. 489, 33 P. 275 (1893); *Jordan v. Greig*, 33 Colo. 360, 80 P. 1045 (1905); *Goodman v. City of Ft. Collins*, 164 F. 970 (8th Cir. 1908).

**Applicability of section.** The provisions of this section allowing amendment of a petition are as applicable to the correction of errors and omissions in the statement of jurisdictional facts as to the correction of other defects. *Lebanon Mining Co. v. Consol. Republican Mining Co.*, 6 Colo. 371 (1882); *Archibald v. Thompson*, 2 Colo. 388 (1892); *Sw. Land Co. v. Hickory Jackson Ditch Co.*, 18 Colo. 489, 33 P. 275 (1893); *Jordan v. Greig*, 33 Colo. 360, 80 P. 1045 (1905); *Goodman v. City of Ft. Collins*, 164 F. 970 (8th Cir. 1908).

**General statutory provisions governing amendments to pleadings are inapplicable** to the eminent domain act, which prescribes a complete system of procedure for the taking or damaging of private property. *Trippe v. Overacker*, 7 Colo. 72, 1 P. 695 (1883); *Knoth v. Barclay*, 8 Colo. 300, 6 P. 924 (1885); *Colo. Cent. R.R. v. Allen*, 13 Colo. 229, 22 P. 605 (1889); *Kindel v. Le Bert*, 23 Colo. 385, 48 P. 641, 58 Am. St. R. 234 (1897).

**Matter of amendments is discretionary with the court.** *Knoth v. Barclay*, 8 Colo. 300, 6

P. 924 (1885); *Goodman v. City of Ft. Collins*, 164 F. 970 (8th Cir. 1908).

**Amendment power unaffected by parties' failure to appear.** The power of the court to allow an amendment of a petition is not affected in any wise by the failure of parties to appear because the personal service of the summons brought them under the jurisdiction of the court for all purposes of the proceedings as fully as a voluntary appearance could have done. *Goodman v. City of Ft. Collins*, 164 F. 970 (8th Cir. 1908).

**Defective condemnation proceedings may be renewed**, and the petition and other papers may be amended whenever necessary to a fair trial and final determination of the controversy. *Colo. Cent. R.R. v. Allen*, 13 Colo. 229, 22 P. 605 (1889).

**Jurisdiction is not lost by amendment of petition** because an amendment is not the institution of a new proceeding, and it creates no occasion for the issuance of a new summons or like process. *Goodman v. City of Ft. Collins*, 164 F. 970 (8th Cir. 1908).

**Trial court's refusal to permit amendment deemed no abuse of discretion.** If the condemnor is fully aware of the nature and value of the property it seeks to take, it may not wait until after evidence of value has been heard and, because of anticipated dissatisfaction with the amount of the award, modify its position where the property owners have changed their position



in good faith and reliance on the condemnor's representations; since the trial court's refusal to permit an amendment was based upon consideration of fairness to the parties, the trial court did not abuse its discretion in denying to condemnor's motion to amend. *Evergreen Fire Prot. Dist. v. Huckleby*, 626 P.2d 744 (Colo. App. 1981).

**Applied** in *Colo. E.R.R. v. Chicago, B. & Q. Ry.*, 141 F. 898 (8th Cir. 1905); *Schneider v. Schneider*, 36 Colo. 518, 86 P. 347 (1906); *Tegeler v. Schneider*, 49 Colo. 574, 114 P. 288 (1911); *Cucharas Sanitation & Water v. Mounsey*, 805 P.2d 1177 (Colo. App. 1990).

**38-1-105. Adjournment - commission - compensation - defective title - withdrawal of deposit.** (1) The court may adjourn the proceedings from time to time and shall direct any further notice thereof to be given that may seem proper. The court shall hear proofs and allegations of all parties interested touching the regularity of the proceedings and shall rule upon all objections thereto. Unless a jury is requested by the owner of the property as provided in section 38-1-106, the court shall appoint a board of commissioners of not less than three disinterested and impartial freeholders to determine compensation in the manner provided in this article to be allowed to the owner and persons interested in the lands, real estate, claims, or other property proposed to be taken or damaged in such county for the purposes alleged in the petition. The court shall fix the time and place for the first meeting of such commissioners. Such meeting shall be held at least thirty days prior to the date scheduled for the trial to determine compensation. At the meeting, a voir dire examination shall be conducted by the court and the parties to determine whether the proposed commissioners are disinterested and impartial freeholders. If the court determines that any of the proposed commissioners is not disinterested and impartial, the court shall replace such person and appoint another commissioner, who shall also be subject to voir dire examination. At the hearing to determine compensation, the court shall administer an oath to the commissioners, shall instruct them in writing as to their duties, and, at the conclusion of the testimony, shall instruct them in writing as to the applicable and proper law to be followed by them in arriving at their ascertainment. The court shall fix reasonable compensation for the services and expenses of said commissioners and shall provide the services of a court reporter to record all proceedings had by the commissioners.

(2) The commissioners, before entering upon the duties of their office, shall take an oath to faithfully and impartially discharge their duties as commissioners, and any one of them may administer oaths to witnesses produced before them. The commissioners may request the court or clerk thereof to issue subpoenas to compel witnesses to attend the proceedings and testify as in other civil cases and may adjourn and hold meetings for that purpose. They may request the court to make rulings upon the propriety of the proof or objections of the parties. They shall hear the proofs and allegations of the parties according to the rules of evidence and, after viewing the premises or other property and without fear, favor, or partiality, shall ascertain and certify the proper compensation to be made to said owner or parties interested for the lands, real estate, claims, or other property to be taken or affected, as well as all damages accruing to the owner or parties interested in consequence of the condemnation of the same. The commissioners shall make, subscribe, and file with the clerk of the court in which such proceedings are had a certificate of their ascertainment and assessment, in which such lands, real estate, claims, or other property shall be described with convenient certainty and accuracy.

(3) The court, upon the filing of such certificate or returning of a verdict of a jury as provided in section 38-1-107 and due proof that such compensation and separate sums, if any, are certified or found to have been paid to the parties entitled to the same or have been deposited to the credit of such parties in court or with the clerk of the court for that purpose, shall make and cause to be entered in its minutes a rule describing such lands, real estate, claims, or other property, such ascertainment or compensation with the mode of making it, and each payment or deposit of the compensation, a certified copy of which shall be recorded and indexed in the office of the county clerk and recorder of the proper county in like manner and with like effect as if it were a deed of conveyance from the owner and parties interested to the proper parties. If there is more than one person interested as owner or otherwise in the property and they are unable to agree upon the nature, extent, or value of their respective interests in the total amount of compensation so ascertained and assessed

on an undivided basis by either a commission or a jury, the nature, extent, or value of said interests shall thereupon be determined according to law in a separate and subsequent proceeding and distribution made among the several claimants thereto.

(4) Upon the entry of such rule, the petitioner shall become seized in fee unless a lesser interest has been sought, except as provided in this section, of all such lands, real estate, claims, or other property described in said rule as required to be taken, and may take possession and hold and use the same for the purposes specified in such petition, and shall thereupon be discharged from all claims for any damages by reason of any matter specified in such petition, certificate, or rule of said court. No right-of-way or easement acquired by condemnation shall ever give the petitioner any right, title, or interest to any vein, ledge, lode, deposit, oil, natural gas, or other mineral resource found or existing in the premises condemned, except insofar as the same may be required for subsurface support.

(5) If at any time after an attempted or actual ascertainment of compensation under this article or any purchase or by donation to said petitioner of any lands, real estate, claims, or other property for purposes specified in the petition it appears that the title acquired thereby, to all or any part of such lands for the use of such petitioner, is defective or if said assessment fails or is deemed defective, the petitioner may proceed and perfect such title by procuring an ascertainment of the proper compensation to be made to any person who has title, claim, or interest in or lien upon such lands, real estate, claims, or other property and by making payment thereof in the manner provided in section 38-1-112, as near as may be.

(6) (a) At any stage of such new proceedings or of any proceedings under this article, the court, by rule in that behalf made, may authorize the petitioner, if already in possession, to use, and, if not in possession, to take possession of and use, said premises during the pendency and until the final conclusion of such proceedings and may stay all actions and proceedings against such petitioner on account thereof, if such petitioner pays a sufficient sum into court, or to the clerk thereof, to pay the compensation in that behalf when ascertained. The court wherein any such proceedings are had shall determine the amount such petitioner is required to pay or deposit pending any such ascertainment. In every case where possession is so authorized, it is lawful for either party to conduct the proceedings to a conclusion, if the same are delayed by the other party.

(b) Upon proper application to the court or by stipulation between the parties, the owner may withdraw from the sum so deposited an amount not to exceed three-fourths of the highest valuation evidenced or testimony presented by the petitioner at the hearing for possession, unless the petitioner agrees to a larger withdrawal, if all parties interested in the property sought to be acquired consent and agree to such withdrawal. Any such withdrawal of said deposit shall be a partial payment of the amount of total compensation to be paid and shall be deducted by the clerk of the court from any award or verdict entered thereafter.

(c) The petitioner shall not take possession of the property sought to be taken or condemned earlier than thirty days after service of the summons upon the defendant, unless the owner consents to such possession prior to the expiration of the thirty-day period.

**Source:** G.L. § 1063. G.S. C. § 242. R.S. 08: § 2420. C.L. § 6316. CSA: C. 61, § 6. CRS 53: § 50-1-6. L. 61: p. 371, § 3. L. 63: p. 476, § 1. C.R.S. 1963: § 50-1-6. L. 66: p. 27, § 1. L. 84: (1) amended, p. 972, § 2, effective February 17. L. 85: (6)(c) added, p. 1194, § 3, effective June 6. L. 2008: (4) amended, p. 627, § 1, effective August 5.

## ANNOTATION

- I. General Consideration.
- II. The Proceedings.
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### I. GENERAL CONSIDERATION.

**Law reviews.** For note, "The Real Property Interest Created in a Railroad Upon Acquisition of Its Right-of-Way", see 27 Rocky Mt. L. Rev. 73 (1954). For article, "La Plata Electric Asso-



ciation v. Cummins: A Radical Departure or a Consistent Interpretation of Pre-Existing Equities in Colorado Condemnation Law?", see 65 Den. U. L. Rev. 93 (1988).

**Only such interest necessary to accomplish purpose passed.** This article passes only such estate or interest in the lands as is reasonably necessary to accomplish the purpose had in view in the condemnation proceeding. *Lithgow v. Pearson*, 25 Colo. App. 70, 135 P. 759 (1913).

**As a result of the 2008 legislative expansion of this section, subsection (4) prohibits a governmental entity from acquiring through condemnation a right to any mineral resource** beneath real property that was itself acquired through condemnation for highway purposes except to the extent required for subsurface support. Prior to that expansion, subsection (4) did not prohibit such acquisition by the department of transportation. *Dept. of Transp. v. Gypsum Ranch Co.*, 244 P.3d 127 (Colo. 2010).

**Specific land description in order appointing commissioners not required.** This section does not require that the land to be taken or damaged should be specifically described in the order appointing the commissioners. *Williams v. Bd. of Comm'rs*, 48 Colo. 541, 111 P. 71 (1910).

**Trial judge is not required to preside at all commissioners' meetings.** *Bd. of County Comm'rs v. Vail Associates*, 171 Colo. 381, 468 P.2d 842 (1970).

**Applied in** *Smith Canal or Ditch Co. v. Colo. Ice & Storage Co.*, 34 Colo. 485, 82 P. 940 (1905); *Boothroyd v. Bd. of Comm'rs*, 43 Colo. 428, 97 P. 255 (1908); *Kern v. Minekime*, 45 Colo. 378, 101 P. 341 (1909); *Hoover-Benninghoff v. Palisade*, 48 Colo. 64, 108 P. 983 (1910); *United States v. O'Neill*, 198 F. 677 (D. Colo. 1912); *Keller v. Miller*, 63 Colo. 304, 165 P. 774 (1917); *Rothwell v. Coffin*, 122 Colo. 140, 220 P.2d 1063 (1950); *Potashnik v. Pub. Serv. Co.*, 126 Colo. 98, 247 P.2d 137 (1952); *Goldstein v. Denver Urban Renewal Auth.*, 192 Colo. 422, 560 P.2d 80 (1977); *Bd. of County Comm'rs v. Delaney*, 41 Colo. App. 548, 592 P.2d 1338 (1978); *Buck v. District Court*, 199 Colo. 344, 608 P.2d 350 (1980); *State Dept. of Hwys. v. Pigg*, 656 P.2d 46 (Colo. App. 1982).

## II. THE PROCEEDINGS.

### A. In General.

**Parties entitled to presence at trial, cross-examination, etc.** At the trial both parties are entitled to be present, to cross-examine witnesses and to object to the admission or exclusion of any and all documents offered in evidence. *Routt County Dev. Co. v. Johnson*, 23 Colo. App. 511, 130 P. 1081 (1913).

**Petitioner may pay award or abandon proceedings.** Under a judgment in condemnation the petitioner may pay the award and take title to

the property, or he may abandon the proceedings and, thus, incur no liability for the sum awarded as the value of the property; and this is true even in cases where by virtue of the statute, he has obtained preliminary possession pending trial. *Dolores No. 2 Land & Canal Co. v. Hartman*, 17 Colo. 138, 29 P. 378 (1891).

**Condemning party may discontinue proceedings at any time** before the right of the property owner to compensation or damages has become complete, in the absence of a statutory provision showing a legislative intent to the contrary. *Denver & R.G.R.R. v. Mills*, 59 Colo. 198, 147 P. 681 (1915); *Denver & N.O.R.R. v. Lamborn*, 8 Colo. 380, 8 P. 582 (1885); *Johnson v. Climax Molybdenum Co.*, 109 Colo. 308, 124 P.2d 929 (1942).

**Payment required for costs and damages recoverable upon abandonment.** The privilege to so abandon the proceeding does not relieve the condemning party from the payment of such costs and damages as may be lawfully recovered. *Denver & R.G.R.R. v. Mills*, 59 Colo. 198, 147 P. 681, 1916E Ann. Cas. 985 (1915).

**Landowner must recover damages in separate action.** Damages occasioned by the occupancy and use of the land by the condemnor, where the condemnor discontinues the proceedings after gaining temporary possession of the property, must be recovered by the landowner in a separate action. *Johnson v. Climax Molybdenum Co.*, 109 Colo. 308, 124 P.2d 929 (1942).

**Since landowner's action for damages improper for consideration in condemnation proceedings.** The procedural requirement of the landowner having to seek recovery in a separate action arose from the fact that condemnor, after abandoning and discontinuing the proceedings, was relegated to the status of a trespasser ab initio, and the landowner's action for damages, of necessity, had to sound in tort and involved essentials, both in the pleading and trial thereof, not properly subjects for consideration in condemnation proceedings under this section. *Johnson v. Climax Molybdenum Co.*, 109 Colo. 308, 124 P.2d 929 (1942).

**Condemnor has burden of maintaining his right** by proper proofs, once the landowner has controverted the condemnor's right to condemn. *Otero Irrigation Dist. v. Enderud*, 122 Colo. 136, 220 P.2d 862 (1950).

**Property owner acquires no vested right to compensation awarded until condemnor has secured a vested right to the property condemned, and vice versa.** *City of Broomfield v. Walnut Creek Dev. Corp.*, 666 P.2d 1103 (Colo. App. 1982).

**Scope of petitioner's showing in pleadings and proof.** The petitioner is at liberty to show, by proper pleadings and proof that such title or claim is nothing more than the bare legal title, without any equity in the defendant, and that the damages are merely nominal, or that the defen-

dant's estate is something less than the full legal and equitable interest, on account of the payment and acceptance of the compensation therefor, as pleaded; nothing in disparagement of defendant's title, unless fairly within the scope of the pleadings, could be properly admitted in evidence. *Knoth v. Barclay*, 8 Colo. 300, 6 P. 924 (1885); *G.B. & L. Ry. v. Haggart*, 9 Colo. 346, 12 P. 215 (1886); *Colo. Cent. R.R. v. Allen*, 13 Colo. 229, 22 P. 605 (1889).

**Order violating constitution does not vitiate rest of proceedings.** Whether an interlocutory order violates constitutional requirement of due process of law or not, it does not vitiate the rest of the proceedings for condemnation and, if in those proceedings, respondents have had notice and have had their compensation judicially ascertained, the case will not be reversed because of such order, unless it is shown that it has injuriously affected their rights upon the merits. *Sternberger v. McClain v. People*, 9 Colo. 190, 11 P. 85 (1886); *San Luis Land, Canal & Imp. Co. v. Kenilworth Canal Co.*, 3 Colo. App. 244, 32 P. 860 (1893); *Colo. Fuel & Iron Co. v. Four Mile Ry.*, 29 Colo. 90, 66 P. 902 (1901); *Lavelle v. Town of Julesburg*, 49 Colo. 290, 112 P. 774 (1911); *Cont'l Mines Power & Reduction Co.*, 68 Colo. 129, 186 P. 910 (1920), appeal dismissed, 257 U.S. 617, 42 S. Ct. 95, 66 L. Ed. 399 (1921).

**Issues pertaining to the government's right to take immediate possession of condemned property are properly part of eminent domain proceedings.** Because the trial court had jurisdiction to decide issues pertaining to the department of transportation's right to take immediate possession of the property, it necessarily follows that the trial court also had jurisdiction to accept, interpret, and enforce a stipulation which resolved the dispute over such possession. *Dept. of Transp. v. Auslaender*, 94 P.3d 1239 (Colo. App. 2004).

#### B. Questions for Determination in Limine.

**Questions for determination by court include:** (1) Whether or not the petitioner belongs to the class of persons entitled to condemn; (2) whether or not the property sought to be taken belongs to the class of property that is subject to condemnation; (3) whether or not the purpose for which the property is sought to be taken is one for which condemnation is permitted; (4) whether or not the petitioner and the owner have been able to come to an agreement concerning a purchase of the land; and (5) whether or not the act authorizing the proceeding is constitutional. *Pine Martin Mining Co. v. Empire Zinc Co.*, 90 Colo. 529, 11 P.2d 221 (1932).

**Court must determine necessity and purpose of taking land.** The question of the necessity of taking land and property from the owner

and the question as to whether or not the purpose for which the property is to be taken is a public one are questions which the court must answer because the correct answers are conditioned by rules of law of which the commissioners cannot have competent knowledge. *Union P.R.R. v. Colo. Postal Tel. Cable Co.*, 30 Colo. 133, 69 P. 564 (1902), appeal dismissed, 191 U.S. 577, 24 S. Ct. 861, 48 L. Ed. 309 (1903).

**Petitioner's entitlement to condemn.** If a petitioner is not entitled to condemn a tract, or if a tract should not have been taken are matters for the court to settle in advance. *Wassenich v. City & County of Denver*, 67 Colo. 456, 186 P. 533 (1919).

Since a right-of-way shall not give the party condemning it any right, title, or interest to any vein, ledge, lode, or deposit in the premises so taken, the question of whether the petitioners were precluded from running a tunnel is a matter which, if proper to consider in condemnation proceedings, must be settled by the court. *Colo. Fuel & Iron Co. v. Four Mile Ry.*, 29 Colo. 90, 66 P. 902 (1901).

**Inability to agree is to be determined by court.** *Kaschke v. Camfield*, 46 Colo. 60, 102 P. 1061 (1909).

**Feasibility or financial success of enterprise not determinations for court in limine.** Whether or not an enterprise is feasible or will be a financial success cannot be inquired into even by commissioners charged with the duty of determining the question of necessity for the project, and clearly such questions were not for the determination of the court in limine. *Rothwell v. Coffin*, 122 Colo. 140, 220 P.2d 1063 (1950).

**Nothing in subsection (1) purports to preclude a court from making determination before trial on the legal question of whether the phrase "private ways of necessity" includes ways for natural gas pipelines.** This legal question is distinguished from factual question of necessity, that is, whether the way sought is "reasonably necessary" under the facts and circumstances of the case, which is one for the trier of fact. *Akin v. Four Corners Encampment*, 179 P.3d 139 (Colo. App. 2007).

#### C. Power of Commissioners.

**Language of subsection (2) is permissive and not mandatory.** *Bd. of County Comm'rs v. McClure Venture*, 41 Colo. App. 524, 594 P.2d 585 (1978).

**Province of board fixed by subsection (2).** The province of the board of commissioners is fixed by the terms of subsection (2). *Broadmoor Land Co. v. Curr*, 142 F. 421 (8th Cir. 1905); *Routt County Dev. Co. v. Johnson*, 23 Colo. App. 511, 130 P. 1081 (1913).

**Commissioner is combination of civil juror and judge.** *State Dept. of Hwys. v. Copper Mt., Inc.*, 624 P.2d 936 (Colo. App. 1981).



**Commissioners to make all evidentiary decisions.** The board of commissioners may seek the aid of the trial court in resolving the propriety of the proofs or objections of the parties; however, in the absence of the board's requesting such aid, the board will make all evidentiary decisions. *City of Aurora v. Webb*, 41 Colo. App. 11, 585 P.2d 288 (1978).

The commission was entitled to consider any competent evidence, including after sales which were comparable in character, close in time and in location, in ascertaining the present, reasonable market value of the condemned property at the date of the taking. *State Dept. of Hwys. v. Town of Silverthorne*, 707 P.2d 1017 (Colo. App. 1985), cert. dismissed, 736 P.2d 411 (Colo. 1987).

**Commissioners may not hold interviews with those not called as witnesses.** *Routt County Dev. Co. v. Johnson*, 23 Colo. App. 511, 130 P. 1081 (1913).

**Commissioners may not examine documents not produced** at the hearing. *Routt County Dev. Co. v. Johnson*, 23 Colo. App. 511, 130 P. 1081 (1913).

**Commissioners not required to determine questions of law.** It was never intended that commissioners should be required to determine questions the solution of which depends upon the application of intricate questions of law such as would be presented by the trial of issues tendered by the answer of respondent. *Sand Creek Lateral Irrigation Co. v. Davis*, 17 Colo. 326, 29 P. 742 (1892); *Siedler v. Seely*, 8 Colo. App. 499, 46 P. 848 (1896); *Thompson v. De Weese-Dye Ditch & Reservoir Co.*, 25 Colo. 243, 53 P. 507 (1898); *Gibson v. Cann*, 28 Colo. 499, 66 P. 879 (1901); *Colo. Fuel & Iron Co. v. Four Mile Ry.*, 29 Colo. 90, 66 P. 902 (1901); *Union P.R.R. v. Colo. Postal Tel. Cable Co.*, 30 Colo. 133, 69 P. 564 (1902), appeal dismissed, 191 U.S. 577, 24 S. Ct. 861, 48 L. Ed. 309 (1903).

**Section does not confer roving commission upon commissioners;** therefore, the commissioners may not go into the highways and byways in quest of plats, documents, and printed matter. *Routt County Dev. Co. v. Johnson*, 23 Colo. App. 511, 130 P. 1081 (1913).

**Effect of one commissioner's failure to view subject property.** Failure of one of commission of three freeholders to view subject property does not vitiate the commission's ascertainment of value and the judgment entered thereon. *Bd. of County Comm'rs v. McClure Venture*, 41 Colo. App. 524, 594 P.2d 585 (1978).

**Disqualification of commissioner.** There is no Colorado law on the grounds for disqualification of a commissioner. *State Dept. of Hwys. v. Copper Mt., Inc.*, 624 P.2d 936 (Colo. App. 1981).

### III. DEPOSITS.

#### A. In General.

**Purpose of requiring deposit** is to provide the landowner with security for the payment of compensation and damages ultimately awarded. *City of Englewood v. Reffel*, 34 Colo. App. 103, 522 P.2d 1241 (1974).

**Preliminary deposit is not payment, nor part payment**, until it is actually so applied. *Dolores No. 2 Land & Canal Co. v. Hartman*, 17 Colo. 138, 29 P. 378 (1891); *Denver & R.G.R.R. v. Mills*, 59 Colo. 198, 147 P. 681 (1915).

**Deposit required must be sufficient to pay compensation due** the landowner when the value of his land is determined by a board of commissioners or a jury as provided. *Swift v. Smith*, 119 Colo. 126, 201 P.2d 609 (1948).

If the petitioner deposits a sum with the court sufficient to pay the compensation when it is later ascertained, the court may authorize the petitioner to take immediate possession of the property before a final evaluation of the property is made. *E-470 Pub. Hwy. Auth. v. 455 Co.*, 997 P.2d 1273 (Colo. App. 1999).

**Court acts as depositary of petitioner.** In receiving the preliminary deposit, the court, or its proper officer, acts as the depositary of the petitioner until the deposit is actually applied to its ultimate purpose or is otherwise legally disposed of. *Denver & R.G.R.R. v. Mills*, 59 Colo. 198, 147 P. 681 (1915); *Dolores No. 2 Land & Canal Co. v. Hartman*, 17 Colo. 138, 29 P. 378 (1891).

#### B. Withdrawal of Deposits.

**Withdrawals deemed provisional.** Withdrawals from the sum deposited pursuant to subsection (6)(b) are provisional, not absolute. *City of Englewood v. Reffel*, 34 Colo. App. 103, 522 P.2d 1241 (1974).

**If deposit withdrawn, petitioner's right of possession suspended.** A preliminary deposit in a condemnation proceeding is essential to the petitioner's right of entry and possession and, if by any means, it is withdrawn before the final determination of the controversy, the petitioner's right of possession is suspended. *Dolores No. 2 Land & Canal Co. v. Hartman*, 17 Colo. 138, 29 P. 378 (1891); *Denver & R.G.R.R. v. Mills*, 59 Colo. 198, 147 P. 681 (1915).

**Refund of excessive withdrawals.** If approximation of value is shown to be grossly inflated, there is no justification for allowing the landowner to retain amounts previously withdrawn. *City of Englewood v. Reffel*, 34 Colo. App. 103, 522 P.2d 1241 (1974).

If courts refused to allow a refund when excessive amounts are withdrawn, the landowners would be unjustly enriched at the public's expense. *City of Englewood v. Reffel*, 34 Colo. App. 103, 522 P.2d 1241 (1974).

**Order demanding landowner refund excess withdrawn not modification of judgment.** Where a city in a second judgment succeeded in drastically reducing the amount of the landowners' award in an eminent domain proceeding, but the landowners had under the first judgment, and in accordance with subsection (6) (b), withdrawn a significant excess over the final award, an order of the court demanding a refund was not a modification of the judgment, but was an attempt to give effect to the judgment. *City of Englewood v. Reffel*, 34 Colo. App. 103, 522 P.2d 1241 (1974).

#### IV. DAMAGES.

**Commissioners fix compensation payable to interested parties.** The commissioners shall fix the compensation to be paid, not only to the owners, but to all parties interested in the lands taken, as well as all damages accruing to such owners or parties interested in consequence of the condemnation of the same. *Hutchinson v. McLaughlin*, 15 Colo. 492, 25 P. 317 (1890); *Swift v. Smith*, 119 Colo. 126, 201 P.2d 609 (1948).

**Commissioners to consider highest and best use.** The commissioners are not to view the property in its present status only, but rather, the present market value is to be assessed in light of the highest and best use to which the property can reasonably be applied. *City of Aurora v. Webb*, 41 Colo. App. 11, 585 P.2d 288 (1978).

**Probability of upward rezoning.** If a probability of upward rezoning exists, the commissioners may take evidence, under the comparable sales method of valuation, of sales of other property which has benefited by the more advantageous zoning status. *City of Aurora v. Webb*, 41 Colo. App. 11, 585 P.2d 288 (1978).

**This state follows version of undivided basis rule.** Where a lessor holds a fee simple subject to an encumbrance, such as a lease, this state follows the rule that the property must be valued on an undivided basis, but with some distinctions from the strict undivided fee rule. *Montgomery Ward & Co. v. City of Sterling*, 185 Colo. 238, 523 P.2d 465 (1974).

**Under undivided basis rule, parties have opportunity to agree on apportionment of award,** thereby avoiding completely the difficult task of ascertaining the value of the separate interests. *Montgomery Ward & Co. v. City of Sterling*, 185 Colo. 238, 523 P.2d 465 (1974).

Once the reasonable market value of property in an eminent domain proceeding has been established, the apportionment of that amount among claimants is of no concern to the condemnor. *State Dept. of Hwys. v. Town of Silverthorne*, 707 P.2d 1017 (Colo. App. 1985), cert. dismissed, 736 P.2d 411 (Colo. 1987).

**Undivided basis rule has effect of curbing excessive awards** in that it simplifies and nar-

rows the issues in the proceeding in which the condemnor has an interest. *Montgomery Ward & Co. v. City of Sterling*, 185 Colo. 238, 523 P.2d 465 (1974).

**Encumbrance adding or subtracting from fair market value not ignored.** The undivided basis rule, as applied in Colorado and, as distinguished from the undivided fee rule adopted in some states, does not ignore the value which an encumbrance may add to or subtract from the fair market value of the property as a whole. *Montgomery Ward & Co. v. City of Sterling*, 185 Colo. 238, 523 P.2d 465 (1974).

**Contract rental adding to value relevant.** The undivided basis rule contemplates that where a contract rental adds to the fair market value of the property, evidence of that rental is relevant in determining the compensation to be paid. *Montgomery Ward & Co. v. City of Sterling*, 185 Colo. 238, 523 P.2d 465 (1974).

**If contract rental less than fair rent, latter relevant.** Under the undivided basis rule, where a contract rental is less than the fair rental, the fair rental and not the contract rental is the relevant evidence on the issue of compensation. This assures a fair return for the property valued as a whole. *Montgomery Ward & Co. v. City of Sterling*, 185 Colo. 238, 523 P.2d 465 (1974).

**Condemnor need not pay for interest which was not lost** by condemnees under the undivided basis rule. *Montgomery Ward & Co. v. City of Sterling*, 185 Colo. 238, 523 P.2d 465 (1974).

**Lessee's compensable rights in leasehold unaffected by lessor's settlement.** Where lessee has compensable rights in leasehold, these rights are not affected by lessor's settlement with the condemnor. *Montgomery Ward & Co. v. City of Sterling*, 185 Colo. 238, 523 P.2d 465 (1974).

**Where lessee is party in interest, its compensation is affected** by amount which condemnors must pay for entire property taken, and although it may have waived its right to present its own evidence of value, it did not waive its right to insist that the award be based on competent evidence and to cross-examine its source. *Montgomery Ward & Co. v. City of Sterling*, 185 Colo. 238, 523 P.2d 465 (1974).

**Stipulation not proper basis for award.** Where a lessee, a party in interest, was not a party to a stipulation between the condemnors and the lessor, and objected to admissibility of the stipulation and asserted its right to cross-examine the appraisers, the stipulation is not a proper basis for the award. *Montgomery Ward & Co. v. City of Sterling*, 185 Colo. 238, 523 P.2d 465 (1974).

**When interest on award accrues.** Where the authorization to take possession of property is contingent on a deposit, the date of possession for purposes of entitlement to interest on the award is the date of deposit. *Denver Urban*



Renewal Auth. v. Hayutin, 40 Colo. App. 559, 583 P.2d 296 (1978).

**Procedure for determining the total value of the property.** In a valuation hearing, the commission and the court properly refused to

consider evidence of chain of title to the condemned street. State Dept. of Hwys. v. Town of Silverthorne, 707 P.2d 1017 (Colo. App. 1985), cert. dismissed, 736 P.2d 411 (Colo. 1987).

**38-1-106. Jury.** The owner of the property involved in any proceeding brought under the provisions of this article, before the appointment of commissioners, as provided in section 38-1-105, and before the expiration of the time for the defendant to appear and answer, may demand a jury of freeholders residing in the county in which the petition is filed to determine the compensation to be allowed in the manner provided in this article. Such demand may be made in the pleadings or by a separate writing filed with the clerk. Such jury shall consist of six persons, unless a larger number is demanded by any party to the proceeding. In no case shall the number of jurors exceed twelve. Any party so demanding a larger number than six jurors shall advance the fees for such additional jurors for one day's service according to the rate allowed jurors in the district court.

**Source:** G.L. § 1064. G.S. C. § 243. L. 1889: p. 156, § 1. R.S. 08: § 2421. C.L. § 6317. CSA: C. 61, § 7. CRS 53: § 50-1-7. L. 61: p. 374, § 4. C.R.S. 1963: § 50-1-7. L. 66: p. 30, § 2.

#### ANNOTATION

**Section complies with constitution.** This section complies with § 15 of art. II, Colo. Const., in providing for a board of commissioners or a jury to ascertain the compensation for taking private property against the owner's consent. Trippe v. Overacker, 7 Colo. 72, 1 P. 695 (1883).

**Privilege of jury trial is unconditional;** when demanded in proper time, it must be allowed. Sand Creek Lateral Irrigation Co. v. Davis, 17 Colo. 326, 29 P. 742 (1892).

**Disposition of preliminary matters before jury called required.** All preliminary matters are, in a regular and orderly course, to be disposed of before a jury is called to assess damages; for, unless the right to condemn be first established, there will be no damage, hence no occasion for a jury, and the jury comes for that single purpose, and for no other. Kaschke v. Camfield, 46 Colo. 60, 102 P. 1061 (1909); Colo. Fuel & Iron Co. v. Four Mile Ry., 29 Colo. 90, 66 P. 902 (1901).

Where a jury is demanded and impaneled to try the question of damages caused by taking land for a right-of-way for a ditch, the question of the necessity for taking the land cannot be tried before the jury. Thompson v. De Weese-Dye Ditch & Reservoir Co., 25 Colo. 243, 53 P. 507 (1898).

**Right to demand jury of freeholders afforded in inverse condemnation.** This section provides that a landowner may demand a jury of freeholders to determine the damages or compensation to be awarded in an eminent domain proceeding. The same right should likewise be afforded a landowner seeking redress, after the fact, in an inverse condemnation action. Ossman

v. Mountain States Tel. & Tel. Co., 184 Colo. 360, 520 P.2d 738 (1974).

**Inverse condemnation and common-law claim not litigated in same suit.** The requirement of a jury of freeholders in an inverse condemnation action and the lack of such a requirement in an ordinary civil action leads to the conclusion that an inverse condemnation claim cannot be litigated in the same lawsuit with a common-law claim. Ossman v. Mountain States Tel. & Tel. Co., 184 Colo. 360, 520 P.2d 738 (1974).

**Challenge for cause should be sustained to juror who is not freeholder.** State Dept. of Hwys. v. Ogden, 638 P.2d 832 (Colo. App. 1981).

**Retrial required where jury not made up of freeholders.** Where, although the owner of property involved in a condemnation proceeding requested merely a "jury of six" and the trial court attempted to qualify the jury as freeholders, a juror did not hear the question and thus was not discovered that he was not a freeholder, there is no waiver of a jury made up of freeholders. The case must be retried before a properly constituted jury. State Dept. of Hwys. v. Ogden, 638 P.2d 832 (Colo. App. 1981).

**Defendant is not entitled to have his damages assessed twice in an eminent domain proceeding,** first by a commission, and then by a jury; a jury trial is allowed in lieu of an assessment of damages by a commission. Snider v. Town of Platteville, 75 Colo. 589, 227 P. 548 (1924); Trippe v. Overacker, 7 Colo. 72, 1 P. 695 (1883).

**Verdict of jury is a special verdict in a special statutory proceeding under this section**

since the jury is concerned only with determining the amount of compensation to be paid the owners of property taken. *City of Aurora v. Powell*, 153 Colo. 4, 383 P.2d 798 (1963).

**Striking answer no justification for reversible error.** Striking out an answer in condemnation proceedings by the trial court is not an error that would justify reversal. *Whitehead v. City of Denver*, 13 Colo. App. 134, 56 P. 913 (1899).

**Under this section, unlike C.R.C.P. 38, no fees need be advanced at time of jury demand.** It is only if more than six jurors are requested that any fees must be advanced, and then the only fees required are those for the number of jurors beyond the initial six. *Town of*

*Red Cliff v. Reider*, 851 P.2d 282 (Colo. App. 1993).

Although landowners waived their right to a jury of twelve by not tendering fees at the time of their jury demand, they did not thereby waive their statutory right to a trial by a six-person jury. *Town of Red Cliff v. Reider*, 851 P.2d 282 (Colo. App. 1993).

**Applied in** *Southwestern Land Co. v. Hickory Jackson Ditch Co.*, 18 Colo. 489, 33 P. 275 (1893); *Siedler v. Seely*, 8 Colo. App. 499, 46 P. 848 (1896); *Union P.R.R. v. Colo. Postal Tel. Cable Co.*, 30 Colo. 133, 69 P. 564 (1902); *Broadmoor Land Co. v. Curr*, 142 F. 421 (8th Cir. 1905).

**38-1-107. Inspection of premises - expenses - verdict.** (1) When the jury has been selected and the jurors have taken an oath faithfully and impartially to discharge their duties, the court, at the request of any party to the proceeding and in the discretion of the court, may order that the jury go upon the premises sought to be taken or damaged, in charge of a sworn bailiff, and examine the premises in person. Such order shall require the party making such request to advance a sum, to be fixed by the court in such order, sufficient in the opinion of the court to defray the necessary expenses of such examination. In default of such party forthwith advancing such sum, such order shall be held for naught upon such trial before a jury. The court shall preside in the same manner and with like powers as in other cases. Evidence shall be admitted or rejected by the court according to the rules of law. At the conclusion of the evidence, the matters in controversy may be argued by counsel to the jury. At the conclusion of the arguments, the court shall instruct the jury in writing. The jury shall retire for deliberation, in charge of a sworn officer, and when they have agreed upon a verdict the same shall be returned into court.

(2) If the jury fails to agree, it may be discharged by the court. Thereupon another jury shall be summoned as soon as practicable, in the same manner as before, and like proceedings be had with such jury or successive juries, until a verdict is had. Any party feeling aggrieved by such verdict may move before such court for a new trial in the same manner and for the same causes as in actions at law. The refusal of such court to grant a new trial may be excepted to and assigned for appeal.

**Source:** G.L. § 1067. G.S. C. § 246. L. 1889: p. 157, § 3. R.S. 08: § 2424. C.L. § 6320. CSA: C. 61, § 10. CRS 53: § 50-1-10. C.R.S. 1963: § 50-1-10.

#### ANNOTATION

**Person, other than bailiff accompanying jury's view, constitutes error.** Where a view of the proposed right-of-way by the jury was directed by the court, it is error to appoint guides to aid the jury in their view because no person other than the sworn bailiff in charge of the jury is allowed to accompany the jury on their view of the premises. *Colo. Fuel & Iron Co. v. Four Mile Ry.*, 29 Colo. 90, 66 P. 902 (1901).

**Purpose of deposit.** The deposit under subsection (1) is required for the sole purpose of making secure the award of compensation to be made for the taking of the land. *Teller v. Sievers*, 20 Colo. App. 109, 77 P. 261 (1904); *Denver &*

*G.R.R. v. Mills*, 59 Colo. 198, 147 P. 681 (1915).

**Costs are recoverable.** *McClain v. People*, 9 Colo. 190, 11 P. 85 (1886); *Dolores No. 2 Land & Canal Co. v. Hartman*, 17 Colo. 138, 29 P. 378 (1892); *Schneider v. Schneider*, 36 Colo. 518, 86 P. 347 (1906).

Courts may award costs to respondents in condemnation proceedings. *Dolores No. 2 Land & Canal Co. v. Hartman*, 17 Colo. 138, 29 P. 378 (1892).

**Costs are part of judgment.** *Dolores No. 2 Land & Canal Co. v. Hartman*, 17 Colo. 138, 29 P. 378 (1892).



**Attorney fees not allowable.** McClain v. People, 9 Colo. 190, 11 P. 85 (1886); Dolores No. 2 Land & Canal Co. v. Hartman, 17 Colo. 138, 29 P. 378 (1892); Schneider v. Schneider, 36 Colo. 518, 86 P. 347 (1906).

**Requiring jury's return of special findings within trial court's discretion.** Whether or not a jury shall be required to return special findings in a condemnation proceeding rests in the discretion of the trial court and, unless that discretion has been abused to the prejudice of the party requesting such findings, the action of the trial court in refusing to require such findings will not be disturbed. Colo. Fuel & Iron Co. v. Four Mile Ry., 29 Colo. 90, 66 P. 902 (1901).

**38-1-108. Order of possession.** The court, upon such verdict, shall proceed to adjudge and make such order as to right and justice shall pertain, ordering that the petitioner enter upon such property and the use of the same, upon payment of full compensation as ascertained. Such order with evidence of such payment shall constitute complete justification of the taking of such property.

**Source:** G.L. § 1068. G.S. C. § 247. R.S. 08: § 2425. C.L. § 6321. CSA: C. 61, § 11. CRS 53: § 50-1-11. C.R.S. 1963: § 50-1-11.

#### ANNOTATION

**Judgment construed.** A judgment is the sentence of the law pronounced by a court of competent jurisdiction as the result of proceedings instituted, and it is a judicial act; to be valid it must be pronounced by the court at a time and place appointed by law, and in the form the court requires. City of Aurora v. Powell, 153 Colo. 4, 383 P.2d 798 (1963).

**Jury's findings do not constitute judgment.** The findings of a jury as to compensation in a condemnation proceeding do not constitute a judgment, the verdict not being a judicial determination but a finding of fact which the court may accept, reject, or utilize in formulating a judgment. City of Aurora v. Powell, 153 Colo. 4, 383 P.2d 798 (1963).

**Findings of court do not constitute judgment,** and a statement that a judgment was rendered cannot supply the place of the judgment itself. City of Aurora v. Powell, 153 Colo. 4, 383 P.2d 798 (1963).

**Verdict itself is not judicial determination of fact,** and it is without virtue until judgment has been rendered upon it. City of Aurora v. Powell, 153 Colo. 4, 383 P.2d 798 (1963).

**Property disposition in trial court's discretion.** The trial court has a discretion in deter-

**Refusal of taxation of costs.** The trial courts possess discretionary power to refuse a taxation in respondent's favor of costs contumaciously or unreasonably incurred. Dolores No. 2 Land & Canal Co. v. Hartman, 17 Colo. 138, 29 P. 378 (1892).

**Court lacks authority to require deposit.** The court has no authority to require the petitioner in a condemnation proceeding to deposit a sum to be applied on costs accrued or to accrue. Teller v. Sievers, 20 Colo. App. 109, 77 P. 261 (1904); Denver & R.G.R.R. v. Mills, 59 Colo. 198, 147 P. 681 (1915).

mining whether immediate possession of property shall be given to the condemnor in eminent domain proceedings. Vivian v. Bd. of Trustees, 152 Colo. 556, 383 P.2d 801 (1963).

**Order for temporary possession is interlocutory.** Town of Glendale v. City & County of Denver, 137 Colo. 188, 322 P.2d 1053 (1958).

**Review must be by original proceedings.** Because an order for temporary possession in a condemnation proceeding is interlocutory, any review must be by an original proceeding. Larson v. Chase Pipe Line Co., 183 Colo. 76, 514 P.2d 1316 (1973).

**Relief from interlocutory order by certiorari.** The proper proceeding for relief from an interlocutory order in eminent domain actions is by certiorari when directed to an endangered fundamentally substantive and substantial right. Town of Glendale v. City & County of Denver, 137 Colo. 188, 322 P.2d 1053 (1958).

**Writ of error is improper procedure to review an interlocutory order** of a district court granting immediate possession in eminent domain. Town of Glendale v. City & County of Denver, 137 Colo. 188, 322 P.2d 1053 (1958).

**38-1-109. Intervention - cross petition.** Any person not made a party to such proceeding may become such by filing a cross petition at any time before the hearing, setting forth that he is an owner or has an interest in the property sought to be taken or damaged by the petitioner and stating the character and extent of such interest. The rights of such person shall thereupon be fully considered and determined. Except for such cross petition, there shall be no written pleadings on the part of any party to the proceeding, but, at the

hearing provided for in section 38-1-105, the court shall hear and dispose of all objections that may be raised touching the legal sufficiency of the petition or cross petition or the regularity of the proceedings in any other respect. In case any person or corporation at any time or in any manner succeeds to the right of any party in the subject matter of the proceeding, such proceeding shall not abate thereby, but such person or corporation, upon motion and upon proof of the fact of such succession, shall be substituted for such party as a party to the proceeding.

**Source:** G.L. § 1069. G.S. C. § 248. L. 1889: p. 158, § 4. R.S. 08: § 2426. C.L. § 6322. CSA: C. 61, § 12. CRS 53: § 50-1-12. C.R.S. 1963: § 50-1-12.

#### ANNOTATION

**Cross petition may encompass lands not included in petition.** The language of this section is broad enough to permit the defendant to file a cross petition where he has other lands that will be affected by the condemnation proceedings, which are not included in the petition. *Denver & R.G.R.R. v. Griffith*, 17 Colo. 598, 31 P. 171 (1892).

**Party allowed to defend title to preserve voluntary agreement with condemnor.** Intervention has been refused in eminent domain proceedings only where the intervenor has no interest in the property. Nothing in this section precludes a party from defending its title from condemnation in order to preserve its rights under a voluntary agreement with the condemnor. *Bd. of County Comm'rs v. Anderson*, 34 Colo. App. 37, 525 P.2d 478 (1974), *aff'd*, 188 Colo. 337, 534 P.2d 1201 (1975).

**Disregarding intervention rights constitutes error.** The rights of a minor in real estate

may be condemned; and, when a petition in intervention is filed in a condemnation proceeding setting forth such rights, it is error to disregard the same. *Hutchinson v. McLaughlin*, 15 Colo. 492, 25 P. 317 (1890).

**Intervenor has right to appeal final judgment** adversely affecting it once intervention has been properly granted. *Bd. of County Comm'rs v. Anderson*, 34 Colo. App. 37, 525 P.2d 478 (1974), *aff'd*, 188 Colo. 337, 534 P.2d 1201 (1975).

**Statute as basis for jurisdiction.** *Jacobucci v. District Court*, 189 Colo. 380, 541 P.2d 667 (1975).

**Applied** in *Otero Canal Co. v. Fosdick*, 20 Colo. 522, 39 P. 332 (1895); *Colo. E.R.R. v. Chicago, B. & Q. Ry.*, 141 F. 898 (8th Cir. 1905); *Deepe v. United States*, 103 Colo. 294, 86 P.2d 242 (1938); *Boxberger v. State Hwy. Comm'n*, 126 Colo. 526, 251 P.2d 920 (1952).

**38-1-110. Appellate review.** In all cases, upon final determination thereof in the district court, the judgment is subject to appellate review as provided by law and the Colorado appellate rules.

**Source:** G.L. § 1070. G.S. C. § 249. R.S. 08: § 2427. C.L. § 6323. CSA: C. 61, § 13. CRS 53: § 50-1-13. C.R.S. 1963: § 50-1-13. L. 64: p. 266, § 156.

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**Principal object of condemnation proceedings** is to ascertain the price which a petitioner must pay for the land which he desires to acquire, and, until that determination is made by a board or jury and the same has been approved by a court, it cannot be said that the rights of the parties have become fixed or determined. *Town of Glendale v. City & County of Denver*, 137 Colo. 188, 322 P.2d 1053 (1958); *Burlington & C.R.R. v. Colo. E.R.R.*, 45 Colo. 222, 100 P. 607 (1909).

**Supreme court cannot take original jurisdiction of condemnation proceedings.** *Denver & N.O.R.R. v. Lamborn*, 9 Colo. 119, 10 P. 797 (1886).

**This section discourages review of cause piecemeal.** *Burlington & C.R.R. v. Colo. E.R.R.*, 45 Colo. 222, 100 P. 607 (1909).

**Review is allowed only upon final determination of proceedings.** See *Burlington & C.R.R. v. Colo. E.R.R.*, 45 Colo. 222, 100 P. 607 (1909).

A judgment which settles the rights of respective parties is a final judgment reviewable by the appellate court. *Denver Power & Irrigation Co. v. Denver & R.G.R.R.*, 30 Colo. 204, 69 P. 568 (1902).

When commissioners filed with the clerk their certificate of ascertainment and assessment, and the court or judge denied the motion of peti-



tioner or respondent, as the case may be, to vacate and set aside the same, there is such a final determination as entitles him to an appeal. *Benninghoff v. Town of Palisade*, 48 Colo. 64, 108 P. 983 (1910).

**Interlocutory order not reviewable.** The order of the trial court which determines that the petitioner has the power to condemn is not final, but merely interlocutory, from which an appeal, and to which a writ of error, do not lie. *Burlington & C.R.R. v. Colo. & E.R.R.*, 45 Colo. 222, 100 P. 607 (1909); *First Nat'l Bank v. Minnesota Mines*, 109 Colo. 6, 121 P.2d 488, cert. denied,

316 U.S. 687, 62 S. Ct. 1277, 86 L. Ed. 1759 (1942); *Town of Glendale v. City & County of Denver*, 137 Colo. 188, 322 P.2d 1053 (1958).

**Intervenor has right to appeal final judgment** affecting it adversely once intervention has been properly granted. *Bd. of County Comm'rs v. Anderson*, 34 Colo. App. 37, 525 P.2d 478 (1974), aff'd, 188 Colo. 337, 534 P.2d 1201 (1975).

**Applied** in *Order of Friars Minor of Province of Most Holy Name v. Denver Urban Renewal Auth.*, 186 Colo. 367, 527 P.2d 804 (1974).

**38-1-111. Possession pending appeal.** In cases in which compensation is ascertained, if the owner of the property taken or affected prosecutes an appeal as provided by law and the Colorado appellate rules, the petitioner may pay into court or to the clerk thereof the amount of compensation ascertained and awarded for the use of the owner and shall thereupon be entitled to take possession and use the property taken or affected the same as if no such appeal had been taken. The money so deposited shall remain on deposit until such appeal has been heard and determined. If the owner elects to receive such money before the determination of said appeal, the appeal shall thereupon be dismissed so far as such owner is concerned. If the appeal is taken by the petitioner, the amount of compensation shall nevertheless be paid into court or to the clerk thereof for the use of the owner of the property condemned or affected before such petitioner has the right to take possession of and use said property so condemned or affected. Such compensation may be paid to such owner, at any time before the determination of such appeal, upon the execution and delivery of a good and sufficient bond by such owner with good and sufficient sureties, to be approved by said court, in a sum double the amount of such compensation, conditioned that such owner will pay and refund to such petitioner all or such part of said sum as said owner may be required or adjudged to pay said petitioner, together with the cost of said appeal.

**Source:** G.L. § 1071. G.S. C. § 250. R.S. 08: § 2428. C.L. § 6324. CSA: C. 61, § 14. CRS 53: § 50-1-14. C.R.S. 1963: § 50-1-14.

#### ANNOTATION

**Order of additional deposit covering award proper during pending proceedings.** Where the petitioner in condemnation proceedings desired to occupy and use the premises pending appellate proceedings, it is proper to order an additional deposit sufficient to cover the amount of the compensation ascertained and awarded. *Otero Canal Co. v. Fosdick*, 20 Colo. 522, 39 P. 332 (1895).

**Use of security deposit in subsequent condemnation proceedings.** The security deposit for possession, pending condemnation proceedings, cannot be used in a subsequent condemnation proceeding by the same petitioner and for a portion of the same premises where the damages suffered by respondent through the first proceeding have not been determined and paid. *Denver & N.O.R.R. v. Lamborn*, 9 Colo. 119, 10 P. 797 (1886).

**Dismissal of an appeal by a condemnee who requested a release of funds from the court registry** that inadvertently included the \$100 nominal damage award being contested and who submitted a copy of a check made

payable to the court registry in the amount of \$100 would simply advance form over substance and would frustrate rather than promote the function of courts, which is to adjudicate fully the issues presented by the parties. *Colo. Mountain Prop. v. Heineman*, 860 P.2d 1388 (Colo. App. 1993).

**Statute does not bar appeal without exception when a property owner elects to receive the benefit of a judgment before the determination of an appeal.** Property owners may appeal the nature of the title obtained by a water and sanitation district that condemned the property, even though the property owners withdrew the bond that the district deposited with the clerk of court. *Steamboat Lake Water & Sanit. v. Halvorson*, 252 P.3d 497 (Colo. App. 2011).

**Applied** in *Denver, etc., R. Co. v. Jackson*, 6 Colo. 340 (1882); *Cunningham v. Quinn*, 12 Colo. 473, 21 P. 488 (1889); *Dolores No. 2 Land & Canal Co. v. Hartman*, 17 Colo. 138, 29 P. 378 (1891); *Colo. Fuel & Iron Co. v. Four Mile Ry.*, 29 Colo. 90, 66 P. 902 (1901); *Broadmoor Land Co. v. Curr*, 133 F. 37 (8th Cir. 1904); *Denver &*

R.G.R.R. v. Mills, 59 Colo. 198, 147 P. 681 (1915); State Dept. of Hwys. v. Casteel, 781 P.2d 108 (Colo. App. 1989); E-470 Pub. Hwy.

Auth. v. 455 Co., 997 P.2d 1273 (Colo. App. 1999).

**38-1-112. Payment to clerk or owner.** Payment of compensation adjudged may in all cases be made to the court or the clerk thereof, who shall on demand pay the same to the party entitled thereto, taking receipt therefor. Payment may be made to the party entitled thereto or to his conservator or guardian.

**Source:** G.L. § 1072. G.S. C. § 251. R.S. 08: § 2429. C.L. § 6325. CSA: C. 61, § 15. CRS 53: § 50-1-15. C.R.S. 1963: § 50-1-15.

#### ANNOTATION

**Claimant's rights unaffected by change in form of res.** When the condemnor pays the amount of the award for the condemned property into the registry of the court, the change of the form of the res from property to money does not affect the relative rights of the owner and other claimants in the res. Southworth v. Dept. of Hwys., 176 Colo. 82, 489 P.2d 204 (1971).

**Payment of award into court discharges further tax obligation.** Where the state high-

way department paid into court the amount of an award in condemnation proceedings, it discharged its obligation and was relieved of further responsibility for an unpaid city tax lien assessed for the creation of a local public improvement district. Southworth v. Dept. of Hwys., 176 Colo. 82, 489 P.2d 204 (1971).

**38-1-113. Verdict recorded.** The court shall cause the verdict of the jury and the judgment of said court to be entered upon the records of said court.

**Source:** G.L. § 1073. G.S. C. § 252. R.S. 08: § 2430. C.L. § 6326. CSA: C. 61, § 16. CRS 53: § 50-1-16. C.R.S. 1963: § 50-1-16.

**38-1-114. Formula for computing compensation - definitions.** (1) Except for the provisions of subsection (2) of this section that shall apply to acquisitions for highways and transportation projects undertaken by the regional transportation district created by article 9 of title 32, C.R.S., the right to compensation and the amount thereof, including damages and benefits, if any, shall be determined initially as of the date the petitioner is authorized by agreement, stipulation, or court order to take possession or the date of trial or hearing to assess compensation, whichever is earlier, but any amount of compensation determined initially shall remain subject to adjustment for one year after the date of the initial determination to provide for additional damages or benefits not reasonably foreseeable at the time of the initial determination. In estimating the value of all property actually taken, the true and actual value at such time shall be allowed and awarded. No deduction therefrom shall be allowed for any benefit to the residue of said property. In estimating damages occasioned to other portions of the claimant's property or any part thereof other than that actually taken, the value of the benefits, if any, may be deducted therefrom. In all cases the owner shall receive the full and actual value of all property actually taken. In case the benefit to the property not actually taken exceeds the damages sustained by the owner to the property not actually taken, the owner shall not be required to pay or allow credit for such excess.

(2) (a) For acquisitions for highways and transportation projects undertaken by the regional transportation district created by article 9 of title 32, C.R.S., the right to compensation and the amount thereof, including damages and benefits, if any, shall be determined as of the date the petitioner is authorized by agreement, stipulation, or court order to take possession or the date of trial or hearing to assess compensation, whichever is earlier, but any amount of compensation determined initially shall remain subject to adjustment for one year after the date of the initial determination to provide for additional damages or benefits not reasonably foreseeable at the time of the initial determination.



(b) If an entire tract or parcel of property is condemned, the amount of compensation to be awarded is the reasonable market value of the said property on the date of valuation.

(c) If only a portion of a tract or parcel of land is taken, the damages and special benefits, if any, to the residue of said property shall be determined. When determining damages and special benefits, the appraiser shall take into account a proper discount when the damages and special benefits are forecast beyond one year from the date of appraisal.

(d) In determining the amount of compensation to be paid for such a partial taking, the compensation for the property taken and damages to the residue of said property shall be reduced by the amount of any special benefits which result from the improvement or project, but not to exceed fifty percent of the total amount of compensation to be paid for the property actually taken.

(3) For purposes of this section, "transportation" shall have the same meaning as set forth in section 43-1-102 (6), C.R.S.

**Source:** G.L. § 1074. G.S. C. § 253. R.S. 08: § 2431. C.L. § 6327. CSA: C. 61, § 17. CRS 53: § 50-1-17. L. 61: p. 375, § 5. L. 63: p. 477, § 2. C.R.S. 1963: § 50-1-17. L. 79: Entire section amended, p. 1381, § 1, effective July 1. L. 87: Entire section amended, p. 1308, § 1, effective July 1. L. 2005: (1) and (2)(a) amended and (3) added, p. 317, § 1, effective August 8.

**Cross references:** For discussion of instructions and evidence admissible on determination of agricultural land values, see *City and County of Denver v. Minshall*, 109 Colo. 31, 121 P.2d 667 (1942), and *City and County of Denver v. Quick*, 108 Colo. 111, 113 P.2d 999 (1941).

## ANNOTATION

- I. General Consideration.
- II. Damages for Property Actually Taken.
  - A. In General.
  - B. Measure of Compensation Allowed.
- III. Damages to Residue of Property.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "Some Problems of Severance Damage", see 29 *Dicta* 327 (1952). For article, "Inverse Condemnation — A Viable Alternative", see 51 *Den. L. J.* 529 (1974). For article, "Status of Landowners Property Slated for Condemnation", see 14 *Colo. Law.* 1191 (1985).

**Right of just compensation guarded.** Section 15 of art. II, Colo. Const., guarantees just compensation to the owner when property is taken without his consent, and this right is jealously guarded. *Lamborn v. Bell*, 18 Colo. 346, 32 P. 989, 20 L.R.A. 241 (1893).

**Subsection (2)(d) does not violate art. II, § 15, of the Colorado Constitution**, which requires that landowners receive just compensation for property taken or damaged. When an award of compensation for property taken is reduced by the amount of special benefits pursuant to subsection (2)(d), the value of the payment received plus the value of the land still possessed by the landowner after the taking, enhanced by the special benefits, is equivalent to the value of the landowners property prior to the taking. Therefore, the landowner receives just compensation. *E-470 Pub. Hwy. Auth. v. Revenig*, 91 P.3d 1038 (Colo. 2004).

**General compensation rules not strictly applied if result fundamentally unfair.** The general rule that compensation is to be determined as of the date of the order of possession cannot be applied strictly if the result would be fundamentally unfair. *Bd. of County Comm'rs v. Delaney*, 41 Colo. App. 548, 592 P.2d 1338 (1978) (decided prior to 1979 amendment).

**State has duty to assure just compensation.** It is the duty of the state, in the conduct of an inquest by which the compensation is ascertained, to see that it is just, not merely to the individual whose property is taken, but to the public which is to pay for it. *Williams v. City & County of Denver*, 147 Colo. 195, 363 P.2d 171 (1961).

**Condemnation award is made in gross** as a general rule. *Vivian v. Bd. of Trustees*, 152 Colo. 556, 383 P.2d 801 (1963).

**Claimants litigate right to assessed damages among themselves.** When the damages are assessed for the taking of the property, it should be paid into court and the claimants can litigate the right thereto among themselves. *Denver Power & Irrigation Co. v. Denver & R.G.R.R.*, 30 Colo. 204, 69 P. 568 (1902); *Vivian v. Bd. of Trustees*, 152 Colo. 556, 383 P.2d 801 (1963).

**Landowner has burden to show property value and damages.** In a proceeding to condemn property for public use, the burden is upon the landowner to show the value of the property or interest therein actually taken, as well as the damages, if any, to the residue of such property. *Colo. Cent. R.R. v. Allen*, 13 Colo. 229, 22 P. 605 (1889).

**Petitioner has burden to show benefits**, if any, as well as the burden of showing the necessity of the taking, where such matters are litigated. *Colo. Cent. R.R. v. Allen*, 13 Colo. 229, 22 P. 605 (1889).

**Requirement to accept device to lessen damage prohibited.** A landowner cannot be required to accept a structure or device of the petitioner, intended to lessen such damage, and which is no part of the improvement for which his land is taken. *Von Richtofen v. Bijou Irrigation Dist.*, 52 Colo. 527, 125 P. 495 (1912).

**Invalidity of award must be shown by anyone asserting it** by clear and satisfactory evidence. *Pub. Serv. Co. v. City of Loveland*, 79 Colo. 216, 245 P. 493 (1926).

**Value of land taken in condemnation proceeding** should be determined as of date of city's possession and not as of the date of valuation hearing if condemnee did not seek damages to the remainder and had accepted a stipulated monetary amount upon condemnation. Therefore, condemnee was only entitled to the difference between the payment accepted and the fair market value of land at time of possession plus interest on the difference from the date of possession. *City of Glendale v. Rose*, 679 P.2d 1096 (Colo. App. 1983) (action commenced prior to 1979 amendment).

If the property is sought to be condemned under this procedure and if the court authorizes the condemning authority to take possession of the property prior to the valuation hearing, the ultimate award of compensation, based on the property, shall be determined as of the date the petitioner is authorized by the court to take possession. If, however, the condemning authority has not taken possession of the property prior to the valuation hearing, then the valuation date is the date of trial or hearing to assess compensation. *Fowler Irrevocable Trust 1992-1 v. City of Boulder*, 992 P.2d 1188 (Colo. App. 1999), *aff'd in part and rev'd in part on other grounds*, 17 P.3d 797 (Colo. 2001).

**Where the state takes possession prior to entering into a contract or receiving a court order**, fair market value must be determined as of the date of possession. *The Mill v. State Dept. of Health*, 868 P.2d 1099 (Colo. App. 1993).

**The plain language of the statute allows for the determination of true and actual value as of the date of possession.** Where mining waste existed on the property as of the date the city took possession but was not discovered until after the city took possession, this section does not preclude the introduction of that information. *City of Black Hawk v. Ficke*, 215 P.3d 1129 (Colo. App. 2008).

**Applied in Twin Lakes Hydraulic Gold Mining Syndicate v. Colo. M. Ry.**, 16 Colo. 1, 27 P. 258 (1890); *San Luis Land, Canal & Imp. Co. v. Kenilworth Canal Co.*, 3 Colo. App. 244, 32 P. 860 (1893); *Lithgow v. Pearson*, 25 Colo. App.

70, 135 P. 759 (1913); *Pine Martin Mining Co. v. Empire Zinc Co.*, 90 Colo. 529, 11 P.2d 221 (1932); *Fishel v. City & County of Denver*, 106 Colo. 576, 108 P.2d 236 (1940); *Rullo v. Pub. Serv. Co.*, 163 Colo. 99, 428 P.2d 708 (1967); *Denver Urban Renewal Auth. v. Marshall Mfg. Co.*, 35 Colo. App. 227, 532 P.2d 746 (1975); *Hayden v. Bd. of County Comm'rs*, 41 Colo. App. 102, 580 P.2d 830 (1978).

## II. DAMAGES FOR PROPERTY ACTUALLY TAKEN.

### A. In General.

**Witnesses qualified to testify on property value.** A witness may be sufficiently qualified to testify if he is a resident, landowner or farmer in the neighborhood, and is familiar with the value of the property. *Bd. of Dirs. v. Calvaresi*, 156 Colo. 173, 397 P.2d 877 (1964).

**Owner may testify as to his own estimate of value** of his land. *Bd. of Dirs. v. Calvaresi*, 156 Colo. 173, 397 P.2d 877 (1964).

**Jury not required to accept owner's conclusions.** Where the trial court allowed the owner to testify on his theory of value and past operations, the jury was certainly entitled to weigh the past history against the glowing future predicted, but was not required to accept the owner's conclusions. *Ruth v. Dept. of Hwys.*, 145 Colo. 546, 359 P.2d 1033 (1961).

**Rejection of owner's estimate of value harmless error.** The rejection of evidence, that defendant had stated, after the improvement was constructed, that he would not take \$10,000 for his place, held, in view of testimony given by other witnesses for plaintiff, if error, to be harmless. *Wiley Drainage Dist. v. Semmens*, 80 Colo. 365, 250 P. 527 (1926).

**Laying foundation for expert's cross-examination on property appraisals.** Sufficient foundation for cross-examination of an expert as to appraisals of other property which he has made in the area is laid where it is shown: (1) That the appraisal is of a piece of property that he has determined to be comparable or involves similar property in the neighborhood of the condemned property; and (2) that the appraisal is not too remote in time. *Bd. of County Comm'rs v. H.A. Nottingham & Sons*, 36 Colo. App. 265, 540 P.2d 1126 (1975).

One of the few means a condemnee has to question the credibility of the condemnor's expert witness, other than by contradictory testimony by other witnesses, is to show that the expert has made other inconsistent appraisals of the comparable or of similar neighboring land at a time which is not too remote to provide a reasonable comparison. This line of cross-examination, while ostensibly used for the purpose of testing the witness's credibility, serves, in essence, to elicit additional affirmative evidence of



the value of the comparable, and as such, it is relevant for purposes of determining the true value of the land used as a comparison. *Bd. of County Comm'rs v. H.A. Nottingham & Sons*, 36 Colo. App. 265, 540 P.2d 1126 (1975).

#### B. Measure of Compensation Allowed.

**Compensation allowable** is the difference in value of the property before and after the taking is complete. *Denver & R.G.R.R. v. Griffith*, 17 Colo. 598, 31 P. 171 (1892).

The compensation allowable is the price the property will sell for where there is a demand. *Denver N.W. & P. Ry. v. Howe*, 49 Colo. 256, 112 P. 779 (1910).

Elements of damages to condemned property such as the cost of restoration of property, estimate of replacement value, and related items are admissible only if they would have a bearing on and influence opinion as to value. *Mack v. Bd. of County Comm'rs*, 152 Colo. 300, 381 P.2d 987 (1963).

**Factors considered in determining proper measure of owner's recovery include:** (1) Compensation for the land or property actually taken equal to the true and actual value thereof at the time of the appraisalment; and (2) damages to the residue of the land or property not taken, equal to the actual diminution of its market value, if any, for any use to which the same may reasonably be put. *City of Denver v. Bayer*, 7 Colo. 113, 2 P. 6 (1883); *Colo. Cent. R.R. v. Allen*, 13 Colo. 229, 22 P. 605 (1889); *Colo. M. Ry. v. Brown*, 15 Colo. 193, 25 P. 87 (1890).

In arriving at the present value of the property taken and the damages, if any, to the residue, the jury has a right to consider its present condition, improvements, surroundings, and capabilities, and the present use of the land and any reasonable use in the future to which it may be adapted or to which it might be put. *Bd. of County Comm'rs v. Noble*, 117 Colo. 77, 184 P.2d 142 (1947); *Ruth v. Dept. of Hwys.*, 145 Colo. 546, 359 P.2d 1033 (1961); *Dept. of Hwys. v. Schulhoff*, 167 Colo. 72, 445 P.2d 402 (1968).

**Market value of land.** In determining the value of the land taken, the jury is to be governed by the land's market value at the time of the trial. *Mulford v. Farmers' Reservoir & Irrigation Co.*, 62 Colo. 167, 161 P. 301 (1916); *Vivian v. Bd. of Trustees*, 152 Colo. 556, 383 P.2d 801 (1963).

**Market value** is the price which property will bring when offered for sale by one who desires but is not obliged to sell it, and is bought by one who desires it but is under no necessity to buy the property. *Bd. of County Comm'rs v. Noble*, 117 Colo. 77, 184 P.2d 142 (1947); *Vivian v. Bd. of Trustees*, 152 Colo. 556, 383 P.2d 801 (1963); *Dept. of Hwys. v. Schulhoff*, 167 Colo. 72, 445 P.2d 402 (1968).

**Just compensation excludes factors relating to public acquisition.** Under the test of market value, just compensation cannot include any increment arising from the very fact of acquisition of the subject property because, if the land sold in the open market under ordinary and usual circumstances, factors relating to public acquisition would have to be excluded from consideration. *Williams v. City & County of Denver*, 147 Colo. 195, 363 P.2d 171 (1961).

**Just compensation is determined as of the date the petitioner is authorized by agreement, stipulation, or court order to take possession of the subject property and cannot include any increment arising from the very fact of acquisition or the intended use of the property.** *Wall v. City of Aurora*, 172 P.3d 934 (Colo. App. 2007).

**Amount of liens cannot be added to award.** The award of the commission or the jury must reflect only the fair market value of the property taken and there cannot be added to the award as part of the fair market value the amount of liens which exist against the property. *Dept. of Hwys. v. Kelley*, 151 Colo. 517, 379 P.2d 386 (1963).

**Price paid for similar property in voluntary sale admissible evidence.** Evidence of the price paid for similar property in a voluntary sale is admissible on the question of value of the property condemned, provided the properties sold are similar in locality and character to the property in question and not so far removed in point of time to make a comparison unjust or impossible. *Dept. of Hwys. v. Schulhoff*, 167 Colo. 72, 445 P.2d 402 (1968); *Western Slope Gas Co. v. Lake Eldora Corp.*, 32 Colo. App. 293, 512 P.2d 641 (1973); *Bd. of County Comm'rs v. Evergreen, Inc.*, 35 Colo. App. 171, 532 P.2d 777 (1974); *Loloff v. Sterling*, 31 Colo. 102, 71 P. 1113 (1903); *Herring v. Platte River Power Authority*, 728 P.2d 709 (Colo. 1986).

**Determination of property similarities rests in trial court's discretion.** Whether condemned property and property voluntarily sold are sufficiently similar so that sale price would be aid to the jury in fixing the value of the property condemned rests largely in the sound discretion of the trial court which will not be interfered with unless abused. *Dept. of Hwys. v. Schulhoff*, 167 Colo. 72, 445 P.2d 402 (1968); *W. Slope Gas Co. v. Lake Eldora Corp.*, 32 Colo. App. 293, 512 P.2d 641 (1973); *Herring v. Platte River Power Authority*, 728 P.2d 709 (Colo. 1986).

**Evidence of value of individual lots in subdivision admissible.** Where process of subdivision, platting, recording, and development had progressed to point where individual lots were available as separate units for sale, such land would have a higher market value than land which is merely currently suitable for sale as one tract to a single person who would in turn subdivide or develop the land for sale to others.

Therefore, although the question for the jury is the fair market value of the tract as a whole, evidence as to the individual lot values would be both pertinent and necessary to a consideration of the highest and best use of the land. *Bd. of County Comm'rs v. Evergreen, Inc.*, 35 Colo. App. 171, 532 P.2d 777 (1974).

**When evidence of enhancement resulting from acquisition admissible.** Although evidence relating to enhancement in value as a result of the acquisition of the subjected property is generally inadmissible, there are exceptional situations where the courts will admit evidence of enhancement resulting from an acquisition and they include cases where the location of the proposed project is indefinite or where there is a supplemental taking. *Williams v. City & County of Denver*, 147 Colo. 195, 363 P.2d 171 (1961); *City & County of Denver v. Smith*, 152 Colo. 227, 381 P.2d 269 (1963).

**Speculative or prospective values are not admissible** in arriving at the fair market value of the property. *Dept. of Hwys. v. Schulhoff*, 167 Colo. 72, 445 P.2d 402 (1968); *Ruth v. Dept. of Hwys.*, 145 Colo. 546, 359 P.2d 1033 (1961).

Fair compensation does not include speculative values either lowering or raising the compensation to be paid. *Williams v. City & County of Denver*, 147 Colo. 195, 363 P.2d 171 (1961).

Under some circumstances, evidence of a probable change in zoning may be admitted where such change is unrelated to the acquisition of the subject property, and where the change in zoning results from the taking of the subject property, it is not admissible. *Williams v. City & County of Denver*, 147 Colo. 195, 363 P.2d 171 (1961).

**Expert testimony as to value based on mere speculation is not competent.** An expert opinion that relies upon an estimate of construction costs that the undisputed evidence demonstrated was not only unreliable, but was mere speculation is not legally competent evidence under C.R.E. 703. *Farrar v. Total Petroleum, Inc.*, 799 P.2d 463 (Colo. App. 1990).

**Uses available for adaptation of property considered.** The use to which the property taken is subjected may be taken into consideration in determining the proper measure of damages recoverable by the owner of property. *City of Denver v. Bayer*, 7 Colo. 113, 2 P. 6 (1883); *Colo. Cent. R.R. v. Allen*, 13 Colo. 229, 22 P. 605 (1889); *Colo. M. Ry. v. Brown*, 15 Colo. 193, 25 P. 87 (1890).

The most profitable and advantageous use to which the property taken is adapted is the basis upon which fair compensation should be determined. *Union Exploration Co. v. Moffat Tunnel Imp. Dist.*, 104 Colo. 109, 89 P.2d 257 (1939).

If land is so situated that it is actually available for building purposes, its value for such purposes may be considered, even if it is used as a farm or is covered with brush and boulders.

*Dept. of Hwys. v. Schulhoff*, 167 Colo. 72, 445 P.2d 402 (1968).

It is improper, however, for the jury to consider an undeveloped tract of land as though a subdivision thereon is an accomplished fact, and such undeveloped property may not be valued on a per lot basis, the cost factor clearly being too speculative. *Dept. of Hwys. v. Schulhoff*, 167 Colo. 72, 445 P.2d 402 (1968).

The value of lands taken is to be estimated not merely with reference to the use to which it is at the time applied, but with reference to uses to which it is plainly adapted; thus, the owner of lands having thereon an excavation for an irrigating ditch, never used for the purpose and long since abandoned by the person who made it, is entitled to the market value of the land, taking into account that this excavation is to be considered with reference to the purpose for which it is suited. *Roberts v. Scurvin Ditch Co.*, 22 Colo. App. 120, 125 P. 552 (1912).

Special value for particular uses is to be considered in the assessment. *Denver N.W. & P. Ry. v. Howe*, 49 Colo. 256, 112 P. 779 (1910).

**Contract rental adding to value relevant evidence.** The undivided basis rule contemplates that where a contract rental adds to the fair market value of the property, evidence of that rental is relevant in determining the compensation to be paid. *Montgomery Ward & Co. v. City of Sterling*, 185 Colo. 238, 523 P.2d 465 (1974).

**Fair rental is relevant evidence if contract rental less than fair rental.** Under the undivided basis rule, where a contract rental is less than the fair rental, the fair rental and not the contract rental is the relevant evidence on the issue of compensation. This assures a fair return for the property valued as a whole. *Montgomery Ward & Co. v. City of Sterling*, 185 Colo. 238, 523 P.2d 465 (1974).

**Rental value of land considered.** The rental value of land is an element for the purpose of determining present market value. *Vivian v. Bd. of Trustees*, 152 Colo. 556, 383 P.2d 801 (1963).

**Rental of lands while in possession of petitioner is not allowable** without evidence of rental value. *Mulford v. Farmers' Reservoir & Irrigation Co.*, 62 Colo. 167, 161 P. 301 (1916).

**Undivided basis rule.** Where a lessor holds a fee simple subject to an encumbrance, such as a lease, the property must be valued on an undivided basis, but with some distinctions from the strict undivided fee rule. *Montgomery Ward & Co. v. City of Sterling*, 185 Colo. 238, 523 P.2d 465 (1974).

**Parties have opportunity to agree on apportionment of award** under the undivided basis rule, thereby avoiding completely the difficult task of ascertaining the value of the separate interests. *Montgomery Ward & Co. v. City of Sterling*, 185 Colo. 238, 523 P.2d 465 (1974).



**Condemnor need not pay for interest not lost by condemnees** under the undivided basis rule. *Montgomery Ward & Co. v. City of Sterling*, 185 Colo. 238, 523 P.2d 465 (1974).

**Injury to business on condemned land not element of just compensation.** Injury to a business conducted upon lands taken does not constitute an element of just compensation because the business itself is not being condemned and can be relocated elsewhere. *City & County of Denver v. Hinsey*, 177 Colo. 178, 493 P.2d 348 (1972).

**Where income is derived from land itself**, as in a farming or ranching operation, then an injury to a business conducted upon the lands may be considered in determining just compensation. *City & County of Denver v. Hinsey*, 177 Colo. 178, 493 P.2d 348 (1972).

It is well settled that when land occupied for business purposes is taken by eminent domain, the owner is entitled to compensation only for the value of the land and improvements but not for the value of any business conducted thereon. Since rental trailers located on condemned land are personal property and were not themselves condemned, the commission's refusal to consider income from them was correct. *Bd. of County Comm'rs v. HAD Enterprises, Inc.*, 35 Colo. App. 162, 533 P.2d 45 (1974).

**Property deemed waste not valueless.** Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use, because others may be able to use it, and make it subserve the necessities or conveniences of life, and its capability of being made thus available gives it a market value which can be readily estimated. *Roberts v. Scurvin Ditch Co.*, 22 Colo. App. 120, 125 P. 552 (1912); *Colo. M. Ry. v. Brown*, 15 Colo. 193, 25 P. 87 (1890).

**No interest is allowable on unliquidated claim for damages**, in the absence of contract or of statute providing therefor. *Union Exploration Co. v. Moffat Tunnel Imp. Dist.*, 104 Colo. 109, 89 P.2d 257 (1939).

**When interest on award accrues.** Where the authorization to take possession of property is contingent on a deposit, the date of possession for purposes of entitlement to interest on the award is the date of deposit. *Denver Urban Renewal Auth. v. Hayutin*, 40 Colo. App. 559, 583 P.2d 296 (1978).

**Exemplary damages not allowed in condemnation proceeding.** Absent a provision for exemplary damages, such damages are not to be allowed in a special statutory proceeding for condemnation. *Ossman v. Mountain States Tel. & Tel. Co.*, 184 Colo. 360, 520 P.2d 738 (1974).

An inverse condemnation action is in the nature of a special statutory proceeding and is to be tried as if it were an eminent domain proceeding. Thus, the exemplary damages statute, which authorizes the award of exemplary dam-

ages in "all civil actions", is not applicable to an inverse condemnation action. *Ossman v. Mountain States Tel. & Tel. Co.*, 184 Colo. 360, 520 P.2d 738 (1974).

**Landowner entitled to costs reasonably incurred.** A landowner is entitled to be compensated for costs incurred by him in condemnation proceedings, provided such costs are reasonably incurred, on the theory that to require the landowner to pay such costs would reduce the just compensation for the taking. *Dept. of Hwys. v. Kelley*, 151 Colo. 517, 379 P.2d 386 (1963).

**"Costs" means expenses necessarily incurred** by reason of the litigation. *Dept. of Hwys. v. Kelley*, 151 Colo. 517, 379 P.2d 386 (1963).

**Attorney fees are not included within meaning of "costs"** and are not recoverable in eminent domain proceedings. *Dept. of Hwys. v. Intermountain Term. Co.*, 164 Colo. 354, 435 P.2d 391 (1967).

**Special improvement assessments against land taken are not "costs".** Special improvement assessments against land taken by condemnation and paid by the landowner are not expenses necessarily incurred by reason thereof, and cannot be taxed as costs. *Dept. of Hwys. v. Kelley*, 151 Colo. 517, 379 P.2d 386 (1963).

**All evidence relevant to the determination of the present market value of condemned property is admissible**, including evidence of the most advantageous potential future use of the entire property, even if the condemned property would need to be dedicated as part of annexation and rezoning of the entire property in the future. *Palizzi v. City of Brighton*, 228 P.3d 957 (Colo. 2010).

Evidence of the value of the condemned portion as a part of the whole is admissible and should be evaluated by the fact finder when determining just compensation. *Palizzi v. City of Brighton*, 228 P.3d 957 (Colo. 2010).

### III. DAMAGES TO RESIDUE OF PROPERTY.

**Measure of damages to residue is diminution of market value.** The measure of damages to the residue of property after an eminent domain taking is the diminution of the market value by reason of the taking. *W. Slope Gas Co. v. Lake Eldora Corp.*, 32 Colo. App. 293, 512 P.2d 641 (1973).

Damages are awarded equal to the actual diminution of its market value, if any, for any use to which the same may reasonably be put. *Roberts v. Scurvin Ditch Co.*, 22 Colo. App. 120, 125 P. 552 (1912); *City of Denver v. Bayer*, 7 Colo. 113, 2 P. 6 (1883); *Colo. Cent. R.R. v. Allen*, 13 Colo. 229, 22 P. 605 (1889); *Denver & R.G.R.R. v. Griffith*, 17 Colo. 598, 31 P. 171 (1892).

Damage to the residue after land taken is to be measured by the present difference between market value before and after taking, and includes all damages from the natural, necessary, and reasonable result of the taking. *Mack v. Bd. of County Comm'rs*, 152 Colo. 300, 381 P.2d 987 (1963).

All damages, present and prospective, that are the natural, necessary, or reasonable result of the taking should be assessed, except such as may arise from negligent or unskillful construction. *Mulford v. Farmers' Reservoir & Irrigation Co.*, 62 Colo. 167, 161 P. 301 (1916); *Denver City Irrigation & Water Co. v. Middaugh*, 12 Colo. 434, 21 P. 565 (1889); *Loloff v. Sterling*, 31 Colo. 102, 71 P. 113 (1903); *Farmers' Reservoir & Irrigation Co. v. Cooper*, 54 Colo. 402, 130 P. 1004 (1913); *Moffat v. City & County of Denver*, 57 Colo. 473, 143 P. 577 (1914).

**Damage to residue includes** all damages from the natural, necessary, and reasonable result of the taking. *Mack v. Bd. of County Comm'rs*, 152 Colo. 300, 381 P.2d 987 (1963).

When a portion of a parcel of land is taken from a property owner in a condemnation proceeding, the landowner is entitled to recover all damages that are the natural, necessary, and reasonable result of the taking, as measured by the reduction in the market value of the remainder of the property. The property owner is entitled to present any relevant evidence concerning diminution of market value caused by the taking. If the evidence supports a finding that a diminution of market value has occurred, compensation must be awarded. *La Plata Elec. Ass'n, Inc. v. Cummins*, 728 P.2d 696 (Colo. 1986); *Bement v. Empire Elec. Ass'n, Inc.* 28 P.2d 706 (Colo. 1986); *Herring v. Platte River Power Authority*, 728 P.2d 709 (Colo. 1986).

**Loss and inconvenience thereby occasioned may be considered** in determining the proper measure of damages recoverable by an owner whose property has been taken. *City of Denver v. Bayer*, 7 Colo. 113, 2 P. 6 (1883); *Colo. Cent. R.R. v. Allen*, 13 Colo. 229, 22 P. 605 (1889); *Colo. M. Ry. v. Brown*, 15 Colo. 193, 25 P. 87 (1890).

**Loss of means of access to premises considered.** Where the premises sought are used by the landowner as the means of access to the premises not taken, the injury occasioned by the taking will, in this respect, be special to him, and he is entitled to compensation therefor. *Lavelle v. Town of Julesburg*, 49 Colo. 290, 112 P. 774 (1910).

Although it would seem difficult to establish the true or market value of access rights since they are not a commodity dealt in on a buying and selling market, the right of ingress and egress to and from a person's property adds or detracts from the property value and it would

seem that the true value of such rights could only be found in the difference between the value of the land and its use for any and all kinds of purposes before the disturbance or destruction of such rights, and the value of the land minus any access or disturbed or inconvenient access to the highway. *Boxberger v. State Hwy. Comm'n*, 126 Colo. 526, 251 P.2d 920 (1952).

**Damage for loss beyond market value prohibited.** The condemnor is not permitted to add an additional element of damage for loss of use beyond the market value. *Vivian v. Bd. of Trustees*, 152 Colo. 556, 383 P.2d 801 (1963).

**Costs of restoration are not allowed** as a test for determining damages to residue occasioned by a taking in condemnation cases. *Western Slope Gas Co. v. Lake Eldora Corp.*, 32 Colo. App. 293, 512 P.2d 641 (1973).

**Evidence of aesthetic damage and damage for loss of view**, which would result from construction of power line, is admissible in assessing damages to remainder since unsightliness or loss of view did not affect any other owner or public in a general way but did specifically affect remainder. *La Plata Elec. Ass'n, Inc. v. Cummins*, 703 P.2d 592 (Colo. App. 1985), *aff'd*, 728 P.2d 696 (Colo. 1986).

**Jury cannot consider general benefits.** General benefits, which accrue to the residue of property after a condemnation by reason of the improvement, may not be considered by the jury in arriving at the market value of the residue after the taking. *Mack v. Bd. of County Comm'rs*, 152 Colo. 300, 381 P.2d 987 (1963).

**"Benefit".** "Benefit", as used in eminent domain law, is not equivalent or interchangeable with "benefit" that arises out of special improvement. *City of Englewood v. Weist*, 184 Colo. 325, 520 P.2d 120 (1974).

"Benefit" that justifies a special assessment tax is not the same "benefit" that must be calculated and deducted from a landowner's recovery in an eminent domain proceeding. *City of Englewood v. Weist*, 184 Colo. 325, 520 P.2d 120 (1974).

**General benefit cannot be set off against damages.** General benefits that result to the owner in common with the public and other nearby owners cannot be set off against damages. *W. Slope Gas Co. v. Lake Eldora Corp.*, 32 Colo. App. 293, 512 P.2d 641 (1973).

**Special benefits that may be set off against damages** are those benefits that accrue directly to the residue as a result of the construction of the improvement and that directly and particularly benefit that residue as opposed to benefiting the public generally. *W. Slope Gas Co. v. Lake Eldora Corp.*, 32 Colo. App. 293, 512 P.2d 641 (1973); *E-470 Pub. Highway Auth. v. 455 Co.*, 983 P.2d 149 (Colo. App. 1999), *rev'd on other grounds*, 3 P.3d 18 (Colo. 2000).



**Special benefits may generally be set off against a condemnation award** but cannot be set off where the remaining property is subject to an assessment for those same benefits. E-470 Pub. Highway Auth. v. 455 Co., 983 P.2d 149 (Colo. App. 1999), rev'd on other grounds, 3 P.3d 18 (Colo. 2000).

**Trial court abused its discretion by granting landowners' motion in limine to exclude all evidence of special benefits accruing to the landowners' property as a result of the E-470 highway construction.** The commissioners should have had the opportunity at trial to consider all parties' evidence of the special benefits accruing to the remaining property. Both the highway authority's and the landowners' appraisers agreed that construction of the E-470 conferred special benefits on the landowners' remaining property. By excluding this evidence of special benefits, the trial court effectively ensured that the landowners would recover in an amount greater than they suffered. E-470 Pub. Hwy. Auth. v. 455 Co., 3 P.3d 18 (Colo. 2000).

Whether the highway expansion fee is labeled as a "special fee" or a "special assessment", the mere existence of such fee is not, in and of itself, an adequate basis for excluding all evidence of special benefits for two reasons: (1) The fee is speculative; and (2) the fee does not charge for the same benefit as those the highway authority sought to introduce into evidence. E-470 Pub. Hwy. Auth. v. 455 Co., 3 P.3d 18 (Colo. 2000).

**City's collection of special assessment tax not foreclosed.** A city's failure to prove any benefit to the landowner's property in the section 38-1-101 proceeding does not foreclose the city from collecting a special assessment tax. The city is entitled to specially assess for the benefit accruing to the landowner's property by the construction of the special improvement.

City of Englewood v. Weist, 184 Colo. 325, 520 P.2d 120 (1974).

**Record that included contradictory and conflicting evidence supported the trial court's determination** that diminution, if any, of the value of condemnee's remaining property was de minimis even though condemnee testified that he was forced to sell his remaining lots low because the condemnation action could possibly result in a loss of privacy, an increased traffic flow, and an inability to construct a security gate at the entrance to the subdivision. Colo. Mountain Prop. v. Heineman, 860 P.2d 1388 (Colo. App. 1993).

**Trial court's refusal to award damages based on the purportedly lower sales prices of condemnee's lots is consistent with rule** that compensation in a condemnation action is measured either at the time the petitioner is authorized to take possession or at the date of the trial or hearing in which compensation is assessed, particularly where the trial court, within its discretion, found that condemnee failed to meet the burden of establishing that claimed loss. Colo. Mountain Prop. v. Heineman, 860 P.2d 1388 (Colo. App. 1993).

**Trial court did not err in awarding nominal damages** since the record supports its finding that there was not evidence presented of any additional cost of the roadway other than evidence of initial costs that were not associated with the subsequent grant of the access easement. Colo. Mountain Prop. v. Heineman, 860 P.2d 1388 (Colo. App. 1993).

**No unjust enrichment where** the record shows that the development costs in building roadway would have been incurred by condemnee regardless of whether condemnor pursued his rights in condemnation. Colo. Mountain Prop. v. Heineman, 860 P.2d 1388 (Colo. App. 1993).

**38-1-115. Contents of report or verdict.** (1) Except as provided in this section, the report of the commissioners or the verdict of the jury shall contain:

- (a) An accurate description of the land taken;
- (b) The value of the land or property actually taken;
- (c) The damages, if any, to the residue of such land or property; and
- (d) The amount and value of the benefit.

(2) No findings as to damages and benefits as provided in paragraphs (c) and (d) of subsection (1) of this section shall be required in cases involving the total taking of property, nor shall either or both of such findings be required in cases involving the partial taking of property unless evidence thereof has been received by the commissioners or jury.

(3) The report of the commissioners or the verdict of the jury may also contain such other findings or answers to interrogatories as the court in its discretion may require to establish the value of the property condemned on an undivided basis.

**Source:** G.L. § 1075. G.S. C. § 254. R.S. 08: § 2432. C.L. § 6328. CSA: C. 61, § 18. CRS 53: § 50-1-18. L. 63: p. 477, § 3. C.R.S. 1963: § 50-1-18. L. 66: p. 30, § 3.

## ANNOTATION

- I. General Consideration.
- II. Requirement as to Description of the Land Taken.
- III. Requirement as to Value of Land Taken.
- IV. Requirement as to Amount and Value of Benefits to Residue.

## I. GENERAL CONSIDERATION.

**This section is mandatory.** *Denver N.W. & P. Ry. v. Howe*, 49 Colo. 256, 112 P. 779 (1910); *Denver & R.G.R.R. v. Stark*, 16 Colo. 291, 26 P. 779 (1891); *Otero Canal Co. v. Fosdick*, 20 Colo. 522, 39 P. 332 (1895); *Colo. Fuel & Iron Co. v. Four Mile Ry.*, 29 Colo. 90, 66 P. 902 (1901).

**Section must be strictly construed.** *Pueblo v. Rudd*, 5 Colo. 270 (1880); *Rio Grande S. Ry. v. Knight*, 1 Colo. App. 219, 28 P. 19 (1891).

**Failure of verdict to include required contents deemed fatal.** A failure to include in the verdict those things required by the section is fatal. *Norris v. City of Pueblo*, 12 Colo. App. 290, 55 P. 747 (1898).

**Province of jury is to determine damages to be awarded the owner of the property taken.** *Colo. Fuel & Iron Co. v. Four Mile Ry.*, 29 Colo. 90, 66 P. 902 (1901); *Tegeler v. Schneider*, 49 Colo. 574, 114 P. 288 (1911).

The question of the necessity for taking for municipal purposes is not for the jury. *Warner v. Town of Gunnison*, 2 Colo. App. 430, 31 P. 238 (1892).

**Submission of questions not required properly refused.** Any attempt to submit to the jury any questions, save those which it is required to report upon, is properly refused. *Colo. Fuel & Iron Co. v. Four Mile Ry.*, 29 Colo. 90, 66 P. 902 (1901).

**When directions requiring additional evidence not prejudicial.** Where the report of the commissioners, based upon the evidence presented, was in compliance with this section, the directions of the trial court requiring more evidence, to the extent, were surplusage not affecting the substantial rights of the parties, therefore, not prejudicial. *Dept. of Hwys. v. Intermountain Term. Co.*, 164 Colo. 354, 435 P.2d 391 (1967).

**Respondent to show cash value of property.** The burden rests upon the respondent to show by a preponderance of the evidence the present actual cash value of the property taken, as well as the damages, if any, resulting to the residue, but the burden of showing benefits, if any, accruing to the residue rests upon the petitioner. *Bd. of County Comm'rs v. Noble*, 117 Colo. 77, 184 P.2d 142 (1947).

**Petitioner to show benefits accruing to residue.** The burden of showing benefits, if any, accruing to the residue rests upon the petitioner.

*Bd. of County Comm'rs v. Noble*, 117 Colo. 77, 184 P.2d 142 (1947).

**When objection to report or verdict required.** Any objection to the commissioners' report must be made when it is returned, before the commissioners are discharged. *Evergreen Fire Prot. Dist. v. Huckleby*, 626 P.2d 744 (Colo. App. 1981).

Objection to the form or substance of a verdict must be made at the time of its return, and before the discharge of the jury. *Fort Lyon Canal Co. v. Farnan*, 48 Colo. 414, 109 P. 861 (1910).

**Applied in** *Searl v. Sch.* Dist. No. 2, 133 U.S. 553, 10 S. Ct. 374, 33 L. Ed. 740 (1890); *Pub. Serv. Co. v. City of Loveland*, 79 Colo. 216, 245 P. 493 (1926); *Wiley Drainage Dist. v. Semmens*, 80 Colo. 365, 250 P. 527 (1926).

## II. REQUIREMENT AS TO DESCRIPTION OF THE LAND TAKEN.

**Description as land "tinted pink" on map insufficient.** It is not a sufficient description to merely refer to the land as the land described in the petition, nor as the land "tinted pink" on the map. *Norris v. City of Pueblo*, 12 Colo. App. 290, 55 P. 747 (1898).

## III. REQUIREMENT AS TO VALUE OF LAND TAKEN.

**Verdict must state value of property taken for conformity.** The verdict does not conform to the requirements of subsection (1) (b), where it does not state the value of the property actually taken. *Sand Creek Lateral Irrigation Co. v. Davis*, 17 Colo. 326, 29 P. 742 (1892).

**Stating gross amount in verdict as value deemed noncompliance.** Stating a gross amount as the value of the property taken to cover right-of-way and enlargement for a certain distance, certainly is not a compliance with subsection (1) (b), and neither can the other amounts assessed as damages to cover certain work and improvements be regarded as an ascertainment of the value of the property taken. *Sand Creek Lateral Irrigation Co. v. Davis*, 17 Colo. 326, 29 P. 742 (1892).

## IV. REQUIREMENT AS TO AMOUNT AND VALUE OF BENEFITS TO RESIDUE.

**Verdict must show consideration and determination of benefits question.** The verdict must affirmatively show that the question of benefits was considered and determined; otherwise it was insufficient and must be vacated. *Fort Lyon Canal Co. v. Farnan*, 48 Colo. 414, 109 P. 861 (1910).



Where the verdict as to this matter was as follows: "That the amount and value of the benefits received by the defendants due to the construction of this ditch, is \_\_\_\_\_ dollars", the question of the benefits was considered and passed upon, and benefits were nothing. *Fort Lyon Canal Co. v. Farnan*, 48 Colo. 414, 109 P. 861 (1910).

**Verdict not fixing definite value to be rejected.** A verdict not fixing any definite amount or value of the supposed benefit, in dollars, is to be rejected. *Denver N.W. & P. Ry. v. Howe*, 49 Colo. 256, 112 P. 779 (1910).

**38-1-116. Interest on award.** The court shall forthwith cause the report of the commissioners or the verdict of the jury to be entered upon the records of the court, and, where possession of the property has been previously taken by the petitioner pursuant to section 38-1-105 (6), it shall add to the amount of any such award interest at the rate established pursuant to section 5-12-106 (2), C.R.S., on and after the date of such possession until the date such award of the commissioners or verdict of the jury is filed with the clerk of the court. No interest shall be allowed on that portion of the award which the owner and others interested received or could have received as a partial payment by withdrawal from the deposit as provided in section 38-1-105 (6), nor shall interest be allowed for the period wherein the trial of the case is delayed or continued by or at the request of the respondent.

**Source:** L. 61: p. 375, § 7. **CRS 53:** § 50-1-20. **L. 63:** p. 477, § 4. **C.R.S. 1963:** § 50-1-19. **L. 66:** p. 31, § 4. **L. 85:** Entire section amended, p. 1194, § 4, effective June 6.

#### ANNOTATION

**Law reviews.** For article, "Collecting Pre- and Post- Judgment Interest in Colorado: A Primer", see 15 Colo. Law. 753 (1986). For article, "An Update of Appendices from Collecting Pre- and Post-Judgment Interest in Colorado", see 15 Colo. Law. 990 (1986).

**When interest on award accrues.** Where the authorization to take possession of property is contingent on a deposit, the date of possession for purposes of entitlement to interest on the award is the date of deposit. *Denver Urban Renewal Auth. v. Hayutin*, 40 Colo. App. 559, 583 P.2d 296 (1978).

When the landowner, with the consent of the other interested parties, could have withdrawn funds deposited by the petitioner pursuant to § 38-1-105 (6), the exception to the interest accrual requirement under this section applies and no interest is allowed on the funds. *E-470 Pub. Hwy. Auth. v. 455 Co.*, 997 P.2d 1273 (Colo. App. 1999).

**No conflict with general interest statute.** There is no conflict between this section, which provides for six percent interest from the date of possession until the date the commission's award is filed with the court, and the general interest statute, § 5-12-102, pertaining to interest thereafter, since once the amount of the valuation award has been ascertained, the result is like any other judgment. And, since the condemnation statutes are silent on the matter of interest for the period after judgment, the general statute on interest applies. *Denver Urban*

*Renewal Auth. v. Hayutin*, 40 Colo. App. 559, 583 P.2d 296 (1978); *E-470 Pub. Hwy. Auth. v. 455 Co.*, 997 P.2d 1273 (Colo. App. 1999).

**No interest accrues on the amount of an immediate possession deposit made under § 38-1-105.** By depositing funds into the court registry, a petitioner relinquishes control of the funds and transfers to the property owner the right to withdraw and use the funds, and the petitioner is no longer responsible for the productive use of the funds. *E-470 Pub. Hwy. Auth. v. 455 Co.*, 997 P.2d 1273 (Colo. App. 1999).

**Interest under this section to be compounded annually.** Although this section does not specifically state that interest is to be compounded annually, since the rate of interest under this section is determined by reference to the rate established in § 5-12-106 (2), which provides for annual compounding of interest, this section implicitly provides that interest be compounded annually. *State Dept. of Hwys. v. Interstates-Denver West*, 781 P.2d 176 (Colo. App. 1989).

**Trial court appropriately denied award of pre-judgement interest in inverse condemnation case.** There was no order authorizing the municipality to take possession of the property prior to trial. Moreover, the evaluation date used by each of the parties, without objection from either, was the date of the hearing, and the jury was specifically instructed to determine the value of the property taken as of that date. Accordingly, because the property was valued as

of the date of the trial and not as of some earlier date, no award of pre-judgment interest was authorized. *Fowler Irrevocable Trust 1992-1 v. City of Boulder*, 992 P.2d 1188 (Colo. App.

1999), aff'd in part and rev'd in part on other grounds, 17 P.3d 797 (Colo. 2001).

**Applied** in *State Dept. of Hwys. v. Copper Mt., Inc.*, 624 P.2d 936 (Colo. App. 1981).

**38-1-117. Condemnation of personal property.** Whenever a petitioner is specifically authorized by law to acquire personal property or interests therein by condemnation, the proceedings to acquire the same shall be governed by this article, and the petitioner shall acquire such interest therein as may be sought and specifically described in the petition in condemnation.

**Source:** L. 66: p. 31, § 5. C.R.S. 1963: § 50-1-22.

**38-1-118. Evidence concerning value of property.** Any witness in a proceeding under articles 1 to 7 of this title, in any court of record of this state wherein the value of real property is involved, may state the consideration involved in any recorded transfer of property, otherwise material and relevant, which was examined and utilized by him in arriving at his opinion, if he has personally examined the record and communicated directly and verified the amount of such consideration with either the buyer or seller. Any such testimony shall be admissible as evidence of such consideration and shall remain subject to rebuttal as to the time and actual consideration involved and subject to objections as to its relevancy and materiality.

**Source:** L. 61: p. 376, § 7. CRS 53: § 50-1-22. L. 63: p. 478, § 5. C.R.S. 1963: § 50-1-21.

## ANNOTATION

**Law reviews.** For article, "Inverse Condemnation — A Viable Alternative", see 51 Den. L.J. 529 (1974).

**Competence of witness not presumed.** It will not be presumed that a witness is competent to give an opinion as to the value of property; rather, it must be shown that he has some peculiar means of forming an intelligent, correct judgment as to the value of the property in question or the effect upon it by a particular improvement beyond what is possessed by men generally. *City & County of Denver v. Hinsey*, 177 Colo. 178, 493 P.2d 348 (1972).

**Knowledge of witness may be derived from** buying and selling, valuing, and managing real estate in the town or county where the particular property is situated or by reason of being acquainted with the property in the neighborhood where it is situated, especially if accompanied by a knowledge of sales of similar property. *City & County of Denver v. Hinsey*, 177 Colo. 178, 493 P.2d 348 (1972).

**Expert testimony need not be stricken** where expert relied only in part on sales data he did not personally confirm but did not offer the data as direct evidence to support his opinion. Any impermissible impact that the unverifiable sales may have had on the expert's testimony was ameliorated by striking evidence of the comparable property that was supported by the unverified sales. *Westminster v. Jefferson Center Ass'n*, 958 P.2d 495 (Colo. App. 1997).

**Owner's opinion of property value.** A property owner may testify as to his opinion of the value of his own property. *Denver Urban Renewal Auth. v. Berglund-Cherne Co.*, 193 Colo. 562, 568 P.2d 478 (1977); *Denver Urban Renewal Auth. v. Hayutin*, 40 Colo. App. 559, 583 P.2d 296 (1978).

Testimony by the owner regarding the price paid for replacement property in a transaction that was not a comparable sale is incompetent. *Denver Urban Renewal Auth. v. Hayutin*, 40 Colo. App. 559, 583 P.2d 296 (1978).

**Evidence of restoration costs admissible.** Evidence of costs of restoration and replacement of property where there is no testimony to relate these costs to market value is admissible only insofar as it aids the jury in arriving at the market value of the property before and after the taking in order that there be no confusion between the measure of damages and evidence admissible to show damages. *City & County of Denver v. Hinsey*, 177 Colo. 178, 493 P.2d 348 (1972).

**Evidence of economic rent is admissible only for limited purpose** of establishing the basis for the expert's final opinion of value. *Denver Urban Renewal Auth. v. Berglund-Cherne Co.*, 193 Colo. 562, 568 P.2d 478 (1977).

**Evidence of the character and amount of business conducted on the land taken** is only admissible for the limited purpose of showing a



use to which the land could be put. City & County of Denver v. Hinsey, 177 Colo. 178, 493 P.2d 348 (1972).

**When opinion evidence inadmissible.** Opinion testimony based almost entirely on the of-

fering prices as distinguished from the sale prices of replacement properties and on the price paid for a noncomparable property is inadmissible. Denver Urban Renewal Auth. v. Hayutin, 40 Colo. App. 559, 583 P.2d 296 (1978).

**38-1-119. Preference on docket.** To assure that property owners receive compensation for the taking of their property at the earliest practical time and to reduce the interest obligation of petitioners, all courts wherein such actions are pending shall give such actions preference over other civil actions therein in the manner of setting the same for trial.

**Source:** L. 61: p. 375, § 7. CRS 53: § 50-1-21. C.R.S. 1963: § 50-1-20.

**38-1-120. Acquisition of state lands - department of natural resources.** All proceedings brought by the department of natural resources pursuant to the provisions of section 24-33-107 (3) (a), C.R.S., for the acquisition of interests in state lands under the jurisdiction of the state board of land commissioners shall be as prescribed by this article.

**Source:** L. 73: p. 178, § 2. C.R.S. 1963: § 50-1-23.

**Cross references:** For state board of land commissioners acquiring land by eminent domain, see § 24-33-107 (3)(a).

**38-1-121. Appraisals - negotiations.** (1) As soon as a condemning authority determines that it intends to acquire an interest in property, it shall give notice of such intent, together with a description of the property interest to be acquired, to anyone having an interest of record in the property involved. If the property has an estimated value of five thousand dollars or more, such notice shall advise that the condemning authority shall pay the reasonable costs of an appraisal pursuant to subsection (2) of this section. Such notice, however, need not be given to any of such persons who cannot be found by the condemning authority upon the exercise of due diligence. Upon receipt of such notice, such persons may employ an appraiser of their choosing to appraise the property interest to be acquired. Such appraisal shall be made using sound, fair, and recognized appraisal practices which are consistent with law. The value of the land or property actually taken shall be the fair market value thereof. Within ninety days of the date of such notice, such persons may submit to the condemning authority a copy of such appraisal. The condemning authority immediately upon receipt thereof shall submit to such persons copies of its appraisals. If the property interest is being acquired in relation to a federal aid project, then the appraisals submitted by the condemning authority shall be those which have been approved by it pursuant to applicable statutes and regulations, if such approval is required. All of these appraisals may be used by the parties to negotiate in good faith for the acquisition of the property interest, but neither the condemning authority nor such persons shall be bound by such appraisals.

(2) If an appraisal is submitted to the condemning authority in accordance with the provisions of subsection (1) of this section, the condemning authority shall pay the reasonable costs of such appraisal. If more than one person is interested in the property sought to be acquired and such persons cannot agree on an appraisal to be submitted under subsection (1) of this section, the condemning authority shall be relieved of any obligation herein imposed upon it to pay for such appraisals as may be submitted to it pursuant to this section.

(3) Nothing in this section shall be construed as in any way limiting the obligation of the condemning authority to negotiate in good faith for the acquisition of any property interest sought prior to instituting eminent domain proceedings or as in any way limiting the discovery rights of parties to eminent domain proceedings.

(4) Nothing in this section shall prevent the condemning authority from complying with federal and state requirements to qualify the authority for federal aid grants.

(5) Nothing in this section shall be construed to limit the right of the condemning agency to institute eminent domain proceedings or to obtain immediate possession of

property as permitted by law; except that an eminent domain proceeding may not proceed to trial on the issue of valuation until the ninety-day period provided in subsection (1) of this section has expired or the owner's appraisal has been submitted to the condemning authority, whichever is sooner.

(6) If the parties involved in the negotiations fail to reach agreement on the fair market value of the property being acquired, the condemning authority, prior to proceeding to trial on the issue of valuation, shall furnish all owners of record a written final offer.

**Source:** L. 75: Entire section added, p. 1405, § 1, effective July 18. L. 78: (1) and (5) amended, p. 274, § 100, effective May 23. L. 85: (1) amended and (6) added, p. 1194, § 5, effective June 6.

#### ANNOTATION

**Statute designed to facilitate negotiations and settlement.** This statute, which is not mandatory, contemplates and is designed to facilitate negotiations and settlement between parties involved in condemnation proceedings. *City of Colo. Springs v. Berl*, 658 P.2d 280 (Colo. App. 1982).

**This section does not apply to the award of costs pursuant to C.R.C.P. 54(d).** *City of Colo. Springs v. Berl*, 658 P.2d 280 (Colo. App. 1982).

**When costs of appraisals are litigation expenses.** If the owner chooses not to submit appraisals prior to trial, but does so as evidence during trial, the costs of the appraisals of real

property are correctly viewed as expenses necessarily incurred by reason of the litigation. *City of Colo. Springs v. Berl*, 658 P.2d 280 (Colo. App. 1982).

**Amount offered by county not dispositive of lack of good faith attempt to negotiate** where efforts by county were thwarted by lack of response from the landowners. *Bd. of County Comm'rs v. Blosser*, 844 P.2d 1237 (Colo. App. 1992).

**Property interests contemplated by subsection (3) are limited to recorded interests.** *City & County of Denver v. Eat Out, Inc.*, 75 P.3d 1141 (Colo. App. 2003).

**38-1-122. Attorney fees.** (1) If the court finds that a petitioner is not authorized by law to acquire real property or interests therein sought in a condemnation proceeding, it shall award reasonable attorney fees, in addition to any other costs assessed, to the property owner who participated in the proceedings.

(1.5) In connection with proceedings for the acquisition or condemnation of property in which the award determined by the court exceeds ten thousand dollars, in addition to any compensation awarded to the owner in an eminent domain proceeding, the condemning authority shall reimburse the owner whose property is being acquired or condemned for all of the owner's reasonable attorney fees incurred by the owner where the award by the court in the proceedings equals or exceeds one hundred thirty percent of the last written offer given to the property owner prior to the filing of the condemnation action. The provisions of this subsection (1.5) shall not apply to any condemnation proceeding seeking to acquire rights-of-way under article 4, 5, or 5.5 of this title, article 45 of title 37, C.R.S., or section 7 of article XVI of the Colorado constitution.

(2) Nothing in subsection (1) of this section shall be construed as limiting the ability of a property owner to recover just compensation, including attorneys fees, as may otherwise be authorized by law.

**Source:** L. 85: Entire section added, p. 1195, § 6, effective June 6. L. 2003: (1.5) added, p. 2669, § 2, effective July 1.

**Cross references:** For the legislative declaration in the 2003 act adding subsection (1.5), see section 1 of chapter 421, Session Laws of Colorado 2003.

#### ANNOTATION

**Purpose of section is to compensate a property owner who is required to incur costs**

**when the condemning authority does not proceed properly.** *Fowler Irrevocable Trust* 1992-1



v. City of Boulder, 992 P.2d 1188 (Colo. App. 1999), aff'd in part and rev'd in part on other grounds, 17 P.3d 797 (Colo. 2001).

**The legislature intended that challenges to a condemning agency's authority to condemn be addressed by subsection (1), but that challenges to a condemning agency's valuations be addressed by subsection (1.5).** Town of Telluride v. San Miguel Valley Corp., 197 P.3d 261 (Colo. App. 2008).

In valuation cases, the legislature intended to limit awards of attorney fees to relatively egregious cases where the condemning agency has not offered fair value to the property owner and also intended that reimbursement for attorney fees be limited to the fees incurred in obtaining a fair valuation. Town of Telluride v. San Miguel Valley Corp., 197 P.3d 261 (Colo. App. 2008).

**Landowner is not authorized by law to condemn a right-of-way where he already has a common law way of necessity** and, accordingly, the property owner against whom the condemnation proceedings were brought may recover attorney fees. Billington v. Yust, 789 P.2d 196 (Colo. App. 1989).

**Subsection (2) permits recovery of attorney fees only if another statute expressly authorizes such recovery.** Dept. of Health v. Hecla Mining Co., 781 P.2d 122 (Colo. App. 1989); City of Holyoke v. Schlachter Farms R.L.L.P., 22 P.3d 960 (Colo. App. 2001).

**Attorney fees should be allowed** where the condemnee proves that an alternate acceptable route is legally available to the condemnor at the time the condemnation action is commenced. West v. Hinksmon, 857 P.2d 483 (Colo. App. 1992).

**But where dismissal is reversed on appeal,** the award of attorney fees is not appropriate. Freeman v. Rost Family Trust, 973 P.2d 1281 (Colo. App. 1999).

**No attorney fees should be allowed** where the condemnee establishes the existence of an acceptable alternate route across the condemnee's own property. West v. Hinksmon, 857 P.2d 483 (Colo. App. 1992).

**For purposes of awarding attorney fees, the petition for condemnation was amended in such a substantial manner that it was tantamount to the filing of a new condemnation action for a second parcel of land.** Thus, the last written offer prior to filing the original condemnation proceeding on the first parcel and the subsequent amended petition as to the second parcel both constitute last written final offers as to the respective parcels. Sch. Dist. No. 12 v. Sec. Life of Denver Ins. Co., 179 P.3d 1 (Colo. App. 2007), rev'd on other grounds, 185 P.3d 781 (Colo. 2008).

**When there are two distinct and separable condemnations that were tried in a single**

**proceeding, this section contemplates the trial court's application of each written offer to the corresponding condemnation scenario.** Because the condemnation award in either scenario exceeds 130% of the condemning authority's corresponding final written offer, the owner of the property is entitled to attorney fees. Sch. Dist. No. 12 v. Sec. Life of Denver Ins. Co., 185 P.3d 781 (Colo. 2008).

**Absent evidence of a contrary legislative intent, section does not authorize fee awards in situations other than successful defenses in unauthorized condemnation proceedings.** As such, fee award in inverse condemnation action would be improper. Fowler Irrevocable Trust 1992-1 v. City of Boulder, 992 P.2d 1188 (Colo. App. 1999), aff'd in part and rev'd in part on other grounds, 17 P.3d 797 (Colo. 2001).

**Prejudgment interest is separate from the "award by the court".** "[A]ward by the court" plainly contemplates only the principal award and not the prejudgment interest on that award. City of Colo. Springs v. Andersen Mahon Enters., 251 P.3d 536 (Colo. App. 2010).

**Court rejects contention that section requires an "all or nothing" award of attorney fees and that trial court was therefore precluded from making a partial award of fees and costs.** To refuse to award a respondent any fees at all when the trial court has found that the petitioner was not authorized to acquire some of the property interests being sought would thwart the purpose of the statute. Similarly, it would be equally inappropriate to award a respondent all fees incurred in defending the entire action when at least some of petitioner's condemnation claims were in fact authorized by law. Thus, an "all or nothing" approach would lead to unreasonable and absurd results. Wilkinson v. Gaffney, 981 P.2d 1121 (Colo. App. 1999).

Here, record supports trial court's determination that respondents were entitled to an award of only fees incurred in defending against petitioner's unauthorized claim for a utility easement by condemnation. Further, the court's ruling is supported by the record and is consistent with the statutory intent of discouraging the filing of unauthorized condemnation claims. Accordingly, trial court committed no abuse of discretion. Wilkinson v. Gaffney, 981 P.2d 1121 (Colo. App. 1999).

**The city's bad faith in one aspect of the litigation does not violate the condemnation statutes** and therefore does not mean the city is not authorized by law to acquire the property for purposes of subsection (1). City of Black Hawk v. Ficke, 215 P.3d 1129 (Colo. App. 2008).

**Applied in Platte River Power Auth. v. Nelson,** 775 P.2d 82 (Colo. App. 1989); Akin v. Four Corners Encampment, 179 P.3d 139 (Colo. App. 2007).

## PART 2

GOVERNMENTAL ENTITIES, INDIVIDUALS, AND  
CORPORATIONS AUTHORIZED TO EXERCISE THE POWER OF  
EMINENT DOMAIN

**38-1-201. Legislative declaration.** (1) The general assembly hereby finds and declares that:

(a) The power of eminent domain allows the federal government, the state, counties, cities and counties, municipalities, and various other types of governmental entities to condemn property when necessary for public use and allows individual property owners and corporations to condemn property in certain circumstances when condemnation is necessary to create a private way of necessity or to allow beneficial use of private property.

(b) Although both the state constitution and state statutes require the payment of just compensation to any person whose property is condemned, the exercise of the power of eminent domain nonetheless substantially impacts fundamental property rights.

(c) Because of this substantial impact, it is necessary and appropriate to ensure that Coloradans can easily determine which governmental entities, corporations, and other persons may exercise the power of eminent domain and to further ensure that Coloradans can easily identify the procedural requirements that entities, corporations, and other persons must follow when exercising the power of eminent domain.

(2) The general assembly further finds and declares that:

(a) In addition to counties, cities and counties, and municipalities that serve as general units of government in the state, the governmental structure of the state includes a wide variety of special districts, authorities, and other governmental entities that serve limited governmental purposes, some of which may exercise the power of eminent domain.

(b) Although many of the provisions of state law that authorize governmental entities, individuals, and corporations to exercise the power of eminent domain and prescribe procedures that govern the exercise of that power are concentrated in this article and in articles 2 to 7 of this title, the proliferation throughout the history of the state of special districts, authorities, and other governmental entities that serve limited governmental purposes, together with other historical factors that have necessitated grants of eminent domain powers to certain types of corporations and persons, have resulted in the codification in other parts of the Colorado Revised Statutes of many other provisions that authorize the exercise of the power of eminent domain.

(c) The codification of provisions of state law that authorize eminent domain in parts of the Colorado Revised Statutes other than this article and articles 2 to 7 of this title makes it difficult in many cases for Coloradans to easily determine, with respect to any given governmental entity, corporation, or person:

(I) Whether the governmental entity, corporation, or person may exercise the power of eminent domain; and

(II) The procedural requirements that the governmental entity, corporation, or person must comply with in order to exercise the power of eminent domain.

(d) In order to help Coloradans to more easily determine whether any given governmental entity, corporation, or person may exercise the power of eminent domain and identify the procedural requirements that the entity, corporation, or person must follow in exercising the power of eminent domain, it is necessary, appropriate, and in the best interests of the state to list in this part 2 all of the governmental entities, corporations, and persons that may exercise the power of eminent domain pursuant to provisions of state law and to clarify that the procedural requirements specified in this article and articles 2 to 7 of this title apply to all eminent domain proceedings.

(e) In enacting this part 2, it is not the intent of the general assembly to:

(I) Repeal, limit, or otherwise modify the authority of any governmental entity, corporation, or person to exercise the power of eminent domain;

(II) Grant new eminent domain authority to any governmental entity, individual, or corporation; or

(III) Infringe upon the home rule power of any home rule municipality or county.



**Source:** L. 2006: Entire part added, p. 351, § 1, effective August 7.

**38-1-202. Governmental entities, corporations, and persons authorized to use eminent domain.** (1) The following governmental entities, types of governmental entities, and public corporations, in accordance with all procedural and other requirements specified in this article and articles 2 to 7 of this title and to the extent and within any time frame specified in the applicable authorizing statute, may exercise the power of eminent domain:

- (a) The United States as authorized in section 3-1-102, C.R.S.;
- (b) The state:
  - (I) As authorized in paragraph (b) of article IX of the upper Colorado river basin compact, codified at section 37-62-101, C.R.S.;
  - (II) As authorized in paragraph 3. of article V of the South Platte river compact, codified at section 37-65-101, C.R.S.;
  - (III) As authorized in article VII of the Republican river compact, codified at section 37-67-101, C.R.S.;
  - (IV) By action of the general assembly or by action of any of the following officers and agencies of the state:
    - (A) The department of human services as authorized in section 19-2-403.5, C.R.S.;
    - (B) The department of natural resources as authorized in section 24-33-107 (3), C.R.S.;
    - (C) The department of personnel with the approval of the governor as authorized in section 24-82-102, C.R.S.;
    - (D) The attorney general at the direction of the governor as authorized in section 24-82-302 (1), C.R.S.;
    - (E) The department of public health and environment as authorized in section 25-11-303 (1) (d), C.R.S.;
    - (F) The governor as authorized in section 27-90-102 (3), C.R.S.;
    - (G) The department of transportation as authorized in sections 33-11-104 (4), 43-1-210 (1), (2), and (3), 43-1-217 (1), 43-1-406 (4), 43-1-414 (1), (2), (3), and (4), 43-1-509, 43-1-1410 (1) (i), 43-2-135 (1) (k), 43-3-106, and 43-3-107, C.R.S.;
    - (H) The state board of land commissioners as authorized in section 36-4-108, C.R.S.;
    - (I) The transportation commission created in section 43-1-106, C.R.S., as authorized in section 43-1-208 (3), C.R.S.;
    - (J) The statewide bridge enterprise as authorized in section 43-4-805 (5) (e), C.R.S.;
    - (J.5) The high-performance transportation enterprise as authorized in section 43-4-806 (6) (e), C.R.S.; and
    - (K) The Colorado aeronautical board as authorized in section 43-10-106, C.R.S.;
  - (c) State educational boards of control, including the state board for community colleges and occupational education and junior college boards of trustees, and institutions of higher education, as authorized in sections 23-31.5-108, 23-53-105, 23-60-208, 23-71-122 (1) (p), and 38-2-105, C.R.S.;
  - (d) Counties, cities and counties, and boards of county commissioners as authorized in sections 24-72-104 (2), 25-3-306, 29-6-101, 30-11-104 (2), 30-11-107 (1) (w), 30-11-205, 30-11-307 (1) (c), 30-20-108 (3), 30-20-402 (1) (a), 30-35-201 (37), (41), (42), and (43), 31-25-216 (2), 41-4-102, 41-4-104, 41-4-108, 41-5-101 (1) (a), 43-1-217 (1), 43-2-112 (2), 43-2-204, 43-2-206, and 43-3-107, C.R.S.;
  - (e) Cities, cities and counties, and towns as authorized in sections 29-4-104 (1) (d), 29-4-105, 29-4-106, 29-6-101, 29-7-104, 30-20-108 (3), 31-15-706 (2), 31-15-707 (1) (a) and (1) (e), 31-15-708 (1) (b), 31-15-716 (1) (c), 31-25-201 (1), 31-25-216 (2), 31-25-402 (1) (c), 31-35-304, 31-35-402 (1) (a), 31-35-512 (1) (g), 38-5-105, 38-6-101, 38-6-122, 41-4-108, and 41-4-202, C.R.S.;
  - (f) The following types of single purpose districts, special districts, authorities, boards, commissions, and other governmental entities that serve limited governmental purposes or that may exercise eminent domain for limited purposes on behalf of a county, city and county, city, or town:
    - (I) A school district as authorized in section 22-32-111, C.R.S.;

(II) A power authority established pursuant to section 29-1-204 (1), C.R.S., as authorized in section 29-1-204 (3) (f), C.R.S.;

(III) A water or drainage authority established pursuant to section 29-1-204.2 (1), C.R.S., as authorized in section 29-1-204.2 (3) (f), C.R.S.;

(IV) A multijurisdictional housing authority established pursuant to section 29-1-204.5 (1), C.R.S., as authorized in section 29-1-204.5 (3) (f), C.R.S.;

(V) A housing authority organized pursuant to part 2 of article 4 of title 29, C.R.S., as authorized in sections 29-4-209 (1) (k), 29-4-211, and 29-4-212, C.R.S.;

(VI) An authority created by a municipality for the purpose of carrying out a development plan pursuant to section 29-4-306, C.R.S., as authorized in sections 29-4-306 (2) and 29-4-307 (1) (a), C.R.S.;

(VII) A metropolitan recreation district or park and recreation district organized under article 1 of title 32, C.R.S., or a municipal board given charge of a recreation system as authorized in sections 29-7-104 and 32-1-1005 (1) (c), C.R.S.;

(VIII) An improvement district created by a county pursuant to part 5 of article 20 of title 30, C.R.S., as authorized in section 30-20-512 (1) (i), C.R.S.;

(IX) An urban renewal authority created pursuant to section 31-25-104, C.R.S., as authorized in sections 31-25-105 (1) (e) and 31-25-105.5, C.R.S., and in accordance with the vesting requirements specified in article 7 of this title;

(X) An improvement district created by a municipality pursuant to part 6 of article 25 of title 31, C.R.S., as authorized in section 31-25-611 (1) (i), C.R.S.;

(XI) A board of water and sewer commissioners created by the governing body of a municipality pursuant to section 31-35-501, C.R.S., as authorized in sections 31-35-511 and 31-35-512 (1) (g), C.R.S.;

(XII) A fire protection district as authorized in section 32-1-1002 (1) (b), C.R.S.;

(XIII) A metropolitan district as authorized in section 32-1-1004 (4), C.R.S.;

(XIV) A sanitation, water and sanitation, or water district as authorized in section 32-1-1006 (1) (f), C.R.S.;

(XV) A tunnel district as authorized in section 32-1-1008 (1) (c), C.R.S.;

(XVI) A water and sanitation district organized under part 4 of article 4 of title 32, C.R.S., as authorized in section 32-4-406 (1) (j), C.R.S.;

(XVII) A metropolitan sewage district organized under the provisions of part 5 of article 4 of title 32, C.R.S., as authorized in section 32-4-502 (5) and 32-4-510 (1) (j), C.R.S.;

(XVIII) A regional service authority formed in accordance with the provisions of section 17 of article XIV of the state constitution and article 7 of title 32, C.R.S., as authorized in section 32-7-113 (1) (k), C.R.S.;

(XIX) The regional transportation district created in section 32-9-105, C.R.S., as authorized in sections 32-9-103 (2), 32-9-119 (1) (k), and 32-9-161, C.R.S.;

(XX) The urban drainage and flood control district created in section 32-11-201, C.R.S., as authorized in sections 32-11-104 (10), 32-11-216 (1) (g), 32-11-220 (1) (b), 32-11-615 (2), and 32-11-663, C.R.S.;

(XX.5) The Fountain creek watershed, flood control, and greenway district created in section 32-11.5-201, C.R.S., as authorized in section 32-11.5-205 (1) (n) (I), C.R.S.;

(XXI) A mine drainage district organized under the provisions of article 51 of title 34, C.R.S., as authorized in section 34-51-123, C.R.S.;

(XXII) A conservation district created pursuant to article 70 of title 35, C.R.S., as authorized in section 35-70-108 (1) (e), C.R.S.;

(XXIII) A conservancy district created under articles 1 to 8 of title 37, C.R.S., as authorized in sections 37-2-105 (7), 37-3-103 (1) (h), 37-3-116, 37-3-117, and 37-4-109 (3), C.R.S.;

(XXIV) A drainage district organized pursuant to article 20 of title 37, C.R.S., as authorized in sections 37-21-114 (1), 37-23-103, and 37-24-104, C.R.S.;

(XXV) The Grand Junction drainage district created in section 37-31-102 (1), C.R.S., as authorized in sections 37-31-119 and 37-31-152, C.R.S.;



(XXVI) An irrigation district organized under the provisions of article 41 of title 37, C.R.S., as authorized in sections 37-41-113 (3) and (5), 37-41-114, 37-41-128, and 37-43-207, C.R.S.;

(XXVII) An irrigation district organized under the provisions of article 42 of title 37, C.R.S., as authorized in sections 37-42-113 (1) and (2) and 37-43-207, C.R.S.;

(XXVIII) An internal improvement district established under the provisions of article 44 of title 37, C.R.S., as authorized in sections 37-44-103 (1) (b), 37-44-108 (1) and (2), 37-44-109, and 37-44-141, C.R.S.;

(XXIX) A water conservancy district organized under the provisions of article 45 of title 37, C.R.S., as authorized in sections 37-45-118 (1) (c) and 37-45-119, C.R.S.;

(XXX) A water activity enterprise, as defined in section 37-45.1-102 (4), C.R.S., exercising the legal authority to exercise the power of eminent domain of the district that owns it in relation to a water activity, as defined in section 37-45.1-102 (3), C.R.S., as authorized in section 37-45.1-103 (4), C.R.S.;

(XXXI) The Colorado river water conservation district created in section 37-46-103, C.R.S., as authorized in section 37-46-107 (1) (i), C.R.S.;

(XXXII) The southwestern water conservation district created in section 37-47-103, C.R.S., as authorized in section 37-47-107 (1) (i), C.R.S.;

(XXXIII) The Rio Grande water conservation district created in section 37-48-102, C.R.S., as authorized in section 37-48-105 (1) (i), C.R.S.;

(XXXIV) The Republican river water conservation district created in section 37-50-103 (1), C.R.S., as authorized in section 37-50-107 (1) (j), C.R.S.;

(XXXV) The Colorado water conservation board created in section 37-60-102, C.R.S., as authorized in section 37-60-106 (1) (j), C.R.S.;

(XXXVI) The Colorado water resources and power development authority created in section 37-95-104 (1), C.R.S., as authorized in section 37-95-106 (1) (n) and (1) (v), C.R.S.;

(XXXVII) A public airport authority created under the provisions of article 3 of title 41, C.R.S., as authorized in section 41-3-106 (1) (j), C.R.S.;

(XXXVIII) A public highway authority created pursuant to section 43-4-504, C.R.S., as authorized in sections 43-4-505 (1) (a) (IV) and 43-4-506 (1) (h), C.R.S.;

(XXXIX) A regional transportation authority created pursuant to section 43-4-603, C.R.S., as authorized in section 43-4-604 (1) (a) (IV), C.R.S.; and

(XL) The Colorado aeronautical board created in section 43-10-104, C.R.S., as authorized in section 43-10-106 (1), C.R.S.

(2) The following types of corporations and persons, in accordance with all procedural and other requirements specified in this article and articles 2 to 7 of this title and to the extent and within any time frame specified in the applicable authorizing provision of the state constitution or statute may exercise the power of eminent domain:

(a) A person or corporation that needs to exercise the power of eminent domain in order to acquire any right-of-way across public, private, or corporate lands for the construction of ditches, canals, and flumes for the purposes of conveying water for domestic purposes, for the irrigation of agricultural lands, for mining and manufacturing purposes, or for drainage, as authorized in section 7 of article XVI of the state constitution;

(b) A pipeline company as authorized in article 5 of this title and sections 7-43-102, 34-48-105, 34-48-111, 38-1-101.5, 38-1-101.7, 38-2-101, 38-4-102, and 38-4-107, C.R.S.;

(c) A cemetery company organized pursuant to section 7-47-101, C.R.S., as authorized in section 7-47-102, C.R.S.;

(d) A cemetery authority, as defined in section 12-12-101 (2), C.R.S., as authorized in section 12-12-105, C.R.S.;

(e) A public utility as authorized in section 32-12-125, C.R.S.;

(f) An owner or agent of an owner of coal lands lying on two or more sides of the property of another as authorized in section 34-31-101, C.R.S.;

(g) A person who requires a right-of-way or property in order to bring water or air into a mine or convey tailings and wastes from a mining operation, construct or maintain a flume, ditch, pipeline, tram, tramway, or pack trail over or through mining claims, or follow a mineral-bearing vein or lode into the property of another person pursuant to an established

right to do so as authorized in sections 34-48-101, 34-48-105, 34-48-107, 34-48-110, and 34-48-111, C.R.S.;

(h) A natural gas public utility, as defined in section 34-64-102 (3), C.R.S., as authorized in section 34-64-103, C.R.S.;

(i) A person who owns a water right or conditional water right as authorized in article 86 of title 37, C.R.S.;

(j) A person who needs to create or operate a water storage facility in order to realize the person's right to appropriate water as authorized in section 37-87-101, C.R.S.;

(k) A person who, under general laws or special charter, requires and is entitled to private property of another for private use, private ways of necessity, or for reservoirs, drains, flumes, or ditches on or across the lands of others for agricultural, mining, milling, domestic, or sanitary purposes as authorized in section 38-1-102;

(l) A corporation formed for the purpose of constructing a road, ditch, reservoir, pipeline, bridge, ferry, tunnel, telegraph line, railroad line, electric line, electric plant, telephone line, or telephone plant as authorized in section 38-2-101;

(m) Landowners who wish to construct a drain to carry off surplus water as authorized in section 38-2-103;

(n) A mineral landowner who needs to construct a connecting railroad spur over another landowner's property as authorized in section 38-2-104;

(o) A tunnel company as authorized in sections 38-2-101, 38-4-101, 38-4-107, and 38-4-110;

(p) An electric power company as authorized in sections 38-2-101, 38-4-101, and 38-4-107;

(q) A tramway company as authorized in sections 38-4-104 and 38-4-107;

(r) A telegraph, telephone, electric light power, gas, or pipeline company as authorized in sections 38-2-101 and 38-5-105 and limited by section 38-5-108; and

(s) A person, company, corporation, or association that has been granted an electric railroad franchise as authorized in section 40-24-102, C.R.S.

**Source:** **L. 2006:** Entire part added, p. 353, § 1, effective August 7. **L. 2007:** (1)(c) amended, p. 550, § 6, effective August 3. **L. 2008:** (1)(d) and (1)(e) amended, p. 2055, § 13, effective July 1. **L. 2009:** (1)(b)(IV)(J) amended and (1)(b)(IV)(J.5) added, (SB 09-108), ch. 5, p. 54, § 16, effective March 2; (1)(f)(XX.5) added, (SB09-141), ch. 194, p. 875, § 2, effective April 30. **L. 2010:** (1)(b)(IV)(F) amended, (SB 10-175), ch. 188, p. 807, § 83, effective April 29. **L. 2011:** (1)(b)(IV)(F) amended, (HB 11-1303), ch. 264, p. 1173, § 87, effective August 10.

## ARTICLE 2

### Specific Grants of Power

38-2-101.	Who may condemn real estate, rights-of-way, or other rights - additional requirements for private toll roads and toll highways.	38-2-103.	Proceedings to drain.
		38-2-104.	Mineral landowner may construct connecting railway spur.
38-2-102.	Entering lands to survey - liability.	38-2-105.	Higher education governing boards have right of eminent domain.

**38-2-101. Who may condemn real estate, rights-of-way, or other rights - additional requirements for private toll roads and toll highways.** (1) If any corporation formed for the purpose of constructing a road, ditch, reservoir, pipeline, bridge, ferry, tunnel, telegraph line, railroad line, electric line, electric plant, telephone line, or telephone plant is unable to agree with the owner for the purchase of any real estate or right-of-way or easement or other right necessary or required for the purpose of any such corporation for transacting its business or for any lawful purpose connected with the operations of the company, the corporation may acquire title to such real estate or right-of-way or easement or other right in the manner provided by law for the condemnation of real estate or right-of-way. Any



ditch, reservoir, or pipeline company, in the same manner, may condemn and acquire the right to take and use any water not previously appropriated.

(2) Notwithstanding the provisions of subsection (1) of this section, a toll road or toll highway company may not condemn real estate or right-of-way, but the department of transportation may exercise, subject to the conditions and limitations set forth in sections 7-45-104 and 43-1-1202 (1) (f), C.R.S., the power of eminent domain for purposes of acquiring property and rights-of-way necessary for the completion of a toll road or toll highway open to the public that is incorporated into the comprehensive statewide transportation plan prepared pursuant to section 43-1-1103 (5), C.R.S., and is being undertaken as a public-private initiative between the department and the company. Such a toll road or toll highway company shall provide written notice of its intent to construct a toll road or toll highway as required by section 7-45-108 (2), C.R.S.

(3) Nothing in this section shall be construed to authorize any toll road or toll highway company to construct a toll road or toll highway through, in, upon, under, or over any street or alley of any city, incorporated town, county, or city and county without first obtaining the consent of the municipal or county authorities having power to give the consent of the city, incorporated town, county, or city and county.

(4) (a) A political subdivision may levy a tax, fee, or charge on a toll road or toll highway company for any right or privilege of constructing or operating a toll road or toll highway such as a street or public highway construction permit fee or an impact fee or other similar development charge designed to fund expenditures by the political subdivision on capital facilities needed to serve the toll road or toll highway, but shall only levy a construction permit fee to the extent that the permit fee applies to all persons seeking a construction permit.

(b) All permit fees, impact fees, or other similar development charges levied by a political subdivision on a toll road or toll highway company constructing or operating a toll road or toll highway shall be no greater than necessary to defray the costs directly incurred by the political subdivision in providing services, and, in the case of impact fees or other development charges, shall be no greater than necessary to defray impacts directly related to the toll road or toll highway. The fees and charges shall also be reasonably related in time to the incurrence of the impacts or costs. In any controversy concerning the appropriateness of a fee or charge, the political subdivision shall have the burden of proving that the fee or charge is no greater than necessary to defray the direct impacts or costs incurred by the political subdivision. All costs of construction shall be borne by the toll road or toll highway company constructing or operating the toll road or toll highway.

(5) As used in this section, unless the context otherwise requires:

(a) (Deleted by amendment, L. 2008, p. 1712, § 9, effective June 2, 2008.)

(b) "Toll road or toll highway" shall have the meaning set forth in section 7-45-102 (8), C.R.S.

(c) "Toll road or toll highway company" shall have the meaning set forth in section 7-45-102 (9), C.R.S.

**Source:** G.L. § 304. G.S. § 338. L. 1891: p. 98, § 3. R.S. 08: § 2461. C.L. § 6362. CSA: C. 61, § 52. L. 52: p. 109, § 1. CRS 53: § 50-2-1. C.R.S. 1963: § 50-2-1. L. 79: Entire section amended, p. 1381, § 2, effective July 1. L. 2006: (2), (3), and (4) amended and (5) added, p. 1769, § 2, effective June 6; entire section amended, p. 546, § 1, effective August 7. L. 2008: (2) and (5)(a) amended, p. 1712, § 9, effective June 2.

**Cross references:** For the taking of private property for private use, see § 14 of art. II, Colo. Const.; for taking property for public use, see § 15 of art. II, Colo. Const.; for the right-of-way of pipeline companies, see § 7-43-102.

## ANNOTATION

**Law reviews.** For article, "Eminent Domain in Colorado", see 29 Dicta 313 (1952). For article, "Recent Developments in Colorado Em-

inent Domain", see 27 Rocky Mt. L. Rev. 23 (1954). For article, "Condemnation and Redevelopment", see 28 Rocky Mt. L. Rev. 535

(1956). For article, "Assemblage, Design and Construction for Real Estate Developments", see 11 Colo. Law. 2297 (1982).

**Section not offensive to constitutions.** This section does not offend either § 25 of art. V, Colo. Const. or the fourteenth amendment of the federal constitution. *Miller v. Pub. Serv. Co.*, 129 Colo. 513, 272 P.2d 283 (1954), appeal dismissed, 348 U.S. 923, 75 S. Ct. 338, 99 L. Ed. 724 (1955).

**De facto corporation may exercise power of eminent domain.** *Crystal Park Co. v. Morton*, 27 Colo. App. 74, 146 P. 566 (1915).

**Irrigation districts fall within scope of section.** *Riverside Irrigation Dist. v. Lamont*, 194 Colo. 320, 572 P.2d 151 (1977).

**Applied** in *F.C. Ayres Mercantile Co. v. Union P.R.R.*, 16 F.2d 395 (8th Cir. 1926); *Pine Martin Mining Co. v. Empire Zinc Co.*, 90 Colo. 529, 11 P.2d 221 (1932); *Otero Irrigation Dist. v. Enderud*, 122 Colo. 136, 220 P.2d 862 (1950); *Potashnik v. Pub. Serv. Co.*, 126 Colo. 98, 247 P.2d 137 (1952); *Town of Glendale v. City & County of Denver*, 137 Colo. 188, 322 P.2d 1053 (1958); *Buck v. District Court*, 199 Colo. 344, 608 P.2d 350 (1980).

**38-2-102. Entering lands to survey - liability.** Any corporation formed for the purpose of constructing a road, ditch, tunnel, or railroad may cause such examination and survey as may be necessary to the selection of the most advantageous route and, for such purpose, by its officers, agents, or servants may enter upon the lands of any person or corporation, but subject to liability for all actual damages which are occasioned thereby.

**Source:** G.L. § 305. G.S. § 339. R.S. 08: § 2462. C.L. § 6363. CSA: C. 61, § 53. CRS 53: § 50-2-2. C.R.S. 1963: § 50-2-2.

**38-2-103. Proceedings to drain.** Whenever the owners of any parcels of land desire to construct a drain for the purpose of carrying off surplus water and they cannot agree among themselves or with the parties who own land below, through which it is expedient to carry the drain in order to reach a natural waterway, then proceedings may be had in the same manner as in cases of eminent domain affecting irrigation works of diversion. The rights-of-way for such drains shall be regarded as equal to those for irrigation canals.

**Source:** L. 1893: p. 258, § 1. R.S. 08: § 2463. C.L. § 6364. CSA: C. 61, § 54. CRS 53: § 50-2-3. C.R.S. 1963: § 50-2-3.

**38-2-104. Mineral landowner may construct connecting railway spur.** It is lawful for the owner of any coal or other mineral lands, not contiguous to any railroad in this state, desiring to connect such lands with any railroad by means of a connecting railway spur, not to exceed fifteen miles in length, to construct and operate such connecting railway spur across any other lands lying intermediate between such coal or other mineral lands and any railroad with which such connection may be desired. In case the owner of such coal or other mineral lands is unable to agree with the owner of such intermediate lands for the purchase of any necessary rights-of-way across such intermediate lands for the purpose of constructing and operating such connecting railway spur as to the purchase price on such rights-of-way, then the owner of such coal or other mineral lands may exercise the right of eminent domain and condemn any rights-of-way across such intermediate lands necessary to make such connection and to construct and operate such connecting railway spur, and it may acquire title to such rights-of-way in the manner provided by law for the condemnation of lands for rights-of-way by railroad companies. All the laws of this state relating to the manner of exercising the right of eminent domain by railroad companies are hereby made applicable to such proceedings.

**Source:** L. 01: p. 237, § 1. R.S. 08: § 2464. C.L. § 6365. CSA: C. 61, § 55. CRS 53: § 50-2-4. C.R.S. 1963: § 50-2-4.

**38-2-105. Higher education governing boards have right of eminent domain.** The regents of the university of Colorado, the board of governors of the Colorado state university system for Colorado state university and Colorado state university - Pueblo, the board of trustees for Fort Lewis college, the board of trustees of the Colorado school of



mines, the board of trustees for the university of northern Colorado, the board of trustees for Adams state university, the board of trustees for Colorado Mesa university, the board of trustees for Western state Colorado university, and the board of trustees for Metropolitan state university of Denver have the power to acquire real property, which they may deem necessary, by the exercise of eminent domain through condemnation proceedings in accordance with law.

**Source:** L. 37: p. 402, § 1. CSA: C. 61, § 56. CRS 53: § 50-2-5. L. 61: pp. 708, 709, §§ 2, 3. C.R.S. 1963: § 50-2-5. L. 2002: Entire section amended, p. 1249, § 27, effective August 7. L. 2003: Entire section amended, p. 2002, § 65, effective May 22; entire section amended, p. 792, § 15, effective July 1. L. 2004: Entire section amended, p. 1205, § 81, effective August 4. L. 2010: Entire section amended, (HB 10-1375), ch. 327, p. 1515, § 1, effective May 27. L. 2011: Entire section amended, (SB 11-265), ch. 292, p. 1368, § 26, effective August 10. L. 2012: Entire section amended, (HB 12-1080), ch. 189, p. 761, § 25, effective May 19; entire section amended, (SB 12-148), ch. 125, p. 429, § 20, effective July 1; entire section amended, (HB 12-1331), ch. 254, p. 1272, § 20, effective August 1.

**Editor's note:** (1) Amendments to this section by House Bill 03-1093 and House Bill 03-1344 were harmonized.

(2) Amendments to this section by House Bill 12-1080, House Bill 12-1331, and Senate Bill 12-148 were harmonized.

**Cross references:** (1) For the legislative declaration in the 2011 act amending this section, see section 1 of chapter 292, Session Laws of Colorado 2011.

(2) For the legislative declaration in the 2012 act amending this section, see section 1 of chapter 125, Session Laws of Colorado 2012.

## ARTICLE 3

### Condemnation of Public Lands

38-3-101.	Condemning public land - petition.	38-3-104.	lished. Order - copy recorded.
38-3-102.	Notice - service - publication.	38-3-105.	Judgment - appellate review.
38-3-103.	Hearing - findings filed - pub-		

**38-3-101. Condemning public land - petition.** Whenever any corporation authorized to appropriate for a public use by the exercise of the right of eminent domain lands, rights-of-way, or other rights or easements in lands requires, needs, or desires to appropriate lands, rights-of-way, or other rights or easements in lands which belong to the United States, the state of Colorado, or any other state or sovereignty, such corporation, for the purpose of having such lands, rights-of-way, or other rights or easements appropriated to such use and for determining the compensation to be paid to such owner therefor, may present a petition to the district court in each of the counties in which such lands, or any part thereof, are located, describing the desired property, giving the name of the owner thereof, and stating by whom and for what purpose it is proposed to be appropriated and that it is needed and required by the petitioner for the public use to which it is proposed to devote the same, and praying that such court appropriate such property to its use and determine the compensation to be paid to the owner therefor.

**Source:** L. 15: p. 229, § 1. C.L. § 6331. CSA: C. 61, § 21. CRS 53: § 50-3-1. C.R.S. 1963: § 50-3-1. L. 64: p. 266, § 167.

## ANNOTATION

**Law reviews.** For article, "Eminent Domain in Colorado", see 29 Dicta 313 (1952).

**This section does not grant any authority to corporations that have power of eminent**

**domain to condemn state lands but merely establishes the procedures by which to do so.**

Town and water and sanitation district were not authorized to condemn state-owned property to determine feasibility of recreation and water

storage project. *Town of Parker v. Colo. Div. of Parks*, 860 P.2d 584 (Colo. App. 1993).

**Applied in** *Denver & R.G.R.R. v. Wilson*, 28 Colo. 6, 62 P. 843 (1900) (decided prior to section's earliest source, L. 15, p. 229, § 1).

**38-3-102. Notice - service - publication.** The court shall fix a time for the first hearing upon said petition. Notice directed to such owner of the filing of the petition and its object and containing a description of the property and of the time and place of the first hearing shall be published by such corporation in one or more newspapers of general circulation in the state of Colorado once a week for six weeks prior to the time set for the first hearing. At least two weeks before the time set for the first hearing, a copy of said notice shall be served on any party who is in actual possession of the land, and, in case the state is the owner, on the attorney general, and, in case the United States is the owner, on the United States attorney for the district in which the land or any part thereof is situated. The copy of such notice shall be deemed to have been sufficiently served if delivered during the usual hours of business at the residence of the party in possession or at the office of the attorney general or the United States attorney, as the case may be.

**Source:** L. 15: p. 230, § 2. C.L. § 6332. CSA: C. 61, § 22. CRS 53: § 50-3-2. C.R.S. 1963: § 50-3-2. L. 76: Entire section amended, p. 607, § 33, effective July 1.

**Cross references:** For publication of legal notices, see part 1 of article 70 of title 24.

**38-3-103. Hearing - findings filed - published.** Upon proof being filed of the publication of such notice and of such personal service where required, the court, at the time and place therein fixed or to which the hearing may be adjourned, shall proceed to hear the allegations and proofs of all persons interested which touch the matters committed to it, and it shall regulate the order of proof as it may deem best. The testimony taken by it shall be under oath. The court shall determine the truth of the matters alleged and set forth in the petition and also the compensation to be paid to such owner for the lands, rights-of-way, or other rights or easements in lands to be appropriated. In the event that the petitioner has theretofore taken possession of such lands, rights-of-way, or other rights or easements in lands, the value thereof shall be determined without considering the value of any improvements that may have been constructed by such corporation and as of the date when such corporation took possession. The court shall file among its records its findings in writing and shall give notice to the petitioner that its findings have been filed. The petitioner shall cause a notice to be published in one or more newspapers of general circulation in the state of Colorado once a week for two weeks, setting forth that the findings of the court have been filed and stating the amount of the compensation fixed by the court. If the owner has appeared in said proceeding by attorney, a copy of said notice shall be served prior to the last publication of said notice upon the attorney so appearing.

**Source:** L. 15: p. 230, § 3. C.L. § 6333. CSA: C. 61, § 23. CRS 53: § 50-3-3. C.R.S. 1963: § 50-3-3.

**38-3-104. Order - copy recorded.** In case no appeal is taken within thirty days after the last publication of notice that the findings of the court have been filed, the court, upon the payment by the petitioner to the clerk of such court of the compensation fixed by the court and upon motion of the petitioner, shall enter an order appropriating the lands, rights-of-way, or other rights or easements in lands, as the case may be, to the petitioner. Thereafter, the same shall be the property of the petitioner, and a certified copy of the order may be filed for record with the county clerk and recorder of the county in which such lands, rights-of-way, or other rights or easements in lands are located. Such record shall be notice, and a certified copy of such record shall be evidence of the title and rights of the petitioner as therein set forth. The clerk of said court shall notify the owner of the property of the payment of the compensation fixed by the court and shall pay the same to such owner on demand.



**Source:** L. 15: p. 231, § 4. C.L. § 6334. CSA: C. 61, § 24. CRS 53: § 50-3-4. C.R.S. 1963: § 50-3-4.

**38-3-105. Judgment - appellate review.** Upon the payment into court of the compensation assessed, the court shall give judgment appropriating the lands, rights-of-way, or other rights or easements in lands, as the case may be, to the petitioner, and thereafter the same shall be the property of the petitioner. Either party to the action may appeal from the judgment in like manner and with like effect as in ordinary condemnation cases. Such appeal shall not stay the proceedings so as to prevent the petitioner from taking such lands into its possession and using them for the purposes of the petitioner or from proceeding to exercise the rights-of-way or other rights or easements appropriated.

**Source:** L. 15: p. 231, § 5. C.L. § 6335. CSA: C. 61, § 25. CRS 53: § 50-3-5. C.R.S. 1963: § 50-3-5.

## ARTICLE 4

### Rights-of-way: Designated Common Carriers

38-4-101.	Tunnel companies.	38-4-111.	Tunnel company to file map.
38-4-102.	Pipeline companies.	38-4-112.	Pipeline company to file map.
38-4-103.	Electric power companies.	38-4-113.	Power company to file map.
38-4-104.	Tramway companies.	38-4-114.	Tramway company to file map.
38-4-105.	Common carriers - fees.		
38-4-106.	Distance governs rate.	38-4-115.	Companies to transport ore - toll.
38-4-107.	Compensation.		
38-4-108.	Owner entitled to minerals.	38-4-116.	Companies to furnish power - fees.
38-4-109.	Owner to have access to tunnel.		
38-4-110.	No right to vein matter acquired.		

**38-4-101. Tunnel companies.** Any foreign or domestic corporation organized or chartered for the purpose, among other things, of carrying, transmitting, or delivering ores, minerals, or other property for hire by means of a tunnel shall have the right-of-way for the construction, operation, and maintenance of any such tunnel of sufficient size and dimensions for such purpose through or over any patented or unpatented mines, mining claims, or other lands without the consent of the owner thereof, if such right-of-way is necessary to reach the place to or from which it is proposed to carry such ores, minerals, or other property.

**Source:** L. 07: p. 282, § 1. R.S. 08: § 2435. C.L. § 6336. CSA: C. 61, § 26. CRS 53: § 50-4-1. C.R.S. 1963: § 50-4-1.

## ANNOTATION

**Law reviews.** For article, "Eminent Domain in Colorado", see 29 Dicta 313 (1952).

**Applied** in *Tanner v. Treasury Tunnel, Mining & Reduction Co.*, 35 Colo. 593, 83 P. 464, 4

L.R.A. (n.s.) 106 (1906); *Sternberger v. Continental Mines Power & Reduction Co.*, 68 Colo. 129, 186 P. 910 (1920).

**38-4-102. Pipeline companies.** Any foreign or domestic corporation organized or chartered for the purpose, among other things, of conducting or maintaining a pipeline for the transmission of power, water, air, or gas for hire to any mine or mining claim or for any manufacturing, milling, mining, or public purpose shall have the right-of-way for the construction, operation, and maintenance of such pipeline for such purpose through any lands without the consent of the owner thereof, if such right-of-way is necessary for the purpose for which said pipeline is used.

**Source:** L. 07: p. 283, § 2. R.S. 08: § 2436. C.L. § 6337. CSA: C. 61, § 27. CRS 53: § 50-4-2. C.R.S. 1963: § 50-4-2.

**Cross references:** For the right-of-way of pipeline companies, see § 7-43-102.

**38-4-103. Electric power companies.** Any foreign or domestic corporation organized or chartered for the purpose, among other things, of conducting and maintaining electric power transmission lines for providing power or light by means of electricity for hire shall have a right-of-way for the construction, operation, and maintenance of such electric power transmission lines through any patented or unpatented mine or mining claim or other land without the consent of the owner thereof, if such right-of-way is necessary for the purposes proposed.

**Source:** L. 07: p. 283, § 3. R.S. 08: § 2437. C.L. § 6338. CSA: C. 61, § 28. CRS 53: § 50-4-3. C.R.S. 1963: § 50-4-3.

**38-4-104. Tramway companies.** Any foreign or domestic corporation organized or chartered for the purposes, among other things, of conducting and maintaining for hire an aerial tramway for transporting ores, minerals, waste materials, or other property from any mine or mining claim by means of an aerial tramway shall have the right-of-way for the construction, operation, and maintenance for such tramway and for all necessary towers and supports thereof over and across any intervening mining claims, lands, or premises without the consent of the owner thereof, if such right-of-way is necessary for the purposes proposed.

**Source:** L. 07: p. 283, § 4. R.S. 08: § 2438. C.L. § 6339. CSA: C. 61, § 29. CRS 53: § 50-4-4. C.R.S. 1963: § 50-4-4.

**38-4-105. Common carriers - fees.** Any such corporations organized or chartered for any or all of the purposes mentioned in sections 38-4-101 to 38-4-104 shall be deemed common carriers and shall fix and charge only a reasonable and uniform rate to all persons who desire the use of any such tunnel, pipeline, electric power transmission lines, or aerial tramway.

**Source:** L. 07: p. 283, § 5. R.S. 08: § 2439. C.L. § 6340. CSA: C. 61, § 30. CRS 53: § 50-4-5. C.R.S. 1963: § 50-4-5.

**38-4-106. Distance governs rate.** In fixing the rate to be charged its patrons, as provided in section 38-4-105, any such transportation tunnel company or aerial tramway company shall take into consideration the distance over which the materials to be transported are carried.

**Source:** L. 07: p. 284, § 6. R.S. 08: § 2440. C.L. § 6341. CSA: C. 61, § 31. CRS 53: § 50-4-6. C.R.S. 1963: § 50-4-6.

**38-4-107. Compensation.** Any such corporation shall make due and just compensation for such right-of-way to the owners of the property through which it is proposed to construct, operate, and maintain such tunnel, pipeline, electric transmission lines, or aerial tramway. When the parties cannot agree upon such right-of-way and the amount of compensation to be paid the owner of such property, the same shall be determined in the manner provided by law for the exercise of the right of eminent domain.

**Source:** L. 07: p. 284, § 7. R.S. 08: § 2441. C.L. § 6342. CSA: C. 61, § 32. CRS 53: § 50-4-7. C.R.S. 1963: § 50-4-7.



**38-4-108. Owner entitled to minerals.** The owner of any vein, lode, mining claim, or other property over which it is proposed to construct a tunnel, as provided in this article, shall have the right to all ores and minerals taken from such vein or lode at the intersection thereof with such tunnel.

**Source:** L. 07: p. 284, § 8. R.S. 08: § 2442. C.L. § 6343. CSA: C. 61, § 33. CRS 53: § 50-4-8. C.R.S. 1963: § 50-4-8.

**38-4-109. Owner to have access to tunnel.** The owner of such vein or lode so intersected shall have the right, at any reasonable time and from time to time, upon application to the superintendent or other managing officer of such tunnel corporation, to enter such tunnel with his surveyors and inspectors for the purpose of inspecting and making a survey of any such vein or lode. The owner of such vein or lode and his employees shall have the right of ingress and egress into and out of said tunnel at all reasonable times.

**Source:** L. 07: p. 284, § 9. R.S. 08: § 2443. C.L. § 6344. CSA: C. 61, § 34. CRS 53: § 50-4-9. C.R.S. 1963: § 50-4-9.

**38-4-110. No right to vein matter acquired.** Nothing in this article shall be so construed as to give such tunnel corporation the right to follow any vein or lode without the consent of the owner. When any vein or lode is encountered in driving any such tunnel, such tunnel corporation shall only have the right-of-way to cross such vein or lode at such angle as may be suitable for the convenient operation of the tunnel.

**Source:** L. 07: p. 284, § 10. R.S. 08: § 2444. C.L. § 6345. CSA: C. 61, § 35. CRS 53: § 50-4-10. C.R.S. 1963: § 50-4-10.

**38-4-111. Tunnel company to file map.** Any such tunnel corporation desiring to avail itself of the benefit of this article shall file with the county clerk and recorder of the county in which it is proposed to operate a map or survey of the proposed tunnel for which it desires a right-of-way, together with a statement showing the route of the proposed tunnel and the patented or unpatented mining claims or other property through which it is proposed to construct the same, and may file supplementary maps and surveys upon any lawful change of its proposed line of tunnel.

**Source:** L. 07: p. 284, § 11. R.S. 08: § 2445. C.L. § 6346. CSA: C. 61, § 36. CRS 53: § 50-4-11. C.R.S. 1963: § 50-4-11.

**38-4-112. Pipeline company to file map.** Any such pipeline corporation desiring to avail itself of the benefit of this article shall file with the county clerk and recorder of the county in which it is proposed to operate a map or survey of the proposed line for which it desires a right-of-way, together with a statement showing the route of the proposed pipeline and the patented or unpatented mining claims or other property through which it is proposed to construct the same, and may file supplementary maps and surveys upon any lawful change of its proposed line.

**Source:** L. 07: p. 285, § 12. R.S. 08: § 2446. C.L. § 6347. CSA: C. 61, § 37. CRS 53: § 50-4-12. C.R.S. 1963: § 50-4-12.

**38-4-113. Power company to file map.** Any such electric power transmission corporation desiring to avail itself of the benefit of this article shall file with the county clerk and recorder of the county in which it proposes to operate a map or survey of the proposed lines for which it desires a right-of-way, together with a statement showing the route of the proposed lines and the patented or unpatented mining claims or other property through which it is proposed to construct the same, and may file supplementary maps and surveys upon any lawful change of its proposed lines.

**Source:** L. 07: p. 285, § 13. **R.S. 08:** § 2447. **C.L.** § 6348. **CSA:** C. 61, § 38. **CRS 53:** § 50-4-13. **C.R.S. 1963:** § 50-4-13.

**38-4-114. Tramway company to file map.** Any such aerial tramway corporation desiring to avail itself of the benefit of this article shall file with the county clerk and recorder of the county in which it is proposed to operate a map or survey of the proposed route for which it desires a right-of-way, together with a statement showing the route of the proposed tramway and the patented or unpatented mining claims or other property over or across which it is proposed to construct the same, and may file supplementary maps and surveys upon any lawful change of its proposed route.

**Source:** L. 07: p. 285, § 14. **R.S. 08:** § 2448. **C.L.** § 6349. **CSA:** C. 61, § 39. **CRS 53:** § 50-4-14. **C.R.S. 1963:** § 50-4-14.

**38-4-115. Companies to transport ore - toll.** Any such tunnel or aerial tramway corporation, subject to its reasonable regulations, shall accept from the owners of mining properties all ores, waste materials, and other materials loaded in cars and delivered to it along its line of tunnel or aerial tramways for transportation and afford facilities for the handling of the same at such place upon payment to it at the rates established and fixed by such tunnel or aerial tramway corporation.

**Source:** L. 07: p. 285, § 15. **R.S. 08:** § 2449. **C.L.** § 6350. **CSA:** C. 61, § 40. **CRS 53:** § 50-4-15. **C.R.S. 1963:** § 50-4-15.

**38-4-116. Companies to furnish power - fees.** Any such pipeline corporation or electric power transmission corporation, subject to its reasonable regulations, shall furnish to the owners of mining properties power from said pipelines or electric power transmission lines upon payment to it at the rates established and fixed by such corporation.

**Source:** L. 07: p. 286, § 16. **R.S. 08:** § 2450. **C.L.** § 6351. **CSA:** C. 61, § 41. **CRS 53:** § 50-4-16. **C.R.S. 1963:** § 50-4-16.

ARTICLE 5

Rights-of-way: Transmission Companies

38-5-101.	Use of public highways.		have eminent domain right.
38-5-102.	Right-of-way across state land.	38-5-106.	Possession pending action.
38-5-103.	Power of companies to contract.	38-5-107.	Companies, cities, and towns carrying high voltage - crossings - arbitration.
38-5-104.	Right-of-way across private lands.	38-5-108.	Consent necessary to use of streets.
38-5-105.	Companies, cities, and towns		

**38-5-101. Use of public highways.** Any domestic or foreign electric light power, gas, or pipeline company authorized to do business under the laws of this state or any city or town owning electric power producing or distribution facilities shall have the right to construct, maintain, and operate lines of electric light, wire or power or pipeline along, across, upon, and under any public highway in this state, subject to the provisions of this article. Such lines of electric light, wire or power, or pipeline shall be so constructed and maintained as not to obstruct or hinder the usual travel on such highway.

**Source:** L. 07: p. 385, § 1. **R.S. 08:** § 2451. **C.L.** § 6352. **CSA:** C. 61, § 42. **L. 39:** p. 365, § 1. **CRS 53:** § 50-5-1. **L. 63:** p. 479, § 1. **C.R.S. 1963:** § 50-5-1. **L. 96:** Entire section amended, p. 303, § 2, effective April 12.



## ANNOTATION

**Law reviews.** For article, "Eminent Domain in Colorado", see 29 Dicta 313 (1952). For comment on *Englewood v. Mountain States Tel. & Tel. Co.*, 163 Colo. 400, 431 P.2d 40 (1967), appearing below, see 40 U. Colo. L. Rev. 167 (1967).

**Section within constitutional boundaries.** The provisions of this section are well within the boundaries of art. XXV, Colo. Const. *City of Englewood v. Mountain States Tel. & Tel. Co.*, 163 Colo. 400, 431 P.2d 40 (1967).

**Right granted subject to reasonable changes by municipal authorities.** The right granted in this section is qualified and subject to the power of the municipal authorities to make such reasonable changes in the grade or an improvement therein as in their judgment the public interests demanded and required. *Mountain States Tel. & Tel. Co. v. Horn Tower Constr. Co.*, 147 Colo. 166, 363 P.2d 175 (1961).

**The provisions of this section are not applicable** to grant a state franchise to continue using public highways when consent of a city was never obtained by a rural electric association for the use of the city's streets to expand its facilities. *City of Greeley v. Poudre Valley R. Elec.*, 744 P.2d 739 (Colo. 1987), appeal dismissed for want of a properly presented federal question, 485 U.S. 949, 108 S. Ct. 1207, 99 L. Ed. 2d 409 (1988).

**An intoxicated, speeding driver is not engaged in "usual travel" and, therefore, is not within the class of persons intended to be protected by this section.** *Jacque v. Pub. Serv. Co. of Colo.*, 890 P.2d 138 (Colo. App. 1994).

**Applied in** *Sternberger v. Cont'l Mines Power & Reduction Co.*, 68 Colo. 129, 186 P. 910 (1920); *City of Northglenn v. City of Thornton*, 193 Colo. 536, 569 P.2d 319 (1977).

**38-5-102. Right-of-way across state land.** Any domestic or foreign electric light power, gas, or pipeline company authorized to do business under the laws of this state, or any city or town owning electric power producing or distribution facilities shall have the right to construct, maintain, and operate lines of electric light wire or power or pipeline and obtain permanent right-of-way therefor over, upon, under, and across all public lands owned by or under the control of the state, upon the payment of such compensation and upon compliance with such reasonable conditions as may be required by the state board of land commissioners.

**Source:** L. 07: p. 385, § 2. R.S. 08: § 2452. C.L. § 6353. CSA: C. 61, § 43. L. 39: p. 365, § 2. CRS 53: § 50-5-2. L. 63: p. 479, § 2. C.R.S. 1963: § 50-5-2. L. 96: Entire section amended, p. 303, § 3, effective April 12.

**38-5-103. Power of companies to contract.** Such electric light power, gas, or pipeline company, or such city or town shall have power to contract with any person or corporation, the owner of any lands or any franchise, easement, or interest therein over or under which the line of electric light wire power or pipeline is proposed to be laid or created for the right-of-way for the construction, maintenance, and operation of its electric light wires, pipes, poles, regulator stations, substations, or other property and for the erection, maintenance, occupation, and operation of offices at suitable distances for the public accommodation.

**Source:** L. 07: p. 386, § 3. R.S. 08: § 2453. C.L. § 6354. CSA: C. 61, § 44. CRS 53: § 50-5-3. L. 63: p. 480, § 3. C.R.S. 1963: § 50-5-3. L. 96: Entire section amended, p. 303, § 4, effective April 12.

**38-5-104. Right-of-way across private lands.** (1) Such telegraph, telephone, electric light power, gas, or pipeline company or such city or town shall be entitled to the right-of-way over or under the land, property, privileges, rights-of-way, and easements of other persons and corporations and to the right to erect its poles, wires, pipes, regulator stations, substations, systems, and offices upon making just compensation therefor in the manner provided by law. The rights granted by this section and section 38-5-105 to such electric light power, gas, or pipeline companies or to such cities and towns shall not extend to the taking of any portion of the right-of-way of a railroad company, except to the extent of acquiring any necessary easement to cross the same or to serve such railroad company

with electric light, power, or gas service. The rights granted by this section and section 38-5-105 to telegraph or telephone companies shall not extend to the taking of any portion of the right-of-way of a railroad company, except to the extent of acquiring any easement which does not materially interfere with the existing use by the railroad company, or except to the extent of acquiring any necessary easement to cross the same or to serve such railroad company with telegraph or telephone service.

(2) If any right-of-way is taken by such telegraph, telephone, electric light power, gas, or pipeline company, city or town over any portion of the right-of-way of a railroad company the taking party shall pay the entire cost of constructing its facilities along such right-of-way, including any expenses incurred by the railroad for inspection and flagging as reasonably necessary to avoid interference with safe operation of the railroad. The taking party shall also bear the entire cost, including the cost of such inspection and flagging, of removing, relocating, altering, or protecting any facility installed on right-of-way so taken if, at any time, such removal, relocation, alteration, or protection becomes reasonably necessary to avoid interference with the railroad company's ability to use its original right-of-way to operate its railroad efficiently and safely and to efficiently and safely serve existing, new, or potential railroad customers. The taking party shall indemnify the railroad company from all losses and expenses resulting from the negligence of the taking party, its successors or contractors, in connection with or related to such right-of-way. The taking party shall have no claim against the railroad for any loss resulting from damage to the taking party's telegraph or telephone facilities resulting from any unforeseen emergencies or acts of God such as derailment, explosions, collisions, or activities reasonably performed in repairing damages caused by such occurrences.

**Source:** L. 07: p. 386, § 4. R.S. 08: § 2454. C.L. § 6355. CSA: C. 61, § 45. CRS 53: § 50-5-4. L. 63: p. 480, § 4. C.R.S. 1963: § 50-5-4. L. 79: Entire section amended, p. 1382, § 3, effective July 1.

**38-5-105. Companies, cities, and towns have eminent domain right.** Such telegraph, telephone, electric light power, gas, or pipeline company or such city or town is vested with the power of eminent domain, and authorized to proceed to obtain rights-of-way for poles, wires, pipes, regulator stations, substations, and systems for such purposes by means thereof. Whenever such company or such city or town is unable to secure by deed, contract, or agreement such rights-of-way for such purposes over, under, across, and upon the lands, property, privileges, rights-of-way, or easements of persons or corporations, it shall be lawful for such telegraph, telephone, electric light power, gas, or pipeline company or any city or town owning electric power producing or distribution facilities to acquire such title in the manner now provided by law for the exercise of the right of eminent domain and in the manner as set forth in this article.

**Source:** L. 07: p. 386, § 5. R.S. 08: § 2455. C.L. § 6356. CSA: C. 61, § 46. CRS 53: § 50-5-5. L. 63: p. 480, § 5. C.R.S. 1963: § 50-5-5.

#### ANNOTATION

**Because corporation is a foreign corporation,** in good standing and authorized to do business in Colorado, operates and maintains a pipeline on landowner's properties, conveys petroleum products through its pipelines, and would be responsible for the construction, cost, operation, and maintenance of the pipeline, corporation is a pipeline company for purposes of this section. *Sinclair Transp. Co. v. Sandberg*, 228 P.3d 198 (Colo. App. 2009).

**Trial court did not err in determining that corporation is a pipeline company under this section with the power of eminent domain and the authority to condemn landowners' property.** *Sinclair Transp. Co. v. Sandberg*, 228 P.3d 198 (Colo. App. 2009).

**Applied** in *Larson v. Chase Pipe Line Co.*, 183 Colo. 76, 514 P.2d 1316 (1973).



**38-5-106. Possession pending action.** At any time after jurisdiction has been obtained pursuant to section 38-1-103, the petitioner, upon notice to the respondent pursuant to the Colorado rules of civil procedure, may move for an order for immediate possession. Upon such motion and after hearing, the court, by rule in that behalf made, may authorize the petitioner, upon payment into court or to the clerk thereof of the amount determined by the court as probably sufficient to pay the sum that may ultimately be awarded as compensation and damages for the taking, if not in possession to take possession of such right-of-way, and if already in possession to maintain and keep such possession, and in all cases to use and enjoy such right-of-way during the pendency and until the final conclusion of such proceedings, and the court may stay all actions and proceedings against such petitioner on account thereof. Withdrawal from the sum so deposited may be had as provided in section 38-1-105 (6) (b). At such hearing for immediate possession, the court shall hear and dispose of all objections that are raised at that time concerning the motion for immediate possession, the legal sufficiency of the petition, or the regularity of the proceedings in any other respect.

**Source:** L. 07: p. 386, § 6. R.S. 08: § 2456. C.L. § 6357. CSA: C. 61, § 47. CRS 53: § 50-5-6. C.R.S. 1963: § 50-5-6. L. 75: Entire section amended, p. 1406, § 2, effective July 18.

#### ANNOTATION

**Section inapplicable to acquisition of land for highway purposes.** This section has no application whatever to eminent domain proceedings in which rights-of-way for highways are sought, and it is error to assume that this section confers any right or authority to maintain an action hereunder to acquire lands for highway purposes. *Swift v. Smith*, 119 Colo. 126, 201 P.2d 609 (1948).

**Possession may be acquired only if property acquirable by eminent domain.** A public service company may not lawfully acquire immediate possession of any property pursuant to this section unless that property could be lawfully acquired by the exercise of eminent domain. *Shaklee v. District Court*, 636 P.2d 715 (Colo. 1981).

**Possession may not be awarded pending determination of public use.** Because land cannot lawfully be condemned pending a judicial determination of the issue of public use, neither may immediate possession pendente lite be awarded. *Shaklee v. District Court*, 636 P.2d 715 (Colo. 1981).

**Applied** in *Colo. Fuel & Iron Co. v. Four Mile Ry.*, 29 Colo. 90, 66 P. 902 (1901); *Lavelle v. Town of Julesburg*, 49 Colo. 290, 112 P. 774 (1910); *Denver & R.G.R.R. v. Mills*, 59 Colo. 198, 147 P. 681 (1915); *Mulford v. Farmers' Reservoir & Irrigation Co.*, 62 Colo. 167, 161 P. 301 (1916); *Beth Medrosh Hagodol v. City of Aurora*, 126 Colo. 267, 248 P.2d 732 (1952).

**38-5-107. Companies, cities, and towns carrying high voltage - crossings - arbitration.** (1) Any person, corporation, or city or town seeking to secure a right-of-way for lines of electric light or for the transmission of electric power for any purpose over, under, or across any right-of-way of any other person, corporation, or city or town for such purposes or seeking to erect or construct its lines of wire under or over the lines of wire already constructed by such other person, corporation, or city or town for any such purposes upon, under, along, or across any public highway or upon, under, along, or across any public lands owned or controlled by the state of Colorado before constructing such lines or wires over, under, or across such rights-of-way or wires of other persons, corporations, or cities or towns, where either of said lines or wires carry a current at an electrical pressure of five thousand volts or more, shall agree with such other persons, corporations, or cities or towns as to the conditions under or upon which such overhead or underneath construction or crossing shall be made, looking to the due protection and safeguard of the wires of the person, corporation, or city or town already having a right-of-way for such wires and looking to the safety of life, health, and property. In case of an inability to agree upon the conditions under or upon which such overhead or underneath crossings shall be made, the person, corporation, or city or town owning and operating or controlling the lines of wires already built or constructed and the person, corporation, or city or town seeking to construct new lines or wires or to make said crossings shall each select a person as an arbitrator,

which two persons shall determine said conditions under or upon which such overhead or underneath construction or crossing shall be made. In case of a disagreement in regard thereto by the arbitrators, they shall select a third person to act with them, and the decision made by any two of said arbitrators shall be final and binding upon the person, corporation, or city or town so seeking to make or construct the crossings, who shall construct the crossings in a manner determined by such arbitrators.

(2) The parties interested, before they make their submission to the arbitrators, shall make and subscribe a written article of agreement in and by which they shall agree to submit the matter as to how said crossings shall be made to the arbitrators named, and will abide by their award. Said award shall be in writing, and a copy thereof delivered to each of the parties interested. Such conditions for protection at said crossings shall be established at the sole expense of the person, corporation, or city or town seeking the right-of-way for such overhead or underneath construction or crossings. Nothing in this article shall affect the right of any person, corporation, or city or town to make such crossings where the lines or wires of neither of the parties concerned carry a current at an electrical pressure of less than five thousand volts.

**Source:** L. 07: p. 387, § 7. R.S. 08: § 2457. C.L. § 6358. CSA: C. 61, § 48. CRS 53: § 50-5-7. L. 63: p. 481, § 6. C.R.S. 1963: § 50-5-7. L. 96: (1) amended, p. 303, § 5, effective April 12.

**38-5-108. Consent necessary to use of streets.** Nothing in this article shall be construed to authorize any person, partnership, association, corporation, or city or town to erect any poles, construct any electric light power line, or pipeline, or extend any wires or lines along, through, in, upon, under, or over any streets or alleys of any city or incorporated town without first obtaining the consent of the municipal authorities having power to give the consent of such city or incorporated town.

**Source:** L. 07: p. 388, § 8. R.S. 08: § 2458. C.L. § 6359. CSA: C. 61, § 49. CRS 53: § 50-5-8. L. 63: p. 482, § 7. C.R.S. 1963: § 50-5-8. L. 96: Entire section amended, p. 303, § 6, effective April 12.

ANNOTATION

**Law reviews.** For comment on Englewood v. Mountain States Tel. & Tel. Co., 163 Colo. 400, 431 P.2d 40 (1967), appearing below, see 40 U. Colo. L. Rev. 167 (1967).

**The right to maintain right-of-way continues until** the state, which granted the privilege, desires to modify, alter, or withdraw it. City of

Englewood v. Mountain States Tel. & Tel. Co., 163 Colo. 400, 431 P.2d 40 (1967).

**Applied** in Town of Lyons v. City of Longmont, 54 Colo. 112, 129 P. 198 (1912); Pub. Serv. Co. v. City of Loveland, 79 Colo. 216, 245 P. 493 (1926).

ARTICLE 5.5

Rights-of-way: Telecommunications Providers

**Law reviews:** For article, “S.B. 10: Access to Public Rights-of-Way for Telecommunications Providers”, see 25 Colo. Law. 89 (September 1996); for article, “Rights-of-Way Regulating Authority After Denver v. Qwest”, see 30 Colo. Law. 103 (July 2001).

38-5.5-101.	Legislative declaration.		land.
38-5.5-102.	Definitions.	38-5.5-105.	Power of companies to contract.
38-5.5-103.	Use of public highways - discrimination prohibited - content regulation prohibited.	38-5.5-106.	Consent necessary to use of streets.
		38-5.5-107.	Permissible taxes, fees, and charges.
38-5.5-104.	Right-of-way across state		



38-5.5-108. Pole attachment agreements - limitations on required payments.

**38-5.5-101. Legislative declaration.** (1) The general assembly hereby finds, determines, and declares that:

(a) The passage of House Bill 95-1335, enacted at the first regular session of the sixtieth general assembly, established a policy within the state to encourage competition among the various telecommunications providers, to reduce the barriers to entry for those providers, to authorize and encourage competition within the local exchange telecommunications market, and to ensure that all consumers benefit from such competition and expansion.

(b) The stated goals of House Bill 95-1335 were that all citizens have access to a wider range of telecommunications services at rates that are reasonably comparable within the state, that basic service be available and affordable to all citizens, and that universal access to advanced telecommunications services would be available to all consumers. Such goals are essential to the economic and social well-being of the citizens of Colorado and can be accomplished only if telecommunications providers are allowed to develop ubiquitous, seamless, statewide telecommunications networks. To require telecommunications companies to seek authority from every political subdivision within the state to conduct business is unreasonable, impractical, and unduly burdensome. In addition, the general assembly further finds and declares that since the public rights-of-way are dedicated to and held on a nonproprietary basis in trust for the use of the public, their use by telecommunications companies is consistent with such policy and appropriate for the public good.

(2) The general assembly further finds, determines, and declares that nothing in this article shall be construed to alter or diminish the authority of political subdivisions of the state to lawfully exercise their police powers with respect to activities of telecommunications providers within their boundaries, and, subject to such reservation of authority, that:

(a) The construction, maintenance, operation, oversight, and regulation of telecommunications providers and their facilities is a matter of statewide concern and interest;

(b) Telecommunications providers operating under the authority of the federal communications commission or the Colorado public utilities commission pursuant to article 15 of title 40, C.R.S., require no additional authorization or franchise by any municipality or other political subdivision of the state to conduct business within a given geographic area and that no such political subdivision has jurisdiction to regulate telecommunications providers based upon the content, nature, or type of telecommunications service or signal they provide except to the extent granted by federal or state legislation;

(c) Telecommunications providers have a right to occupy and utilize the public rights-of-way for the efficient conduct of their business;

(d) Access to rights-of-way and oversight of that access must be competitively neutral, and no telecommunications provider should enjoy any competitive advantage or suffer a competitive disadvantage by virtue of a selective or discriminatory exercise of the police power by a local government.

**Source:** L. 96: Entire article added, p. 298, § 1, effective April 12.

#### ANNOTATION

A municipal ordinance that conflicts with the specific provisions of state statute concerning telecommunications providers, which imposes express limitations on local regula-

tion of telecommunications providers, is preempted and invalid. City & County of Denver v. Qwest Corp., 18 P.3d 748 (Colo. 2001).

**38-5.5-102. Definitions.** As used in this article, unless the context otherwise requires:

(1) "Political subdivision" means a county, city and county, city, town, service authority, school district, local improvement district, law enforcement authority, water, sanitation, fire protection, metropolitan, irrigation, drainage, or other special district, or any other kind of municipal, quasi-municipal, or public corporation organized pursuant to law.

(2) "Public highway" or "highway" for purposes of this article includes all roads, streets, and alleys and all other dedicated rights-of-way and utility easements of the state or any of its political subdivisions, whether located within the boundaries of a political subdivision or otherwise.

(3) "Telecommunications provider" or "provider" means a person that provides telecommunications service, as defined in section 40-15-102 (29), C.R.S., with the exception of cable services as defined by section 602(5) of the federal "Cable Communications Policy Act of 1984", 47 U.S.C. sec. 522(6), pursuant to authority granted by the public utilities commission of this state or by the federal communications commission. "Telecommunications provider" or "provider" does not mean a person or business using antennas, support towers, equipment, and buildings used to transmit high power over-the-air broadcast of AM and FM radio, VHF and UHF television, and advanced television services, including high definition television. The term "telecommunications provider" is synonymous with "telecommunication provider".

**Source: L. 96:** Entire article added, p. 299, § 1, effective April 12.

**Editor's note:** Section 602(5) of the federal "Cable Communications Policy Act of 1984" referenced in subsection (3) was repealed October 25, 1994.

**38-5.5-103. Use of public highways - discrimination prohibited - content regulation prohibited.** (1) Any domestic or foreign telecommunications provider authorized to do business under the laws of this state shall have the right to construct, maintain, and operate conduit, cable, switches, and related appurtenances and facilities along, across, upon, and under any public highway in this state, subject to the provisions of this article and of article 1.5 of title 9, C.R.S.; and the construction, maintenance, operation, and regulation of such facilities, including the right to occupy and utilize the public rights-of-way, by telecommunications providers are hereby declared to be matters of statewide concern. Such facilities shall be so constructed and maintained as not to obstruct or hinder the usual travel on such highway.

(2) No political subdivision shall discriminate among or grant a preference to competing telecommunications providers in the issuance of permits or the passage of any ordinance for the use of its rights-of-way, nor create or erect any unreasonable requirements for entry to the rights-of-way for such providers.

(3) No political subdivision shall regulate telecommunications providers based upon the content or type of signals that are carried or capable of being carried over the provider's facilities; except that nothing in this subsection (3) shall be construed to prevent such regulation by a political subdivision when the authority to so regulate has been granted to the political subdivision under federal law.

**Source: L. 96:** Entire article added, p. 300, § 1, effective April 12.

**38-5.5-104. Right-of-way across state land.** Any domestic or foreign telecommunications provider authorized to do business under the laws of this state shall have the right to construct, maintain, and operate lines of communication, switches, and related facilities and obtain permanent right-of-way therefor over, upon, under, and across all public lands owned by or under the control of the state, upon the payment of such just compensation and upon compliance with such reasonable conditions as may be required by the state board of land commissioners.

**Source: L. 96:** Entire article added, p. 300, § 1, effective April 12.

**38-5.5-105. Power of companies to contract.** Any domestic or foreign telecommunications provider shall have power to contract with any person or corporation, the owner of any lands or any franchise, easement, or interest therein over or under which the provider's conduits, cable, switches, and related appurtenances and facilities are proposed to be laid or



created for the right-of-way for the construction, maintenance, and operation of such facilities and for the erection, maintenance, occupation, and operation of offices at suitable distances for the public accommodation.

**Source: L. 96:** Entire article added, p. 301, § 1, effective April 12.

**38-5.5-106. Consent necessary to use of streets.** (1) (a) Nothing in this article shall be construed to authorize any telecommunications provider to erect any poles or construct any conduit, cable, switch, or related appurtenances and facilities along, through, in, upon, under, or over any public highway within a political subdivision without first obtaining the consent of the authorities having power to give the consent of such political subdivision.

(b) A telecommunications provider that, on or before April 12, 1996, either has obtained consent of the political subdivision having power to give such consent or is lawfully occupying a public highway in a political subdivision shall not be required to apply for additional or continued consent of such political subdivision under this section.

(2) Consent for the use of a public highway within a political subdivision shall be based upon a lawful exercise of the police power of such political subdivision and shall not be unreasonably withheld, nor shall any preference or disadvantage be created through the granting or withholding of such consent.

**Source: L. 96:** Entire article added, p. 301, § 1, effective April 12.

**38-5.5-107. Permissible taxes, fees, and charges.** (1) (a) No political subdivision shall levy a tax, fee, or charge for any right or privilege of engaging in a business or for use of a public highway other than:

(I) A license fee or tax authorized under section 31-15-501 (1) (c), C.R.S., or article XX of the state constitution; and

(II) A street or public highway construction permit fee, to the extent that such permit fee applies to all persons seeking a construction permit.

(b) All fees and charges levied by a political subdivision shall be reasonably related to the costs directly incurred by the political subdivision in providing services relating to the granting or administration of permits. Such fees and charges also shall be reasonably related in time to the occurrence of such costs. In any controversy concerning the appropriateness of a fee or charge, the political subdivision shall have the burden of proving that the fee or charge is reasonably related to the direct costs incurred by the political subdivision. All costs of construction shall be borne by the provider.

(2) (a) Any tax, fee, or charge imposed by a political subdivision shall be competitively neutral among telecommunications providers.

(b) Nothing in this article or in article 32 of title 31, C.R.S., shall invalidate a tax or fee imposed if such tax or fee cannot legally be imposed upon another provider or service because of the requirements of state or federal law or because such other provider is exempt from taxation or lacks a taxable nexus with the political subdivision imposing the tax or fee.

(c) If a political subdivision imposes a tax on a provider and such tax does not apply to other providers of comparable telecommunications services due to the language of the ordinance or resolution that imposes the tax, then the governing body of the political subdivision shall take one of the following two courses of action:

(I) If it can do so without violating the election requirements of section 20 of article X of the state constitution, the governing body shall amend the ordinance or resolution that imposes the tax so as to extend the tax to providers of comparable telecommunications services; or

(II) If an election is required under section 20 of article X of the state constitution, the governing body shall cause an election to be held in accordance with said section 20 to authorize the extension of the tax to providers of comparable telecommunications services. If the extension of the tax is not approved by the voters at such election, then the existing tax shall no longer apply to the providers that had been subject to the tax immediately before the election.

(3) Taxes, fees, and charges imposed shall not be collected through the provision of in-kind services by telecommunications providers, nor shall any political subdivision require the provision of in-kind services as a condition of consent to use a highway.

(4) The terms of all agreements between political subdivisions and telecommunications providers regarding use of highways shall be matters of public record and shall be made available upon request pursuant to article 72 of title 24, C.R.S.

**Source:** L. 96: Entire article added, p. 301, § 1, effective April 12.

#### ANNOTATION

**Section prohibiting municipality from exacting a fee from telecommunications providers for the use of public rights-of-way, beyond costs directly incurred by the municipality, does not authorize a taking of property for which the municipality would be entitled to compensation by inverse condemnation under article II, § 15 of the state constitution. A**

municipality controls public rights-of-way in its governmental capacity, and such property is not "private" for purposes of a takings analysis. *City & County of Denver v. Qwest Corp.*, 18 P.3d 748 (Colo. 2001).

**Applied** in *Plains Coop. v. Washington Bd. of County Comm'rs*, 226 P.3d 1189 (Colo. App. 2009).

#### **38-5.5-108. Pole attachment agreements - limitations on required payments.**

(1) No municipally owned utility shall request or receive from a telecommunications provider or a cable television provider, as defined in section 602(5) of the federal "Cable Communications Policy Act of 1984", in exchange for permission to attach telecommunications devices to poles, any payment in excess of the amount that would be authorized if the municipally owned utility were regulated pursuant to 47 U.S.C. sec. 224, as amended.

(2) No municipality shall request or receive from a telecommunications provider, in exchange for or as a condition upon a grant of permission to attach telecommunications devices to poles, any in-kind payment.

**Source:** L. 96: Entire article added, p. 302, § 1, effective April 12.

**Editor's note:** Section 602(5) of the federal "Cable Communications Policy Act of 1984" referenced in subsection (1) was repealed October 25, 1994.

### ARTICLE 6

#### Proceedings by Cities and Towns

##### PART 1

##### CONDEMNATION OF PROPERTY

38-6-101.	Power of towns and cities.	38-6-112.	Objections - default - burden of proof - findings - reappraisal - appraisal.
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38-6-104.	Judge to set hearing - summons - service - publication.	38-6-115.	Amendments - new parties - notice.
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38-6-106.	Commissioners - oaths - hearing.	38-6-117.	City may dismiss proceedings.
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PART 2

CONDEMNATION OF WATER RIGHTS

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- 38-6-202. Petition.
- 38-6-203. Condemnation - municipal - water supplies - standards and procedures for evaluations.
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- 38-6-209. Hearing - notice - publication.
- 38-6-210. Objections - default - burden of proof - findings - reappraisalment.
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- 38-6-214. Decree - copy to municipality - payments - collection of assessments.
- 38-6-215. Municipality may dismiss proceedings.
- 38-6-216. Ownership in controversy - award.

PART 1

CONDEMNATION OF PROPERTY

**38-6-101. Power of towns and cities.** Whenever, in a town, city, or city and county, the council thereof or other municipal board having authority by charter or statute passes a resolution or ordinance to establish, construct, extend, open, widen, or alter any street, lane, avenue, boulevard, park, playground, parkway, pleasure way, public square, market, viaduct, bridge, sewer, tunnel, or subway or to build, acquire, construct, or establish any public building or any other public work or public improvement, said town, city, or city and county shall have the right to take, damage, condemn, or appropriate by right of eminent domain such private property as may be required in the manner provided for in this part 1; but, except as specifically authorized by law, no incorporated town shall exercise the power of eminent domain over property outside the town boundaries. In any case where such special benefits are not to be assessed by commissioners as provided in section 38-6-107 against the real estate specially benefited, the said town, city, or city and county may follow the procedure set forth in this part 1 or the procedure set forth in article 1 of this title.

**Source:** L. 11: p. 373, § 1. C.L. § 9076. CSA: C. 163, § 119. CRS 53: § 50-6-1. L. 57: p. 365, § 1. L. 59: p. 423, § 1. C.R.S. 1963: § 50-6-1. L. 69: p. 356, § 1. L. 76: Entire section amended, p. 312, § 60, effective May 20.

**Cross references:** For the proceedings and procedure for taking private property for public use, see part 1 of article 1 of this title.

ANNOTATION

**Law reviews.** For comment, “Water: State-wide or Local Concern? City of Thornton v. Farmers Reservoir & Irrigation Co., 194 Colo. 526, 575 P.2d 382 (1978)”, see 56 Den. L. J. 625 (1979). For article, “Condemnation of Property for Economic Development by Home Rule Municipalities”, see 25 Colo. Law. 53 (January 1996).

**Acquisition of right-of-way makes condemnation unnecessary.** When an owner of land permitted the city to construct and operate a pipe line through his land, the city acquired a vested

right-of-way and condemnation was unnecessary. Enke v. City of Greeley, 31 Colo. App. 337, 504 P.2d 1112 (1972).

**Where condemnation action to be commenced.** Art. XX, Colo. Const., and this article provide that a condemnation action must be commenced in the district court in which the city and county is situated. Toll v. City & County of Denver, 139 Colo. 462, 340 P.2d 862 (1959).

**City has option of proceeding under either section 38-1-101 or this section** in condemning

private property for a public use. *City of Englewood v. Weist*, 184 Colo. 325, 520 P.2d 120 (1974).

**Once election made city cannot be bound by other procedure.** Once a city elects to proceed under article 1 of this title, it cannot be forced to follow, comply with, or be bound by the provisions contained in this part. *City of Englewood v. Weist*, 184 Colo. 325, 520 P.2d 120 (1974).

**Determination of special assessments presumed valid.** The invalidity of a municipal ordinance generally must be established beyond a reasonable doubt; however, a different rule as to special assessments has been established. A presumption of validity inheres in a city council's determination that the benefits specially accru-

ing to properties equal or exceed the assessments thereon. *Cline v. City of Boulder*, 35 Colo. App. 349, 532 P.2d 770 (1975).

**Property owners must show invalidity of ordinance as to special assessments.** The burden is on the property owners to affirmatively show to the council, by substantial competent evidence, that a municipal ordinance is invalid as to special assessments. *Cline v. City of Boulder*, 35 Colo. App. 349, 532 P.2d 770 (1975).

**Applied in** *Alexander v. City & County of Denver*, 51 Colo. 140, 116 P. 342 (1911); *Wassenich v. City & County of Denver*, 67 Colo. 456, 186 P. 533 (1919); *Snider v. Town of Platteville*, 75 Colo. 589, 227 P. 548 (1924); *People ex rel. Bear Creek Dev. Corp. v. District Court*, 78 Colo. 526, 242 P. 997 (1925).

**38-6-102. Petition.** The attorney for said city or city and county, in the name of such city or city and county, shall apply to the district court of the district in which said city or city and county is situated, by petition, which petition shall state the general nature of the improvement proposed to be established or made, a correct description of the property required, and the name of the owner of said property as shown on the records of the county clerk and recorder of the county or city and county in which said property is situated. Said petition shall pray for the appointment of three disinterested commissioners, freeholders of real estate in and residents of said city or city and county, to appraise and award the damages which said owner may sustain by reason of the appropriation and condemnation of such property by the city or city and county and to perform such other duties as are in this part 1 enumerated.

**Source:** L. 11: p. 374, § 2. C.L. § 9077. CSA: C. 163, § 120. CRS 53: § 50-6-2. C.R.S. 1963: § 50-6-2. L. 76: Entire section amended, p. 312, § 61, effective May 20.

#### ANNOTATION

**Law reviews.** For article, "Inverse Condemnation — A Viable Alternative", see 51 Den. L.J. 529 (1974). For comment, "Water: State-wide or Local Concern? *City of Thornton v. Farmers Reservoir & Irrigation Co.*", 194 Colo. 526, 575 P.2d 382 (1978)", see 56 Den. L. J. 625 (1979).

**Applied in** *Wassenich v. City & County of Denver*, 67 Colo. 456, 186 P. 533 (1919); *Toll v. City & County of Denver*, 139 Colo. 462, 340 P.2d 862 (1959).

**38-6-103. Defendants - guardian ad litem.** The owners of all property sought to be condemned for the proposed improvement shall be made parties defendant. It shall not be necessary to make any person a defendant unless such person has some title thereto of record in the office of the county clerk and recorder of the county or city and county in which said property is situated. If the proceeding seeks to affect land owned by an infant or a mentally incompetent person, the legal guardian or conservator of such person shall be made a party defendant. If such person has no legal guardian, the district court shall have the power to appoint a guardian ad litem to represent such person.

**Source:** L. 11: p. 374, § 3. C.L. § 9078. CSA: C. 163, § 121. CRS 53: § 50-6-3. C.R.S. 1963: § 50-6-3. L. 75: Entire section amended, p. 932, § 53, effective July 1.

**38-6-104. Judge to set hearing - summons - service - publication.** Upon the filing of the petition, said court shall fix a date for hearing said petition, and the attorney for the petitioner shall prepare and issue a summons, directed to the defendants, notifying them of the date fixed by the court for the hearing. Jurisdiction of said defendants shall be obtained



by causing the summons to be served on the defendants in like manner as is provided by the laws of this state for the service of summons in civil actions, except as otherwise provided in this section. The date for the hearing of the petition shall not be less than ten days after the date of the service of the summons. In case any defendant does not reside in said city or city and county or is a foreign corporation or in case the attorney for the petitioner files an affidavit that he has endeavored to find such person in such city or city and county, for the purpose of causing the person to be served, and that after reasonable effort he has been unable to find said person in said city or city and county, the petitioner may cause the summons to be published for three consecutive times in any daily or weekly newspaper published in said city or city and county. The date for the hearing of said petition shall not be less than ten days after the date of the last publication of said summons.

**Source:** L. 11: p. 374, § 4. C.L. § 9079. CSA: C. 163, § 122. CRS 53: § 50-6-4. C.R.S. 1963: § 50-6-4.

**38-6-105. Answer - hearing - commissioners.** Any defendant has the right to appear in the proceeding and file an answer, in writing, with the clerk of the court, at any time prior to the date fixed for the hearing of the petition but not thereafter, in which answer said defendant shall set forth such legal objections as he may have to the condemnation or appropriation of any property owned by him or to the prosecution of said proceeding. At the time set for the hearing of said petition or such time to which the hearing may have been continued by the court, the court shall proceed to hear any objections raised by the answer, if any there be. The court has no power to inquire into the necessity of exercising the power of eminent domain for the purpose proposed, nor into the necessity of making the proposed improvement, nor into the necessity of taking the particular property described in the petition. If the court finds that the petitioner has the right to prosecute said proceeding and such objections as may have been filed are overruled, the court shall appoint three disinterested commissioners in condemnation, freeholders of real estate in said city or city and county and residents thereof, who shall have the powers and duties provided in this part 1. No person shall be disqualified to act as a commissioner by reason of the fact that he may own either the fee or other interest in or to property that might be assessed a special benefit on account of the proposed improvement.

**Source:** L. 11: p. 375, § 5. C.L. § 9080. CSA: C. 163, § 123. CRS 53: § 50-6-5. C.R.S. 1963: § 50-6-5. L. 76: Entire section amended, p. 312, § 62, effective May 20.

#### ANNOTATION

**Law reviews.** For comment discussing church condemnation, see 46 U. Colo. L. Rev. 43 (1974). For comment, "Water: Statewide or Local Concern? City of Thornton v. Farmers Reservoir & Irrigation Co., 194 Colo. 526, 575 P.2d 382 (1978)", see 56 Den. L. J. 625 (1979).

**Questions for court to determine in limine.** Whether or not the petitioner belongs to the class of persons entitled to condemn; whether or not the property sought to be taken belongs to the class of property that is subject to condemnation; whether or not the purpose for which the property is sought to be taken is one for which

condemnation is permitted; whether or not the petitioner and the owner have been able to come to an agreement concerning a purchase of the land; and whether or not the act authorizing the proceeding is constitutional — these and similar questions, when raised, are for the court to determine in limine. *Wassenich v. City & County of Denver*, 67 Colo. 456, 186 P. 533 (1919); *Dunham v. City of Golden*, 31 Colo. App. 433, 504 P.2d 360 (1972).

**Applied** in *People ex rel. Bear Creek Dev. Corp. v. District Court*, 78 Colo. 526, 242 P. 997 (1925).

**38-6-106. Commissioners - oaths - hearing.** The commissioners, before entering upon the duties of their office, shall take an oath to faithfully, promptly, and impartially discharge their duties as such commissioners. Any commissioner may administer oaths to witnesses produced before him. The commissioners may issue subpoenas and compel witnesses to attend and testify, may adjourn and hold meetings, and shall hear such proofs as may be presented to them.

**Source:** L. 11: p. 375, § 6. C.L. § 9081. CSA: C. 163, § 124. CRS 53: § 50-6-6. C.R.S. 1963: § 50-6-6.

**38-6-107. Assessment of damages - lien - fund.** It is the duty of the commissioners to estimate, fix, and determine the fair and actual cash market value of all property proposed to be taken for the improvement, without reference to the projected improvement, and the fair, direct, and actual damage caused on account of said improvement to other property not taken for the improvement. The commissioners shall provide for the payment of the total amount of their awards for land taken and damaged, in all cases where the resolution or ordinance authorizing the improvement so provides, by assessing against the owners of all real estate which, in their opinion, will be specially benefited by the proposed improvement the amounts of said benefit as special assessments, and such commissioners shall assess the balance required to make said total amount as a general assessment against the petitioning city or city and county. Such special benefits shall be assessed against the owners of each lot or parcel of property that is, in the opinion of said commissioners, specially benefited by said improvement, which said special benefits shall be a lien on the property so charged, and shall be collected as provided by the charter or ordinance of said city or city and county, and when so collected shall be paid into the treasury of said city or city and county as a separate fund, to be used for the payment of the awards and damages.

**Source:** L. 11: p. 376, § 7. C.L. § 9082. CSA: C. 163, § 125. CRS 53: § 50-6-7. C.R.S. 1963: § 50-6-7.

#### ANNOTATION

**Law reviews.** For article, "Eminent Domain in Colorado", see 29 Dicta 313 (1952).

**Assessment of damages by jury is in lieu of assessment by commission.** Snider v. Town of Platteville, 75 Colo. 589, 227 P. 548 (1924).

**Property owner is not entitled to have damages assessed twice,** first by a commission and then by a jury. Snider v. Town of Platteville, 75 Colo. 589, 227 P. 548 (1924).

**Speculative damages not awarded.** All damages, present or prospective, which are the reasonable and necessary result of an improvement, are taken into account, and compensation awarded therefor, but not speculative damages which may by possibility result from future municipal action, for a different purpose. Moffat v. City & County of Denver, 57 Colo. 473, 143 P. 577 (1914).

**Injury to business conducted upon lands taken not element of just compensation.** Injury to a business conducted upon lands taken under the right of eminent domain, in the absence of a statute expressly allowing it, does not constitute an element of just compensation. City & County of Denver v. Tondall, 86 Colo. 372, 282 P. 191 (1929).

**Railway property, benefited by special improvements, may be assessed the same as other lands.** Post Printing & Publishing Co. v. City &

County of Denver, 68 Colo. 50, 189 P. 39 (1920).

**"Benefit" construed.** "Benefit", which justifies special assessment tax, is not the same "benefit" which must be calculated and deducted from a landowner's recovery in an eminent domain proceeding. City of Englewood v. Weist, 184 Colo. 325, 520 P.2d 120 (1974).

**City not foreclosed from collecting special assessment tax.** A city's failure to prove any benefit to the landowner's property in the section 38-1-101 proceeding does not foreclose the city from collecting a special assessment tax. The city was entitled to specially assess for the benefit accruing to the landowner's property by the construction of the special improvement. City of Englewood v. Weist, 184 Colo. 325, 520 P.2d 120 (1974).

**Opinion of expert witnesses permitted as to amount of damages.** Witnesses who have properly qualified as experts may give their opinion as to the amount of damages. City & County of Denver v. Tondall, 86 Colo. 372, 282 P. 191 (1929).

**Applied in** Lavelle v. Town of Julesburg, 49 Colo. 290, 112 P. 774 (1910); Wassenich v. City & County of Denver, 67 Colo. 456, 186 P. 533 (1919); City & County of Denver v. Tondall, 86 Colo. 372, 282 P. 191 (1929).

**38-6-108. Commissioners' report.** The commissioners shall make, subscribe, and file with the clerk of the court in which such proceedings are had a report of their awards and



assessments, in which all property assessed shall be described with convenient certainty and accuracy. In said report, the awards and damages allowed to each owner and the benefits assessed against each parcel of land shall be separately stated.

**Source:** L. 11: p. 376, § 8. C.L. § 9083. CSA: C. 163, § 126. CRS 53: § 50-6-8. C.R.S. 1963: § 50-6-8.

**38-6-109. Cost assessed against block.** In all cases where the proposed improvement is the opening, widening, establishing, or extension of a public alley, the cost thereof shall be assessed against the property in the particular block in which said alley is situated, according to the benefits to be received therefrom, and against none other.

**Source:** L. 11: p. 376, § 9. C.L. § 9084. CSA: C. 163, § 127. CRS 53: § 50-6-9. C.R.S. 1963: § 50-6-9.

#### ANNOTATION

**Applied** in *Phipps v. City & County of Denver*, 57 Colo. 205, 140 P. 797 (1914).

**38-6-110. Property need not be in city limits.** In all proceedings under this part 1, the petitioner has the right to take or condemn separate parcels of land. Such parcels of land need not be adjoining or contiguous to each other. In all cases where a proceeding is brought to condemn, appropriate, or acquire land for boulevard, parkway, or park purposes, such land or any part thereof may be situated beyond or without the corporate limits of said city or city and county, subject to the limitation imposed by section 31-25-201 (1), C.R.S.

**Source:** L. 11: p. 377, § 10. C.L. § 9085. CSA: C. 163, § 128. CRS 53: § 50-6-10. C.R.S. 1963: § 50-6-10. L. 76: Entire section amended, p. 313, § 63, effective May 20. L. 83: Entire section amended, p. 1266, § 4, effective July 1.

**Cross references:** For the legislative declaration in the 1983 act amending this section, see section 1 of chapter 367, Session Laws of Colorado 1983.

**38-6-111. Hearing - notice - publication.** After the report of said commissioners is filed with the clerk of the court, the court shall fix a time for the consideration of said report, and the petitioner shall give written notice to the defendants and all other persons who are the owners of record of property mentioned in said report, whether damaged, appropriated, condemned, or assessed special benefits, of the matters contained in said report and of the time so fixed by the court for the consideration thereof. The notice shall be served in like manner as is provided by the laws of this state for the service of summons in civil actions, except as otherwise provided in this section. Said persons shall be served at least ten days before the time fixed for the consideration of the report by the court. In case any defendant or owner of record of any property damaged, appropriated, condemned, or assessed special benefits does not reside in said city or city and county or is a foreign corporation or in case the attorney for said petitioner files an affidavit that he has endeavored to find such person in said city or city and county, for the purpose of causing said person to be notified, and that after reasonable effort he has been unable to find said person in said city or city and county, the petitioner may cause to be published a notice, of the matters affecting such person contained in said report and of the time fixed for the consideration thereof, for three successive times in some daily or weekly newspaper published in said city or city and county. Said publication shall be in lieu of personal service of said notice on all such persons.

**Source:** L. 11: p. 377, § 11. C.L. § 9086. CSA: C. 163, § 129. CRS 53: § 50-6-11. C.R.S. 1963: § 50-6-11.

**Cross references:** For publication of legal notices, see part 1 of article 70 of title 24.

### ANNOTATION

**Applied** in *Wassenich v. City & County of Denver*, 67 Colo. 456, 186 P. 533 (1919).

**38-6-112. Objections - default - burden of proof - findings - reappraisalment.** Any person who is the owner of, or who has any interest in, any of the property mentioned in said report, whether appropriated or damaged or against which special benefits have been assessed, may appear, at or before the time fixed by the court for the consideration of said report but not after said time, and file his written objection to said report. Default shall be entered against the owners of all property mentioned in said report who have not filed objections thereto within said time, and the report shall be confirmed by the court as to such persons. At the time fixed by the court for the consideration of said report, the court shall proceed to hear any objections that have been filed, except where a jury trial has been demanded, as provided for in section 38-6-113. Any party interested in said proceeding may introduce such evidence as may tend to establish the right of the matter. The burden of proof to change any finding, award, or assessment of said commissioners shall be upon the person objecting thereto. If it appears to the court that the property of the objector has been appraised by the commissioners at more or less than the fair, actual cash market value thereof, or that the fair, direct, and actual damage to property not taken is greater or less than the amount awarded by the commissioners, or that the property of the objector is assessed a special benefit in an amount greater than it will be actually benefited by the proposed improvement, the court shall so find and shall also find what the proper award or assessment shall be, and judgment shall be rendered accordingly. The court, for good cause shown, may modify, alter, change, annul, or confirm the report of the commissioners, or any part thereof, or may order a new reappraisalment and assessment as to any of the property affected in the proceeding by the same commissioners or by other commissioners appointed by the court.

**Source:** L. 11: p. 378, § 12. C.L. § 9087. CSA: C. 163, § 130. CRS 53: § 50-6-12. C.R.S. 1963: § 50-6-12.

### ANNOTATION

**Applied** in *Phipps v. City & County of Denver*, 57 Colo. 205, 140 P. 797 (1914); *City & County of Denver v. Lathan*, 57 Colo. 371, 141 P. 462 (1914).

**38-6-113. Jury trial - motion for new trial - appellate proceedings.** (1) At the time fixed for the hearing of the commissioners' report or at any time prior thereto but not after said time, any defendant who owns or is interested in any property actually taken, appropriated, or damaged on account of the proposed improvement and who is dissatisfied with the amount awarded to him by said commissioners may file his demand, in writing, for a trial by a jury of either six or twelve freeholders to appraise and assess the damages which said defendant or person may sustain by reason of the appropriation and condemnation of, or damage to, his property. Any person so demanding a jury, at the time of said demand, shall deposit with the clerk the jury fees for one day's services according to the rate allowed jurors in the district court. The court shall fix an early date for said trial, and on such date the defendants who have made written demands for jury trial within the time provided shall proceed to submit their claims to the jury. Such jury shall be drawn as in civil actions; except that the jurors shall have the qualifications provided in this section.

(2) The court shall proceed in the same manner and with like powers as in other cases, except as otherwise provided in this part 1. At the request of any party to the proceedings, the court shall order that the jury go upon the premises sought to be taken or damaged, in charge of a sworn bailiff and in the company of any other person that the court may order, and examine the premises in person. At the conclusion of the evidence, the matters in controversy may be argued by counsel to the jury, and at the conclusion of the arguments



the court shall instruct the jury in writing. The jury shall return a special verdict fixing and determining the damages or compensation to be allowed to each defendant, severally, who has demanded a jury trial, which verdict shall include both the fair, actual cash market value of the land actually taken for the improvement and the direct, fair, and actual damage, if any, caused on account of said improvement to property not taken for the improvement. Any party to the proceeding may move for a new trial in the same manner as in actions at law. The refusal of said court to grant the same may be excepted to and assigned for appeal, but no appeal shall be permitted to stay the improvement sought by the proceeding.

**Source:** L. 11: p. 378, § 13. C.L. § 9088. CSA: C. 163, § 131. CRS 53: § 50-6-13. C.R.S. 1963: § 50-6-13. L. 76: (2) amended, p. 313, § 64, effective May 20.

#### ANNOTATION

**Limiting number of witnesses is within court's discretion.** Wassenich v. City & County of Denver, 67 Colo. 456, 186 P. 533 (1919).

**Jury is not authorized to view premises other than the land condemned.** Wassenich v. City & County of Denver, 67 Colo. 456, 186 P. 533 (1919).

**Market value to be determined.** The issue to be determined is the fair, actual cash market value of the land taken at the time of the award and the direct, fair and actual damages to the remainder of the tract, not taken, caused by the improvement, equal to the diminution in the market value of the residue at the time of the trial, for any use to which it may be put, reasonably. Wassenich v. City & County of Denver, 67 Colo. 456, 186 P. 533 (1919).

Any reasonable future use to which the land may be adapted or applied by men of ordinary

prudence and judgment may be considered only insofar as it may assist the jury in arriving at the present market value. Wassenich v. City & County of Denver, 67 Colo. 456, 186 P. 533 (1919).

**Evidence of sales of like properties admissible.** In computing damages under a jury trial evidence of sales of other like properties, in the same vicinity, and used for the same purpose, is admissible. Wassenich v. City & County of Denver, 67 Colo. 456, 186 P. 533 (1919).

**Opinions by qualified witnesses as to value permitted.** To aid and assist the jury in arriving at an opinion, witnesses who are qualified may give their opinions as to the value and any special circumstances upon which those opinions are based. Wassenich v. City & County of Denver, 67 Colo. 456, 186 P. 533 (1919).

**38-6-114. Costs - compensation.** The cost of the proceedings shall be paid by the city or city and county. The commissioners shall be allowed a reasonable compensation for their services and expenses, the amount of which shall be fixed by the court.

**Source:** L. 11: p. 379, § 14. C.L. § 9089. CSA: C. 163, § 132. CRS 53: § 50-6-14. C.R.S. 1963: § 50-6-14.

#### ANNOTATION

**Applied** in Moffat v. City & County of Denver, 57 Colo. 473, 143 P. 577 (1914); Wassenich

v. City & County of Denver, 67 Colo. 456, 186 P. 533 (1919).

**38-6-115. Amendments - new parties - notice.** Amendment to the petition or to any paper or record in the proceedings shall be permitted by the court whenever necessary to a fair hearing and final determination of the questions involved. Should it become necessary at any stage of the proceedings to bring in a new party, the court has the power to make such rule or order in relation thereto as may be deemed reasonable and proper. The court also has the power to make all necessary rules and orders for notice to persons of the pendency of the proceedings.

**Source:** L. 11: p. 380, § 15. C.L. § 9090. CSA: C. 163, § 133. CRS 53: § 50-6-15. C.R.S. 1963: § 50-6-15.

**38-6-116. Decree - copy to city clerk - payments - collection of assessments.** After the trial hearings and determination of all objections to said report, the court shall make its

judgment and decree, granting the petitioner such title to the property condemned as may be petitioned for and the right to enter upon the same, upon payment of the compensation ascertained. The decree shall describe each parcel of property so condemned and state the owner thereof and shall describe the property against which special assessments have been made and the amounts thereof. When said judgment and decree have been made by the court, the clerk of said court shall make a certified copy thereof and after thirty days deliver the same to the clerk of the city or city and county. Unless other provision is made in the charter of said city or city and county for the payment of said awards, the council, within ninety days after the date of said decree, shall make, by ordinance, the necessary appropriation for the payment of the compensation for the property condemned. The proper officers of said city or city and county shall thereupon issue the warrants of said city or city and county to the respective parties entitled thereto. The council, by ordinance, shall also provide for the collection of such special assessments as have been confirmed by the final decree of the court.

**Source:** L. 11: p. 380, § 16. C.L. § 9091. CSA: C. 163, § 134. CRS 53: § 50-6-16. C.R.S. 1963: § 50-6-16.

#### ANNOTATION

**This section is mandatory.** Heimbecher v. City & County of Denver, 97 Colo. 465, 50 P.2d 785 (1935).

**Applied** in Wassenich v. City & County of Denver, 67 Colo. 456, 186 P. 533 (1919).

**38-6-117. City may dismiss proceedings.** The attorney for the city or city and county commencing the proceedings has the right to withdraw said proceedings or to dismiss the same as to one or more of said defendants or as to one or more parcels of land, without prejudice, at any stage of the proceedings, and the petitioner shall pay the costs thereof.

**Source:** L. 11: p. 380, § 17. C.L. § 9092. CSA: C. 163, § 135. CRS 53: § 50-6-17. C.R.S. 1963: § 50-6-17.

#### ANNOTATION

**Meaning of this section and § 38-6-116.** This section and § 38-6-116 when read in conjunction with each other mean that the proceedings mentioned in this section come to an end at the expiration of 90 days, as specified in § 38-6-116. Heimbecher v. City & County of Denver, 97 Colo. 465, 50 P.2d 785 (1935).

**Applied** in Fifteenth Street Inv. Co. v. City & County of Denver, 59 Colo. 189, 147 P. 677 (1915); Post Printing & Publ'g Co. v. City & County of Denver, 68 Colo. 50, 189 P. 39 (1920).

**38-6-118. Ownership in controversy - award.** If the ownership of any property condemned or damaged is in controversy, the amount awarded in payment of said property or the damage thereto shall be paid into the registry of said court for the use of the successful claimants of said property as their respective interests appear to the court. All disputes as to ownership of property taken or damaged shall be tried to the court.

**Source:** L. 11: p. 381, § 18. C.L. § 9093. CSA: C. 163, § 136. CRS 53: § 50-6-18. C.R.S. 1963: § 50-6-18.

#### ANNOTATION

**Applied** in Wassenich v. City & County of Denver, 67 Colo. 456, 186 P. 533 (1919).



**38-6-119. Possession - award paid.** As soon as the amounts awarded for property taken or in payment of damages have been tendered to the parties entitled thereto, respectively, or deposited in the registry of said court for the use of the respective persons entitled to said amounts, the city or city and county may have possession of said premises and may proceed with the proposed improvement. When any controversy concerning ownership has been determined, the clerk of said court shall pay the amounts awarded to said parties.

**Source:** L. 11: p. 381, § 19. C.L. § 9094. CSA: C. 163, § 137. CRS 53: § 50-6-19. C.R.S. 1963: § 50-6-19.

#### ANNOTATION

**Property owner deemed entitled to money** and he cannot be required to accept city warrants, no matter what may be their value.

Wassenich v. City & County of Denver, 67 Colo. 456, 186 P. 533 (1919).

**38-6-120. Review - deposit - possession.** Upon the final determination of any proceeding under this part 1, appeal shall lie in every case to bring into review the proceedings therein. If the owner of any property taken or affected appeals, the petitioner may pay into the registry of said court the amount of compensation awarded therefor, for the use of said owner, and shall thereupon be entitled to take possession of and use the property taken or affected the same as if no appeal had been taken. The money so deposited shall remain on deposit until the appeal has been heard and determined. If any owner elects to receive such amount before the determination of such appeal, said appeal shall thereupon be dismissed so far as such owner is concerned.

**Source:** L. 11: p. 381, § 20. C.L. § 9095. CSA: C. 163, § 138. CRS 53: § 50-6-20. C.R.S. 1963: § 50-6-20. L. 76: Entire section amended, p. 313, § 65, effective May 20.

#### ANNOTATION

**No review of award absent objection.** Where no objection is made below to the damages awarded in respect to land taken, the supreme court will not, on appeal, review such

award. Phipps v. City & County of Denver, 57 Colo. 205, 140 P. 797 (1914).

**Applied** in Wassenich v. City & County of Denver, 67 Colo. 456, 186 P. 533 (1919).

**38-6-121. Lis pendens.** In any proceeding brought under this part 1, the petitioner, at the time of filing the petition or at any time thereafter during the pendency of such proceeding, may file with the county clerk and recorder of the county in which the property sought to be condemned is situated a notice of the pendency of the proceeding, containing a general description of the property affected. The filing of such notice shall be constructive notice of the proceeding to any purchaser or encumbrancer of said property. The petitioner shall take all property condemned under this part 1 free of all conveyances, taxes, or assessments that have attached thereto subsequent to the filing of the lis pendens.

**Source:** L. 11: p. 382, § 21. C.L. § 9096. CSA: C. 163, § 139. CRS 53: § 50-6-21. C.R.S. 1963: § 50-6-21. L. 76: Entire section amended, p. 314, § 66, effective May 20.

**38-6-122. Eminent domain beyond city limits.** Cities and towns are granted the power of eminent domain both within and beyond their corporate limits, for the purpose of constructing or installing storm or sanitary sewers, septic tanks, disposal works, or electric lines, regulator stations, substations, and related facilities, such power to be exercised in the manner prescribed by law. Nothing in this section shall authorize the pollution or contamination of any public river, stream, or water.

**Source:** L. 21: p. 773, § 1. C.L. § 9097. CSA: C. 163, § 140. CRS 53: § 50-6-22. L. 63: p. 482, § 8. C.R.S. 1963: § 50-6-22.

#### ANNOTATION

**Law reviews.** For comment, "Water: State-wide or Local Concern? City of Thornton v. Farmers Reservoir & Irrigation Co., 194 Colo. 526, 575 P.2d 382 (1978)", see 56 Den. L. J. 625 (1979).

**Town must comply with § 30-28-110 in exercising powers under this section.** A town must comply with county zoning procedures enunciated in § 30-28-110, when the town exercises its power of eminent domain for construction of sewage facilities beyond its corporate limits pursuant to this section. Blue River Defense Comm. v. Town of Silverthorne, 33 Colo. App. 10, 516 P.2d 452 (1973).

**County residents entitled to present objections and views.** Even though a town may affirmatively overrule a county's decision regarding the town's proposed construction of a

sewage plant, the residents of the county are entitled to an opportunity to present their objections and views and to have these considered as part of the planning commission's approval or disapproval and to require that if construction is to proceed, the town must determine to proceed in the face of the county's objection. Blue River Defense Comm. v. Town of Silverthorne, 33 Colo. App. 10, 516 P.2d 452 (1973).

**Public stream not condemnable for sewer system purposes.** This section grants to municipal corporations the authority to condemn land for the right-of-way for sewers, but no statute provides for the condemnation of a public stream for the purpose of making it a part of a sewer system. Healy v. City of Delta, 59 Colo. 124, 147 P. 662 (1915).

#### PART 2

#### CONDEMNATION OF WATER RIGHTS

**38-6-201. Condemnation of water rights by municipalities.** This part 2 shall apply to any water right which is to be condemned by a town, city, county, or municipal corporation having the powers of condemnation, referred to in this part 2 as a "municipality".

**Source:** L. 75: Entire part added, p. 1408, § 1, effective July 1.

#### ANNOTATION

**Law reviews.** For comment, "Water: State-wide or Local Concern? City of Thornton v. Farmers Reservoir & Irrigation Co., 194 Colo.

526, 575 P.2d 382 (1978)", see 56 Den. L. J. 625 (1979).

**38-6-202. Petition.** (1) The attorney for any municipality, in the name of said municipality, shall apply to the district court of the district in which the municipality is situated, by petition, which petition shall set forth the general nature of the improvement proposed to be established or made, a correct description of the water right required, the name of the owner of the water right, and those persons who may be damaged by the acquisition of the water right. Said petition shall pray for the appointment of three disinterested commissioners appointed by the court of jurisdiction, freeholders of real estate in Colorado, one to be a resident from the area affected by the proposed action, one to be a resident of the municipality bringing the action, and one to be a party who has no interest in the controversy, to determine the issue of the necessity of exercising eminent domain as proposed in the petition and, if the condemnation is to be allowed, to appraise and award the damages that each person damaged may sustain by reason of the appropriation and condemnation of the water right by the municipality and to perform such other duties as are in this part 2 enumerated.

(2) No municipality shall be allowed to condemn water rights, as provided in section 38-6-207, for any anticipated or future needs in excess of fifteen years, nor shall any municipality be allowed to condemn water rights that are appropriated to a prior public use.



**Source: L. 75:** Entire part added, p. 1408, § 1, effective July 1.

#### ANNOTATION

**Law reviews.** For comment, "Water: State-wide or Local Concern? City of Thornton v. Farmers Reservoir & Irrigation Co., 194 Colo. 526, 575 P.2d 382 (1978)", appearing below, see 56 Den. L. J. 625 (1979).

**Provisions held unconstitutional.** The provisions of this part, subsection (1) of this section, and §§ 38-6-203, 38-6-207 (1), (3), (4) and 38-6-210, relating to the appointment, action, and effect of a commission to determine the issue of necessity of exercising eminent domain,

are in conflict with the express grant of eminent domain powers to home rule cities by § 1 of art. XX, Colo. Const. City of Thornton v. Farmers Reservoir & Irrigation Co., 194 Colo. 526, 575 P.2d 382 (1978).

The 15-year provision of subsection (2), as applied to home-rule municipalities, is unconstitutional. City of Thornton v. Farmers Reservoir & Irrigation Co., 194 Colo. 526, 575 P.2d 382 (1978).

**38-6-203. Condemnation - municipal - water supplies - standards and procedures for evaluations.** (1) Prior to any hearing for condemnation of water supplies and structures under this part 2, the municipality shall:

(a) Prepare or update a community growth development plan reflecting present population and resources uses and capabilities and projected population growth and resources requirements, the latter to include all resources requirements to provide for phased development of municipal services and facilities;

(b) Prepare a detailed statement describing:

(I) The water rights to be acquired under condemnation and their present uses;

(II) The effects upon the county and suitable area within the river drainage basin or basins from the change or conversion of acquired irrigation and other water supplies to domestic uses, to include economic and environmental effects;

(III) The unavoidable adverse and irreversible effects from such taking of properties and rights; and

(IV) Alternative sources of water supply that may be acquired by appropriation, purchase, lease, conservation, or condemnation and relative acquisitions costs.

(2) The information contained in the growth development plan and statement of effects from the condemnation shall be prepared in sufficient detail to provide a meaningful basis for assessment of the aspects of the condemnation to the public if the condemnation is approved. These statements shall be presented to the commissioners appointed by the court and the defendants and shall be made available to interested parties.

**Source: L. 75:** Entire part added, p. 1409, § 1, effective July 1.

#### ANNOTATION

**Law reviews.** For comment, "Water: State-wide or Local Concern? City of Thornton v. Farmers Reservoir & Irrigation Co., 194 Colo.

526, 575 P.2d 382 (1978)", see 56 Den. L.J. 625 (1979).

**38-6-204. Defendants - guardian ad litem.** The owners of all property sought to be condemned for the proposed improvement or who would be damaged by said improvement shall be made parties defendant. If the proceeding seeks to affect land owned by a minor or mental incompetent under legal disabilities, the legal guardian or conservator of such person shall be made party defendant. If such person has no legal guardian, the district court shall have the power to appoint a guardian ad litem to represent such person.

**Source: L. 75:** Entire part added, p. 1409, § 1, effective July 1.

## ANNOTATION

**Law reviews.** For comment, "Water: State-wide or Local Concern? City of Thornton v. Farmers Reservoir & Irrigation Co., 194 Colo. 526, 575 P.2d 382 (1978)", see 56 Den. L.J. 625 (1979).

**38-6-205. Judge to set hearing - summons - service - publication.** Upon the filing of the petition, said court shall fix a date for hearing said petition, and the attorney for the petitioner shall prepare and issue a summons, directed to the defendants, notifying them of the date fixed by the court for the hearing. Jurisdiction of said defendants shall be obtained by causing the summons to be served on the defendants in like manner as is provided by the laws of this state for the service of summons in civil actions, except as otherwise provided in this section. The date for the hearing of the petition shall not be less than ten days after the date of the service of the summons. In case any defendant does not reside in the state or is a foreign corporation or in case the attorney for the petitioner files an affidavit that he has endeavored to find such person for the purpose of causing the person to be served and that after reasonable effort he has been unable to find said person, the petitioner may cause the summons to be published for three consecutive times in any daily or weekly newspaper published in the judicial district. The date for the hearing of said petition shall not be less than ten days after the date of the last publication of said summons.

**Source: L. 75:** Entire part added, p. 1409, § 1, effective July 1.

## ANNOTATION

**Law reviews.** For comment, "Water: State-wide or Local Concern? City of Thornton v. Farmers Reservoir & Irrigation Co., 194 Colo. 526, 575 P.2d 382 (1978)", see 56 Den. L.J. 625 (1979).

**38-6-206. Answer - hearing - jury.** (1) Any defendant has the right to appear in the proceeding and file an answer, in writing, with the clerk of the court, at any time prior to the date fixed for the hearing of the petition but not thereafter, in which answer said defendant shall set forth such objections as he may have to the condemnation or appropriation of any water right owned by him or to the prosecution of said proceeding.

(2) Any defendant may file a demand for a jury trial as provided for in section 38-6-211 (1), prior to the date fixed for the hearing of the petition.

(3) At the time set for the hearing of said petition or at the time to which the hearing may have been continued by the court, the court shall proceed to hear any objections raised by the answer provided for in subsection (1) of this section. The court shall also appoint three commissioners to carry out the provisions of this part 2.

**Source: L. 75:** Entire part added, p. 1410, § 1, effective July 1.

**38-6-207. Duty of commissioners, determination of necessity.** (1) In any case initiated for the acquisition of water rights pursuant to this part 2, it is the duty of the commissioners to:

(a) Examine and assess the growth development plan and statement provided by the municipality, from the proposed condemnation, required in section 38-6-203, and obtain necessary information pursuant to powers granted in section 38-6-208, and make a determination as to the necessity of exercising the power of eminent domain for the proposed purposes;

(b) Provide one of the following recommendations to the court, based upon their findings:

- (I) There exists no need and necessity for condemnation as proposed.
- (II) There exists a need and necessity for condemnation as proposed.
- (III) There exists a need and necessity for condemnation, but it is premature.



(2) In making a recommendation, as provided in subsection (1) (b) (II) of this section, the commissioners may recommend an alternate source of water supply.

(3) The commissioners shall hear the proofs and allegations of the parties and, after viewing the premises, certify the proper compensation to be made to said owner or parties interested for the water or other property to be taken or affected, as well as all damages accruing to the owner or parties interested in consequences of the condemnation of the same.

(4) If the commissioners find there exists no need and necessity for the condemnation proposed, they shall make no finding as to the value of the condemned property.

**Source: L. 75:** Entire part added, p. 1410, § 1, effective July 1.

#### ANNOTATION

**Law reviews.** For comment, "Water: State-wide or Local Concern? *City of Thornton v. Farmers Reservoir & Irrigation Co.*, 194 Colo. 526, 575 P.2d 382 (1978)", see 56 Den. L. J. 625 (1979).

**Provisions held unconstitutional.** The provisions of this part, §§ 38-6-202(1), 38-6-203, 38-6-210 and subsections (1), (3), and (4) of this section, relating to the appointment, action, and effect of a commission to determine the issue of necessity of exercising eminent domain are in conflict with the express grant of eminent do-

main powers to home rule cities by § 1 of art. XX, Colo. Const. *City of Thornton v. Farmers Reservoir & Irrigation Co.*, 194 Colo. 526, 575 P.2d 382 (1978).

**Review of determination of necessity.** The determination of necessity is an essential part of the power of eminent domain and is not reviewable by the judiciary absent a showing of fraud or bad faith. *City of Thornton v. Farmers Reservoir & Irrigation Co.*, 194 Colo. 526, 575 P.2d 382 (1978).

**38-6-208. Commissioners - oaths - hearing.** The commissioners, before entering upon the duties of their office, shall take an oath to faithfully, promptly, and impartially discharge their duties as such commissioners. Any commissioner may administer oaths to witnesses produced before him. The commissioners may issue subpoenas and compel witnesses to attend and testify, may adjourn and hold meetings, and shall hear such proofs as may be presented to them.

**Source: L. 75:** Entire part added, p. 1411, § 1, effective July 1.

**38-6-209. Hearing - notice - publication.** After the report of the commissioners is filed with the clerk of the court, the court shall fix a time for the consideration of said report, and the petitioner shall give written notice to the defendants and all other persons who are the owners of property mentioned in said report, whether damaged, appropriated, condemned, or assessed special benefits, of the matters contained in said report and of the time so fixed by the court for the consideration thereof. The notice shall be served in like manner as is provided by the laws of this state for the service of summons in civil actions, except as otherwise provided in this section. Said persons shall be served at least ten days before the time fixed for the consideration of the report by the court. In case any defendant or owner of any property damaged, appropriated, condemned, or assessed special benefits does not reside in the state or is a foreign corporation or in case the attorney for said petitioner files an affidavit that he has endeavored to find such person for the purpose of causing said person to be notified and that after reasonable effort he has been unable to find said person in the state, the petitioner may cause to be published a notice, of the matters affecting such person contained in said report and of the time fixed for the consideration thereof, for three successive times in some daily or weekly newspaper published in said judicial district. Said publication shall be in lieu of personal service of said notice on all such persons.

**Source: L. 75:** Entire part added, p. 1411, § 1, effective July 1.

**38-6-210. Objections - default - burden of proof - findings - reappraisement.** Any person who is the owner of, or who has any interest in, any of the property mentioned in

said report, whether appropriated or damaged or against which special benefits have been assessed, may appear, at or before the time fixed by the court for the consideration of said report, but not after said time, and file his written objection to said report. Default shall be entered against the owners of all property mentioned in said report who have not filed objections thereto within said time, and the report shall be confirmed by the court as to such persons. At the time fixed by the court for the consideration of said report, the court shall proceed to hear any objections that have been filed, except where a jury trial has been demanded, as provided for in section 38-6-211. Any party interested in said proceeding may introduce such evidence as may tend to establish the right of the matter. The burden of proof to change any finding, award, or assessment of said commissioners shall be upon the person objecting thereto. If it appears to the court that the property of the objector has been appraised by the commissioners at more or less than the fair, actual cash market value thereof, or that the fair, direct, and actual damage to property not taken is greater or less than the amount awarded by the commissioners, or that the property of the objector is assessed a special benefit in an amount greater than it will be actually benefited by the proposed improvement, the court shall so find and shall also find what the proper award or assessment shall be, and judgment shall be rendered accordingly. The court, for good cause shown, may modify, alter, change, annul, or confirm the report of the commissioners, or any part thereof, or may order a new appraisal and assessment as to any of the property affected in the proceeding by the same commissioners or by other commissioners appointed by the court.

**Source:** L. 75: Entire part added, p. 1411, § 1, effective July 1.

#### ANNOTATION

**Law reviews.** For comment, "Water: State-wide or Local Concern? City of Thornton v. Farmers Reservoir & Irrigation Co., 194 Colo. 526, 575 P.2d 382 (1978)", see 56 Den. L.J. 625 (1979).

**38-6-211. Jury trial - motion for new trial - appellate proceedings.** (1) At any time prior to the date fixed for the hearing of the petition provided for in section 38-6-205, any defendant who owns or is interested in any property to be taken, appropriated, or damaged on account of the proposed improvement may file his demand, in writing, for a trial by a jury of either six or twelve freeholders to appraise and assess the damages which said defendant or person may sustain by reason of the appropriation and condemnation of, or damage to, his property. Any person so demanding a jury, at the time of said demand, shall deposit with the clerk the jury fees for one day's services according to the rate allowed jurors in the district court. The court shall fix an early date for said trial, and on such date the defendants who have made written demands for jury trial within the time provided shall proceed to submit their claims to the jury. Such jury shall be drawn as in civil actions; except that the jurors shall have the qualifications provided in this section.

(2) The court shall proceed in the same manner and with like powers as in other cases, except as otherwise provided in this part 2. At the request of any party to the proceedings, the court shall order that the jury go upon the premises sought to be taken or damaged, in charge of a sworn bailiff and in the company of any other person that the court may order, and examine the premises in person. At the conclusion of the evidence, the matters in controversy may be argued by counsel to the jury, and at the conclusion of the arguments the court shall instruct the jury in writing. The jury shall return a special verdict fixing and determining the damages or compensation to be allowed to each defendant, severally, who has demanded a jury trial, which verdict shall include the fair, actual cash market value of the land actually taken for the improvement. Any party to the proceeding may move for a new trial in the same manner as in actions at law. The refusal of said court to grant the same may be excepted to and assigned for appeal, but no appeal shall be permitted to stay the improvement sought by the proceeding.

**Source:** L. 75: Entire part added, p. 1412, § 1, effective July 1.



**38-6-212. Costs - compensation.** The cost of the proceedings shall be paid by the municipality. The commissioners shall be allowed a reasonable compensation for their services and expenses, the amount of which shall be fixed by the court. The court may also order that the municipality pay reasonable attorney fees.

**Source:** L. 75: Entire part added, p. 1412, § 1, effective July 1.

**38-6-213. Amendments - new parties - notice.** Amendment to the petition or to any paper or record in the proceedings shall be permitted by the court whenever necessary to a fair hearing and final determination of the questions involved. Should it become necessary at any stage of the proceedings to bring in a new party, the court has the power to make such rule or order in relation thereto as may be deemed reasonable and proper. The court also has the power to make all necessary rules and orders for notice to persons of the pendency of the proceedings.

**Source:** L. 75: Entire part added, p. 1412, § 1, effective July 1.

**38-6-214. Decree - copy to municipality - payments - collection of assessments.** After the trial hearings and determination of all objections to said report, the court shall make its judgment and decree. The decree shall describe the property so condemned and state the owner thereof and shall describe the property against which special assessments have been made and the amounts thereof. When said judgment and decree have been made by the court, the clerk of said court shall make a certified copy thereof and after thirty days deliver the same to the municipality. Unless other provision is made in the charter of the municipality for the payment of said awards, the legislative body, within ninety days after the date of said decree, shall make the necessary appropriation for the payment of the compensation for the property condemned. The proper officers of the municipality shall compensate the respective parties entitled thereto. The municipality shall also provide for the collection of such special assessments as have been confirmed by the final decree of the court.

**Source:** L. 75: Entire part added, p. 1413, § 1, effective July 1.

#### ANNOTATION

**Law reviews.** For comment, "Water: State-wide or Local Concern? City of Thornton v. Farmers Reservoir & Irrigation Co., 194 Colo. 526, 575 P.2d 382 (1978)", see 56 Den. L.J. 625 (1979).

**38-6-215. Municipality may dismiss proceedings.** The attorney for the municipality commencing the proceedings has the right to withdraw said proceedings or to dismiss the same as to one or more of said defendants or as to one or more parcels of property, without prejudice, at any stage of the proceedings, and the petitioner shall pay the costs thereof.

**Source:** L. 75: Entire part added, p. 1413, § 1, effective July 1.

**38-6-216. Ownership in controversy - award.** If the ownership of any property condemned or damaged is in controversy, the amount awarded in payment of said property or the damage thereto shall be paid into the registry of said court for the use of the successful claimants of said property as their respective interests appear to the court. All disputes as to ownership of property taken or damaged shall be tried to the court.

**Source:** L. 75: Entire part added, p. 1413, § 1, effective July 1.

**ARTICLE 7****Eminent Domain by  
Urban Renewal Authorities - Vesting**

38-7-101.	Motion for vesting - contents.	38-7-105.	Construction of article.
38-7-102.	Motion for vesting - procedure with respect thereto.	38-7-106.	Commissioners - other articles.
38-7-103.	Vesting of title - procedure.	38-7-107.	Interest.
38-7-104.	Withdrawals from deposit.		

**38-7-101. Motion for vesting - contents.** (1) In any proceeding initiated by an urban renewal authority, as defined in section 31-25-103, C.R.S., under the provisions of article 1 of this title, the petitioner or any respondent, at any time after the petition has been filed and before judgment is entered in the proceeding, may file a written verified motion requesting that, immediately or at some specified later date, the petitioner be vested with fee simple title, or some lesser estate, interest, or easement, as may be required, to the real property, or a specified portion thereof, which is the subject of the proceeding, and be authorized to take possession of and use such property. Any motion filed by any respondent shall affect, and be limited in application to, the property in which the said respondent has an interest. All the owners of property must join in any motion filed by any respondent under this section, unless one or more of the owners of record cannot by due diligence be found, in which instance this fact shall be stated in the motion.

(2) The motion described in subsection (1) of this section, referred to in this article as the "motion for vesting", shall set forth:

(a) An accurate description of the property to which the motion relates and the estate or interest sought to be acquired or divested; but, in any motion for vesting filed by any respondent, the interest sought to be divested shall be the interest described in the petition in eminent domain; and

(b) The names of the owners of record of the property described in the motion for vesting; and

(c) The date upon which it is requested that the estate or interest sought to be acquired or divested shall vest in the petitioner and the date upon which it is requested that the petitioner shall be entitled to possession and use of the subject property.

**Source:** L. 69: p. 357, § 1. C.R.S. 1963: § 50-7-1.

**Cross references:** For the definition of an urban renewal authority, see § 31-25-103 (8.5); for proceedings and procedure for taking private property, see part 1 of article 1 of this title.

**38-7-102. Motion for vesting - procedure with respect thereto.** (1) The court shall set a date, not less than twenty days after the filing of such motion, for the hearing thereon, and the court shall require at least ten days' notice to be given to each party to the proceeding whose interests would be affected by the taking requested. The averments in the motion and the necessity for the vesting of title, or some lesser estate, prior to the final determination of just compensation shall be deemed admitted unless such averments are controverted in a responsive pleading filed at or before the hearing on the motion for vesting.

(2) At the hearing on the motion for vesting, if such averments have been controverted in responsive pleadings filed at or before the said hearing and if the court has not previously, in the same proceeding, determined the same, the court shall first hear and determine the following matters:

(a) The authority of the petitioner to exercise the right of eminent domain;

(b) Whether the property described in the motion for vesting is subject to the exercise of the right of eminent domain;

(c) Whether the right of eminent domain is being properly exercised in the particular proceeding.



(3) Failure to raise the issues enumerated in subsection (2) of this section, at or before the hearing on the motion for vesting, shall constitute a waiver insofar as the said issues relate to the property described in the motion for vesting. The court's order thereon shall be a final order, and an appeal may be obtained for the review thereof by either party within twenty days after the entry of such order, but not thereafter unless the appellate court, on good cause shown, shall, within the twenty-day period, extend the time for obtaining an appeal. Appellate review shall not stay the other proceedings under this article, unless the appeal was obtained by the petitioner or unless an order staying such further proceedings is entered by the appellate court upon a showing of irreparable injury.

(4) If the issues enumerated under subsection (2) of this section are determined in favor of the petitioner and further proceedings are not stayed or if further proceedings are stayed and the appeal results in a determination in favor of the petitioner, the court shall hear and determine all matters raised in and relating to the motion for vesting. If the foregoing matters are determined in favor of the petitioner, the court shall appoint three disinterested commissioners, who shall be freeholders, to assess the compensation to which the respondents named in the motion for vesting may be entitled by reason of the appropriation of the petitioner.

(5) The commissioners, before entering upon the duties of their office, shall take an oath to faithfully and impartially discharge their duties as commissioners. Any one of them may administer oaths to witnesses produced before them. The commissioners shall forthwith view the property, hear such testimony, and consider such evidence as is reasonably necessary to enable them to make a preliminary finding of an amount constituting just compensation for the taking of the property of the respondents named in the motion for vesting. The commissioners shall forthwith make, subscribe, and file with the clerk of the court in which such proceedings are had a certified report meeting the requirements of section 38-1-115. Upon the motion of the petitioner filed within ten days of receipt of the notice provided for in section 38-7-103 (1), the court shall review the said report of the commissioners, and, upon good cause shown by the petitioner, the court may order a new report by the same or different commissioners, and the said order shall void the report objected to. The new commissioners appointed, if any, and the new report shall be in accordance with the provisions of this article.

(6) Such preliminary finding of just compensation and any deposit made or security provided pursuant thereto shall not be evidence in the further proceedings to ascertain finally the just compensation to be paid and shall not be disclosed in any manner to a jury impaneled in such proceedings.

**Source:** L. 69: p. 358, § 1. C.R.S. 1963: § 50-7-2.

**Cross references:** For contents of the report or verdict in eminent domain proceedings, see § 38-1-115.

**38-7-103. Vesting of title - procedure.** (1) When the certified report of the commissioners is filed with the clerk of the court, the said clerk shall forthwith notify all parties named in the motion for vesting of the filing of the said report and of the amount preliminarily found to constitute just compensation.

(2) Within ten days of receipt of the notice described in subsection (1) of this section, the petitioner shall deposit with the court or the clerk of the court, for the use of the respondent named in the motion for vesting, the sum of money preliminarily found to constitute just compensation by the commissioners. If the petitioner has filed a motion for a new report under section 38-7-102 (5), the deposit shall not be due until ten days following the court's ruling on the said motion, if the motion is denied. If the motion is granted by the court, a new notice shall be sent by the clerk upon receipt of the new report.

(3) Upon payment into the court or the clerk of the court of the sum described in subsection (2) of this section by the petitioner, the court shall enter an order vesting in the petitioner the fee simple title, or such lesser estate, interest, or easement, as may be required, to the property as requested in the motion for vesting at such date as the court considers proper, and fixing a date on which the petitioner is authorized to take possession of and to

use the property. A certified copy of said order shall be recorded and indexed in the recorder's office of the county in which the property is located in like manner and with like effect as if it were a deed of conveyance from the owners and parties interested to the proper parties. If there is more than one person interested as owner or otherwise in the property and they are unable to agree upon the nature, extent, or value of their respective interests in the total amount of compensation so ascertained and assessed on an undivided basis, the nature, extent, or value of said interests shall be determined according to law in a separate and subsequent proceeding and distribution made among the several claimants.

(4) At the request of any affected party and upon his showing of undue hardship or other good cause, the petitioner's authority to take possession of the property shall be postponed for more than ten days after the date of such vesting of title or more than fifteen days after the entry of such order when the order does not vest title in the petitioner. If postponement occurs, such party shall pay to the petitioner a reasonable rental for such property, the amount thereof to be determined by the court.

**Source:** L. 69: p. 359, § 1. C.R.S. 1963: § 50-7-3.

**38-7-104. Withdrawals from deposit.** Upon proper application to the court or by stipulation between the parties, the respondent may withdraw from the sum deposited pursuant to section 38-7-103 (2) an amount not to exceed three-fourths of the highest valuation evidenced by testimony presented by the petitioner to the commissioners, unless the petitioner agrees to a larger withdrawal. All parties interested in the property sought to be acquired shall be required to consent and agree to any such withdrawal. Any such withdrawal of said deposit shall be a partial payment of the amount of total compensation to be paid and shall be deducted by the clerk of the court from any award or verdict entered thereafter. Any party making such withdrawal shall refund to the clerk of the court, upon the entry of a proper court order, any portion of the amount so withdrawn which exceeds the amount finally ascertained in the proceeding to be just compensation or damages, costs, or expenses owing to such party.

**Source:** L. 69: p. 360, § 1. C.R.S. 1963: § 50-7-4.

**38-7-105. Construction of article.** The right to take possession and title prior to the final judgment as prescribed in this article is in addition to any other right, power, or authority otherwise conferred by law and shall not be construed as abrogating, limiting, or modifying any such other right, power, or authority, including the rights, powers, and authorities granted in articles 1 to 6 of this title. Should the provisions of this article be invoked by any party, the final determination of the amount constituting just compensation shall be determined pursuant to the provisions of article 1 of this title.

**Source:** L. 69: p. 360, § 1. C.R.S. 1963: § 50-7-5.

**Cross references:** For computing damages and compensation, see § 38-1-114.

**38-7-106. Commissioners - other articles.** Nothing in this article shall be construed to prevent a commissioner appointed under this article from being appointed pursuant to the provisions of articles 1 to 6 of this title in the same eminent domain proceeding. Nothing in this article shall prevent the appointment of a commissioner, for purposes of this article, who has previously been appointed in the same proceeding under the provisions of article 1 of this title.

**Source:** L. 69: p. 360, § 1. C.R.S. 1963: § 50-7-6.

**Cross references:** For the appointment of a board of commissioners to determine just compensation, see § 38-1-105 (1).



**38-7-107. Interest.** The petitioner shall pay interest as provided in section 38-1-116; except that no interest shall be allowed on that portion of the award which the respondent received or could have received as a partial payment by withdrawal from the sum deposited by the petitioner pursuant to section 38-7-103 (2).

**Source:** L. 69: p. 360, § 1. C.R.S. 1963: § 50-7-7.

**Cross references:** For the interest on an award, see § 38-1-116.

FRAUDS - STATUTE OF FRAUDS

ARTICLE 8

Fraudulent Transfers

**Law reviews:** For article, "Representing the Debtor: Counsel Beware", see 23 Colo. Law. 539 (1994); for article, "Overcoming Difficulties in Collecting Child Support and Maintenance", see 24 Colo. Law. 2725 (1995).

38-8-101.	Short title.		ligation is incurred.
38-8-102.	Definitions.	38-8-108.	Remedies of creditors.
38-8-103.	Insolvency.	38-8-109.	Defenses, liability, and protection of transferee.
38-8-104.	Value.		
38-8-105.	Transfers fraudulent as to present and future creditors.	38-8-110.	Extinguishment of cause of action.
38-8-106.	Transfers fraudulent as to present creditors.	38-8-111.	Supplementary provisions.
38-8-107.	When transfer is made or ob-	38-8-112.	Uniformity of application and construction.

UNIFORM FRAUDULENT TRANSFER ACT  
PREFATORY NOTE

The Uniform Fraudulent Conveyance Act was promulgated by the Conference of Commissioners on Uniform State Laws in 1918. The Act has been adopted in 25 jurisdictions, including the Virgin Islands. It has also been adopted in the sections of the Bankruptcy Act of 1938 and the Bankruptcy Reform Act of 1978 that deal with fraudulent transfers and obligations.

The Uniform Act was a codification of the "better" decisions applying the Statute of 13 Elizabeth. See Analysis of H.R. 12339, 74th Cong., 2d Sess. 213 (1936). The English statute was enacted in some form in many states, but, whether or not so enacted, the voidability of fraudulent transfer was part of the law of every American jurisdiction. Since the intent to hinder, delay, or defraud creditors is seldom susceptible of direct proof, courts have relied on badges of fraud. The weight given these badges varied greatly from jurisdiction, and the Conference sought to minimize or eliminate the diversity by providing that proof of certain fact combinations would conclusively establish fraud. In the absence of evidence of the existence of such facts, proof of a fraudulent transfer was to depend on evidence of actual intent. An important reform effected by the Uniform Act was the elimination of any requirement that a creditor have obtained a judgment or execution returned unsatisfied

before bringing an action to avoid a transfer as fraudulent. See American Surety Co. v. Conner, 251 N.Y. 1, 166 N.E. 783, 67 A.L.R. 244 (1929) (per C.J. Cardozo).

The Conference was persuaded in 1979 to appoint a committee to undertake a study of the Uniform Act with a view to preparing the draft of a revision. The Conference was influenced by the following considerations:

- (1) The Bankruptcy Reform Act of 1978 has made numerous changes in the section of that Act dealing with fraudulent transfers and obligations, thereby substantially reducing the correspondence of the provisions of the federal bankruptcy law on fraudulent transfers with the Uniform Act.
- (2) The Committee on Corporate Laws of the Section of Corporations, Banking & Business Law of the American Bar Association, engaged in revising the Model Corporation Act, suggested that the Conference review provisions of the Uniform Act with a view to determining whether the Acts are consistent in respect to the treatment of dividend distributions.
- (3) The Uniform Commercial Code (located in title 4 of C.R.S.), enacted at least in part by all 50 states, had substantially modified related rules of law regulating transfers of personal property, notably by facilitating the making and

perfection of security transfers against attack by unsecured creditors.

(4) Debtors and trustees in a number of cases have avoided foreclosure of security interests by invoking the fraudulent transfer section of the Bankruptcy Reform Act.

(5) The Model Rules of Professional Conduct adopted by the House of Delegates of the American Bar Association on August 2, 1983, forbid a lawyer to counsel or to assist a client in conduct that the lawyer knows is fraudulent.

The Drafting Committee appointed by the Conference held its first meeting in January of 1983. A first reading of a draft of the revision of the Uniform Fraudulent Conveyance Act was had at the Conference's meeting in Boca Raton, Florida, on July 27, 1983. The Committee held four meetings in addition to a meeting held in connection with the Conference meeting in Boca Raton. Meetings were also attended by the following representatives of interested organizations:

Robert Rosenberg, Esq., of the American Bar Association;

Richard Cherin, Esq., of the Commercial Financial Services Committee of the Corporation, Banking and Business Law Section of the American Bar Association;

Robert Zinman, Esq., of the American College of Real Estate Lawyers;

Bruce Bernstein, Esq., of the National Commercial Finance Association;

Ernest E. Specks, Esq., of the Real Property, Probate and Trust Law Section of the American Bar Association.

The Committee determined to rename the Act the Uniform Fraudulent Transfer Act in recognition of its applicability to transfers of personal property as well as real property, "conveyance" having a connotation restricting it to a transfer of personal property. As noted in Comment (2) accompanying § 1(2) (numbered as section 38-8-102 (2) in C.R.S.) and Comment (8) accompanying § 4 (numbered as section 38-8-105 in C.R.S.), however, this Act, like the original Uniform Act, does not purport to cover the whole law of voidable transfers and obligations. The limited scope of the original Act did not impair its effectiveness in achieving uniformity in the areas covered. See McLaughlin, *Application of the Uniform Fraudulent Conveyance Act*, 46 Harv. L. Rev. 404, 405 (1933).

The basic structure and approach of the Uniform Fraudulent Conveyance Act are preserved in the Uniform Fraudulent Transfer Act. There are two sections in the new Act delineating what transfers and obligations are fraudulent. Section 4(a) (numbered as section 38-8-105 (1) in C.R.S.) is an adaptation of three sections of the U.F.C.A.; § 5(a) (numbered as section 38-8-106 (1) in C.R.S.) is an adaptation of another section of the U.F.C.A.; and § 5(b) (numbered as section 38-8-106 (2) in C.R.S.) is new. One section

of the U.F.C.A. (§ 8) is not carried forward into the new Act because deemed to be redundant in part and in part susceptible of inequitable application. Both Acts declare a transfer made or an obligation incurred with actual intent to hinder, delay, or defraud creditors to be fraudulent. Both Acts render a transfer made or obligation incurred without adequate consideration to be constructively fraudulent - i.e., without regard to the actual intent of the parties - under one of the following conditions:

(1) the debtor was left by the transfer or obligation with unreasonably small assets for a transaction or the business in which he was engaged;

(2) the debtor intended to incur, or believed that he would incur, more debts than he would be able to pay; or

(3) the debtor was insolvent at the time or as a result of the transfer or obligation.

As under the original Uniform Fraudulent Conveyance Act a transfer or obligation that is constructively fraudulent because insolvency concurs with or follows failure to receive adequate consideration is voidable only by a creditor in existence at the time the transfer occurs or the obligation is incurred. Either an existing or subsequent creditor may avoid a transfer or obligation for inadequate consideration when accompanied by the financial condition specified in § 4(a)(2)(i) (section 38-8-105 (1)(b)(I) in C.R.S.) or the mental state specified in § 4(a)(2)(ii) (section 38-8-104 (1)(b)(II) in C.R.S.).

Reasonably equivalent value is required in order to constitute adequate consideration under the revised Act. The revision follows the Bankruptcy Code in eliminating good faith on the part of the transferee or obligee as an issue in the determination of whether adequate consideration is given by a transferee or obligee. The new Act, like the Bankruptcy Act, allows the transferee or obligee to show good faith in defense after a creditor establishes that a fraudulent transfer has been made or a fraudulent obligation has been incurred. Thus a showing by a defendant that a reasonable equivalent has been given in good faith for a transfer or obligation is a complete defense although the debtor is shown to have intended to hinder, delay, or defraud creditors.

A good faith transferee or obligee who has given less than a reasonable equivalent is nevertheless allowed a reduction in liability to the extent of the value given. The new Act, like the Bankruptcy Code, eliminates the provision of the Uniform Fraudulent Conveyance Act that enables a creditor to attack a security transfer on the ground that the value of the property transferred is disproportionate to the debt secured. The premise of the new Act is that the value of the interest transferred for security is measured by and thus corresponds exactly to the debt



secured. Foreclosure of a debtor's interest by a regularly conducted, noncollusive sale on default under a mortgage or other security agreement may not be avoided under the Act as a transfer for less than a reasonably equivalent value.

The definition of insolvency under the Act is adapted from the definition of the term in the Bankruptcy Code. Insolvency is presumed from proof of a failure generally to pay debts as they become due.

The new Act adds a new category of fraudulent transfer, namely, a preferential transfer by an insolvent insider to a creditor who had reasonable cause to believe the debtor to be insolvent. An insider is defined in much the same way as in the Bankruptcy Code and includes a relative, also defined as in the Bankruptcy Code, a director or officer of a corporate debtor, a partner, or a person in control of a debtor. This provision is available only to an existing creditor. Its premise is that an insolvent debtor is obliged to pay debts to creditors not related to him before paying those who are insiders.

The new Act omits any provision directed particularly at transfers or obligations of insolvent partnership debtors. Under § 8 of the Uniform Fraudulent Conveyance Act any transfer made or obligation incurred by an insolvent partnership to a partner is fraudulent without regard to intent or adequacy of consideration. So categorical a condemnation of a partnership transaction with a partner may unfairly prejudice the interests of a partner's separate creditors. The new Act also omits as redundant a provision in the original Act that makes fraudulent a transfer made or obligation incurred by an insolvent partnership for less than a fair consideration to the partnership.

Section 7 (numbered as section 38-8-108 in C.R.S.) lists the remedies available to creditors under the new Act. It eliminates as unnecessary and confusing a differentiation made in the original Act between the remedies available to holders of matured claims and those holding unmatured claims. Since promulgation of the Uniform Fraudulent Conveyance Act the Supreme Court has imposed restrictions on the

availability and use of prejudgment remedies. As a result many states have amended their statutes and rules applicable to such remedies, and it is frequently unclear whether a state's procedures include a prejudgment remedy against a fraudulent transfer or obligation. A bracketed paragraph is included in Section 7 for adoption by those states that elect to make such a remedy available.

Section 8 (numbered as section 38-8-109 in C.R.S.) prescribes the measure of liability of a transferee or obligee under the Act and enumerates defenses. Defenses against avoidance of a preferential transfer to an insider under § 5(b) (numbered as section 38-8-106 (2) in C.R.S.) include an adaptation of defenses available under § 547(c)(2) and (4) of the Bankruptcy Code when such a transfer is sought to be avoided as a preference by the trustee in bankruptcy. In addition a preferential transfer may be justified when shown to be made pursuant to a good faith effort to stave off forced liquidation and rehabilitate the debtor. Section 8 also precludes avoidance, as a constructively fraudulent transfer, of the termination of a lease on default or the enforcement of a security interest in compliance with Article 9 of the Uniform Commercial Code.

The new Act includes a new section specifying when a transfer is made or an obligation is incurred. The section specifying the time when a transfer occurs is adapted from Section 548(d) of the Bankruptcy Code. Its premise is that if the law prescribes a mode for making the transfer a matter of public record or notice, it is not deemed to be made for any purpose under the Act until it has become such a matter of record or notice.

The new Act also includes a statute of limitations that bars the right rather than the remedy on expiration of the statutory periods prescribed. The law governing limitations on actions to avoid fraudulent transfers among the states is unclear and full of diversity. The Act recognizes that laches and estoppel may operate to preclude a particular creditor from pursuing a remedy against a fraudulent transfer or obligation even though the statutory period of limitations has not run.

**38-8-101. Short title.** This article shall be known and may be cited as the "Colorado Uniform Fraudulent Transfer Act".

**Source:** L. 91: Entire article added, p. 1681, § 1, effective July 1.

**Editor's note - Colorado legislative change:** This section was numbered as section 12 in the uniform act. Colorado placed it here and renumbered the succeeding sections accordingly. Colorado also used its own numbering system for subsections and paragraphs within sections. Where necessary, these changes will be noted in the comments.

**38-8-102. Definitions.** As used in this article, unless the context otherwise requires:

(1) "Affiliate" means:

(a) A person who directly or indirectly owns, controls, or holds with power to vote twenty percent or more of the outstanding voting securities of the debtor, other than a person who holds the securities:

- (I) As a fiduciary or agent without sole discretionary power to vote the securities; or
- (II) Solely to secure a debt, if the person has not exercised the power to vote;

(b) A corporation, twenty percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor or a person who directly or indirectly owns, controls, or holds with power to vote, twenty percent or more of the outstanding voting securities of the debtor, other than a person who holds the securities:

- (I) As a fiduciary or agent without sole power to vote the securities; or
- (II) Solely to secure a debt, if the person has not in fact exercised the power to vote;

(c) A person whose business is operated by the debtor under a lease or other agreement, or a person substantially all of whose assets are controlled by the debtor; or

(d) A person who operates the debtor's business under a lease or other agreement or controls substantially all of the debtor's assets.

(2) "Asset" means property of a debtor. "Asset" shall not include:

(a) Property to the extent it is encumbered by a valid lien;

(b) Property to the extent it is generally exempt immediately prior to the time of transfer under nonbankruptcy law; or

(c) An interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only one tenant.

(3) "Claim" means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

(4) "Control" of a debtor or debtor's property by another person does not include conduct undertaken by the other person to enforce rights existing under a valid agreement, entered into in good faith and not primarily for the purpose of obtaining control of the debtor or the debtor's property, including without limitation a lease of such property.

(5) "Creditor" means a person who has a claim.

(6) "Debt" means liability on a claim.

(7) "Debtor" means a person who is liable on a claim.

(8) "Insider" means:

(a) If the debtor is an individual:

(I) A relative of the debtor or of a general partner of the debtor;

(II) A partnership in which the debtor is a general partner;

(III) A general partner in a partnership described in subparagraph (II) of this paragraph (a); or

(IV) A corporation of which the debtor is a director, officer, or person in control;

(b) If the debtor is a corporation:

(I) A director of the debtor;

(II) An officer of the debtor;

(III) A person in control of the debtor;

(IV) A partnership in which the debtor is a general partner;

(V) A general partner in a partnership described in subparagraph (IV) of this paragraph (b); or

(VI) A relative of a general partner, director, officer, or person in control of the debtor;

(c) If the debtor is a partnership:

(I) A general partner in the debtor;

(II) A relative of a general partner in, or a general partner of, or a person in control of the debtor;

(III) Another partnership in which the debtor is a general partner;

(IV) A general partner in a partnership described in subparagraph (III) of this paragraph (c); or

(V) A person in control of the debtor;

(d) An affiliate, or an insider of an affiliate as if the affiliate were the debtor; or

(e) A managing agent of the debtor.



(9) “Lien” means a charge against or an interest in property to secure payment of a debt or performance of an obligation, and includes a security interest created by agreement, a judicial lien obtained by legal or equitable process or proceedings, a common-law lien, or a statutory lien.

(10) “Person” means an individual, partnership, corporation, association, organization, government or governmental subdivision or agency, business trust, estate, trust, or any other legal or commercial entity.

(11) “Property” means anything that may be the subject of ownership.

(12) “Relative” means an individual related by consanguinity within the third degree as determined by the common law, a spouse, or an individual related to a spouse within the third degree as so determined, and includes an individual in an adoptive relationship within the third degree.

(13) “Transfer” means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance.

(14) “Valid lien” means a lien that is effective against the holder of a judicial lien subsequently obtained by legal or equitable process or proceedings.

**Source: L. 91:** Entire article added, p. 1681, § 1, effective July 1.

**Editor’s note - Colorado legislative change:** This section was numbered as section 1 in the uniform act. In the introductory portion to this section, after the word “article”, Colorado added a comma and the words “unless the context otherwise requires”. In the introductory portion to subsection (2), Colorado replaced a comma with a period and changed the words “but the term does not include” to “‘Asset’ shall not include”. In subsection (2) (b), after “exempt”, Colorado added “immediately prior to the time of transfer”. The definition of “control” in subsection (4) has been added and subsequent definitions renumbered accordingly. In subsection (8), the word “means” has been substituted for “includes”.

## OFFICIAL COMMENT

(1) The definition of “affiliate” is derived from § 101(2) of the Bankruptcy Code.

(2) The definition of “asset” is substantially to the same effect as the definition of “assets” in § 1 of the Uniform Fraudulent Conveyance Act. The definition in this Act, unlike that in the earlier Act, does not, however require a determination that the property is liable for the debts of the debtor. Thus, an unliquidated claim for damages resulting from personal injury or a contingent claim of a surety for reimbursement, contribution, or subrogation may be counted as an asset for the purpose of determining whether the holder of the claim is solvent as a debtor under § 2 of this Act (numbered as section 38-8-103 in C.R.S.), although applicable law may not allow such an asset to be levied on and sold by a creditor. Cf. *Manufacturers & Traders Trust Co. v. Goldman* (In re Ollag Construction Equipment Corp.), 578 F.2d 904, 907-09 (2d Cir. 1978).

Subparagraphs (i), (ii), and (iii) (paragraph (a), (b), and (c) in C.R.S.) provide clarification by excluding from the term not only generally exempt property but also an interest in a tenancy by the entirety in many states and an interest that is generally beyond reach by unsecured creditors because subject to a valid lien. This Act, like its predecessor and the Statute of 13 Eliza-

beth, declares rights and provides remedies for unsecured creditors against transfers that impede them in the collection of their claims. The laws protecting valid liens against impairment by levying creditors, exemption statutes, and the rules restricting levyability of interest in entireties property are limitations on the rights and remedies of unsecured creditors, and it is therefore appropriate to exclude property interests that are beyond the reach of unsecured creditors from the definition of “asset” for the purposes of this Act.

A creditor of a joint tenant or tenant in common may ordinarily collect a judgment by process against the tenant’s interest, and in some states a creditor of a tenant by the entirety may likewise collect a judgment by process against the tenant’s interest. See 2 *American Law of Property* 10, 22, 28-32 (1952); Craig, *An Analysis of Estates by the Entirety in Bankruptcy*, 48 *Am.Bankr.L.J.* 255, 258-59 (1974). The levyable interest of such a tenant is included as an asset under this Act.

The definition of “assets” in the Uniform Fraudulent Conveyance Act excluded property that is exempt from liability for debts. The definition did not, however, exclude all property that cannot be reached by a creditor through judicial proceedings to collect a debt. Thus, it

included the interest of a tenant by the entirety although in nearly half the states such an interest cannot be subjected to liability for a debt unless it is an obligation owed jointly by the debtor with his or her cotenant by the entirety. See 2 American Law of Property 29 (1952); Craig, *An Analysis of Estates by the Entirety in Bankruptcy*, 48 Am.Bankr.L.J. 255, 258 (1974). The definition in this Act requires exclusion of interests in property held by tenants by the entirety that are not subject to collection process by a creditor without a right to proceed against both tenants by the entirety as joint debtors.

The reference to "generally exempt" property in § 1(2)(ii) (numbered as section 38-8-102 (2)(b) in C.R.S.) recognizes that all exemptions are subject to exceptions. Creditors having special rights against generally exempt property typically include claimants for alimony, taxes, wages, the purchase price of the property, and labor or materials that improve the property. See Uniform Exemptions Act § 10 and the accompanying Comment. The fact that a particular creditor may reach generally exempt property by resorting to judicial process does not warrant its inclusion as an asset in determining whether the debtor is insolvent.

Since this Act is not an exclusive law on the subject of voidable transfers and obligations (see Comment (8) to § 4 *infra*) (numbered as section 38-8-105 in C.R.S.), it does not preclude the holder of a claim that may be collected by process against property generally exempt as to other creditors from obtaining relief from a transfer of such property that hinders, delays, or defrauds the holder of such a claim. Likewise the holder of an unsecured claim enforceable against tenants by the entirety is not precluded by the Act from pursuing a remedy against a transfer of property held by the entirety that hinders, delays, or defrauds the holder of such a claim.

Nonbankruptcy law is the law of a state or federal law that is not part of the Bankruptcy Code, Title 11 of the United States Code. The definition of an "asset" thus does not include property that would be subject to administration for the benefit of creditors under the Bankruptcy Code unless it is subject under other applicable law, state or federal, to process for the collection of a creditor's claim against a single debtor.

(3) The definition of "claim" is derived from § 101(4) of the Bankruptcy Code. Since the purpose of this Act is primarily to protect unsecured creditors against transfers and obligations injurious to their rights, the words "claim" and "debt" as used in the Act generally have reference to an unsecured claim and debt. As the context may indicate, however, usage of the terms is not so restricted. See, e.g. §§ 1(1)(i)(B) (numbered as section 38-8-102 (1)(b)(II) in C.R.S.) and 1(8) (numbered as section 38-8-102 (9) in C.R.S.).

(4) The definition of "creditor" in combination with the definition of "claim" has substantially the same effect as the definition of "creditor" under § 1 of the Uniform Fraudulent Conveyance Act. As under that Act, the holder of an unliquidated tort claim or a contingent claim may be a creditor protected by this Act.

(5) The definition of "debt" is derived from § 101(11) of the Bankruptcy Code.

(6) The definition of "debtor" is new.

(7) The definition of "insider" is derived from § 101(28) of the Bankruptcy Code. The definition has been restricted in clauses (i)(C), (ii)(E), and (iii)(D) (clauses (a)(III), (b)(V), and (c)(IV) in C.R.S.), to make clear that a partner is not an insider of an individual, corporation, or partnership if any of these latter three persons is only a limited partner. The definition of "insider" in the Bankruptcy Code does not purport to make a limited partner an insider of the partners or of the partnership with which the limited partner is associated, but it is susceptible of a contrary interpretation and one which would extend unduly the scope of the defined relationship when the limited partner is not a person in control of the partnership. The definition of "insider" in this Act also differs from the definition in the Bankruptcy Code in omitting the reference in 11 U.S.C. § 101(28)(D) to an elected official or relative of such an official as an insider of a municipality. As in the Bankruptcy Code (see 11 U.S.C. § 102(3)), the word "includes" is not limiting, however. Thus, a court may find a person living with an individual for an extended time in the same household or as a permanent companion to have the kind of close relationship intended to be covered by the term "insider." Likewise, a trust may be found to be an insider of a beneficiary.

(8) The definition of "lien" is derived from paragraphs (30), (31), (43), and (45) of § 101 of the Bankruptcy Code, which define "judicial lien," "lien," "security interest," and "statutory lien" respectively.

(9) The definition of "person" is adapted from paragraphs (28) and (30) of § 1-201 of the Uniform Commercial Code, defining "organization" and "person" respectively.

(10) The definition of "property" is derived from § 1-201(33) of the Uniform Probate Code (see section 15-10-201 (36) in C.R.S.). Property includes both real and personal property, whether tangible or intangible, and any interest in property, whether legal or equitable.

(11) The definition of "relative" is derived from § 101(37) of the Bankruptcy Code but is explicit in its references to the spouse of a debtor in view of uncertainty as to whether the common law determines degrees of relationship by affinity.

(12) The definition of "transfer" is derived principally from § 101(48) of the Bankruptcy Code. The definition of "conveyance" in § 1 of



the Uniform Fraudulent Conveyance Act was similarly comprehensive, and the references in this Act to "payment of money, release, lease, and the creation of a lien or incumbrance" are derived from the Uniform Fraudulent Conveyance Act. While the definition in the Uniform Fraudulent Conveyance Act did not explicitly refer to an involuntary transfer, the decisions under that Act were generally consistent with an interpretation that covered such a transfer. See, e.g., *Hearn 45 St. Corp. v. Jano*, 283 N.Y. 139, 27 N.E.2d 814, 128 A.L.R. 1285 (1940) (execution and foreclosure sales); *Lefkowitz v. Finkelstein Trading Corp.*, 14 F.Supp. 898, 899

(S.D.N.Y. 1936) (execution sale); *Langan v. First Trust & Deposit Co.*, 277 App.Div. 1090, 101 N.Y.S.2d 36 (4th Dept. 1950), *aff'd*, 302 N.Y. 932, 100 N.E.2d 189 (1951) (mortgage foreclosure); *Catabene v. Wallner*, 16 N.J.Super. 597, 602, 85 A.2d 300, 302 (1951) (mortgage foreclosure).

(13) The definition of "valid lien" is new. A valid lien includes an equitable lien that may not be defeated by a judicial lien creditor. See, e.g., *Pearlman v. Reliance Insurance Co.*, 371 U.S. 132, 136 (1962) (upholding a surety's equitable lien in respect to a fund owing a bankrupt contractor).

## ANNOTATION

**"Creditor"** includes persons with unlitigated claims against a defendant. *Sands v. New Age Family P'ship, Ltd.*, 897 P.2d 917 (Colo. App. 1995).

**"Insider"** includes spouses; therefore, the burden of proof lies with the creditor to prove each and every element of a fraudulent transfer under the statute before the debtor and spouse must come forward to prove their entitlement to the defense of good faith and reasonably equivalent value. In re *Thomason*, 202 Bankr. 768 (Bankr. D. Colo. 1996).

**"Obligation,"** not specifically defined in this section, is generally synonymous with "transfer" and includes the assumption by the debtor

of a duty to transfer an asset as a fraudulent transfer, even though no actual transfer has as yet taken place. *Sands v. New Age Family P'ship, Ltd.*, 897 P.2d 917 (Colo. App. 1995).

Neither **"transfer"** nor **"obligation"** refers to the creditor's claim against the debtor, but refers instead to the transaction by which the debtor sought to place assets beyond the reach of creditors. *Sands v. New Age Family P'ship, Ltd.*, 897 P.2d 917 (Colo. App. 1995).

**A transaction between a husband and wife is presumptively fraudulent.** Nevertheless, the movant must still establish an intent to hinder, delay, or defraud. *Krol v. Unglaub*, 332 B.R. 303 (Bankr. N.D. Ill. 2005).

**38-8-103. Insolvency.** (1) A debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation.

(2) A debtor who is generally not paying his debts as they become due is presumed to be insolvent.

(3) A partnership is insolvent under subsection (1) of this section if the sum of the partnership's debts is greater than the aggregate of all of the partnership's assets, at a fair valuation, and the sum of the excess of the value of each general partner's nonpartnership assets over the partner's nonpartnership debts.

(4) Assets under this section do not include property that has been transferred, concealed, or removed with intent to hinder, delay, or defraud creditors or that has been transferred in a manner making the transfer voidable under this article.

(5) Debts under this section do not include an obligation to the extent it is secured by a valid lien on property of the debtor not included as an asset.

**Source: L. 91:** Entire article added, p. 1684, § 1, effective July 1.

**Editor's note - Colorado legislative change:** This section was numbered as section 2 in the uniform act. In subsection (3), the phrase "at a fair valuation" has been moved from immediately after "aggregate" to immediately after the first "assets".

## OFFICIAL COMMENT

(1) Subsection (a) (numbered as subsection (1) in C.R.S.) is derived from the definition of "insolvent" in § 101(29)(A) of the Bankruptcy Code. The definition in subsection (a) and the correlated definition of partnership insolvency

in subsection (c) (numbered as subsection (3) in C.R.S.) contemplate a fair valuation of the debts as well as the assets of the debtor. As under the definition of the same term in § 2 of the Uniform Fraudulent Conveyance Act exempt prop-

erty is excluded from the computation of the value of the assets. See § 1(2) supra. (numbered as section 38-8-102 (2) in C.R.S.) For similar reasons interests in valid spendthrift trusts and interests in tenancies by the entireties that cannot be severed by a creditor of only one tenant are not included. See the Comment to § 1(2) supra. (numbered as section 38-8-102 (2) in C.R.S.) Since a valid lien also precludes an unsecured creditor from collecting the creditor's claim from the encumbered interest in a debtor's property, both the encumbered interest and the debt secured thereby are excluded from the computation of insolvency under this Act. See § 1(2) supra (numbered as section 38-8-102 (2) in C.R.S.) and subsection (e) of this section (numbered as subsection (5) in C.R.S.).

The requirement of § 550(b)(1) of the Bankruptcy Code that a transferee be "without knowledge of the voidability of the transfer" in order to be protected has been omitted as inappropriate. Knowledge of the facts rendering the transfer voidable would be inconsistent with the good faith that is required of a protected transferee. Knowledge of the voidability of a transfer would seem to involve a legal conclusion. Determination of the voidability of the transfer ought not to require the court to inquire into the legal sophistication of the transferee.

(2) Section 2(b) (numbered as section 38-8-103 (2) in C.R.S.) establishes a rebuttable presumption of insolvency from the fact of general nonpayment of debts as they become due. Such general nonpayment is a ground for the filing of an involuntary petition under § 303(h)(1) of the Bankruptcy Code. See also U.C.C. § 1-201(23), which declares a person to be "insolvent" who "has ceased to pay his debts in the ordinary course of business." The presumption imposes on the party against whom the presumption is directed the burden of proving that the nonexistence of insolvency as defined in § 2(a) is more probable than its existence. See Uniform Rules of Evidence (1974 Act), Rule 301(a). The 1974 Uniform Rule 301(a) conforms to the Final Draft of Federal Rule 301 as submitted to the United States Supreme Court by the Advisory Committee on Federal Rules of Evidence. "The so-called 'bursting bubble' theory, under which a presumption vanishes upon the introduction of evidence which would support a finding of the nonexistence of the presumed fact, even though not believed, is rejected as according presumptions too 'slight and evanescent' an effect." Advisory Committee's Note to Rule 301. See also 1 J.Weinstein & M.Berger, Evidence 301 [01] (1982).

The presumption is established in recognition of the difficulties typically imposed on a creditor in proving insolvency in the bankruptcy sense, as provided in subsection (a) (numbered as subsection (1) in C.R.S.). See generally Levit, *The Archaic Concept of Balance-Sheet Insolvency*,

47 Am.Bankr.L.J. 215 (1973). Not only is the relevant information in the possession of a non-cooperative debtor but the debtor's records are more often than not incomplete and inaccurate. As a practical matter, insolvency is most cogently evidenced by a general cessation of payment of debts; as has long been recognized by the laws of other countries and is now reflected in the Bankruptcy Code. See Honsberger, *Failure to Pay One's Debts Generally as They Become Due: The Experience of France and Canada*, 54 Am.Bankr.L.J. 153 (1980); J. MacLachlan, *Bankruptcy* 13, 63-64, 436 (1956). In determining whether a debtor is paying its debts generally as they become due, the court should look at more than the amount and due dates of the indebtedness. The court should also take into account such factors as the number of the debtor's debts, the proportion of those debts not being paid, the duration of the nonpayment, and the existence of bona fide disputes or other special circumstances alleged to constitute an explanation for the stoppage of payments. The court's determination may be affected by a consideration of the debtor's payment practices prior to the period of alleged nonpayment and the payment practices of the trade or industry in which the debtor is engaged. The case law that has developed under § 303(h)(1) of the Bankruptcy Code has not required a showing that a debtor has failed or refused to pay a majority in number and amount of his or her debts in order to prove general nonpayment of debts as they become due. See, e.g., *Hill v. Cargill, Inc.* (In re Hill), 8 B.R. 779, 3 C.B.C.2d 920 (Bk.D.Minn. 1981) (nonpayment of three largest debts held to constitute general nonpayment, although small debts were being paid); *In re All Media Properties, Inc.*, 5 B.R. 126, 6 B.C.D. 586, 2 C.B.C.2d 449 (Bk.S.D.Tex. 1980) (missing significant number of payments or regularly missing payments significant in amount said to constitute general nonpayment; missing payments on more than 50% of aggregate of claims said not to be required to show general nonpayment; nonpayment for more than 30 days after billing held to establish nonpayment of a debt when it is due); *In re Kreidler Import Corp.*, 4 B.R. 256, 6 B.C.D. 608, 2 C.B.C.2d 159 (Bk.D.Md. 1980) (nonpayment of one debt constituting 97% of debtor's total indebtedness held to constitute general nonpayment). A presumption of insolvency does not arise from nonpayment of a debt as to which there is a genuine bona fide dispute, even though the debt is a substantial part of the debtor's indebtedness. Cf. 11 U.S.C. § 303(h)(1), as amended by § 426(b) of Public Law No. 98-882, the Bankruptcy Amendments and Federal Judgeship Act of 1984.

(3) Subsection (c) (numbered as subsection (3) in C.R.S.) is derived from the definition of partnership insolvency in § 101(29)(B) of the Bankruptcy Code. The definition conforms gen-



erally to the definition of the same term in § 2(2) of the Uniform Fraudulent Conveyance Act.

(4) Subsection (d) (numbered as subsection (4) in C.R.S.) follows the approach of the definition of "insolvency" in § 101(29) of the Bankruptcy Code by excluding from the computation of the value of the debtor's assets any value that can be realized only by avoiding a transfer of an interest formerly held by the debtor or by discovery or pursuit of property

that has been fraudulently concealed or removed.

(5). Subsection (e) (numbered as subsection (5) in C.R.S.) is new. It makes clear the purpose not to render a person insolvent under this section by counting as a debt an obligation secured by property of the debtor that is not counted as an asset. See also Comments to §§ 1(2) (numbered as section 38-8-102 (2) in C.R.S.) and 2(a) supra (numbered as section 38-8-103 (1) in C.R.S.).

**38-8-104. Value.** (1) Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person.

(2) For the purposes of sections 38-8-105 and 38-8-106, a person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive sale, foreclosing on assets subject to a lien, or pursuant to the execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement.

(3) A transfer is made for present value if the exchange between the debtor and the transferee is intended by them to be contemporaneous and is in fact substantially contemporaneous.

**Source:** L. 91: Entire article added, p. 1684, § 1, effective July 1.

**Editor's note - Colorado legislative change:** This section was numbered as section 3 in the uniform act. In subsection (2), after "conducted," the phrase "noncollusive foreclosure sale or execution" has been changed to "noncollusive sale, foreclosing on assets subject to a lien, or pursuant to the execution".

## OFFICIAL COMMENT

(1) This section defines "value" as used in various contexts in this Act, frequently with a qualifying adjective. The word appears in the following sections:

4(a)(2) (numbered as section 38-8-105 (1)(b) in C.R.S.) ("reasonably equivalent value");

4(b)(8) (numbered as section 38-8-105 (2)(h) in C.R.S.) ("value ... reasonably equivalent");

5(a) (numbered as section 38-8-106 (1) in C.R.S.) ("reasonably equivalent value");

5(b) (numbered as section 38-8-106 (2) in C.R.S.) ("present, reasonably equivalent value");

8(a) (numbered as section 38-8-109 (1) in C.R.S.) ("reasonably equivalent value");

8(b), (c), (d), and (e) (numbered as section 38-8-109 (2), (3), (4), and (5) in C.R.S.) ("value");

8(f)(1) (numbered as section 38-8-109 (6)(a) in C.R.S.) ("new value"); and

8(f)(3) (numbered as section 38-8-109 (6)(c) in C.R.S.) ("present value").

(2) Section 3(a) (numbered as section 38-8-104 (1) in C.R.S.) is adapted from § 548(d)(2)(A) of the Bankruptcy Code. See

also § 3(a) of the Uniform Fraudulent Conveyance Act. The definition in Section 3 is not exclusive. "Value" is to be determined in light of the purpose of the Act to protect a debtor's estate from being depleted to the prejudice of the debtor's unsecured creditors. Consideration having no utility from a creditor's viewpoint does not satisfy the statutory definition. The definition does not specify all the kinds of consideration that do not constitute value for the purposes of this Act—e.g., love and affection. See, e.g., *United States v. West*, 299 F.Supp. 661, 666 (D.Del. 1969).

(3) Section 3(a) does not indicate what is "reasonably equivalent value" for a transfer or obligation. Under this Act, as under § 548(a)(2) of the Bankruptcy Code, a transfer for security is ordinarily for a reasonably equivalent value notwithstanding a discrepancy between the value of the asset transferred and the debt secured, since the amount of the debt is the measure of the value of the interest in the asset that is transferred. See, e.g., *Peoples-Pittsburgh Trust Co. v. Holy Family Polish Nat'l Catholic Church*, Carnegie, Pa., 341 Pa. 390, 19 A.2d 360 (1941). If,

however, a transfer purports to secure more than the debt actually incurred or to be incurred, it may be found to be for less than a reasonably equivalent value. See e.g., *In re Peoria Braumeister Co.*, 138 F.2d 520, 523 (7th Cir. 1943) (chattel mortgage securing a \$3,000 note held to be fraudulent when the debt secured was only \$2,500); *Hartford Acc. & Indemnity Co. v. Jirasek*, 254 Mich. 131, 140, 235 N.W. 836, 839 (1931) (quitclaim deed given as mortgage held to be fraudulent to the extent the value of the property transferred exceeded the indebtedness secured). If the debt is a fraudulent obligation under this Act, a transfer to secure it as well as the obligation would be vulnerable to attack as fraudulent. A transfer to satisfy or secure an antecedent debt owed an insider is also subject to avoidance under the conditions specified in Section 5(b) (numbered as section 38-8-106 (2) in C.R.S.).

(4) Section 3(a) of the Uniform Fraudulent Conveyance Act has been thought not to recognize that an unperformed promise could constitute fair consideration. See *McLaughlin*, Application of the Uniform Fraudulent Conveyance Act, 46 Harv.L.Rev. 404, 414 (1933). Courts construing these provisions of the prior law nevertheless have held unperformed promises to constitute value in a variety of circumstances. See, e.g., *Harper v. Lloyd's Factors, Inc.*, 214 F.2d 662 (2d Cir. 1954) (transfer of money for promise of factor to discount transferor's purchase-money notes given to fur dealer); *Schlecht v. Schlecht*, 168 Minn. 168, 176-77, 209 N.W. 883, 886-87 (1926) (transfer for promise to make repairs and improvements on transferor's homestead); *Farmer's Exchange Bank v. Oneida Motor Truck Co.*, 202 Wis. 266, 232 N.W. 536 (1930) (transfer in consideration of assumption of certain of transferor's liabilities); see also *Hummel v. Cernocky*, 161 F.2d 685 (7th Cir. 1947) (transfer in consideration of cash, assumption of a mortgage, payment of certain debts, and agreement to pay other debts). Likewise a transfer in consideration of a negotiable note discountable at a commercial bank, or the purchase from an established, solvent institution of an insurance policy, annuity, or contract to provide care and accommodations clearly appears to be for value. On the other hand, a transfer for an unperformed promise by an individual to support a parent or other transferor has generally been held voidable as a fraud on creditors of the transferor. See, e.g., *Springfield Ins. Co. v. Fry*, 267 F.Supp. 693 (N.D.Okla. 1967); *Sandler v. Parlapiano*, 236 App.Div. 70, 258 N.Y.Supp. 88 (1st Dep't 1932); *Warwick Municipal Employees Credit Union v. Higham*, 106 R.E. 363, 259 A.2d 852 (1969); *Hulsether v.*

*Sanders*, 54 S.D. 412, 223 N.W. 335 (1929); *Cooper v. Cooper*, 22 Tenn.App. 473, 477, 124 S.W.2d 264, 267 (1939); Note, *Rights of Creditors in Property Conveyed in Consideration of Future Support*, 45 Iowa L.Rev. 546, 550-62 (1960). This Act adopts the view taken in the cases cited in determining whether an unperformed promise is value.

(5) Subsection (b) (numbered as subsection (2) in C.R.S.) rejects the rule of such cases as *Durrett v. Washington Nat. Ins. Co.*, 621 F.2d 201 (5th Cir. 1980) (nonjudicial foreclosure of a mortgage avoided as a fraudulent transfer when the property of an insolvent mortgagor was sold for less than 70% of its fair value); and *Abramson v. Lakewood Bank & Trust Co.*, 647 F.2d 547 (5th Cir. 1981), cert. denied, 454 U.S. 1164 (1982) (nonjudicial foreclosure held to be fraudulent transfer if made without fair consideration). Subsection (b) adopts the view taken in *Lawyers Title Ins. Corp. v. Madrid (In re Madrid)*, 21 B.R. 424 (B.A.P. 9th Cir. 1982), aff'd on another ground, 725 F.2d 1197 (9th Cir. 1984), that the price bid at a public foreclosure sale determines the fair value of the property sold. Subsection (b) prescribes the effect of a sale meeting its requirements, whether the asset sold is personal or real property. The rule of this subsection applies to a foreclosure by sale of the interest of a vendee under an installment land contract in accordance with applicable law that requires or permits the foreclosure to be effected by a sale in the same manner as the foreclosure of a mortgage. See *G.Osborne, G.Nelson, & D.Whitman, Real Estate Finance Law* 83-84, 95-97 (1979). The premise of the subsection is that "a sale of the collateral by the secured party as the normal consequence of default . . . [is] the safest way of establishing the fair value of the collateral . . ." 2 G.Gilmore, *Security Interests in Personal Property*, 1227 (1965).

If a lien given an insider for a present consideration is not perfected as against a subsequent bona fide purchaser or is so perfected after a delay following an extension of credit secured by the lien, foreclosure of the lien may result in a transfer for an antecedent debt that is voidable under Section 5(b) infra (numbered as section 38-8-106 (2) in C.R.S.). Subsection (b) does not apply to an action under Section 4(a)(1) (numbered as section 38-8-105 (1)(a) in C.R.S.) to avoid a transfer or obligation because made or incurred with actual intent to hinder, delay, or defraud any creditor.

(6) Subsection (c) (numbered as subsection (3) in C.R.S.) is an adaptation of § 547(c)(1) of the Bankruptcy Code. A transfer to an insider for an antecedent debt may be voidable under § 5(b) infra (numbered as section 38-8-106 (2) in C.R.S.).

**38-8-105. Transfers fraudulent as to present and future creditors.** (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's



claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

- (a) With actual intent to hinder, delay, or defraud any creditor of the debtor; or
- (b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(I) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(II) Intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.

(2) In determining actual intent under paragraph (a) of subsection (1) of this section, consideration may be given, among other factors, to whether:

- (a) The transfer or obligation was to an insider;
- (b) The debtor retained possession or control of the property transferred after the transfer;
- (c) The transfer or obligation was disclosed or concealed;
- (d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
- (e) The transfer was of substantially all the debtor's assets;
- (f) The debtor absconded;
- (g) The debtor removed or concealed assets;
- (h) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
- (i) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
- (j) The transfer occurred shortly before or shortly after a substantial debt was incurred; and
- (k) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

**Source: L. 91:** Entire article added, p. 1685, § 1, effective July 1.

**Editor's note - Colorado legislative change:** This section was numbered as section 4 in the uniform act.

#### OFFICIAL COMMENT

(1) Section 4(a)(1) (numbered as section 38-8-105 (1)(a) in C.R.S.) is derived from § 7 of the Uniform Fraudulent Conveyance Act. Factors appropriate for consideration in determining actual intent under paragraph (1) (paragraph (a) in C.R.S.) are specified in subsection (b) (subsection (2) in C.R.S.).

(2) Section 4(a)(2) (numbered as section 38-8-105 (1)(b) in C.R.S.) is derived from §§ 5 and 6 of the Uniform Fraudulent Conveyance Act but substitutes "reasonably equivalent value" for "fair consideration." The transferee's good faith was an element of "fair consideration" as defined in § 3 of the Uniform Fraudulent Conveyance Act, and lack of fair consideration was one of the elements of a fraudulent transfer as defined in four sections of the Uniform Act. The transferee's good faith is irrelevant to a determination of the adequacy of the consideration under this Act, but lack of good faith may be a basis for withholding protection

of a transferee or obligee under § 8 infra (numbered as section 38-8-109 in C.R.S.).

(3) Unlike the Uniform Fraudulent Conveyance Act as originally promulgated, this Act does not prescribe different tests when a transfer is made for the purpose of security and when it is intended to be absolute. The premise of this Act is that when a transfer is for security only, the equity or value of the asset that exceeds the amount of the debt secured remains available to unsecured creditors and thus cannot be regarded as the subject of a fraudulent transfer merely because of the encumbrance resulting from an otherwise valid security transfer. Disproportion between the value of the asset securing the debt and the size of the debt secured does not, in the absence of circumstances indicating a purpose to hinder, delay, or defraud creditors, constitute an impermissible hindrance to the enforcement of other creditors' rights against the debtor-transferor. Cf. U.C.C. § 9-311.

(4) Subparagraph (i) of § 4(a)(2) (subparagraph (I) of section 38-8-105 (1)(b) in C.R.S.) is an adaptation of § 5 of the Uniform Fraudulent Conveyance Act but substitutes “unreasonably small [assets] in relation to the business or transaction” for “unreasonably small capital.” The reference to “capital” in the Uniform Act is ambiguous in that it may refer to net worth or to the par value of stock or to the consideration received for stock issued. The special meanings of “capital” in corporation law have no relevance in the law of fraudulent transfers. The subparagraph focuses attention on whether the amount of all the assets retained by the debtor was inadequate, i.e., unreasonably small, in light of the needs of the business or transaction in which the debtor was engaged or about to engage.

(5) Subsection (b) (subsection (2) in C.R.S.) is a nonexclusive catalogue of factors appropriate for consideration by the court in determining whether the debtor had an actual intent to hinder, delay, or defraud one or more creditors. Proof of the existence of any one or more of the factors enumerated in subsection (b) may be relevant evidence as to the debtor’s actual intent but does not create a presumption that the debtor has made a fraudulent transfer or incurred a fraudulent obligation. The list of factors includes most of the badges of fraud that have been recognized by the courts in construing and applying the Statute of 13 Elizabeth and § 7 of the Uniform Fraudulent Conveyance Act. Proof of the presence of certain badges in combination establishes fraud conclusively—i.e., without regard to the actual intent of the parties—when they concur as provided in § 4(a)(2) or in § 5 (section 38-8-105 (1)(b) or in section 38-8-106 in C.R.S.). The fact that a transfer has been made to a relative or to an affiliated corporation has not been regarded as a badge of fraud sufficient to warrant avoidance when unaccompanied by any other evidence of fraud. The courts have uniformly recognized, however, that a transfer to a closely related person warrants close scrutiny of the other circumstances, including the nature and extent of the consideration exchanged. See 1 G. Glenn, *Fraudulent Conveyances and Preferences* § 307 (Rev. ed. 1940). The second, third, fourth, and fifth factors listed are all adapted from the classic catalogue of badges of fraud provided by Lord Coke in *Twyne’s Case*, 3 Coke 80b, 76 Eng.Rep. 809 (Star Chamber 1601). Lord Coke also included the use of a trust and the recitation in the instrument of transfer that it “was made honestly, truly, and bona fide,” but the use of the trust is fraudulent only when accompanied by elements or badges specified in this Act, and recitals of “good faith” can no longer be regarded as significant evidence of a fraudulent intent.

(6) In considering the factors listed in § 4(b) (section 38-8-105 (2) in C.R.S.) a court

should evaluate all the relevant circumstances involving a challenged transfer or obligation. Thus the court may appropriately take into account all indicia negating as well as those suggesting fraud, as illustrated in the following reported cases:

(a) Whether the transfer or obligation was to an insider: *Salomon v. Kaiser* (In re Kaiser), 722 F.2d 1574, 1582-83 (2d Cir. 1983) (insolvent debtor’s purchase of two residences in the name of his spouse and the creation of a dummy corporation for the purpose of concealing assets held to evidence fraudulent intent); *Banner Construction Corp. v. Arnold*, 128 So.2d 893 (Fla. Dist. App. 1961) (assignment by one corporation to another having identical directors and stockholders constituted a badge of fraud); *Travelers Indemnity Co. v. Cormaney*, 258 Iowa 237, 138 N.W.2d 50 (1965) (transfer between spouses said to be a circumstance that shed suspicion on the transfer and that with other circumstances warranted avoidance); *Hatheway v. Hanson*, 230 Iowa 386, 297 N.W. 824 (1941) (transfer from parent to child said to require a critical examination of surrounding circumstances, which, together with other indicia of fraud, warranted avoidance); *Lumpkins v. McPhee*, 59 N.M. 442, 286 P.2d 299 (1955) (transfer from daughter to mother said to be indicative of fraud but transfer held not to be fraudulent due to adequacy of consideration and delivery of possession by transferor).

(b) Whether the transferor retained possession or control of the property after the transfer: *Harris v. Shaw*, 224 Ark. 150, 272 S.W.2d 53 (1954) (retention of property by transferor said to be a badge of fraud and, together with other badges, to warrant avoidance of transfer); *Stephens v. Reginstein*, 89 Ala. 561, 8 So. 68 (1890) (transferor’s retention of control and management of property and business after transfer held material in determining transfer to be fraudulent); *Allen v. Massey*, 84 U.S. (17 Wall.) 351 (1872) (joint possession of furniture by transferor and transferee considered in holding transfer to be fraudulent); *Warner v. Norton*, 61 U.S. (20 How.) 448 (1857) (surrender of possession by transferor deemed to negate allegations of fraud).

(c) Whether the transfer or obligation was concealed or disclosed: *Walton v. First National Bank*, 13 Colo. 265, 22 P. 440 (1889) (agreement between parties to conceal the transfer from the public said to be one of the strongest badges of fraud); *Warner v. Norton*, 61 U.S. (20 How.) 448 (1857) (although secrecy said to be a circumstance from which, when coupled with other badges, fraud may be inferred, transfer was held not to be fraudulent when made in good faith and transferor surrendered possession); *W.T. Raleigh Co. v. Barnett*, 253 Ala. 433, 44 So.2d 585 (1950) (failure to record a deed in



itself said not to evidence fraud, and transfer held not to be fraudulent).

(d) Whether, before the transfer was made or obligation was incurred, a creditor sued or threatened to sue the debtor: *Harris v. Shaw*, 224 Ark. 150, 272 S.W. 2d 53 (1954) (transfer held to be fraudulent when causally connected to pendency of litigation and accompanied by other badges of fraud); *Pergrem v. Smith*, 255 S.W.2d 42 (Ky.App. 1953) (transfer in anticipation of suit deemed to be a badge of fraud; transfer held fraudulent when accompanied by insolvency of transferor who was related to transferee); *Bank of Sun Prairie v. Hovig*, 218 F.Supp. 769 (W.D.Ark. 1963) (although threat or pendency of litigation said to be an indicator of fraud, transfer was held not to be fraudulent when adequate consideration and good faith were shown).

(e) Whether the transfer was of substantially all the debtor's assets: *Walbrun v. Babbitt*, 83 U.S. (16 Wall.) 577 (1872) (sale by insolvent retail shop owner of all of his inventory in a single transaction held to be fraudulent); *Cole v. Mercantile Trust Co.*, 133 N.Y. 164, 30 N.E. 847 (1892) (transfer of all property before plaintiff could obtain a judgment held to be fraudulent); *Lumpkins v. McPhee*, 59 N.M. 442, 286 P.2d 299 (1955) (although transfer of all assets said to indicate fraud, transfer held not to be fraudulent because full consideration was paid and transferor surrendered possession).

(f) Whether the debtor had absconded: *In re Thomas*, 199 F. 214 (N.D.N.Y. 1912) (when debtor collected all of his money and property with the intent to abscond, fraudulent intent was held to be shown).

(g) Whether the debtor had removed or concealed assets: *Bentley v. Young*, 210 F. 202 (S.D.N.Y. 1914), *aff'd*, 223 F. 536 (2d Cir. 1915) (debtor's removal of goods from store to conceal their whereabouts and to sell them held to render sale fraudulent); *Cioli v. Kenourgios*, 59 Cal.App. 690, 211 P. 838 (1922) (debtor's sale of all assets and shipment of proceeds out of the country held to be fraudulent notwithstanding adequacy of consideration).

(h) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred: *Toomay v. Graham*, 151 S.W.2d 119 (Mo.App. 1941) (although mere inadequacy of consideration said not to be a badge of fraud, transfer held to be fraudulent when accompanied by badges of fraud); *Texas Sand Co. v. Shield*, 381 S.W.2d 48 (Tex. 1964) (inadequate consideration said to be an indicator of fraud, and transfer held to be fraudulent because of inadequate consideration, pendency of suit, family relationship of transferee, and fact that all nonexempt property was transferred); *Weigel v. Wood*, 355 Mo. 11, 194 S.W.2d 40 (1946) (although inadequate consid-

eration said to be a badge of fraud, transfer held not to be fraudulent when inadequacy not gross and not accompanied by any other badge; fact that transfer was from father to son held not sufficient to establish fraud).

(i) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or obligation was incurred: *Harris v. Shaw*, 224 Ark. 150, 272 S.W. 2d 53 (1954) (insolvency of transferor said to be a badge of fraud and transfer held fraudulent when accompanied by other badges of fraud); *Bank of Sun Prairie v. Hovig*, 218 F.Supp. 769 (W.D. Ark. 1963) (although the insolvency of the debtor said to be a badge of fraud, transfer held not fraudulent when debtor was shown to be solvent, adequate consideration was paid, and good faith was shown, despite the pendency of suit); *Wareheim v. Bayliss*, 149 Md. 103, 131 A. 27 (1925) (although insolvency of debtor acknowledged to be an indicator of fraud, transfer held not to be fraudulent when adequate consideration was paid and whether debtor was insolvent in fact was doubtful).

(j) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred: *Commerce Bank of Lebanon v. Halladale A Corp.*, 618 S.W. 2d 288, 292 (Mo.App. 1981) (when transferors incurred substantial debts near in time to the transfer, transfer was held to be fraudulent due to inadequate consideration, close family relationship, the debtor's retention of possession, and the fact that almost all the debtor's property was transferred).

(7) The effect of the two transfers described in § 4(b)(11) (section 38-8-105 (2)(k) in C.R.S.), if not avoided, may be to permit a debtor and a lienor to deprive the debtor's unsecured creditors of access to the debtor's assets for the purpose of collecting their claims while the debtor, the debtor's affiliate or insider, and the lienor arrange for the beneficial use or disposition of the assets in accordance with their interests. The kind of disposition sought to be reached here is exemplified by that found in *Northern Pacific Co. v. Boyd*, 228 U.S. 482 (1913), the leading case in establishing the absolute priority doctrine in reorganization law. There the Court held that a reorganization whereby the secured creditors and the management-owners retained their economic interests in a railroad through a foreclosure that cut off claims of unsecured creditors against its assets was in effect a fraudulent disposition (*id.* at 502-05). See *Frank, Some Realistic Reflections on Some Aspects of Corporate Reorganization*, 19 Va. L.Rev. 541, 693 (1933). For cases in which an analogous injury to unsecured creditors was inflicted by a lienor and a debtor, see *Jackson v. Star Sprinkler Corp. of Florida*, 575 F.2d 1223, 1231-34 (8th Cir. 1978); *Heath v. Helmick*, 173 F.2d 157, 161-62 (9th Cir. 1949);

Toner v. Nuss, 234 F.S. 457, 461-62 (E.D.Pa. 1964); and see *In re Spotless Tavern Co., Inc.*, 4 F.Supp. 752, 753, 755 (D.Md. 1933).

(8) Nothing in § 4(b) (section 38-8-105 (2) in C.R.S.) is intended to affect the application of § 2-402(2), 9-205, 9-301, or 6-105 of the Uniform Commercial Code. Section 2-402(2) recognizes the generally prevailing rule that retention of possession of goods by a seller may be fraudulent but limits the application of the rule by negating any imputation of fraud from "retention of possession in good faith and current course of trade by a merchant-seller for a commercially reasonable time after a sale or identification." Section 9-205 explicitly negates any imputation of fraud from the grant of liberty by a secured creditor to a debtor to use, commingle, or dispose of personal property collateral or to account for its proceeds. The section recognizes

that it does not relax prevailing requirements for delivery of possession by a pledgor. Moreover, the section does not mitigate the general requirement of § 9-301(1)(b) that a nonpossessory security interest in personal property must be accompanied by notice-filing to be effective against a levying creditor. Finally, like the Uniform Fraudulent Conveyance Act this Act does not pre-empt the statutes governing bulk transfers, such as Article 6 of the Uniform Commercial Code. Compliance with the cited sections of the Uniform Commercial Code does not, however, insulate a transfer or obligation from avoidance. Thus a sale by an insolvent debtor for less than a reasonably equivalent value would be voidable under this Act notwithstanding compliance with the Uniform Commercial Code.

## ANNOTATION

**The Colorado Uniform Fraudulent Transfer Act (CUFTA) changes the common law rule that a claim of conspiracy to fraudulently convey property fails unless the claimant establishes a lien against the property transferred.** *Double Oak Constr., L.L.C. v. Cornerstone Dev. Int'l, L.L.C.*, 97 P.3d 140 (Colo. App. 2003).

The principle behind the "lien requirement" rule is that, until a creditor obtains a lien giving him or her vested or specific rights in the debtor's property, the debtor is legally free to do what he or she will with his or her property. However, modern fraudulent transfer law, like CUFTA, has dispensed with the lien requirement, focusing instead on the debtor's intent to frustrate the creditor once its claim is made known. *Double Oak Constr., L.L.C. v. Cornerstone Dev. Int'l, L.L.C.*, 97 P.3d 140 (Colo. App. 2003).

**A transfer in violation of CUFTA is a legal wrong that will support a conspiracy claim.** A creditor who does not have a lien on the subject property is nevertheless entitled to assert a civil conspiracy cause of action against persons who participate in a fraudulent conveyance. *Double Oak Constr., L.L.C. v. Cornerstone Dev. Int'l, L.L.C.*, 97 P.3d 140 (Colo. App. 2003).

**For purposes of CUFTA, the intent of a transferee can be imputed to the debtor when the transferee is in a position to dominate or control the disposition of the debtor's property.** *Schempp v. Lucre Mgmt. Group*, 18 P.3d 762 (Colo. App. 2000).

**The transferee's intent is not interchangeable or synonymous with the debtor's intent.** *Schempp v. Lucre Mgmt. Group*, 75 P.3d 1157 (Colo. App. 2003).

**Nothing in this section indicates that the plaintiff's burden of proving fraudulent intent may be reduced by attaching a presumption of fraud to a transaction between a principal**

and an agent. *Schempp v. Lucre Mgmt. Group*, 75 P.3d 1157 (Colo. App. 2003).

**Whether a debtor intended to hinder, delay, or defraud creditors is a question of fact.** The movant has the burden of proving all elements of a fraudulent transfer before the debtor must come forward to prove his or her defenses. *Krol v. Unglaub*, 332 B.R. 303 (Bankr. N.D. Ill. 2005).

**Evidence that transactions were in the ordinary course of business may negate the actual intent element of fraudulent transfer.** *Sender v. Mann*, 423 F. Supp. 2d 1155 (D. Colo. 2006).

**In determining whether a transfer is made with actual intent to defraud, CUFTA sets forth several factors, known as the "badges of fraud", from which an inference of fraudulent intent may be drawn.** *Krol v. Unglaub*, 332 B.R. 303 (Bankr. N.D. Ill. 2005).

When these "badges of fraud" are present in sufficient number, they may give rise to an inference or presumption of an intent to defraud. *Krol v. Unglaub*, 332 B.R. 303 (Bankr. N.D. Ill. 2005).

**Separate findings are not required on each of the "badges of fraud" in subsection (2) where the findings and the record make it clear that the court was aware of and considered many, if not all, of such factors.** *Silverberg v. Colantuno*, 991 P.2d 280 (Colo. App. 1998).

**"Reasonably equivalent value" is not the same as market value, although market value is an important factor to be used in the assessment.** *Silverberg v. Colantuno*, 991 P.2d 280 (Colo. App. 1998).

**Whether "reasonably equivalent value" has been received is a question of fact. What constitutes "reasonably equivalent value" for the transfer requires an analysis of all of the facts and circumstances surrounding the trans-**



action. The standard of reasonably equivalent value implies a rule of reasonableness in light of the particular circumstances. Reasonable equivalence is not synonymous with market value, even though market value is an important factor to be utilized in the assessment. For purposes of the Colorado Uniform Fraudulent Transfer Act, equity looks to the substance of the transaction rather than its form. *Krol v. Unglaub*, 332 B.R. 303 (Bankr. N.D. Ill. 2005).

**A transfer for which the transferor received no direct or indirect benefit cannot be considered reasonably equivalent value**, even with the undisputed history of the transfers of the property back and forth between a husband and wife for zero dollars. *Leverage Leasing Co. v. Smith*, 143 P.3d 1164 (Colo. App. 2006).

**Reserve asset was not unreasonably small and was therefore not constructively fraudulent under subsection (1)(b)(I).** In dispute over real estate commission between real estate broker and judgment debtor, broker failed to show that debtor should have reasonably foreseen that its distribution of proceeds from real estate sale would create an unreasonable risk of insolvency. *CB Richard Ellis, Inc. v. CLGP, LLC*, 251 P.3d 523 (Colo. App. 2010).

**In considering whether distribution of proceeds from real estate sale was constructively fraudulent under subsection (1)(b)(II), trial court applied the proper two-pronged test, consisting of both a subjective and an objective prong.** In dispute over real estate commission between real estate broker and judgment debtor, trial court's finding that debtor did not have an intent or belief that it would be unable to pay entire commission addressed the subject

tive prong. With regard to the objective prong, trial court found that debtor's reserve asset was reasonable to pay its debts as they came due. *CB Richard Ellis, Inc. v. CLGP, LLC*, 251 P.3d 523 (Colo. App. 2010).

**The failure to pay the taxes due results in a forfeiture of the original owner's interest in the property, by operation of law, to the state, which then grants title to the property to the holder of the lien free and clear of any other claims.** Because the state transferred the tax deeds free of all prior interests, there was no transfer by a debtor, as is required to violate CUFTA. In re *Grandote Country Club Co.*, 252 F.3d 1146 (10th Cir. 2001).

**Where property was acquired through a regularly conducted tax sale subject to a competitive bidding procedure**, the tax sale constitutes transfer for "reasonably equivalent value" under CUFTA. In re *Grandote Country Club Co.*, 252 F.3d 1146 (10th Cir. 2001).

**The recording of a mortgage is a transfer under CUFTA.** *Krol v. Unglaub*, 332 B.R. 303 (Bankr. N.D. Ill. 2005).

**Debtor's assets of between \$785,000 and \$800,000 were unreasonably small** in relation to an allegedly fraudulent transfer under subsection (1)(b)(I) where the debtor was exposed to \$2 million in liability. *Tiger v. Anderson*, 976 P.2d 308 (Colo. App. 1998).

**A subsidiary's loan payments on behalf of its corporate parent** are made in exchange for reasonably equivalent value if the subsidiary receives a benefit of the loan made to its parent. *Ciccarelli v. Guaranty Bank*, 99 P.3d 85 (Colo. App. 2004).

**Applied** in *Vickery v. Evelyn V. Trumble Living Trust*, \_\_ P.3d \_\_ (Colo. App. 2011).

**38-8-106. Transfers fraudulent as to present creditors.** (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

(2) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

**Source: L. 91:** Entire article added, p. 1686, § 1, effective July 1.

**Editor's note - Colorado legislative change:** This section was numbered as section 5 in the uniform act.

## OFFICIAL COMMENT

(1) Subsection (a) (numbered as subsection (1) in C.R.S.) is derived from § 4 of the Uniform Fraudulent Conveyance Act. It adheres to

the limitation of the protection of that section to a creditor who extended credit before the transfer or obligation described. As pointed out in

Comment (2) accompanying § 4 (section 38-8-105 in C.R.S.), this Act substitutes “reasonably equivalent value” for “fair consideration.”

(2) Subsection (b) (subsection (2) in C.R.S.) renders a preferential transfer—i.e., a transfer by an insolvent debtor for or on account of an antecedent debt—to an insider vulnerable as a fraudulent transfer when the insider had reasonable cause to believe that the debtor was insolvent. This subsection adopts for general application the rule of such cases as *Jackson Sound Studios, Inc. v. Travis*, 473 F.2d 503 (5th Cir. 1973) (security transfer of corporation’s equipment to corporate principal’s mother perfected on eve of bankruptcy of corporation held to be fraudulent); *In re Lamie Chemical Co.*, 296 F.2d 4th Cir. 1924) (corporate preference to corporate officers and directors held voidable by receiver when corporation was insolvent or nearly so and directors had already voted for liquidation); *Stuart v. Larson*, 298 F.2d 223 (8th Cir. 1924), noted 38 Harv.L.Rev. 521 (1925) (corporate preference to director held voidable). See generally 2 G. Glenn, *Fraudulent Conveyances and Preferences* 386 (rev. ed. 1940). Subsection (b) overrules such cases as *Epstein v. Goldstein*, 107 F.2d 755, 757 (2d Cir. 1939)

(transfer by insolvent husband to wife to secure his debt to her sustained against attack by husband’s trustee); *Hartford Accident & Indemnity Co. v. Jirasek*, 254 Mich. 131, 139, 235 N.W. 836, 389 (1931) (mortgage given by debtor to his brother to secure an antecedent debt owed the brother sustained as not fraudulent).

(3) Subsection (b) (subsection (2) in C.R.S.) does not extend as far as § 8(a) of the Uniform Fraudulent Conveyance Act and § 548(b) of the Bankruptcy Code in rendering voidable a transfer or obligation incurred by an insolvent partnership to a partner, who is an insider of the partnership. The transfer to the partner is not vulnerable to avoidance under § 4(b) (section 38-8-105 (2) in C.R.S.) unless the transfer was for an antecedent debt and the partner had reasonable cause to believe that the partnership was insolvent. The cited provisions of the Uniform Fraudulent Conveyance Act and the Bankruptcy Act make any transfer by an insolvent partnership to a partner voidable. Avoidance of the partnership transfer without reference to the partner’s state of mind and the nature of the consideration exchanged would be unduly harsh treatment of the creditors of the partner and unduly favorable to the creditors of the partnership.

#### ANNOTATION

**The failure to pay the taxes due results in a forfeiture of the original owner’s interest in the property, by operation of law, to the state, which then grants title to the property to the holder of the lien free and clear of any other claims.** Because the state transferred the tax deeds free of all prior interests, there was no transfer by a debtor, as is required to violate the Colorado Uniform Fraudulent Transfer Act. *In re Grandote Country Club Co., Ltd.*, 252 F.3d 1146 (10th Cir. 2001).

**A collusive foreclosure under power of sale is a fraudulent conveyance.** The fundamental element of a fraudulent conveyance is whether the debtor’s estate is unjustly diminished. *Megabank Financial v. Alpha Gamma Rho*, 841 P.2d 318 (Colo. App. 1992).

A chattel mortgage is collusive if it is a transaction intended to delay creditors and to prevent the property of the debtor coming to their use. *Megabank Financial v. Alpha Gamma Rho*, 841 P.2d 318 (Colo. App. 1992).

**A fraudulent conveyance results whether of real or personal property if, as a result of the debtor’s operations on the title to his property, the creditor loses by reason of finding less to seize and apply to his claim; however, no injury can result from a sale of an asset at its fair value since the estate does not abate as a result of what was done.** *Megabank Financial v. Alpha Gamma Rho*, 841 P.2d 318 (Colo. App. 1992).

**Trial court did not err in setting aside preferential transfers from a corporation to**

**the corporation’s sole officer, shareholder, and director,** because the corporation was insolvent at the time of the transfers and transfer was made to a corporate insider. *Morris v. Askeland Enter., Inc.*, 17 P.3d 830 (Colo. App. 2000).

**Where property was acquired through a regularly conducted tax sale subject to a competitive bidding procedure,** the tax sale constitutes transfer for “reasonably equivalent value” under the Colorado Uniform Fraudulent Transfer Act. *In re Grandote Country Club Co., Ltd.*, 252 F.3d 1146 (10th Cir. 2001).

**Debtors did not receive reasonably equivalent value in exchange for their tithes and contributions to their church,** therefore, the transfers were avoided. *In re Bloch*, 207 Bankr. 944 (D. Colo. 1997).

**To succeed on a fraudulent transfer claim, a creditor must show that the debtor did not receive a reasonably equivalent value in exchange for the property.** *Schempp v. Lucre Mgmt. Group, LLC*, 18 P.3d 762 (Colo. App. 2000).

“Reasonable equivalence” is not wholly synonymous with market value, even though market value is an important factor to be used in the assessment, and the determination of reasonably equivalent value requires analysis of all the facts and circumstances surrounding the transaction. *Silverberg v. Colantuno*, 991 P.2d 280 (Colo. App. 1998); *Schempp v. Lucre Mgmt. Group, LLC*, 18 P.3d 762 (Colo. App. 2000).



The standard of “reasonably equivalent value” implies a rule of reasonableness in light of the particular circumstances. *Schempp v. Lucre Mgmt. Group, LLC*, 18 P.3d 762 (Colo. App. 2000).

**In considering whether judgment debtor’s distribution of proceeds from real estate sale was constructively fraudulent, trial court ap-**

**plied proper test with regard to insolvency under subsection (1).** In dispute over real estate commission between real estate broker and judgment debtor, trial court correctly concluded that debtor’s reserve asset was sufficient and reasonable to keep it solvent despite the distribution. *CB Richard Ellis, Inc. v. CLGP, LLC*, 251 P.3d 523 (Colo. App. 2010).

**38-8-107. When transfer is made or obligation is incurred.** (1) For the purposes of this article:

(a) A transfer is made:

(I) With respect to an asset that is real property other than a fixture, but including the interest of a seller or purchaser under a contract for the sale of the asset, when the transfer is so far perfected that a good-faith purchaser of the asset from the debtor against whom applicable law permits the transfer to be perfected cannot acquire an interest in the asset that is superior to the interest of the transferee; and

(II) With respect to an asset that is not real property or that is a fixture, when the transfer is so far perfected that a creditor on a simple contract cannot acquire a judicial lien otherwise than under this article that is superior to the interest of the transferee.

(2) If applicable law permits the transfer to be perfected as provided in subsection (1) of this section and the transfer is not so perfected before the commencement of an action for relief under this article, the transfer is deemed made immediately before the commencement of the action.

(3) If applicable law does not permit the transfer to be perfected as provided in subsection (1) of this section, the transfer is made when it becomes effective between the debtor and the transferee.

(4) A transfer is not made until the debtor has acquired rights in the asset transferred.

(5) An obligation is incurred:

(a) If oral, when it becomes effective between the parties; or

(b) If evidenced by a writing, when the writing executed by the obligor is delivered to or for the benefit of the obligee.

**Source: L. 91:** Entire article added, p. 1686, § 1, effective July 1.

**Editor’s note - Colorado legislative change:** This section was numbered as section 6 in the uniform act.

## OFFICIAL COMMENT

(1) One of the uncertainties in the law governing the avoidance of fraudulent transfers and obligations is the difficulty of determining when the cause of action arises. Subsection (b) (subsection (2) in C.R.S.) clarifies this point in time. For transfers of real estate Section 6(1) (section 38-8-107 (1) in C.R.S.) fixes the time as the date of perfection against a good faith purchaser from the transferor and for transfers of fixtures and assets constituting personalty, the time is fixed as the date of perfection against a judicial lien creditor not asserting rights under this Act. Perfection typically is effected by notice-filing, recordation, or delivery of unequivocal possession. See U.C.C. §§ 9-302, 9-304, and 9-305 (security interest in personal property perfected by notice-filing or delivery of possession to transferee); 4 American Law of Property § 17.10-17.12 (1952) (recordation of transfer or delivery of possession to grantee required for

perfection against bona fide purchaser from grantor). The provision for postponing the time a transfer is made until its perfection is an adaptation of § 548(d)(1) of the Bankruptcy Code. When no steps are taken to perfect a transfer that applicable law permits to be perfected, the transfer is deemed by paragraph (2) to be perfected immediately before the filing of an action to avoid it; without such a provision to cover that eventuality, an unperfected transfer would arguably be immune to attack. Some transfers—e.g., an assignment of a bank account, creation of a security interest in money, or execution of a marital or premarital agreement for the disposition of property owned by the parties to the agreement—may not be amenable to perfection as against a bona fide purchaser or judicial lien creditor. When a transfer is not perfectible as provided in paragraph (1), the transfer occurs for the purpose of this Act

when the transferor effectively parts with an interest in the asset as provided in § 1(12) *supra* (section 38-8-102 (12) in C.R.S.).

(2) Paragraph (4) requires the transferor to have rights in the asset transferred before the transfer is made for the purpose of this section. This provision makes clear that its purpose may not be circumvented by notice-filing or recordation of a document evidencing an interest in an asset to be acquired in the future. Cf. Bankruptcy Code § 547(e); U.C.C. § 9-203(1)(c).

(3) Paragraph (5) is new. It is intended to resolve uncertainty arising from *Rubin v. Manufacturers Hanover Trust Co.*, 661 F.2d 979, 989-91, 997 (2d Cir. 1981), insofar as that case holds that an obligation of guaranty may be deemed to be incurred when advances covered by the guar-

anty are made rather than when the guaranty first became effective between the parties. Compare *Rosenberg, Intercorporate Guaranties and the Law of Fraudulent Conveyances: Lender Beware*, 125 U.Pa.L.Rev. 235, 256-57 (1976).

An obligation may be avoided as fraudulent under this Act if it is incurred under the circumstances specified in § 4(a) (section 38-8-105 (1) in C.R.S.) or § 5(a) (section 38-8-106 (1) in C.R.S.). The debtor may receive reasonably equivalent value in exchange for an obligation incurred even though the benefit to the debtor is indirect. See *Rubin v. Manufacturers Hanover Trust Co.*, 661 F.2d at 991-92; *Williams v. Twin City Co.*, 251 F.2d 678, 681 (9th Cir. 1958); *Rosenberg*, *supra* at 243-46.

### ANNOTATION

**Rather than relying on date when deeds were recorded to determine when a transfer was made under subsection (1)(a)(I),** court ordered remand proceedings regarding when transferee's interest in real property based upon

possession or contract prevented would-be good faith purchaser from acquiring superior interest. *Tiger v. Anderson*, 976 P.2d 308 (Colo. App. 1998).

**38-8-108. Remedies of creditors.** (1) In an action for relief against a transfer or obligation under this article, a creditor, subject to the limitations in section 38-8-109, may obtain:

(a) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;

(b) An attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with the procedure prescribed by the Colorado rules of civil procedure;

(c) Subject to applicable principles of equity and in accordance with applicable rules of civil procedure:

(I) An injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;

(II) Appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or

(III) Any other relief the circumstances may require.

(2) If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds.

**Source: L. 91:** Entire article added, p. 1687, § 1, effective July 1.

**Editor's note - Colorado legislative change:** This section was numbered as section 7 in the uniform act. In subsection (1) (b), Colorado inserted the words "the rules of civil procedure" in the blank provided in the uniform act.

### OFFICIAL COMMENT

(1) This section is derived from §§ 9 and 10 of the Uniform Fraudulent Conveyance Act. Section 9 of that Act specified the remedies of creditors whose claims have matured, and § 10 enumerated the remedies available to creditors whose claims have not matured. A creditor holding an unmatured claim may be denied the right to receive payment for the proceeds of a sale on

execution until his claim has matured, but the proceeds may be deposited in court or in an interest-bearing account pending the maturity of the creditor's claim. The remedies specified in this section are not exclusive.

(2) The availability of an attachment or other provisional remedy has been restricted by amendments of statutes and rules of procedure



to reflect views of the Supreme Court expressed in *Sniadach v. Family Finance Corp.* of Bay View, 395 U.S. 337 (1969), and its progeny. This judicial development and the procedural changes that followed in its wake do not preclude resort to attachment by a creditor in seeking avoidance of a fraudulent transfer or obligation. See, e.g., *Britton v. Howard Sav. Bank*, 727 F.2d 315, 317-20 (3d Cir. 1984); *Computer Sciences Corp. v. Sci-Tek Inc.*, 367 A.2d 658, 661 (Del. Super. 1976); *Great Lakes Carbon Corp. v. Fontana*, 54 A.D.2d 548, 387 N.Y.S. 2d 115 (1st Dep't 1976). Section 7(a)(2) (section 38-8-108 (1)(b) in C.R.S.) continues the authorization for the use of attachment contained in § 9(b) of the Uniform Fraudulent Conveyance Act, or of a similar provisional remedy, when the state's procedure provides therefor, subject to the constraints imposed by the due process clauses of the United States and state constitutions.

(3) Subsections (a) and (b) of §10 of the Uniform Fraudulent Conveyance Act authorized the court, in an action on a fraudulent transfer or obligation, to restrain the defendant from disposing of his property, to appoint a receiver to take charge of his property, or to make any order the circumstances may require. Section 10, however, applied only to a creditor whose claim was unmaturing. There is no reason to restrict the availability of these remedies to such a creditor, and the courts have not so restricted them. See, e.g., *Lipskey v. Voloshen*, 155 Md. 139, 143-45, 141 Atl. 402, 404-05 (1928) (judgment creditor granted injunction against disposition of property by transferee, but appointment of receiver denied for lack of sufficient showing of need for such relief); *Matthews v. Schusheim*, 36 Misc. 2d 918, 922-23, 235 N.Y.S.2d 973, 976-77, 991-92 (Sup.Ct. 1962) (injunction and appointment of receiver granted to holder of claims for fraud, breach of contract, and alimony arrearages; whether creditor's claim was mature said to be immaterial); *Oliphant v. Moore*, 155 Tenn. 359, 362-63, 293 S.W. 541, 542 (1927) (tort creditor granted injunction restraining alleged tortfeasor's disposition of property).

(4) As under the Uniform Fraudulent Conveyance Act, a creditor is not required to obtain a judgment against the debtor-transferor or to have a matured claim in order to proceed under subsection (a) (subsection (1) in C.R.S.). See § 1(3) and (4) *supra* (section 38-8-102 (3) and (4) in C.R.S.); *American Surety Co. v. Conner*, 251 N.Y. 1, 166 N.E. 783, 65 A.L.R. 244 (1929); 1 G. Glenn, *Fraudulent Conveyances and Preferences* 129 (Rev.ed. 1940).

(5) The provision in subsection (b) (subsection (2) in C.R.S.) for a creditor to levy execution on a fraudulently transferred asset continues the availability of a remedy provided in § 9(b) of the Uniform Fraudulent Conveyance Act. See, e.g., *Doland v. Burns Lbr. Co.*, 156 Minn. 238, 194 N.W. 636 (1923); *Montana Ass'n of Credit Management v. Hergert*, 181 Mont. 442, 449, 453, 593 P.2d 1059, 1063, 1065 (1979); *Corbett v. Hunter*, 292 Pa.Super. 123, 128, 436 A.2d 1036, 1038 (1981); see also *American Surety Co. v. Conner*, 251 N.Y. 1, 6, 166 N.E. 783, 784, 65 A.L.R. 244, 247 (1929) ("In such circumstances he [the creditor] might find it necessary to indemnify the sheriff and, when the seizure was erroneous, assumed the risk of error"); *McLaughlin, Application of the Uniform Fraudulent Conveyance Act*, 46 Harv.L.Rev. 404, 441-42 (1933).

(6) The remedies specified in § 7, like those enumerated in §§ 9 and 10 of the Uniform Fraudulent Conveyance Act, are cumulative. *Lind v. O. N. Johnson Co.*, 204 Minn. 30, 40, 282 N.W. 661, 667, 119 A.L.R. 940 (1939) (Uniform Fraudulent Conveyance Act held not to impair or limit availability of the "old practice" of obtaining judgment and execution returned unsatisfied before proceeding in equity to set aside a transfer); *Conemaugh Iron Works Co. v. Delano Coal Co., Inc.*, 298 Pa. 182, 186, 148 A. 94, 95 (1929) (Uniform Fraudulent Conveyance Act held to give an "additional optional remedy" and not to "deprive a creditor of the right, as formerly, to work out his remedy at law"); 1 G. Glenn, *Fraudulent Conveyances and Preferences* 120, 130, 150 (Rev.ed. 1940).

## ANNOTATION

**Section 38-8-109 (2) does not provide an additional remedy to creditors** but instead limits the remedy provided under subsection (1)(a) of this section by limiting the creditor's recovery in an action to avoid a fraudulent transfer to the lesser of the adjusted value of the transferred asset or the amount of the creditor's claim. Because a bankruptcy trustee thus has the power

to recover the same amount sought by the plaintiff creditor for the benefit of all creditors and because allowing individual creditors to file actions for recovery would interfere with the bankruptcy estate and the equitable distribution scheme dependent upon it, the plaintiff creditor lacked standing. *Summers v. Perkins*, 81 P.3d 1141 (Colo. App. 2003).

**38-8-109. Defenses, liability, and protection of transferee.** (1) A transfer or obligation is not voidable under section 38-8-105 (1) (a) against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

(2) Except as otherwise provided in this section, to the extent a transfer is voidable in

an action by a creditor under section 38-8-108 (1) (a), the creditor may recover judgment for the value of the asset transferred, as adjusted under subsection (3) of this section, or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against:

(a) The first transferee of the asset or the person for whose benefit the transfer was made; or

(b) Any subsequent transferee other than a good-faith transferee or obligee who took for value or from any subsequent transferee or obligee.

(3) If the judgment under subsection (2) of this section is based upon the value of the asset transferred, the judgment must be for an amount equal to the value of the asset at the time of the transfer, subject to adjustment as the equities may require.

(4) Notwithstanding voidability of a transfer or an obligation under this article, a good-faith transferee or obligee is entitled, to the extent of the value given the debtor for the transfer or obligation, to:

(a) A lien on or a right to retain any interest in the asset transferred;

(b) Enforcement of any obligation incurred; or

(c) A reduction in the amount of the liability on the judgment.

(5) A transfer is not voidable under section 38-8-105 (1) (b) or 38-8-106 if the transfer results from:

(a) Termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law; or

(b) Enforcement of a security interest in compliance with the provisions of the "Uniform Commercial Code - Secured Transactions", article 9 of title 4, C.R.S.

(6) A transfer is not voidable under section 38-8-106 (2):

(a) To the extent the insider gave new value to or for the benefit of the debtor after the transfer was made unless the new value was secured by a valid lien;

(b) If made in the ordinary course of business or financial affairs of the debtor and the insider; or

(c) If made pursuant to a good-faith effort to rehabilitate the debtor and the transfer secured present value given for that purpose as well as an antecedent debt of the debtor.

**Source: L. 91:** Entire article added, p. 1687, § 1, effective July 1.

**Editor's note - Colorado legislative change:** This section was numbered as section 8 in the uniform act. In subsection (2) (b), the phrase "or obligee" has been added after "transferee" in both places where "transferee" appears.

## OFFICIAL COMMENT

(1) Subsection (a) (subsection (1) in C.R.S.) states the rule that applies when the transferee establishes a complete defense to the action for avoidance based on Section 4(a)(1) (section 38-8-105 (1)(a) in C.R.S.). The subsection is an adaptation of the exception stated in § 9 of the Uniform Fraudulent Conveyance Act. The person who invokes this defense carries the burden of establishing good faith and the reasonable equivalence of the consideration exchanged. *Chorost v. Grand Rapids Factory Showrooms, Inc.*, 77 F. Supp. 276, 280 (D.N.J. 1948), *aff'd*, 172 F.2d 327, 329 (3d Cir. 1949).

(2) Subsection (b) (subsection (2) in C.R.S.) is derived from § 550(a) of the Bankruptcy Code. The value of the asset transferred is limited to the value of the levyable interest on the transferor, exclusive of any interest encumbered by a valid lien. See § 1(2) *supra* (section 38-8-102 (2) in C.R.S.).

(3) Subsection (c) (subsection (3) in C.R.S.) is new. The measure of the recovery of a defrauded creditor against a fraudulent transferee is usually limited to the value of the asset transferred at the time of the transfer. See, e.g., *United States v. Fernon*, 640 F.2d 609, 611 (5th Cir. 1981); *Hamilton Nat'l Bank of Boston v. Halstead*, 134 N.Y. 520, 31 N.E. 900 (1892); cf. *Buffum v. Peter Barceloux Co.*, 289 U.S. 227 (1932) (transferee's objection to trial court's award of highest value of asset between the date of the transfer and the date of the decree of avoidance rejected because an award measured by value as of time of the transfer plus interest from that date would have been larger). The premise of § 8(c) is that changes in value of the asset transferred that occur after the transfer should ordinarily not affect the amount of the creditor's recovery. Circumstances may require a departure from that measure of the recovery,



however, as the cases decided under the Uniform Fraudulent Conveyance Act and other laws derived from the Statute of 13 Elizabeth illustrate. Thus, if the value of the asset at the time of levy and sale to enforce the judgment of the creditor has been enhanced by improvements of the asset transferred or discharge of liens on the property, a good faith transferee should be reimbursed for the outlay for such a purpose to the extent the sale proceeds were increased thereby. See Bankruptcy Code § 550(d); *Janson v. Schier*, 375 A.2d 1159, 1160 (N.H. 1977); *Anno.*, 8 A.L.R. 527 (1920). If the value of the asset has been diminished by severance and disposition of timber or minerals or fixtures, the transferee should be liable for the amount of the resulting reduction. See *Damazo v. Wahby*, 269 Md. 252, 257, 305 A.2d 138, 142 (1973). If the transferee has collected rents, harvested crops, or derived other income from the use or occupancy of the asset after the transfer, the liability of the transferee should be limited in any event to the net income after deduction of the expense incurred in earning the income. *Anno.*, 60 A.L.R.2d 593 (1958). On the other hand, adjustment for the equities does not warrant an award to the creditor of consequential damages alleged to accrue from mismanagement of the asset after the transfer.

(4) Subsection (d) (subsection (4) in C.R.S.) is an adaptation of §548(c) of the Bankruptcy Code. An insider who receives property or an obligation from an insolvent debtor as security for or in satisfaction of an antecedent debt of the transferor or obligor is not a good faith transferee or obligee if the insider has reasonable cause to believe that the debtor was insolvent at the time the transfer was made or the obligation was incurred.

(5) Subsection (e)(1) (subsection (5)(a) in C.R.S.) rejects the rule adopted in *Darby v. Atkinson* (In re Farris), 415 F.Supp. 33, 39-41 (W.D.Okla. 1976), that termination of a lease on default in accordance with its terms and applicable law may constitute a fraudulent transfer. Subsection (e)(2) (subsection (5)(b) in C.R.S.) protects a transferee who acquires a debtor's interest in an asset as a result of the enforcement of a secured creditor's rights pursuant to and in compliance with the provisions of Part 5 of Article 9 of the Uniform Commercial Code. Cf. *Calaiaro v. Pittsburgh Nat'l Bank* (In re Ewing), 33 B.R. 288, 9 C.B.C.2d 526, CCH B.L.R. paragraph 69,460 (Bk.W.D.Pa. 1983) (sale of pledged stock held subject to avoidance as fraudulent transfer in § 548 of the Bankruptcy Code), rev'd, 36 B.R. 476 (W.D.Pa. 1984) (transfer held not voidable because deemed to have occurred more than one year before bankruptcy petition filed). Although a secured creditor may enforce rights in collateral without a sale under § 9-502 or § 9-505 of the Code, the creditor must proceed in good faith (U.C.C.

§ 9-103) and in a "commercially reasonable" manner. The "commercially reasonable" constraint is explicit in U.C.C. § 9-502(2) and is implicit in § 9-505. See 2 G. Gilmore, *Security Interests in Personal Property* 1224-27 (1965).

(6) Subsection (f) (subsection (6) in C.R.S.) provides additional defenses against the avoidance of a preferential transfer to an insider under § 5(b) (section 38-8-106 (2) in C.R.S.).

Paragraph (1) (paragraph (a) in C.R.S.) is adapted from § 547(c)(4) of the Bankruptcy Code, which permits a preferred creditor to set off the amount of new value subsequently advanced against the recovery of a voidable preference by a trustee in bankruptcy to the debtor without security. The new value may consist not only of money, goods, or services delivered on unsecured credit but also of the release of a valid lien. See, e.g., *In re Ira Haupt & Co.*, 424 F.2d 722, 724 (2d Cir. 1970); *Baranow v. Gibraltar Factors Corp.* (In re Hygrade Envelope Co.), 393 F.2d 60, 65-67 (2d Cir.), cert. denied, 393 U.S. 837 (1968); *In re John Morrow & Co.*, 134 F.686, 688 (S.D.Ohio 1901). It does not include an obligation substituted for a prior obligation. If the insider receiving the preference thereafter extends new credit to the debtor but also takes security from the debtor, the injury to the other creditors resulting from the preference remains undiminished by the new credit. On the other hand, if a lien taken to secure the new credit is itself voidable by a judicial lien creditor of the debtor, the new value received by the debtor may appropriately be treated as unsecured and applied to reduce the liability of the insider for the preferential transfer.

Paragraph (2) (paragraph (b) in C.R.S.) is derived from § 546(c)(2) of the Bankruptcy Code, which excepts certain payments made in the ordinary course of business or financial affairs from avoidance by the trustee in bankruptcy as preferential transfers. Whether a transfer was in the "ordinary course" requires a consideration of the pattern of payments or secured transactions engaged in by the debtor and the insider prior to the transfer challenged under § 5(b) (section 38-8-106 (2) in C.R.S.). See *Tait & Williams, Bankruptcy Preference Laws: The Scope of Section 547(c)(2)*, 99 *Banking L.J.* 55, 63-66 (1982). The defense provided by paragraph (2) is available, irrespective of whether the debtor or the insider or both are engaged in business, but the prior conduct or practice of both the debtor and the insider-transferee is relevant.

Paragraph (3) (paragraph (c) in C.R.S.) is new and reflects a policy judgment that an insider who has previously extended credit to a debtor should not be deterred from extending further credit to the debtor in a good faith effort to save the debtor from a forced liquidation in bankruptcy or otherwise. A similar rationale has sustained the taking of security from an insolvent

debtor for an advance to enable the debtor to stave off bankruptcy and extricate itself from financial stringency. *Blackman v. Bechtel*, 80 F.2d 505, 508-09 (8th Cir. 1935); *Olive v. Tyler* (In re Chelan Land Co.), 257 F.497, 5 A.L.R. 561 (9th Cir. 1919); *In re Robin Bros. Bakeries, Inc.*, 22 F.S. 662, 663-64 (N.D.Ill. 1937); see

*Dean v. Davis*, 242 U.S. 438, 444 (1917). The amount of the present value given, the size of the antecedent debt secured, and the likelihood of success for the rehabilitative effort are relevant considerations in determining whether the transfer was in good faith.

## ANNOTATION

**Whether “reasonably equivalent value” has been received is a question of fact.** What constitutes “reasonably equivalent value” for the transfer requires an analysis of all of the facts and circumstances surrounding the transaction. The standard of reasonably equivalent value implies a rule of reasonableness in light of the particular circumstances. Reasonable equivalence is not synonymous with market value, even though market value is an important factor to be utilized in the assessment. For purposes of the Colorado Uniform Fraudulent Transfer Act, equity looks to the substance of the transaction rather than its form. *Krol v. Unglaub*, 332 B.R. 303 (Bankr. N.D. Ill. 2005).

**Subsection (2) of this section does not provide an additional remedy to creditors** but instead limits the remedy provided under § 38-8-108 (1)(a) by limiting the creditor’s recovery in an action to avoid a fraudulent transfer to the lesser of the adjusted value of the transferred asset or the amount of the creditor’s claim.

Because a bankruptcy trustee thus has the power to recover the same amount sought by the plaintiff creditor for the benefit of all creditors and because allowing individual creditors to file actions for recovery would interfere with the bankruptcy estate and the equitable distribution scheme dependent upon it, the plaintiff creditor lacked standing. *Summers v. Perkins*, 81 P.3d 1141 (Colo. App. 2003).

**The ordinary course of business defense is available only to insiders.** *Sender v. Mann*, 423 F. Supp. 2d 1155 (D. Colo. 2006).

**Because ranch was encumbered by valid liens that exceeded its value, it was not an asset under this article.** Because ranch did not constitute an asset under this article, jury’s verdict in favor of plaintiff on his fraudulent conveyance claim must be reversed. *Park County Bd. of County Comm’rs v. Park County Sportsmen’s Ranch, LLP*, 271 P.3d 562 (Colo. App. 2011).

**38-8-110. Extinguishment of cause of action.** (1) A cause of action with respect to a fraudulent transfer or obligation under this article is extinguished unless action is brought:

(a) Under section 38-8-105 (1) (a), within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant;

(b) Under section 38-8-105 (1) (b) or 38-8-106 (1), within four years after the transfer was made or the obligation was incurred; or

(c) Under section 38-8-106 (2), within one year after the transfer was made or the obligation was incurred.

**Source: L. 91:** Entire article added, p. 1689, § 1, effective July 1.

**Editor’s note - Colorado legislative change:** This section was numbered as section 9 in the uniform act.

## OFFICIAL COMMENT

(1) This section is new. Its purpose is to make clear that lapse of the statutory periods prescribed by the section bars the right and not merely the remedy. See Restatement of Conflict of Laws 2d § 143 Comments (b) and (c) (1971). The section rejects the rule applied in *United States v. Gleneagles Inv. Co.*, 565 F.S. 556, 583 (M.D.Pa. 1983) (state statute of limitations held not to apply to action by United States based on Uniform Fraudulent Conveyance Act).

(2) Statutes of limitations applicable to the avoidance of fraudulent transfers and obligations vary widely from state to state and are frequently subject to uncertainties in their application. See *Hesson*, *The Statute of Limitations in Actions to Set Aside Fraudulent Conveyances and in Actions Against Directors by Creditors of Corporations*, 32 Cornell L.Q. 222 (1946); *Annos*, 76 A.L.R. 864 (1932), 128 A.L.R. 1289 (1940), 133 A.L.R. 1311 (1941), 14 A.L.R.2d



598 (1950), and 100 A.L.R.2d 1094 (1965). Together with § 6 (section 38-8-107 in C.R.S.), this section should mitigate the uncertainty and diversity that have characterized the decisions applying statutes of limitations to actions to fraudulent transfers and obligations. The periods prescribed apply, whether the action under this Act is brought by the creditor defrauded or by a

purchaser at a sale on execution levied pursuant to § 7(b) (section 38-8-108 (2) in C.R.S.) and whether the action is brought against the original transferee or subsequent transferee. The prescription of statutory periods of limitation does not preclude the barring of an avoidance action for laches. See § 10 (section 38-8-111 in C.R.S.) and the accompanying Comment *infra*.

### ANNOTATION

**To determine when the four-year statute of limitations under subsection (1)(a) began to run,** court ordered remand proceedings to deter-

mine when the transfer was made under § 38-8-107 (1)(a)(I). *Tiger v. Anderson*, 976 P.2d 308 (Colo. App. 1998).

**38-8-111. Supplementary provisions.** Unless displaced by the provisions of this article, the principles of law and equity, including the law merchant and the law relating to principal and agent, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, insolvency, or other validating or invalidating cause, supplement the provisions of this article.

**Source: L. 91:** Entire article added, p. 1689, § 1, effective July 1.

**Editor's note - Colorado legislative change:** This section was numbered as section 10 in the uniform act.

### OFFICIAL COMMENT

This section is derived from § 11 of the Uniform Fraudulent Conveyance Act and § 1-103 of the Uniform Commercial Code. The section adds a reference to "laches" in recognition of the particular appropriateness of the application of this equitable doctrine to an untimely action to avoid a fraudulent transfer. See *Louis Dreyfus Corp. v. Butler*, 496 F.2d 806, 808 (6th Cir. 1974) (action to avoid transfers to debtor's wife

when debtor was engaged in speculative business held to be barred by laches or applicable statutes of limitations); *Cooch v. Grier*, 30 Del.Ch. 255, 265-66, 59 A.2d 282, 287-88 (1948) (action under the Uniform Fraudulent Conveyance Act held barred by laches when the creditor was chargeable with inexcusable delay and the defendant was prejudiced by the delay).

### ANNOTATION

**The language of this section expressly permits parties to pursue other remedies,** evincing the general assembly's intention not to abrogate preexisting common law claims and remedies by the enactment of the Colorado Uniform Fraudulent Transfer Act (CUFTA). *Double Oak Constr., L.L.C. v. Cornerstone Dev. Int'l, L.L.C.*, 97 P.3d 140 (Colo. App. 2003).

**Since civil conspiracy provides damage remedies independent of those provided under CUFTA,** the trial court did not err in imposing joint tort liability for conspiracy to convey property fraudulently. *Double Oak Constr., L.L.C. v. Cornerstone Dev. Int'l, L.L.C.*, 97 P.3d 140 (Colo. App. 2003).

**38-8-112. Uniformity of application and construction.** This article shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this article.

**Source: L. 91:** Entire article added, p. 1689, § 1, effective July 1.

**Editor's note - Colorado legislative change:** This section was numbered as section 11 in the uniform act. Colorado deleted the phrase "among states enacting it" from the end of this section.

## ARTICLE 10

## Frauds - Statute of Frauds

**Cross references:** For formal requirements for defense of statute of frauds, see § 4-2-201; for modification, rescission, and waiver of contract, see § 4-2-209; for nature of a sale on approval and sale or return, see § 4-2-326; for pleading fraud as a defense, see C.R.C.P. 8.

38-10-101.	Conveyances to defraud.		eligibility for certain public
38-10-102.	Purchaser with notice - prior grantee privy.	38-10-112.	assistance void - exceptions.
38-10-103.	Conveyance determinable at will of grantor void.	38-10-113.	Void agreements.
38-10-104.	Power to revoke and reconvey.	38-10-114.	Goods sold at auction - memorandum.
38-10-105.	Conveyance before power vests.	38-10-115.	No delivery or change of possession - effect.
38-10-106.	Conveyance - trust - power must be in writing.	38-10-116.	Creditors defined.
38-10-107.	Not to affect will or trusts by operation of law.	38-10-117.	Lawful agent may subscribe.
38-10-108.	Contracts for interests in land - must be written.	38-10-118.	Conveyances to defraud creditors void.
38-10-109.	Authorized agent may subscribe instrument.	38-10-119.	Grant or assignment of trust.
38-10-110.	Courts may enforce specific performance.	38-10-120.	Conveyances void against heirs.
38-10-111.	Trusts for use of grantor void against creditors.	38-10-121.	Intent, question of fact - want of consideration.
38-10-111.5.	Trusts to establish or maintain	38-10-122.	Purchaser with notice of fraud.
		38-10-123.	Construction of terms.
		38-10-124.	Term conveyance, how construed.
			Credit agreements - required to be in writing.

**38-10-101. Conveyances to defraud.** Every conveyance of any estate or interest in the lands, or the rents and profits of lands, and every charge upon lands, or upon the rents and profits thereof, made or created with the intent to defraud prior or subsequent purchasers for a valuable consideration of the same lands, rents, or profits, as against such purchasers, shall be void.

**Source:** R.S. p. 337, § 1. G.L. § 1251. G.S. § 1510. R.S. 08: § 2655. C.L. § 5100. CSA: C. 71, § 1. CRS 53: § 59-1-1. C.R.S. 1963: § 59-1-1.

**Cross references:** For the statute of frauds as an affirmative defense, see C.R.C.P. 8(c).

## ANNOTATION

**Law reviews.** For article, "The Statute of Frauds in Colorado", Part I, see 4 Rocky Mt. L. Rev. 29 (1931); Part II, see 4 Rocky Mt. L. Rev. 99 (1932). For note, "A Survey of the Colorado Torrens Act", see 5 Rocky Mt. L. Rev. 149 (1933). For article, "Unwritten Agreements for the Use of Land", see 14 Rocky Mt. L. Rev. 153, 294 (1942). For article, "A Decade of Colorado Law: Conflict of Laws, Security, Contracts and Equity", see 23 Rocky Mt. L. Rev. 247 (1951). For article, "Colorado's New Fraudulent Transfer Statutes", see 20 Colo. Law. 1815 (1991).

**This section has no application to cases involving equitable trusts.** In re Heinzman, 40 Colo. App. 262, 579 P.2d 638 (1977), aff'd, 198 Colo. 36, 596 P.2d 61 (1979).

**Statute of frauds must be raised in pleadings.** For the statute of frauds to be available as a defense, it must be raised in the pleadings; it cannot be urged for the first time in the supreme court on writ of error. Saccomano v. Palermo, 159 Colo. 307, 411 P.2d 22 (1966).

**A collusive foreclosure under power of sale is a fraudulent conveyance.** The fundamental element of a fraudulent conveyance is whether the debtor's estate is unjustly diminished. Megabank Financial v. Alpha Gamma Rho, 841 P.2d 318 (Colo. App. 1992).

A chattel mortgage is collusive if it is a transaction intended to delay creditors and to prevent the property of the debtor coming to their use. Megabank Financial v. Alpha Gamma Rho, 841 P.2d 318 (Colo. App. 1992).



**A fraudulent conveyance results whether of real or personal property if**, as a result of the debtor's operations on the title to his property, the creditor loses by reason of finding less to seize and apply to his claim; however, no injury can result from a sale of an asset at its fair value

since the estate does not abate as a result of what was done. *Megabank Financial v. Alpha Gamma Rho*, 841 P.2d 318 (Colo. App. 1992).

**Applied in** *First Mtg. Sec. Co. v. Fader*, 100 Colo. 22, 64 P.2d 1278 (1937).

**38-10-102. Purchaser with notice - prior grantee privy.** No such conveyance or charge shall be deemed fraudulent in favor of a subsequent purchaser, who has actual or legal notice thereof at the time of his purchase, unless it appears that the grantee in such conveyance or person to be benefited by such charge was privy to the fraud intended.

**Source:** R.S. p. 338, § 2. G.L. § 1252. G.S. § 1511. R.S. 08: § 2656. C.L. § 5101. CSA: C. 71, § 2. CRS 53: § 59-1-2. C.R.S. 1963: § 59-1-2.

**38-10-103. Conveyance determinable at will of grantor void.** Every conveyance or charge of or upon any estate or interest in lands containing any provision for the revocation, determination, or alteration of such estate or interest, or any part thereof, at the will of the grantor shall be void as against subsequent purchasers from such grantor, for a valuable consideration, of any estate or interest so liable to be revoked, determined, or altered by such grantor, by virtue of the power reserved or expressed in such prior conveyance or charge.

**Source:** R.S. p. 338, § 3. G.L. § 1253. G.S. § 1512. R.S. 08: § 2657. C.L. § 5102. CSA: C. 71, § 3. CRS 53: § 59-1-3. C.R.S. 1963: § 59-1-3.

**38-10-104. Power to revoke and reconvey.** When the power to revoke a conveyance of any lands or the rents and profits thereof and to reconvey the same is given to any person other than the grantor in such conveyance and such person thereafter conveys the same lands, rents, or profits to a purchaser for a valuable consideration, such subsequent conveyance shall be valid in the same manner and to the same extent as if the power of revocation were recited therein and the intent to revoke the former conveyance expressly declared.

**Source:** R.S. p. 338, § 4. G.L. § 1254. G.S. § 1513. R.S. 08: § 2658. C.L. § 5103. CSA: C. 71, § 4. CRS 53: § 59-1-4. C.R.S. 1963: § 59-1-4.

**38-10-105. Conveyance before power vests.** If a conveyance to a purchaser under section 38-10-103 or 38-10-104 is made before the person making the same is entitled to execute his power of revocation, it shall nevertheless be valid from the time the power of revocation actually vests in such person, in the same manner and to the same extent as if then made.

**Source:** R.S. p. 338, § 5. G.L. § 1255. G.S. § 1514. R.S. 08: § 2659. C.L. § 5104. CSA: C. 71, § 5. CRS 53: § 59-1-5. C.R.S. 1963: § 59-1-5.

**Cross references:** For a conveyance determinable at the will of the grantor being void, see § 38-10-103; for the validity of the power to revoke a conveyance and reconvey, see § 38-10-104.

**38-10-106. Conveyance - trust - power must be in writing.** No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands or in any manner relating thereto shall be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized by writing.

**Source:** R.S. p. 338, § 6. G.L. § 1256. G.S. § 1515. R.S. 08: § 2660. C.L. § 5105. CSA: C. 71, § 6. CRS 53: § 59-1-6. C.R.S. 1963: § 59-1-6.

## ANNOTATION

- I. General Consideration.
- II. Express Trusts.
- III. Resulting and Constructive Trusts.
- IV. Authority of Agent.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "Express Trusts in Colorado", see 10 Rocky Mt. L. Rev. 9 (1937). For article, "An Aspect of Estate Planning in Colorado: The Revocable Inter Vivos Trust", see 43 Den. L.J. 296 (1966). For note, "A Survey of Colorado Water Law", see 47 Den. L.J. 226 (1970). For article, "Signatures on Documents Affecting Title to Colorado Real Property — Part III", see 12 Colo. Law. 447 (1983).

**Statute of frauds only concerns making of contracts.** Niernberg v. Feld, 131 Colo. 508, 283 P.2d 640 (1955).

**Statute of frauds is inapplicable to revocation of contracts.** Niernberg v. Feld, 131 Colo. 508, 283 P.2d 640 (1955).

**Statute of frauds inapplicable to executed contracts.** Sherman v. Randle, 79 Colo. 243, 245 P. 717 (1926).

**Rescission of executing contract by parol agreement permitted.** An executory contract involving title to, or an interest in, land may be rescinded by an agreement resting in parol. Niernberg v. Feld, 131 Colo. 508, 283 P.2d 640 (1955).

**Statute of frauds is inapplicable to equitable trusts.** Page v. Clark, 40 Colo. App. 24, 572 P.2d 1214 (1977), rev'd on other grounds, 197 Colo. 306, 592 P.2d 792 (1979).

**Agreement restricting use of land is not within statute of frauds** because it does not relate to an interest in land but merely to its use. Thornton v. Schobe, 79 Colo. 25, 243 P. 617 (1925).

**Interest in deed of trust** is not an interest in the underlying land. Since Colorado is a lien theory jurisdiction, statute of frauds does not bar suit on oral agreement to execute and deliver a mortgage upon real estate. Bigelow v. Nottingham, 833 P.2d 764 (Colo. App. 1991), rev'd on other grounds sub nom., Haberl v. Bigelow, 855 P.2d 1368 (Colo. 1993).

**Promissory note secured by a deed of trust for real property does not create an interest in land.** Crown Life Ins. Co. v. Haag Ltd. P'ship, 929 P.2d 42 (Colo. App. 1996).

**Settlement of accounts following partnership termination independent of status of realty.** When the business of a partnership, organized to lease and operate a mine during a

limited period for the sole purpose of making a profit through the extracting and marketing of ores therefrom, had been terminated in a suit brought by one of the partners to settle the partnership accounts and distribute the partnership profits and other assets, no interest in realty was involved, and, in such cases, the right to a settlement and distribution in no way depends upon the legal status of realty under the statute of frauds, therefore, this section is inapplicable to the right to a settlement and distribution. Meagher v. Reed, 14 Colo. 335, 24 P. 681 (1890).

**Partial performance removes contract from scope of statute.** Where there is an accounting between parties when one party paid over half the profits from jointly owned land, there is such partial performance of a contract conveying a one-half interest in land as would remove the contract from the scope of the statute. Bushner v. Bushner, 134 Colo. 509, 307 P.2d 204 (1957).

**Method of use of land not subject to section.** Method of use of land is not estate or interest in land, subject to this section. Thornton v. Schobe, 79 Colo. 25, 243 P. 617 (1925).

**Profits on purchase and sale of land** not an "estate or interest" in the land, subject to this section. Thornton v. Schobe, 79 Colo. 25, 243 P. 617 (1925); Von Trotha v. Bamberger, 15 Colo. 1, 24 P. 883 (1890).

**Defense involves questions of fact and law.** The defense of the statute of frauds involves questions of fact as well as law. Bushner v. Bushner, 134 Colo. 509, 307 P.2d 204 (1957).

**Proof of parol agreement prohibited absent fraud, accident, or mistake.** In the absence of the elements of fraud, accident, or mistake, the grantor in an absolute conveyance is prohibited by the statute of frauds from setting up and proving a parol agreement, in which the grantee was to hold the land in trust for his benefit. Hall v. Linn, 8 Colo. 264, 5 P. 641 (1885); Bohm v. Bohm, 9 Colo. 100, 10 P. 790 (1885); Von Trotha v. Bamberger, 15 Colo. 1, 24 P. 883 (1890).

To exclude the operation of the statute on the ground of fraud where an oral agreement is alleged as a foundation of the trust, it must appear that the promise is used as a means of imposition or deceit; the promise may be received in evidence as one of the steps by which the fraud was accomplished. Bohm v. Bohm, 9 Colo. 100, 10 P. 790 (1885).

Unless the transaction was tainted with either actual or constructive fraud, trust could not be created by parol. Hodgson v. Fowler, 7 Colo. App. 378, 43 P. 462 (1896).



**While Colorado recognizes that the intent to create a trust can be inferred** from the nature of property transactions, the circumstances surrounding the holding of and transfer of property, the particular documents or language employed, and the conduct of the parties, the inference of an intent to create a trust must come from clear, explicit, definite, unequivocal, and unambiguous language or conduct. No finding of a trust is warranted as a matter of law where neither the language of the relevant documents nor the conduct of the parties satisfies this standard. *Bishop and Diocese of Colo. v. Mote*, 716 P.2d 85 (Colo.) (en banc), cert. denied, 479 U.S. 826, 107 S. Ct. 102, 93 L. Ed. 2d 52 (1986); *In re Fairfield Pagosa, Inc.*, 97 F.3d 247 (8th Cir. 1996).

**Applied** in *Farrand v. Beshoar*, 9 Colo. 291, 12 P. 196 (1886); *Beulah Marble Co. v. Mattice*, 22 Colo. 547, 45 P. 432 (1896); *Heron v. Weston*, 44 Colo. 379, 100 P. 1130 (1908); *Griffith v. Sands*, 84 Colo. 456, 271 P. 191 (1928); *Quelland v. Roy*, 148 Colo. 316, 365 P.2d 899 (1961).

## II. EXPRESS TRUSTS.

**Parol evidence cannot establish existence of express trust.** *Von Trotha v. Bamberger*, 15 Colo. 1, 24 P. 883 (1890); *Johnson v. Calnan*, 19 Colo. 168, 34 P. 905, 41 Am. St. R. 224 (1893).

**Parol evidence admissible to show truth of transaction.** Where there is some written evidence showing the existence of a trust, the door is thereby opened to the admission of parol evidence to show the truth of the transaction. *Johnson v. Calnan*, 19 Colo. 168, 34 P. 905, 41 Am. St. R. 224 (1893).

**Written evidence of trust required.** It is not required by this section that a trust should be created by a writing, but that there should be evidence in writing, proving that there was such a trust; the proof may be made by letters and informal documents. *Johnson v. Calnan*, 19 Colo. 168, 34 P. 905 (1893); *Waterbury v. Fisher*, 5 Colo. App. 362, 38 P. 846 (1894), *aff'd*, 23 Colo. 256, 47 P. 277 (1896).

To constitute a valid express trust in relation to realty, the conditions thereof must, by virtue of the statute of frauds, be in writing. *Armor v. Spalding*, 14 Colo. 302, 23 P. 789 (1890).

## III. RESULTING AND CONSTRUCTIVE TRUSTS.

**Resulting and constructive trusts arise by operation of law** upon the transaction of the parties. *Kayser v. Maugham*, 8 Colo. 232, 6 P. 803 (1885); *McPherrin v. Fair*, 57 Colo. 333, 141 P. 472 (1914).

**A constructive trust is a creature of equity** and springs from a desire to prevent the statute of frauds from being used as a shield which

would allow a party to be unjustly enriched. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *Ralston Oil and Gas Co. v. July Corp.*, 719 P.2d 334 (Colo. App. 1985).

### **Situations giving rise to resulting trusts.**

There are three situations in which the trust which arises is properly called a resulting trust: (1) Where an express trust fails in whole or in part; (2) where an express trust is fully performed without exhausting the trust estate; and (3) where property is purchased and the purchase price is paid by one person and at his direction the vendor conveys the property to another person. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A trust in operation of law may occur where a trust is declared only as to part of the conveyance and nothing is said as to rest. *Walker v. Bruce*, 44 Colo. 109, 97 P. 250 (1908).

**Statute of frauds does not prevent declaration of constructive trust** nor does it prevent recovery of property delivered conditionally by one to himself and another as joint tenants in contemplation of marriage. *In re Heinzman*, 198 Colo. 36, 596 P.2d 61 (1979).

**If the conditions for imposing a constructive trust are present, such remedy will not be precluded by application of the statute of frauds.** *Ralston Oil and Gas Co. v. July Corp.*, 719 P.2d 334 (Colo. App. 1985).

**Resulting trust in lands may be established by oral testimony.** *Knox v. McFarren*, 4 Colo. 586 (1879); *Kayser v. Maugham*, 8 Colo. 232, 6 P. 803 (1885); *Bohm v. Bohm*, 9 Colo. 100, 10 P. 790 (1885); *Von Trotha v. Bamberger*, 15 Colo. 1, 24 P. 883 (1890); *First Nat'l Bank v. Campbell*, 2 Colo. App. 271, 30 P. 357 (1892), *rev'd* on other grounds, 22 Colo. 177, 43 P. 1007 (1896); *Warren v. Adams*, 19 Colo. 515, 36 P. 604 (1894); *Berry v. French*, 24 Colo. App. 519, 135 P. 985 (1898); *Walker v. Bruce*, 44 Colo. 109, 97 P. 250 (1908); *O'Byrne v. McNeill*, 90 Colo. 226, 7 P. 956 (1932).

**Statute of frauds has no application to resulting trust**, for such a trust is created by operation of law. *Kayser v. Maugham*, 8 Colo. 232, 6 P. 803 (1885); *Walker v. Bruce*, 44 Colo. 109, 97 P. 250 (1908); *McPherrin v. Fair*, 57 Colo. 333, 141 P. 472 (1914); *In re Doerfer's Estate*, 100 Colo. 304, 67 P.2d 492 (1937); *Vandewiele v. Vandewiele*, 110 Colo. 556, 136 P.2d 523 (1943).

**When constructive trust operates.** It has been held that a constructive trust is the formula through which the conscience of equity finds expression; when property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Where legal title to land has been fraudulently acquired, and is still held in fraud of the rights of

another having a valuable interest in the premises, a trust by operation of law may be declared upon equitable terms. *Learned v. Tritch*, 6 Colo. 432 (1882); *Kayser v. Maugham*, 8 Colo. 232, 6 P. 803 (1885); *Stewart v. Stevens*, 10 Colo. 440, 15 P. 786 (1887); *Von Trotha v. Bamberger*, 15 Colo. 1, 24 P. 883 (1890); *Walker v. Bruce*, 44 Colo. 109, 97 P. 250 (1908).

**Essence of constructive trusts seems to be fraud, deceit, or bad faith;** no effort is made to include them in the intention of the contracting parties. *Kayser v. Maugham*, 8 Colo. 232, 6 P. 803 (1885).

**Fraudulent conveyance prevents trust from resulting to grantor.** No trust can result to grantor when conveyance is made for a colorable, illegal, or fraudulent purpose. *First Nat'l Bank v. Campbell*, 2 Colo. App. 271, 30 P. 357 (1892), rev'd on other grounds, 22 Colo. 177, 43 P. 1007 (1896).

**Confidential relations sufficient to create constructive trust.** Confidential relations between the parties are sufficient to create a constructive trust. *Bohm v. Bohm*, 9 Colo. 100, 10 P. 790 (1885); *Young v. Hinds*, 68 Colo. 164, 188 P. 739 (1920); *Vosburg v. Knight*, 71 Colo. 473, 207 P. 1112 (1922); *Herrick v. Woodrow-Shindler Co.*, 75 Colo. 363, 226 P. 137 (1924); *O'Byrne v. McNeill*, 90 Colo. 226, 7 P.2d 956 (1932).

**Setting aside transaction for abuse of confidential relationship.** If the existence of a confidential relationship has been established, a transaction may be set aside if that relationship has been abused. It is not necessary that the abuse of the confidential relationship be the procuring cause of the original conveyance, but rather the refusal to perform the promise to

reconvey is itself a sufficient abuse of confidence to allow the conveyance to be set aside. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

#### IV. AUTHORITY OF AGENT.

**Agency for sale of lands can be created only by writing.** *Springer v. City Bank & Trust Co.*, 59 Colo. 376, 149 P. 253, 1917A Ann. Cas. 520 (1911).

In the absence of written authority from a wife, the owner of real property, to her husband, authorizing it, a lease and option given by him on a part of the land was void under the statute of frauds. *Simpson v. Nelson*, 71 Colo. 490, 208 P. 455 (1922).

**Written authority required to create power of attorney in fact.** A contract and deed, executed by father, professing to act as attorney in fact for his daughter, were void under the statute of frauds, so far as the daughter was concerned, because he was not authorized in writing to execute the contract and deed. *Clement v. Major*, 1 Colo. App. 297, 29 P. 19 (1892); *Hagerman v. Bates*, 5 Colo. App. 391, 38 P. 1100 (1895), rev'd on other grounds, 24 Colo. 71, 49 P. 139 (1897); *Newman v. Tibbets*, 27 Colo. App. 325, 149 P. 266 (1915), aff'd, 63 Colo. 74, 163 P. 720 (1917).

**Ratification of signing of contract requires writing.** In an action to enforce specific performance of a contract required by the statute of frauds to be in writing, where the statute of frauds was pleaded, ratification of the signing of the contract by one party for another could be shown only in writing. *People's Mining & Milling Co. v. Central Consol. Mines Corp.*, 20 Colo. App. 561, 80 P. 479 (1905).

**38-10-107. Not to affect will or trusts by operation of law.** Section 38-10-106 shall not be construed to affect in any manner the power of the testator in the disposition of his real estate by a last will and testament nor to prevent any trust from arising or being extinguished by implication or operation of law.

**Source:** R.S. p. 338, § 7. G.L. § 1257. G.S. § 1516. R.S. 08: § 2661. C.L. § 5106. CSA: C. 71, § 7. CRS 53: § 59-1-7. C.R.S. 1963: § 59-1-7.

#### ANNOTATION

**Law reviews.** For article, "Express Trusts in Colorado", see 10 Rocky Mt. L. Rev. 9 (1937).

**Statute of frauds is inapplicable to equitable trusts.** *Page v. Clark*, 40 Colo. App. 24, 572

P.2d 1214 (1977), rev'd on other grounds, 197 Colo. 306, 592 P.2d 572 (1979).

**38-10-108. Contracts for interests in land - must be written.** Every contract for the leasing for a longer period than one year or for the sale of any lands or any interest in lands is void unless the contract or some note or memorandum thereof expressing the consideration is in writing and subscribed by the party by whom the lease or sale is to be made.



**Source:** R.S. p. 339, § 8. G.L. § 1258. G.S. § 1517. R.S. 08: § 2662. C.L. § 5107. CSA: C. 71, § 8. CRS 53: § 59-1-8. C.R.S. 1963: § 59-1-8.

## ANNOTATION

- I. General Consideration.
- II. Leases.
- III. Contracts for Sale of Interest in Land.
- IV. Note or Memorandum.
- V. Complete Performance and Part Performance.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "Collateral Effects of the Statute of Frauds", see 13 Rocky Mt. L. Rev. 233 (1941). For note, "The Effect of 'Invalid' Leases", see 22 Rocky Mt. L. Rev. 305 (1950). For article, "The Interest of Landowner and Lessee in Oil and Gas in Colorado", see 25 Rocky Mt. L. Rev. 117 (1953). For article, "Trusts and Estates", see 30 Dicta 435 (1953). For article, "One Year Review of Agency, Partnerships and Corporations", see 40 Den. L. Ctr. J. 123 (1963). For article, "Signatures on Documents Affecting Title to Colorado Real Property — Part III", see 12 Colo. Law. 447 (1983).

**Statute of frauds should operate as shield against fraud.** Burnford v. Banning, 189 Colo. 292, 540 P.2d 337 (1975).

**Section is for protection of vendor and not vendee,** and the vendee cannot take advantage of it. Colo. Lumber, Land, & Imp. Co. v. Dustin, 38 Colo. 398, 87 P. 1142 (1906); Gabarino v. Union Sav. & Loan Ass'n, 107 Colo. 140, 109 P.2d 638 (1941); Boyer v. Karakehian, 915 P.2d 1295 (Colo. 1996).

**This section requires a contract for the sale of land or interest therein to be expressed in a writing signed by the selling or granting party, and such a contract must identify the parties to the transaction, the terms and conditions of the transaction, a description of the property, and the consideration.** Luttgen v. Fischer, 107 P.3d 1152 (Colo. App. 2005).

**When oral contract for land not considered void.** An oral contract for the sale of land cannot be considered void so long as the vendor is willing to treat the contract as good; this rule applies where the vendee resists payment on a check given for the purchase price. Colo. Lumber, Land, & Imp. Co. v. Dustin, 38 Colo. 398, 87 P. 1142 (1906); Gabarino v. Union Sav. & Loan Ass'n, 107 Colo. 140, 109 P.2d 638 (1941); Houtchens v. United Bank of Co. Spgs., 797 P.2d 814 (Colo. App. 1990).

Where the oral contract is not void but voidable, a promise within the statute of frauds will serve as consideration for an enforceable promise by another. Colo. Lumber, Land, & Imp. Co. v. Dustin, 38 Colo. 398, 87 P. 1142 (1906);

Gabarino v. Union Sav. & Loan Ass'n, 107 Colo. 140, 109 P.2d 638 (1941).

**Statute of frauds furnishes rule of evidence,** but not of pleading. Tucker v. Edwards, 7 Colo. 209, 3 P. 233 (1883); Garbanati v. Fassbinder, 15 Colo. 535, 25 P. 991 (1890); Ruth v. Smith, 29 Colo. 154, 68 P. 278 (1901).

**Defense involves questions of fact and law.** The defense of the statute of frauds involves questions of fact as well as law. Bushner v. Bushner, 134 Colo. 509, 307 P.2d 204 (1957).

**Unenforceable contract of the statute cannot be made indirectly enforceable** by promising to execute a sufficient memorandum or otherwise to satisfy the requirements of the statute. Rupp v. Hill, 149 Colo. 48, 367 P.2d 746 (1961).

**Statute of frauds concerns making of contracts only;** it does not apply to the matter of their revocation. Niernberg v. Feld, 131 Colo. 508, 283 P.2d 640 (1955).

**Executory contracts may be rescinded by mutual consent of parties thereto.** Niernberg v. Feld, 131 Colo. 508, 283 P.2d 640 (1955).

**When parol gift of interest in realty deemed good in equity.** A parol gift of an interest in real property is good in equity, as a rule, only when valuable improvements have been made in reliance on the gift, so that to refuse to enforce it is inequitable. Kendall v. Metroz, 65 Colo. 387, 176 P. 473 (1918).

**Contract not evidenced by memorandum conveying title to omitted property.** A written memorandum by the grantor agreeing to convey the legal title to his grantee who has purchased, paid for, and reduced to peaceable possession, property which by mistake was omitted from the original deed, does not evidence a contract for the sale of land within the meaning of this section. Ross v. Purse, 17 Colo. 24, 28 P. 473 (1891).

**Grubstake agreements not within statute of frauds.** Grubstake agreements may be either oral or written and are not within the statute of frauds. Smaller v. Leach, 136 Colo. 297, 316 P.2d 1030 (1957), cert. denied, 356 U.S. 936, 78 S. Ct. 777 (1958).

**Statute does not prevent declaration of constructive trust** nor does it prevent recovery of property delivered conditionally by one to himself and another as joint tenants in contemplation of marriage. In re Heinzman, 198 Colo. 36, 596 P.2d 61 (1979).

**Estoppel as bar to statute of frauds defense.** In order to estop vendors from asserting the statute of frauds as a defense, the vendee must have performed acts constituting substan-

tial action or forbearance. *Tripp v. Shelter Research Inc.*, 729 P.2d 1024 (Colo. App. 1986).

**Estoppel not found.** *Tripp v. Shelter Research Inc.*, 729 P.2d 1024 (Colo. App. 1986).

**A party making an oral promise respecting the title to real estate may not rely on the statute** if the other party fails to assure that the oral agreement is reduced to writing because of the confidence engendered by the first party. The promisor will be treated in such case as a constructive trustee for the other party. *Jarnagin v. Busby, Inc.*, 867 P.2d 63 (Colo. App. 1993).

In order to escape the bar of the statute of frauds, it was necessary for the plaintiffs to prove, among other things, that they reasonably reposed confidence and trust in the promisor at the time of the negotiations leading to the oral agreement at issue and that, but for such confidential relationship, such oral agreement would have been reduced to writing. *Jarnagin v. Busby, Inc.*, 867 P.2d 63 (Colo. App. 1993).

**Applied** in *Wolf v. Burke*, 18 Colo. 264, 32 P. 427, 19 L.R.A. 792 (1893); *Thomas Realty Co. v. Guthrie*, 71 Colo. 98, 204 P. 330 (1922); *Swaim v. Swanson*, 118 Colo. 509, 197 P.2d 624 (1948); *Payne v. Cumming*, 136 Colo. 244, 315 P.2d 818 (1957); *Hunt v. Pick*, 240 F.2d 782 (10th Cir. 1957); *Coulter v. Anderson*, 144 Colo. 402, 357 P.2d 76 (1960); *Dolton v. Capitol Fed. Sav. & Loan Ass'n*, 642 P.2d 21 (Colo. App. 1981); *Great Falls Props., Inc. v. Prof'l Group, Ltd.*, 649 P.2d 1082 (Colo. 1982); *Nicol v. Nelson*, 776 P.2d 1144 (Colo. App. 1989), cert. denied, 785 P.2d 917 (Colo. 1989); *Karakehian v. Boyer*, 900 P.2d 1273 (Colo. App. 1994).

## II. LEASES.

**Verbal lease for year to begin in future valid.** A verbal lease for the term of a year, to begin in the future, is valid. *Sears v. Smith*, 3 Colo. 287 (1877).

**Lease of land for crop year not void.** An oral lease of land for the crop year, made in June, 1943, where the crops to be planted would not mature until July or August, 1944, did not amount to a lease for a period longer than one year, and it is not void under this section. *Northrup v. Nicklas*, 115 Colo. 207, 171 P.2d 417 (1946).

**Time between making lease and taking possession cannot be counted.** The time between the making of the lease and the time when the lessee is entitled to possession thereunder cannot be counted in computing the year as that is no part of the term. *Northrup v. Nicklas*, 115 Colo. 207, 171 P.2d 417 (1946).

## III. CONTRACTS FOR SALE OF INTEREST IN LAND.

**Actual possession must be referable to contract.** Actual possession in furtherance of an

oral contract may be made the foundation for a decree of specific performance, but such possession must be referable to the contract. *Rupp v. Hill*, 149 Colo. 48, 367 P.2d 746 (1961).

**Trier of facts determines whether possession referable.** Whether possession is referable to an oral contract rests upon circumstances, and should be resolved by the trier of the facts. *Rupp v. Hill*, 149 Colo. 48, 367 P.2d 746 (1961).

**Verbal agreements for profits and contracts for land may be independent.** A verbal agreement to share the profits arising from the purchase and sale of real estate may be made independent of any contract for an interest in the land itself. *Kayser v. Maugham*, 8 Colo. 232, 6 P. 803 (1885); *Von Trotha v. Bamberger*, 15 Colo. 1, 24 P. 883 (1890).

**Oral agreement for perpetual right-of-way constitutes easement.** An oral agreement for a perpetual right-of-way over the premises of another constitutes an easement or interest in land and is within the statute of frauds. *Whitsett v. Kershow*, 4 Colo. 419 (1878); *Ward v. Farwell*, 6 Colo. 66 (1881); *Stewart v. Stevens*, 10 Colo. 440, 15 P. 786 (1887); *Fetta v. Vandevier*, 3 Colo. App. 419, 34 P. 168 (1893), aff'd, *Vandevier v. Fetta*, 20 Colo. 368, 38 P. 466 (1894); *Laesch v. Morton*, 38 Colo. 171, 87 P. 1081 (1906); *Workman v. Stephenson*, 26 Colo. App. 339, 144 P. 1126 (1914).

**Agreement for joint benefit of several persons not within section.** Agreement between two or more persons to explore the public domain and discover and locate lodes for the joint benefit of all is not within this section, and it is not necessary that it should be written. *Murley v. Ennis*, 2 Colo. 300 (1874); *Meylette v. Brennan*, 20 Colo. 242, 38 P. 75 (1894).

**Statute inapplicable to extension of performance time of executing contract.** The statute of frauds does not apply to an oral agreement to extend the time for performance of an executory contract. *Poznik v. Urton & Co.*, 30 Colo. App. 475, 496 P.2d 1073 (1972), aff'd, 181 Colo. 15, 506 P.2d 741 (1973).

**Retention right in mine requires writing.** Where one enters upon a mine previously discovered, and to which the discoverer has lost his right by failing to make the development required by the law; from the moment of commencing the labor of development with the bona fide purpose to complete it, and so appropriate the mine, the party has a possession in fact, and for the time being a right to retain that possession, and this right is, perhaps, such an interest in land as cannot be contracted for or disposed of without writing. *Murley v. Ennis*, 2 Colo. 300 (1874).

**Subsequent oral modification unenforceable.** A contract for the sale of land required to be in writing cannot be validly changed or modified as to a material condition, by a subsequent oral agreement, without more, so as to make the



original written agreement, as orally modified, an enforceable obligation. *Burnford v. Blanning*, 189 Colo. 292, 540 P.2d 337 (1975).

**Exceptions to unenforceability of subsequent oral modification.** Exceptions to general rule that contracts for sale of land cannot be modified by subsequent parol agreement include: (1) When subsequent oral agreement amounts to revocation of written contract; and (2) when party consents to, or requests postponement of, performance by other party which is for his benefit and other party has acted on such request or consent. *Urton & Co. v. Poznik*, 181 Colo. 15, 506 P.2d 741 (1973).

Contracts for the sale of land can be modified by subsequent oral agreement if a party consents to or requests a postponement of performance by the other party which is for the requesting party's benefit and the other party has acted thereon. *Colo. Inv. Servs., Inc. v. Hager*, 685 P.2d 1371 (Colo. App. 1984).

**When oral agreement not violative of statute.** Where an oral modification agreed to by the parties has been performed, a contract which affects interests in real property may be modified as to a material condition by a subsequent oral agreement without violating the statute of frauds. *Discovery Land & Dev. Co. v. Colorado-Aspen Dev. Corp.*, 40 Colo. App. 292, 577 P.2d 1101 (1977).

#### IV. NOTE OR MEMORANDUM.

**Required contents of "note or memorandum".** The "note or memorandum" required upon sale of real estate must show on its face or by reference to other writings: (1) The names of the parties, vendor, and vendee; (2) the terms and conditions of the contract; (3) the interest or property affected; and (4) the consideration to be paid therefor. *Eppich v. Clifford*, 6 Colo. 493 (1883); *Micheli v. Taylor*, 114 Colo. 258, 159 P.2d 912 (1945).

**Nexus required between writings.** Where more than one writing is used to satisfy the requirements of the statute of frauds, some nexus between the writings must be shown. While the phrase "internal reference" is often used to describe the requisite nexus, it need not be in the form of express cross-references between the writings. Instead, the requirement may be satisfied by parol evidence where it is apparent that the memoranda referred to the same subject matter or transaction. *Bennett v. Moring*, 33 Colo. App. 390, 522 P.2d 741 (1974).

**Business record qualifies as memorandum.** "Church Roll and Record", a regular business record, although kept in a rather informal manner, qualifies as a memorandum capable of satisfying the statute of frauds. *Bennett v. Moring*, 33 Colo. App. 390, 522 P.2d 741 (1974).

#### V. COMPLETE PERFORMANCE AND PART PERFORMANCE.

**Section is inapplicable when performance of contract is shown.** *Babcock v. Bouton*, 85 Colo. 327, 275 P. 908 (1929); *Rupp v. Hill*, 149 Colo. 48, 367 P.2d 746 (1961); *Ridgeway v. Pope*, 163 Colo. 160, 430 P.2d 77 (1967).

An oral contract for a one-fourth interest in the water of a spring, based on a valuable consideration, and which is performed by both parties, except as to the expenses that may arise in the future, is such a complete performance on both sides as will remove the bar of the statute. *Vandewark v. Widman*, 79 Colo. 82, 243 P. 622 (1926).

Full performance of a parol contract respecting the construction of an irrigating ditch and the right-of-way therefor takes the case out of the operation of the statute of frauds. *Tynon v. Despain*, 22 Colo. 240, 43 P. 1039 (1896).

**Part payment and partial performance complies with section.** A written receipt given as part payment reciting balance due, together with partial performance, is sufficient to overcome claim that contract violated this section. *Tolley v. Fritsinger*, 150 Colo. 440, 374 P.2d 364 (1962).

**Contracts enforceable where there is substantial part performance.** Where there is substantial part performance, which would result in injustice, courts of equity will enforce contracts which otherwise might be unenforceable under the statute of frauds. *Siler v. Inv. Sec. Co.*, 125 Colo. 438, 244 P.2d 877 (1952).

**Payment of profits from jointly owned land partial performance.** Where there is an accounting between parties when one party paid over half the profits from jointly owned land there is such partial performance of a contract conveying a one-half interest in land as would take the contract from under the statute. *Bushner v. Bushner*, 134 Colo. 509, 307 P.2d 204 (1957).

**Money expended for labor and building materials sufficient part performance.** Where persons expended from \$1,200 to \$1,500 in labor and materials in building their home on another's land in reliance on owner's consent, it is clearly apparent that there was sufficient part performance to overcome the defense of the statute of frauds. *Zamboni v. Graham*, 104 Colo. 23, 88 P.2d 98 (1939).

**Part performance may take the place of a writing** under the statute of frauds and will permit enforcement of an otherwise unenforceable oral contract. *Walk v. Miller*, 650 P.2d 1286 (Colo. App. 1981); *Ralston Oil and Gas Co. v. July Corp.*, 719 P.2d 334 (Colo. App. 1985); *L.V. Cattle Co. v. Wilson*, 714 P.2d 1344 (Colo. App. 1986); *A & R Co. v. Union Air Transp., Inc.*, 738 P.2d 73 (Colo. App. 1987).

**Standards used in determining part performance.** Part performance consists of performing

something required by the contract, such as the payment of rent, plus the taking of possession by the tenant and the installation of trade fixtures or other similar equipment of a type that is indicative of a long-term tenancy. *A & R Co. v. Union Air Transp., Inc.*, 738 P.2d 73 (Colo. App. 1987).

A party relying on part performance to defeat a defense based on the statute of frauds must show that the partial performance is more consistent with the terms of the contract than with some other arrangement, such as a month-to-month tenancy or a tenancy at will. *A & R Co. v. Union Air Transp., Inc.*, 738 P.2d 73 (Colo. App. 1987).

Mere possession of property is not substantial part performance if possession may be attributed

to some arrangement other than the one under the alleged oral agreement. *A & R Co. v. Union Air Transp., Inc.*, 738 P.2d 73 (Colo. App. 1987).

In many cases where part performance has been allowed to defeat a statute of frauds defense, either a tenant or a putative owner has taken possession of the premises and made extensive improvements or expenditures in preparing to occupy the property in reliance on an oral agreement. *A & R Co. v. Union Air Transp., Inc.*, 738 P.2d 73 (Colo. App. 1987).

**Evidence insufficient to prove part performance.** *Walk v. Miller*, 650 P.2d 1286 (Colo. App. 1981); *Tripp v. Shelter Research Inc.*, 729 P.2d 1024 (Colo. App. 1986).

**38-10-109. Authorized agent may subscribe instrument.** Every instrument required to be subscribed by any party under section 38-10-108 may be subscribed by the agent of such party lawfully authorized by writing.

**Source:** R.S. p. 339, § 9. G.L. § 1259. G.S. § 1518. L. 1887: p. 274, § 1. R.S. 08: § 2663. C.L. § 5108. CSA: C. 71, § 9. CRS 53: § 59-1-9. C.R.S. 1963: § 59-1-9.

#### ANNOTATION

**Law reviews.** For article, "One Year Review of Agency, Partnerships and Corporations", see 40 Den. L. Ctr. J. 123 (1963). For article, "Signatures on Documents Affecting Title to Colorado Real Property — Part III", see 12 Colo. Law. 447 (1983).

**Agent's written authority required for binding contract.** By this section as amended in 1887, a binding contract for the sale of real estate cannot be executed by an agent, unless the agent be authorized by writing. *Castner v. Richardson*, 18 Colo. 496, 33 P. 163 (1893); *Springer v. City Bank & Trust Co.*, 59 Colo. 376, 149 P. 253, 1917A Ann. Cas. 520 (1915).

A down payment on the purchase price of realty made by a prospective purchaser to one claiming to be the representative of the seller is not binding on the seller in the absence of written authority in the agent to convey. *Nunnally v. Hilderman*, 150 Colo. 363, 373 P.2d 940 (1962).

**Agent must be given specific authority** to do either the general business of his principal or

the particular thing which he assumed to do. *Johnson v. Lennox*, 55 Colo. 125, 133 P. 744 (1913); *Nunnally v. Hilderman*, 150 Colo. 363, 373 P.2d 940 (1962).

**Act of partner in selling real estate is binding** upon the partnership and the other parties without obtaining their written consent when in the apparent scope of the partnership's business. *Ball v. Carlson*, 641 P.2d 303 (Colo. App. 1981).

**Burden is put on plaintiff**, who sues upon a contract thus executed, to show that the person who signed the contract as agent was authorized, not only to negotiate the sale, but also to conclude in writing a binding contract within the terms, conditions, and limitations expressed in the contract upon which the action is founded. *Nunnally v. Hilderman*, 150 Colo. 363, 373 P.2d 940 (1962).

**Applied in** *Malone v. McCullough*, 15 Colo. 460, 24 P. 1040 (1890); *Rice v. Bush*, 16 Colo. 484, 27 P. 720 (1891).

**38-10-110. Courts may enforce specific performance.** Nothing in this article shall be construed to abridge the powers of courts of equity to compel the specific performance of agreements in cases of part performance of such agreement.

**Source:** R.S. p. 339, § 10. G.L. § 1260. G.S. § 1519. R.S. 08: § 2664. C.L. § 5109. CSA: C. 71, § 10. CRS 53: § 59-1-10. C.R.S. 1963: § 59-1-10.



## ANNOTATION

- I. General Consideration.
- II. Specific Performance.
- III. Part Performance.

## I. GENERAL CONSIDERATION.

**Law reviews.** For article, "Part Performance and the Statute of Frauds in Colorado", see 2 Rocky Mt. L. Rev. 209 (1930). For article, "The Remedy of Specific Performance in Colorado Contracts", Part I, see 8 Rocky Mt. L. Rev. 15 (1935); Part II, see 8 Rocky Mt. L. Rev. 106 (1936).

**Applied** in *Foster v. Caffey*, 71 Colo. 171, 204 P. 900 (1922); *Sackett v. Rodeck*, 75 Colo. 425, 226 P. 295 (1924); *Thornton v. Schobe*, 79 Colo. 25, 243 P. 617 (1925); *Moschetti v. Santarelli*, 82 Colo. 346, 259 P. 515 (1927); *Jutten v. Deeble*, 88 Colo. 301, 295 P. 496 (1931); *French v. Mitchell*, 92 Colo. 532, 22 P.2d 644 (1933); *Boyd v. McElroy*, 105 Colo. 527, 100 P.2d 624 (1940); *Poznik v. Urton & Co.*, 30 Colo. App. 475, 496 P.2d 1073 (1972).

## II. SPECIFIC PERFORMANCE.

**Specific performance enforceable for part performance.** Specific performance of an oral contract will be enforced in favor of one who has partly performed it. *Van Trotha v. Bamberger*, 15 Colo. 1, 24 P. 883 (1890); *Knoff v. Grace*, 68 Colo. 527, 190 P. 526 (1920).

**Essential contract terms must be established to justify specific performance of parole contract.** In order to justify the specific performance of a parole contract for the sale of land on the ground of part performance, it is necessary that all the essential terms of the contract must first be established by competent evidence and shown to be definite, certain, clear, and unambiguous. *Mestas v. Martini*, 113 Colo. 108, 155 P.2d 161 (1944).

Where the purchaser of lands has partly performed under a verbal contract, he can recover for what he has done in pursuance of the oral agreement where the vendor insists upon the statute of frauds and refuses to perform. *Colo. Lumber, Land, & Imp. Co. v. Dustin*, 38 Colo. 398, 87 P. 1142 (1906); *Drier v. Sherwood*, 77 Colo. 539, 238 P. 38 (1925).

**Sufficient consideration required for enforceability of agreement.** An agreement, whether within or without the statute of frauds, must be founded upon a sufficient consideration before a court of equity will enforce it. *Beulah Marble Co. v. Mattice*, 22 Colo. 547, 45 P. 432 (1896).

**Cause of performance other than contract alleged insufficient.** What is fairly referable to some cause other than the contract as alleged will not be regarded as sufficient part perfor-

mance to justify a decree of specific performance. *Von Trotha v. Bamberger*, 15 Colo. 1, 24 P. 883 (1890); *Knoff v. Grace*, 68 Colo. 527, 190 P. 526 (1920).

**Requisites for rescission of oral contract for land purchase.** Where a party has rendered services, or paid money, in consideration of an oral contract for the purchase of land, he cannot rescind such contract and recover for such services, or the money paid, unless the other party insists upon the statute of frauds, and refuses to perform it on his part. *Colo. Lumber, Land, & Imp. Co. v. Dustin*, 38 Colo. 398, 87 P. 1142 (1906).

**Evidence of parole contract inadmissible where written contract alleged.** In an action for specific performance of a contract to convey land, where the complaint alleges a written contract, evidence of a parole contract taken out of the statute of frauds by part performance is inadmissible to support the action. *People's Mining & Milling Co. v. Central Consol. Mines Corp.*, 20 Colo. App. 561, 80 P. 479 (1905).

**A trial court has discretion to grant the equitable relief of specific performance** while the jury concurrently deliberates on the award of damages in cases where the damages are in no way contingent upon the trial court's equity decision. *Soneff v. Harlan*, 712 P.2d 1084 (Colo. App. 1985).

## III. PART PERFORMANCE.

**Part performance removes contract from bar of statute of frauds.** Part performance of a contract removes it from the bar of the statute of frauds. *Ridgeway v. Pope*, 163 Colo. 160, 430 P.2d 77 (1967).

**Acts of part performance must be pursuant to verbal contract.** Acts of part performance, such as will furnish a foundation for enforcing a verbal contract respecting land otherwise void under the statute of frauds, must be such as are done in pursuance, or according to the terms, of the contract, and which in some manner affect or change the relation of the parties in respect to the property whereby one of the parties would be defrauded if the contract were not enforced. *Von Trotha v. Bamberger*, 15 Colo. 1, 24 P. 883 (1890).

**Absent agreement, no acts of part performance would exist.** The part performance, which will bring a contract within the provisions of this section, must consist of an act or of acts which it clearly appears the performing party would not have done in the absence of the agreement or without a direct view to its performance. *Horton v. Stegmyer*, 175 F. 756, 20 Ann. Cas. 1134 (8th Cir. 1913); *Brown v. Johanson*, 69 Colo. 400, 194 P. 943 (1920).

**Money expended for labor and building materials constitute part performance.** Where persons expended from \$1,200 to \$1,500 in labor and materials in building their home on another's land in reliance on owner's consent, it is clearly apparent that there was sufficient part performance to overcome the defense of the statute of frauds. *Zamboni v. Graham*, 104 Colo. 23, 88 P.2d 98 (1939); *Hill v. Chambers*, 136 Colo. 129, 314 P.2d 707 (1957).

**Actual possession and making improvements constitute sufficient part performance.** The most important acts which constitute a sufficient part performance to authorize courts of equity to decree specific performance are actual possession, and the making of permanent and valuable improvements. *Hunt v. Hayt*, 10 Colo. 278, 15 P. 410 (1887).

Where the plaintiff solicited defendant to quit his ranch, move to town, take possession of, furnish, and conduct a hotel on certain premises, promising that if he would do so, he, plaintiff, would execute to him a lease of the hotel at a specified rent for a specified term of years, and the defendant complied with this request, re-

moved from his ranch, assumed possession of, and furnished, the hotel, and paid rentals monthly for several months, such acts constitute a sufficient part performance to entitle defendant to specific performance of the contract lease. *Adcock v. Lieber*, 51 Colo. 373, 117 P. 993 (1911).

**Mere possession will not be deemed part performance** sufficient to justify such relief when it may fairly be referable to some other cause than the execution of the contract. *Von Trotha v. Bamberger*, 15 Colo. 1, 24 P. 883 (1890).

**Plaintiff has burden of proof.** In an action to compel defendant to execute a written lease to premises for a term of two years, the burden of proof was upon plaintiff to establish by a preponderance of the evidence that he and the defendant made an oral contract for a written lease of the premises for a period of two years and, that in reliance upon this contract, he had entered into possession and partly performed it. *Kiter v. Owen*, 115 Colo. 7, 168 P.2d 254 (1946).

**38-10-111. Trusts for use of grantor void against creditors.** All deeds of gift, all conveyances, and all transfers or assignments, verbal or written, of goods, chattels, or things in action, or real property, made in trust for the use of the person making the same shall be void as against the creditors existing of such person.

**Source:** R.S. p. 339, § 11. G.L. § 1261. G.S. § 1520. R.S. 08: § 2665. L. 21: p. 339, § 1. C.L. § 5110. CSA: C. 71, § 11. CRS 53: § 59-1-11. C.R.S. 1963: § 59-1-11.

#### ANNOTATION

**Law reviews.** For article, "An Aspect of Estate Planning in Colorado: The Revocable Inter Vivos Trust", see 43 Den. L.J. 296 (1966). For article, "Perils of Pre-Bankruptcy Planning: Transfers, Exemptions and Taxes", see 17 Colo. Law. 1513 (1988). For article, "Chapter 13 Bankruptcy as an Alternative to Chapter 7", see 18 Colo. Law. 2089 (1989). For article, "Can Some Colorado Trusts Provide Protection from Claims of Creditors?", see 28 Colo. Law. 61 (August 1999).

**Object of section** is to invalidate transfers of property which have the effect of placing it beyond the reach of creditors of the person making the transfer, but which leave a beneficial use, control, or ownership in him. *Wilson v. Am. Nat'l Bank*, 7 Colo. App. 194, 42 P. 1037 (1895).

**Applicability of section.** This section refers to cases where the use of trust for the grantor is the principal purpose accomplished by the conveyance, and not merely an incident thereto. *Campbell v. Colo. Coal & Iron Co.*, 9 Colo. 60, 10 P. 248 (1885).

**A public welfare official is not precluded from using the state debtor and creditor law** set forth in this section to set aside an allegedly fraudulent transfer so as to recover under social services law. *Alberico v. Health Mgmt. Sys., Inc.*, 5 P.3d 967 (Colo. App. 2000).

**"Things in action" include assignment of wages** to be earned under a contract existing at the date of the assignment. *City & County of Denver v. Jones*, 85 Colo. 212, 274 P. 924 (1929).

**There is no necessity of proving intent to defraud**, but, if the assignment is shown to be in trust for the grantor, it is, as to existing creditors, the same as if no transfer had been made. *Fulton Inv. Co. v. Smith*, 27 Colo. App. 279, 149 P. 444 (1915), *aff'd*, 64 Colo. 33, 170 P. 1183 (1918).

**Question of intention determined from facts of each case.** The question of intention is one to be determined from the facts and circumstances of each case. *Hunter v. Ferguson*, 3 Colo. App. 287, 33 P. 82 (1893); *Innis v. Carpenter*, 4 Colo. App. 30, 34 P. 1011 (1893).

**Express language of section invalidates conveyance to a trust as against the Colorado**



**department of health care policy and financing ("DHF") because DHF was a creditor at the time of the transfer.** Section does not provide additional or conflicting requirements for eligibility or recovery under the medicaid act. Instead, section simply invalidates conveyance to trust made when creditors have outstanding claims at the time of the conveyance. Thus, defendants' liens are valid and enforceable

against the mother's residence. *Alberico v. Health Mgmt. Sys., Inc.*, 5 P.3d 967 (Colo. App. 2000).

**Applied** in *Sickman v. Abernathy*, 14 Colo. 174, 23 P. 447 (1890); *Eppich v. Blanchard*, 58 Colo. 139, 143 P. 1035 (1914); *Zimmerman v. Mozer*, 10 B.R. 1002 (D. Colo. 1981); *In Re Baum*, 22 F.3d 1014 (10th Cir. 1994).

**38-10-111.5. Trusts to establish or maintain eligibility for certain public assistance void - exceptions.** Any trust established by or for a person that consists of the person's individual assets, income, or property of any kind shall be void for the purpose of establishing or maintaining eligibility for any public assistance as provided by article 2 of title 26, C.R.S., or medical assistance as provided by articles 4, 5, and 6 of title 25.5, C.R.S., unless the trust is established in accordance with the provisions of sections 15-14-412.6 to 15-14-412.9, C.R.S.

**Source:** **L. 94:** Entire section added, p. 1604, § 12, effective July 1. **L. 2000:** Entire section amended, p.1836, § 16, effective January 1, 2001. **L. 2006:** Entire section amended, p. 2022, § 117, effective July 1.

**38-10-112. Void agreements.** (1) Except for contracts for the sale of goods which are governed by section 4-2-201, C.R.S., and lease contracts which are governed by section 4-2.5-201, C.R.S., in the following cases every agreement shall be void, unless such agreement or some note or memorandum thereof is in writing and subscribed by the party charged therewith:

(a) Every agreement that by the terms is not to be performed within one year after the making thereof;

(b) Every special promise to answer for the debt, default, or miscarriage of another person;

(c) Every agreement, promise, or undertaking made upon consideration of marriage, except mutual promises to marry.

(2) Repealed.

**Source:** **R.S.** p. 339, § 12. **G.L.** § 1262. **G.S.** § 1521. **R.S. 08:** § 2666. **C.L.** § 5111. **CSA:** C. 71, § 12. **CRS 53:** § 59-1-12. **C.R.S. 1963:** § 59-1-12. **L. 69:** p. 392, § 1. **L. 77:** (2) repealed, p. 340, § 47, effective January 1, 1978. **L. 91:** (1) amended, p. 321, § 5, effective July 1, 1992.

## ANNOTATION

I. General Consideration.

II. The Memorandum.

A. Form and Sufficiency.

B. The Signature.

III. Agreements not to be Performed Within One Year.

IV. Promise to Answer for the Debt of Another.

V. Agreement Made Upon Consideration of Marriage.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "The Remedy of Specific Performance in Colorado Contracts", Part I, see 8 Rocky Mt. L. Rev. 15 (1935); Part

II, see 8 Rocky Mt. L. Rev. 106 (1936). For article, "One Year Review of Cases on Contracts", see 33 Dicta 57 (1956). For article, "Domestic Case Update", which discusses cases concerning antenuptial agreements, see 14 Colo. Law. 209 (1985).

**Purpose of statute of frauds.** The statute is to be invoked for the purpose of preventing the commission of a fraud. *Walker v. Bruce*, 44 Colo. 109, 97 P. 250 (1908).

**Statute of frauds furnishes rule of evidence**, but not of pleading. *Tucker v. Edwards*, 7 Colo. 209, 3 P. 233 (1883); *Garbanati v. Fassbinder*, 15 Colo. 535, 25 P. 991 (1890); *Ruth v. Smith*, 29 Colo. 154, 68 P. 278 (1901).

**Plea of statute of frauds is personal privilege;** if not pleaded, it will be regarded as

waived. *Benjamin v. Mattler*, 3 Colo. App. 227, 32 P. 837 (1893).

**Statute of frauds must be specially pleaded**, if relied upon in defense. *Benjamin v. Mattler*, 3 Colo. App. 227, 32 P. 837 (1893); *Schildt v. Topliss*, 98 Colo. 464, 56 P.2d 1328 (1936).

In an action upon an oral contract, the defense that it was an agreement to answer for the debt of another and void under this section because it is not in writing is not available to defendant unless the statute be pleaded. *Hamill v. Hall*, 4 Colo. App. 290, 35 P. 927 (1894); *Cerrusite Mining Co. v. Steele*, 18 Colo. App. 216, 70 P. 1091 (1902).

**Unless contractual violation shown in complaint**. *Tucker v. Edwards*, 7 Colo. 209, 3 P. 233 (1883); *Hunt v. Hayt*, 10 Colo. 278, 15 P. 410 (1887); *Garbanati v. Fassbinder*, 15 Colo. 535, 25 P. 991 (1890); *Hamill v. Hall*, 4 Colo. App. 290, 35 P. 927 (1894); *Tynon v. Despaign*, 22 Colo. 240, 43 P. 1039 (1896).

Because the statute of frauds is a defense of which the defendant may or may not avail himself, and if he desires to take advantage thereof, unless the infirmity appears in the complaint, he must affirmatively plead it by answer and he must rely upon it at the trial. *Hunt v. Hayt*, 10 Colo. 278, 15 P. 410 (1887); *Pettit v. Mayhew*, 43 Colo. 274, 95 P. 939 (1908); *Kingdom of Gilpin Mines, Inc. v. McNeill*, 88 Colo. 44, 291 P. 1036 (1930); *Gage v. Young*, 95 Colo. 130, 33 P.2d 389 (1934).

**Where the action alleges a contract price which does not appear in the writing relied upon**, the writing is not sufficient to take the contract out of the statute of frauds. *Howse v. Crumb*, 143 Colo. 90, 352 P.2d 285 (1960).

**Where the contract sued upon is denied by the answer**, the statute of frauds is available without being specially pleaded. *Salomon v. McRae*, 9 Colo. App. 23, 47 P. 409 (1896); *Sch. Dist. No. 46 v. Johnson*, 26 Colo. App. 433, 143 P. 264 (1914).

**Part-performance exception applied in the case of an oral joint venture partnership agreement** where performance by both parties was substantial and consistent with evidence of the terms of the joint venture. *McCrea & Co. Auctioneers, Inc. v. Dwyer Auto Body*, 799 P.2d 394 (Colo. App. 1984) (disagreeing with *Sch. Dist. No. 46 v. Johnson*).

**Parol agreement to reduce contract to writing unenforceable**. A parol agreement to reduce to writing a contract which is within the statute of frauds is unenforceable because a contract that is unenforceable by reason of the statute cannot be made indirectly enforceable by promising to execute a sufficient memorandum or otherwise to satisfy the requirements of the statute. *Rupp v. Hill*, 149 Colo. 48, 367 P.2d 746 (1961).

**Full performance by party makes void contract binding**. Although a contract may have been void under the statute of frauds, nevertheless, if it has been fully performed by one of the parties, it is binding on the other party. *Schust v. Perington*, 169 Colo. 39, 453 P.2d 599 (1969).

**When statute not defense to action on loan agreement**. The statute of frauds is not available as a defense to an action on a loan agreement where the agreement has been fully performed by plaintiff. *Nissen v. Dews*, 43 Colo. App. 228, 603 P.2d 966 (1979).

**Valid contract not altered by void subsequent oral agreement**. Subsequent void oral agreement cannot alter, revoke, or modify previous valid contract. *Harvey v. Morey*, 22 Colo. 412, 45 P. 383 (1896).

**Action may be maintained in Colorado on a contract valid where made**, notwithstanding it would be void under the Colorado statute of frauds, if made in Colorado. *Wolf v. Burke*, 18 Colo. 264, 32 P. 427 (1893).

**Applied** in *Schilling v. Rominger*, 4 Colo. 100 (1878); *Little v. Dougherty*, 11 Colo. 103, 17 P. 292 (1887); *Von Trotha v. Bamberger*, 15 Colo. 1, 24 P. 883 (1890); *Hill v. Groesbeck*, 29 Colo. 161, 67 P. 167 (1901); *Hall v. Allen*, 46 Colo. 355, 104 P. 489 (1909); *Yost v. Irwin*, 53 Colo. 269, 125 P. 526 (1912); *Jones v. Ceres Inv. Co.*, 60 Colo. 562, 154 P. 745 (1916); *Jasper v. Bicknell*, 68 Colo. 308, 191 P. 115 (1920); *Johnson v. Sanchez*, 72 Colo. 514, 212 P. 522 (1923); *Enyart v. Orr*, 78 Colo. 6, 238 P. 29 (1925); *Heuschkel v. Wagner*, 78 Colo. 61, 239 P. 873 (1925); *Clayton Coal Co. v. King*, 108 Colo. 63, 113 P.2d 672 (1941); *Hoff v. Armbruster*, 125 Colo. 198, 242 P.2d 604 (1952); *Lindsey v. Oregon-Washington Plywood Co.*, 287 F.2d 710 (10th Cir. 1961); *Kodekey Elecs., Inc. v. Merchanex Corp.*, 486 F.2d 449 (10th Cir. 1973); *World of Sleep, Inc. v. Seidenfeld*, 674 P.2d 1005 (Colo. App. 1983); *In re Frontier Airlines, Inc.*, 121 Bankr. 386 (Bankr. D. Colo. 1990).

## II. THE MEMORANDUM.

### A. Form and Sufficiency.

**Agreement must express all essential conditions of bargain to satisfy section**. To satisfy this section, the agreement or memorandum must, either by its own terms or by reference to some other writing, express with reasonable certainty all the conditions and essential elements of the bargain. *Salomon v. McRae*, 9 Colo. App. 23, 47 P. 409 (1896).

**Several writings read in connection show memorandum of agreement**. Several writings of different dates may be read in connection to show a memorandum of an agreement. *Beckwith v. Talbot*, 2 Colo. 639 (1875), *aff'd*, 95 U.S. 289, 24 L. Ed. 496 (1877).



The contract, which the parties have made, may be gathered from letters which have passed in correspondence between them; it is not necessary that every paper should contain all the necessary elements of the contract which may be authenticated and established through the medium of letters and separate writings and documents, provided that they refer to each other and to the same persons and things, and that they manifestly relate to the same contract and transaction. *Beckwith v. Talbot*, 2 Colo. 639 (1875), aff'd, 95 U.S. 289, 24 L. Ed. 496 (1877); *Crystal Palace Flouring Mills Co. v. Butterfield*, 15 Colo. App. 246, 61 P. 479 (1900); *McClurg v. Crawford*, 209 F. 340 (8th Cir. 1913); *South Carolina Ins. Co. v. Fisher*, 698 P.2d 1369 (Colo. App. 1984).

**Notices of premium due sufficient memorandum.** Where each year the company sent notices of the premium due, identifying the contract, the dates between which the premium operated making the contract effective and subscribed to by an agent whose authority was not questioned, this is a sufficient memorandum as required by this section to take the obligation out of the statute of frauds. *Massachusetts Bonding & Ins. Co. v. Bd. of County Comm'rs*, 100 Colo. 398, 68 P.2d 555 (1937).

**Agreement between finance company's officers and creditor sufficient memorandum.** An agreement between officers of finance company and creditor, providing for a manager to operate the creditor's business subject to the supervision and control of the officers of the finance company, is a sufficient memorandum to prevent this section being a bar in action against finance company to recover for goods sold to the creditor. *Colo. Fin. Co. v. B.F. Bennet Oil Co.*, 110 Colo. 1, 129 P.2d 299 (1942).

**Letter insufficient to bind wife to payment of husband's debt.** Where Mrs. B., who on account of the illness of her husband was attending to his business, wrote to his creditor the following letter: "Mr. H. You will find enclosed \$50, all I can raise at present. I hope to be able to give you more very soon. Please give me credit, and oblige. Mr. B. is home sick. Mary B.". The letter was insufficient, under this section, to bind her to the payment of her husband's debt. *Bohm v. Hoffer*, 2 Colo. App. 146, 29 P. 905 (1892).

**Extrinsic oral evidence inadmissible to vary written contract terms.** Extrinsic oral evidence is inadmissible to contradict, add to, subtract from, or vary the terms of a written contract, and the rule applies with greater force to contracts required by the statute of frauds to be in writing. *Randolph v. Helps*, 9 Colo. 29, 10 P. 245 (1885); *Nesmith v. Martin*, 32 Colo. 77, 75 P. 590 (1904).

#### B. The Signature.

**Term "subscribed" is substitute for term "signed".** *Coon v. Rigden*, 4 Colo. 275 (1878).

**Letters referring to contract evidence of assent and subscription.** Where a contract was signed by one party and retained by the other, letters subsequently written by the latter, to which the contract was clearly referred, are sufficient to show his assent, and to show that he subscribed the contract within the meaning of this section. *Beckwith v. Talbot*, 2 Colo. 639 (1875), aff'd, 95 U.S. 289, 24 L. Ed. 496 (1877).

**Bills initialed by salesman did not constitute memorandum in writing.** Where a salesman sold bills of goods on credit and indorsed the bills thus: "O.K. McR.", the latter letters being his initials, the indorsement did not constitute an agreement or memorandum in writing within the meaning of this section, and that parol evidence was inadmissible to show that, by a prevailing custom of the trade, it was intended by the indorsement that the salesman should be answerable to his employer for the default of the purchaser in making payment. *Salomon v. McRae*, 9 Colo. App. 23, 47 P. 409 (1896).

### III. AGREEMENTS NOT TO BE PERFORMED WITHIN ONE YEAR.

**Agreement not performed within one year invalid generally.** An agreement that by its terms is not to be performed within one year from the making thereof shall be invalid or void unless the agreement or some note or memorandum thereof is in writing and signed by the party to be charged. *Lucas v. Whittaker Corp.*, 335 F. Supp. 889 (D. Colo. 1971), aff'd, 470 F.2d 326 (10th Cir. 1972).

**Subsection (1)(a) inapplicable where possibility of performance within year.** Subsection (1)(a) does not apply to oral contracts which may not be performed within one year. It refers to contracts which by their affirmative terms exclude performance within that time. *Woodall v. Davis-Creswell Mfg. Co.*, 9 Colo. App. 198, 48 P. 670 (1897); *Clark v. Perdue*, 70 Colo. 589, 203 P. 655 (1922); *Lloyd v. Grynberg*, 464 F. 2d 622 (10th Cir. 1972).

**Oral agreement not to engage in business for three years void.** An agreement, not to engage in a certain business at, or near, a certain place for a period of three years, is an agreement not to be performed within one year, and under this section is void unless in writing. *DeBord v. Holcomb*, 13 Colo. App. 161, 57 P. 548 (1899).

**Subsection (1)(a) is inapplicable to leases.** *Sears v. Smith*, 3 Colo. 287 (1877).

Subsection (1)(a) has no application to parol leases or contracts relating to any interests in lands. *Northrup v. Nicklas*, 115 Colo. 207, 171 P.2d 417 (1946).

**Oral agreement for yearly payments not within section.** An oral agreement as to yearly payments of interest on a promissory note was not within this section for the original contract; a note payable on, or before, 10 years from date,

could have been performed within one year. *Kuhlmann v. McCormack*, 116 Colo. 300, 180 P.2d 863 (1947).

**Oral promise to pay debts upon inheritance not within section.** A debtor's oral promise to pay his debts if he should inherit an interest in his father's estate, notwithstanding his discharge in bankruptcy, is not an agreement not to be performed within one year. *Winbourn v. Crump*, 77 Colo. 574, 238 P. 58 (1925).

**Agreement whose performance is contingent upon happening not within section.** An oral agreement, the performance of which is dependent upon the happening of a certain contingency, is not within the statute if the contingency is such that it may occur within one year; and this is true, although the contingency may not in fact happen until after the expiration of the year, and although the parties may not have expected that it would occur within that period. *Winbourn v. Crump*, 77 Colo. 574, 238 P. 58 (1925).

**Modification of lease by parol for period less than one year.** A modification of a written lease by parol for a period less than one year is not within the statute of frauds. *Doherty v. Doe*, 18 Colo. 456, 33 P. 165 (1893).

**Computation of time.** The year mentioned in subsection (1)(a) runs from the day when the agreement is made, and not from the day when the performance is to begin. *Sch. Dist. No. 46 v. Johnson*, 26 Colo. App. 433, 143 P. 264 (1914).

**Oral agreement for at-will employment.** Where defense of statute of frauds raised, neither partial performance nor payment of compensation deemed sufficient to avoid bar of statute as to enforcement of entire contract. *Chidester v. E. Gas & Fuel Assoc.*, 859 P.2d 222 (Colo. App. 1992).

**While part performance can take an oral agreement out of this section,** such part performance must be fairly referable to no other theory besides that allegedly contained within the oral agreement. *Nelson v. Elway*, 908 P.2d 102 (Colo. 1995).

**Where an oral agreement to sponsor sporting events for two seasons allowed a party to terminate the agreement after one season, the option to terminate may fairly be interpreted as an alternative way to perform the agreement;** therefore, the agreement may be performed within one year, and the statute of frauds does not void the agreement. *Prof'l Bull Riders, Inc. v. Autozone, Inc.*, 113 P.3d 757 (Colo. 2005).

#### IV. PROMISE TO ANSWER FOR THE DEBT OF ANOTHER.

**Promise is considered original when given for promisor's benefit,** rather than to secure credit for a third party debtor. *Cramblit v. Cha-*

*teau Motel, Inc.*, 28 Colo. App. 213, 472, P.2d 183 (1970).

A promise by one, for himself, to pay for services rendered to another, is an original promise, and binding without writing. *Tuttle v. Welty*, 46 Colo. 25, 102 P. 1069 (1909); *Spelts v. Anderson*, 67 Colo. 63, 185 P. 468 (1919).

Where one, to promote his own interest, promises to pay the debt of another, the transaction constitutes an original contract and is not within the statute of frauds. *Spelts v. Anderson*, 67 Colo. 63, 185 P. 468 (1919); *Moon v. Greenlee*, 69 Colo. 482, 195 P. 1100 (1921); *Takamine v. Hirschfeld*, 81 Colo. 501, 256 P. 312 (1927); *Ady v. Weicker Transf. & Storage Co.*, 97 Colo. 230, 48 P.2d 807 (1935); *Mayer Oil Co. v. Schnepf*, 100 Colo. 578, 69 P.2d 775 (1937).

An agreement by a debtor to pay his creditor's obligation to a third party has never been regarded as a collateral promise, but wherever it is entered into upon a sufficient consideration and is accepted by the party to whom the money is to be paid, it has always been deemed an original promise, and enforceable by the party who is entitled to its advantages. *Thatcher v. Rockwell*, 4 Colo. 375 (1878), *aff'd*, 105 U.S. 467, 26 L. Ed. 949 (1881); *Mulvany v. Gross*, 1 Colo. App. 112, 27 P. 878 (1891).

The promise of one person, though in form to answer for the debt of another, if founded upon a new and sufficient consideration, moving from the creditor and promised to the promisor, and beneficial to the latter, is not within the statute of frauds, and need not be in writing. *Green v. Morrison*, 5 Colo. 18 (1879); *De Walt v. Hartzell*, 7 Colo. 601, 4 P. 1201 (1884); *Maxwell v. Dell*, 11 Colo. 415, 18 P. 561 (1888); *Mulvany v. Gross*, 1 Colo. App. 112, 27 P. 878 (1891); *Green v. Latham*, 2 Colo. App. 416, 31 P. 233 (1892); *Fisk v. Reser*, 19 Colo. 88, 34 P. 572 (1893).

Promise of the secretary of a corporation to pay a balance for printing stock certificates if printer "would go ahead" and print them, which he did is an original promise and not within the statute of frauds. *Takamine v. Hirschfeld*, 81 Colo. 501, 256 P. 312 (1927).

An oral promise is collateral and thus barred by the statute of frauds, if the leading object of the promise is to become a surety or guarantor on the debt of another; the promise is original when the performance of the agreement directly benefits the promisor. *Idealco, Inc. v. Gunnin*, 746 P.2d 69 (Colo. App. 1987).

An original oral promise will only be enforced if the accrual of the benefit to the promisor is contingent upon performance by the promisee. *Idealco, Inc. v. Gunnin*, 746 P.2d 69 (Colo. App. 1987).

**Applicability of subsection (1)(b).** A bank, which ignorantly pays money to the holder of an instrument upon the faith of a third person's



statement that he knows the holder to be the payee and which is afterwards compelled to pay the amount to the true payee, may recover the sum from the third person in an action for damages occasioned by the deceit, and subsection (1)(b) cannot be invoked in behalf of the defendant in such case, because his liability does not grow out of any special promise to answer for the debt, default, or miscarriage of another, nor upon any agreement required to be in writing. *Lahay v. City Nat'l Bank*, 15 Colo. 339, 25 P. 704 (1890).

**Part performance which will withdraw a promise covered by subsection (1)(b)** from the statute must consist of acts from which it clearly appears that the performing party would not have done in the absence of the agreement. *Masinton v. Dean*, 659 P.2d 50 (Colo. App. 1982).

**What is done as part performance must be consistent** with no theory other than the oral agreement, otherwise it does not tend to prove the latter. *Masinton v. Dean*, 659 P.2d 50 (Colo. App. 1982).

**To be binding collateral agreement must be in writing.** An agreement, if it is not collateral, but in the nature of an original agreement to pay the debt of another, founded on a sufficient consideration received by the promisor himself, is not within the provisions of subsection (1)(b), and therefore, need not be in writing; but, if the agreement to answer for the debt of another be wholly collateral, it must be in writing. *Thatcher v. Rockwell*, 4 Colo. 375 (1878), *aff'd*, 105 U.S. 467, 26 L. Ed. 949 (1881); *Fisk v. Reser*, 19 Colo. 88, 34 P. 572 (1893).

**Words importing collateral undertaking.** The words, "we will see the articles paid for", or equivalent words, standing alone and uncontrolled by circumstances showing a contrary intent, import a collateral undertaking, and are within the statute of frauds. *Wagner v. Hallack*, 3 Colo. 176 (1877); *Clayton Coal Co. v. King*, 108 Colo. 63, 113 P.2d 672 (1941).

Where the president of an insolvent bank presented to one of the directors, who was also a depositor, a release of his claim in the latter capacity, and to induce the execution thereof, said to the director: "You shall have your money out of the assets of the bank if this settlement goes through." "I will take the assets of the bank, and make the money out of them, and you shall have every nickel." "You shall have all your money back, with interest." These words were a promise to pay the debt of the bank and the oral agreement is void under subsection (1)(b). *Freeman v. Hampton*, 67 Colo. 90, 185 P. 251 (1919).

Where defendant said concerning lumber purchased by another: "If he doesn't pay for it, I will", this is not an original undertaking, but a collateral promise and within the statute of

frauds. *Seal v. Colo. Coal & Lumber Co.*, 79 Colo. 141, 244 P. 469 (1926).

**Agreement within statute where object is to become guarantor to promisee.** When the leading object of the promise or agreement is to become guarantor or surety to the promisee for a debt for which a third party is and continues to be primarily liable, the agreement, whether made before or after, or at the time with the promise of the principal, is within the statute of frauds and not binding unless evidenced by writing. *Cramblit v. Chateau Motel, Inc.*, 28 Colo. App. 213, 472 P.2d 183 (1970).

Where plaintiff sold to a tenant goods and charged them upon his books to such tenant, a promise by the landlord to pay such account, made without consideration, was a promise to pay the debt of another within subsection (1)(b), and was not binding unless made in writing. *Burson v. Bogart*, 18 Colo. App. 449, 72 P. 605 (1903).

**Full performance of promise by plaintiff removes matter from statute.** Assuming that the alleged promises of the defendants amounted to a special promise to answer for the debt of another person, the full performance on the part of plaintiff of the acts required of him under the oral agreement would remove the case from the statute of frauds. *Schust v. Perington*, 169 Colo. 39, 453 P.2d 599 (1969).

**Promise to pay another's debt for consideration not within statute.** Where one promises to pay the debt of another in consideration of money or property received from the debtor for the expressed purpose of paying the debt, the promise is not within the statute of frauds. *Hughes v. Fisher*, 10 Colo. 383, 15 P. 702 (1887); *Durkee v. Conklin*, 13 Colo. App. 313, 57 P. 486 (1899); *Cerrusite Mining Co. v. Steele*, 18 Colo. App. 216, 70 P. 1091 (1902); *McIntire v. Schiffer*, 31 Colo. 246, 72 P. 1056 (1903); *Burson v. Bogart*, 49 Colo. 410, 113 P. 516 (1911); *Argys v. McGlothlen*, 130 Colo. 490, 276 P.2d 983 (1954).

Where, after the plaintiff refused to sell supplies to a corporation lacking credit, the defendant then said: "Charge these things to me, and let the boys at the mine have what they need", the promise was original rather than collateral or of guaranty; hence, not within the statute. *Redington v. Jenkins-McKay Hdwe. Co.*, 111 Colo. 363, 141 P.2d 891 (1943).

**Return to work on promise of payment of wages not within statute.** Where oil drillers ceased work because of default of payment of their wages by the original contractor, and returned to work on the promise of officers of the owner company that the latter would see that their wages were paid, the promise is not within the statute of frauds. *Mayer Oil Co. v. Schnepf*, 100 Colo. 578, 69 P.2d 775 (1937).

**Promise to assume notes for purchase of property not within statute.** Where defendants

purchased property of plaintiffs incumbered by trust deed, and orally agreed to assume the notes secured thereby, such promise is not an agreement to answer for the debt of another person within the meaning of subsection (1)(b). *Enos v. Anderson*, 40 Colo. 395, 93 P. 475 (1907).

**Payment of note in exchange for conveyance of property not within statute.** A promise to a debtor to pay his debt in consideration of the conveyance of property to the promisor is not within the statute of frauds. *Enos v. Anderson*, 40 Colo. 395, 93 P. 475 (1907); *Burson v. Bogart*, 49 Colo. 410, 113 P. 516 (1911); *United States Mining Corp. v. Fred Goble, Inc.*, 82 Colo. 59, 256 P. 1091 (1927).

Where, in exchange for property conveyed to her by her husband, the wife promised to pay off the husband's note, the agreement was nothing more than a promise to perform an obligation in consideration of which the lands were conveyed to her; this agreement constituted an original contract by the wife, not within the statute of frauds. *Green v. Richardson*, 4 Colo. 584 (1879); *McIntire v. Schiffer*, 31 Colo. 246, 72 P. 1056 (1903).

**Where agreement not promise to pay another's debt.** An agreement to place a person's name upon a settlement check is not a promise to pay the debt of another, although performance of the promise may result in the discharge of the debt of another. *Davis v. Ciancio*, 172 Colo. 54, 470 P.2d 30 (1970).

Partnership, agreeing that a loan to one of partners would be a partnership debt, is a direct and not collateral agreement and does not come within the statute. *Kelsey v. Munson*, 198 F. 841 (8th Cir. 1912).

A contract, by which certain expert witnesses were to testify in behalf of the managing officers of a mining corporation in an action against them for sending fraudulent statements through the mail in regard to the values of its properties, is a direct promise to pay the stipulated fees and expenses of the corporation and is not a contract to answer for the debt, default, or miscarriage of another within this section. *Lincoln Mt. Gold Mining Co. v. Williams*, 37 Colo. 193, 85 P. 844 (1906).

**Test for liability for debt of another.** The test for whether one by an oral promise becomes liable for the debts of another is whether or not a promise has been made as a surety of the debtor or as an original undertaking by the promisor. *Seal v. Colo. Coal & Lumber Co.*, 79 Colo. 141, 244 P. 469 (1926).

**Debtor and creditor may sue for breach of promise.** Upon the breach of a promise to pay the debt of another in consideration of money or property received from the debtor, not only the debtor himself, but the creditor, may sue, even though the promise is made to the debtor alone. *Argys v. McGlothlen*, 130 Colo. 490, 276 P.2d 983 (1954).

**Plaintiff has burden of establishing that oral promise asserted was original and unconditional** and thus amounted to an assumption by defendant of the direct liability for goods thereafter furnished to third parties. *Clayton Coal Co. v. King*, 108 Colo. 63, 113 P.2d 672 (1941).

**Novation of a guaranty is an original agreement** rather than a collateral agreement and thus not within the purview of the statute of frauds. *Moffat County State Bank v. Told*, 780 P.2d 11 (Colo. App. 1989), *aff'd*, 800 P.2d 1320 (Colo. 1990).

## V. AGREEMENT MADE UPON CONSIDERATION OF MARRIAGE.

**Writing required for antenuptial agreement.** Antenuptial agreements conveying lands are included in that class of contracts required by this section to be in writing and signed by the party to be charged therewith, as equity will not permit subsection (1)(c) to be made an instrument for the perpetration of a fraud. *Moore v. Allen*, 26 Colo. 197, 57 P. 698, 77 Am. St. R. 255 (1899).

**Widow's violation of antenuptial contract manifested bad faith.** Where an oral contract was entered into between a husband and wife before their marriage wherein it was agreed that their property rights should not be affected by the marriage, and subsequent to their marriage they executed a written agreement in which each waived and released all right to the property of the other, and where the husband left a will in which no provision was made for the widow who attempted to repudiate both contracts as void, her violation of the solemn contracts was a manifestation of bad faith and ought not to be tolerated. *Remington v. Remington*, 69 Colo. 206, 193 P. 550 (1920).

**Where the trial court concluded, and it was undisputed, that the obligations at issue were not made upon consideration of the parties marriage,** the oral agreement was removed from the statute of frauds provision under this section. *In re Lemoine-Hofmann*, 827 P.2d 587 (Colo. App. 1992).

**38-10-113. Goods sold at auction - memorandum.** Whenever goods are sold at auction, and the auctioneer at the time of sale enters in a sale book a memorandum specifying the nature and price of the property sold, the terms of sale, the name of the purchaser, and the name of the person for whose account the sale is made, such memorandum shall be deemed a note of the contract of such sale within the meaning of section 38-10-112.



**Source:** R.S. p. 339, § 13. G.L. § 1263. G.S. § 1522. R.S. 08: § 2667. C.L. § 5112. CSA: C. 71, § 13. CRS 53: § 59-1-13. C.R.S. 1963: § 59-1-13.

**38-10-114. No delivery or change of possession - effect.** Except as otherwise provided in section 4-2-402 or 4-2.5-308, C.R.S., or except where evidence of the transaction is included in the central registry maintained with respect to transactions relating to title to such goods and chattels, or is duly noted on the certificate of title to such goods and chattels by the authority issuing such certificate, or is included in the records of the proper filing office for a security interest in such goods and chattels under section 4-9-501, C.R.S., or is a transaction described in section 4-9-309 or 4-9-310, C.R.S., every sale made by a vendor of goods and chattels in his or her possession or under his or her control and every assignment of goods and chattels, unless each shall be accompanied by an immediate delivery and followed by an actual and continued change of possession of things sold or assigned, shall be presumed to be fraudulent and void as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith, unless the party opposed to the effect of the presumption shall establish that it is more probable than not that such sale or assignment was made by the seller or assignor in good faith and without any actual intent to hinder, delay, or defraud creditors or subsequent purchasers.

**Source:** R.S. p. 339, § 14. G.L. § 1264. G.S. § 1523. R.S. 08: § 2668. C.L. § 5113. CSA: C. 71, § 14. CRS 53: § 59-1-14. C.R.S. 1963: § 59-1-14. L. 65: p. 1481, § 3. L. 83: Entire section amended, p. 1446, § 1, effective July 1. L. 91: Entire section amended, p. 1689, § 2, effective July 1; entire section amended, p. 321, § 6, effective July 1, 1992. L. 2001: Entire section amended, p. 1446, § 42, effective July 1.

**Editor's note:** Amendments to this section by House Bill 91-1080 and Senate Bill 91-129 were harmonized.

**Cross references:** For rights of seller's creditors against sold goods, see § 4-2-402.

## ANNOTATION

- I. General Consideration.
- II. Sufficient Delivery and Change of Possession.
- III. Rights of Creditors.

### I. GENERAL CONSIDERATION.

**Law reviews.** For comment on Daniel v. Surratt (cited below), see 9 Rocky Mt. L. Rev. 98 (1936). For article, "A Decade of Colorado Law: Conflict of Laws, Security, Contracts and Equity", see 23 Rocky Mt. L. Rev. 247 (1951).

**Applicability of section limited.** This section applies only to sales of chattels in possession of the vendor or under his control. Weiland v. Potter, 8 Colo. App. 79, 44 P. 769 (1896).

**Section inapplicable where bailee possesses goods.** This section is inapplicable where, prior to the sale, the vendor has placed the goods in possession of a bailee, and such bailee, being informed of the sale, agrees to hold them for the purchaser. Weiland v. Potter, 8 Colo. App. 79, 44 P. 769 (1896); Hendrie & Bolthoff Mfg. Co. v. Collins, 13 Colo. App. 8, 56 P. 815 (1899); Hendrie & Bolthoff Mfg. Co. v. Collins, 29 Colo. 102, 67 P. 164 (1901); Jones v. Mackenzie Bros. Wall Paper & Paint Co., 19 Colo. App.

121, 73 P. 847 (1903); Morrison v. McCluer, 27 Colo. App. 264, 148 P. 380 (1915).

**Effect of proof of bona fide sale.** A case is not taken out of the statute by proving that the sale was, in fact, bona fide. Bartell v. Griffin, 47 Colo. 569, 108 P. 171 (1910); Fish v. East, 114 F.2d 177 (10th Cir. 1940).

**Party entitled to attack validity of property transfer.** In an action of replevin for property claimed by the plaintiff under a sale to him by a third person, the defendant, who was neither a creditor of, nor a subsequent purchaser from, such third person, could not attack the validity of the transfer of the property between such third person and the plaintiff on the ground of no actual change of possession. Klug v. Munce, 40 Colo. 276, 90 P. 603 (1907).

One who is neither the purchaser of an animal, nor the creditor of the one who sold it, cannot object that a purchase asserted by another was not accompanied by a change of possession. Graves v. Davenport, 45 Colo. 270, 100 P. 429 (1909).

**Review by supreme court.** This section cannot be invoked for the first time in the supreme court on review. Hunt v. Hayt, 10 Colo. 278, 15 P. 410 (1887); Benjamin v. Matler, 3 Colo. App.

227, 32 P. 837 (1893); *Hamill v. Hall*, 4 Colo. App. 290, 35 P. 927 (1894); *Tynon v. Despain*, 22 Colo. 240, 43 P. 1039 (1896); *Painesville Nat'l Bank v. Hannan*, 64 Colo. 301, 171 P. 364 (1918).

**Applied** in *Goodrich v. Michael*, 3 Colo. 77 (1876); *Finding v. Hartman*, 14 Colo. 596, 23 P. 1004 (1890); *McCraw v. Welch*, 2 Colo. 284 (1892); *Goard v. Gunn*, 2 Colo. App. 66, 29 P. 918 (1892); *Anders v. Barton*, 3 Colo. App. 324, 33 P. 142 (1893); *Goff v. Landon*, 5 Colo. App. 452, 39 P. 69 (1895); *Singer Mfg. Co. v. Converse*, 23 Colo. 247, 47 P. 264 (1896); *Stanley v. Citizens' Coal & Coke Co.*, 24 Colo. 103, 49 P. 35 (1897); *Singer Mfg. Co. v. Bohen*, 31 Colo. 444, 72 P. 1097 (1903); *Austin v. Terry*, 38 Colo. 407, 88 P. 189 (1906); *Israel v. Day*, 41 Colo. 52, 92 P. 698 (1907); *Morsch v. Lessig*, 45 Colo. 168, 100 P. 431 (1909); *Visbet v. Federal Title & Trust Co.*, 229 F. 644 (8th Cir. 1915); *Goad v. Corrington*, 61 Colo. 437, 158 P. 284 (1916); *Best & Co. v. Wolf Co.*, 67 Colo. 42, 185 P. 371 (1919); *Case Threshing Mach. Co. v. Reminger*, 77 Colo. 595, 238 P. 63 (1925); *Daniel v. Surratt*, 97 Colo. 43, 46 P.2d 903 (1935); *Foster v. Howell*, 122 Colo. 64, 220 P.2d 717 (1950).

## II. SUFFICIENT DELIVERY AND CHANGE OF POSSESSION.

**Acts necessary to constitute sufficient delivery and change of possession** depend in a great measure upon the nature and situation of the property. *Crymble v. Mulvaney*, 21 Colo. 203, 40 P. 499 (1895).

**Determination of sufficient delivery.** If there is a full surrender upon the part of the vendor and a full assumption on the part of the vendee of the control and dominion of the subject of the sale, the delivery is sufficient. *Cook v. Mann*, 6 Colo. 21 (1881); *Wilcox v. Jackson*, 7 Colo. 521, 4 P. 966 (1884); *Bassinger v. Spangler*, 9 Colo. 175, 10 P. 809 (1886); *Sweeney v. Coe*, 12 Colo. 485, 21 P. 705 (1889); *Herr v. Denver Milling & Mercantile Co.*, 13 Colo. 406, 22 P. 770 (1889); *Atchison v. Graham*, 14 Colo. 217, 23 P. 876 (1890); *Felt v. Cleghorn*, 2 Colo. App. 4, 29 P. 813 (1892); *Springer v. Kreeger*, 3 Colo. App. 487, 34 P. 269 (1893); *Crymble v. Mulvaney*, 21 Colo. 203, 40 P. 499 (1895); *Hugus & Co. v. Hardenburg*, 19 Colo. App. 464, 76 P. 543 (1904).

Where, at the time of the sale, chattels were not in the physical possession of the vendor but were under his control, and where the sale was not accompanied by an immediate delivery to the bank, or any delivery, nor was it followed by an actual and continued change of possession of the things sold, the sale is void. *Reed v. Ardway State Bank*, 102 Colo. 266, 78 P.2d 624 (1938).

This section requires the removal of the property sold from the custody and control of the vendor whenever removal is possible, notwith-

standing any expense or hardship the removal may entail. *Burchinell v. Weinberger*, 4 Colo. App. 6, 34 P. 911 (1893); *Crymble v. Mulvaney*, 21 Colo. 203, 40 P. 499 (1895).

**Requirements of change of possession.** The vendee of chattels must take actual possession of the articles sold, and the possession must be open, notorious, unequivocal, and such as to apprise the community that the goods have changed hands or that the sale is void as to creditors of the vendor. *Bassinger v. Spangler*, 9 Colo. 175, 10 P. 809 (1886); *Sweeney v. Coe*, 12 Colo. 485, 21 P. 705 (1889); *Lloyd v. Williams*, 6 Colo. App. 157, 40 P. 243 (1895); *Willis v. Roberts*, 18 Colo. App. 149, 70 P. 445 (1902).

The necessity of clear, unequivocal, and unmistakable change of possession, and retention of such possession by the vendee, has been properly, fully, and clearly asserted by the supreme court. *Cook v. Mann*, 6 Colo. 21 (1881); *Wilcox v. Jackson*, 7 Colo. 521, 4 P. 966 (1884); *Herr v. Denver Milling & Mercantile Co.*, 13 Colo. 406, 22 P. 770 (1889); *Baur v. Beall*, 14 Colo. 383, 23 P. 345 (1890).

The possession taken by a purchaser of personalty must be actual, continued, visible, open, notorious, unequivocal, and exclusive. *Cook v. Mann*, 6 Colo. 21 (1881); *Davis v. Patterson*, 69 Colo. 226, 193 P. 662 (1920); *Acott v. Sterling Hdwe. & Implement Co.*, 74 Colo. 195, 219 P. 1073 (1923); *Fish v. East*, 114 F.2d 177 (10th Cir. 1940).

**Sale void absent visible indicia of change of ownership.** The sale of a stock of goods in a store is void as no indicia of a change of ownership were visible, where the sign of the former proprietor, who made the sale, was permitted to remain on the building, the vendor frequented the store after the sale and occasionally made sales of goods himself; therefore, the retention of the old sign amounted to a declaration to the public that the former proprietor was still proprietor of the store and it gave to the transaction an equivocal character. *Bassinger v. Spangler*, 9 Colo. 175, 10 P. 809 (1886).

**Gift of automobile by parent to minor child void as to creditors.** Gift of an automobile by a parent to a minor child residing with him, unaccompanied by delivery and continued change of possession, is void as to creditors. *Wilcoxen v. Morgan*, 2 Colo. 473 (1875); *Bassinger v. Spangler*, 9 Colo. 175, 10 P. 809 (1886); *Bartell v. Griffin*, 47 Colo. 569, 108 P. 171 (1910); *Goad v. Corrington*, 61 Colo. 427, 158 P. 284 (1916); *Davis v. Patterson*, 69 Colo. 226, 193 P. 662 (1920); *Chavez v. Haynie*, 75 Colo. 414, 225 P. 852 (1924).

**Purchaser's placing goods in locked room constituted possession.** Where a purchaser of goods obtained possession thereof, put them in a room over which the vendor had no control, locked them up, took the key away, leaving a notice on the door that the goods were his, his



possession satisfied the requirements of this section. Conly v. Friedman, 6 Colo. App. 160, 40 P. 348 (1895).

**Conditional sale not avoided by vendor's continued possession.** Where a bill of sale is made under an oral agreement that it shall be delivered only upon the happening of a certain event, the sale, being conditional, is not avoided by the fact that the vendor continued in possession until performance of the condition. Roberts v. Hawn, 20 Colo. 77, 36 P. 886 (1894).

**If conditional sale is rescinded, seller is bound** to immediately take and keep actual and continued possession of the personalty in order to make the transaction available against the buyer's creditors. Coors v. Reagan, 44 Colo. 126, 96 P. 966 (1908).

**Rights of subsequent purchaser taking with knowledge of prior transaction.** Where a sale of chattels is completed as between the parties thereto, but the possession temporarily remains with the vendor, a subsequent purchaser who has knowledge of the prior transaction takes subject to the rights of the prior vendee. McKee v. Bassick Mining Co., 8 Colo. 392, 8 P. 561 (1885).

**Evidence admissible to determine actual change of possession of goods.** Where the issue is as to whether an actual change of possession of the goods took place, the books of the warehouse in which they were stored, at and after the time of the sale, are admissible to show whether or not there has been such a change. Springer v. Kreeger, 3 Colo. App. 487, 34 P. 269 (1893).

**Concurrent or joint possession inadmissible.** A concurrent or joint possession between buyer and seller is not admissible. Cook v. Mann, 6 Colo. 21 (1881); Wilcox v. Jackson, 7 Colo. 521, 4 P. 966 (1884); Bassinger v. Spangler, 9 Colo. 175, 10 P. 809 (1886); Atchison v. Graham, 14 Colo. 217, 23 P. 876 (1890); Donovan v. Gathe, 3 Colo. App. 151, 32 P. 436 (1893); Bartell v. Griffin, 47 Colo. 569, 108 P. 171 (1910); Fish v. East, 114 F.2d 177 (10th Cir. 1940).

**Purchaser's exclusive possession is question of fact for jury.** A question as to whether exclusive possession of the chattels sold was given to the purchaser is one of fact for the jury. Eversman v. Clements, 6 Colo. App. 224, 40 P. 575 (1895).

### III. RIGHTS OF CREDITORS.

**Recording of bill of sale not notice to creditors.** The recording of a bill of sale, the law not requiring or authorizing the recording of such instruments, is no notice to creditors of the vendor. Bassinger v. Spangler, 9 Colo. 175, 10 P. 809 (1886); Sweeney v. Coe, 12 Colo. 485, 21 P. 705 (1889); Allen v. Steiger, 17 Colo. 552, 31 P.

226 (1892); Fish v. East, 114 F.2d 177 (10th Cir. 1940).

**Rights of parties unaffected by transfer subsequent to sale.** The rights of the parties are not at all affected by any transfer which may be made subsequent to the time of the sale, even though the transfer may occur before any actual levy on the goods by creditors who have sued out attachments or have issued executions. Cook v. Mann, 6 Colo. 21 (1881); Ray v. Raymond, 8 Colo. 467, 9 P. 15 (1885); Bassinger v. Spangler, 9 Colo. 175, 10 P. 809 (1886); Sweeney v. Coe, 12 Colo. 485, 21 P. 705 (1889); Atchison v. Graham, 14 Colo. 217, 23 P. 876 (1890); Allen v. Steiger, 17 Colo. 552, 31 P. 226 (1892); Felt v. Cleghorn, 2 Colo. App. 4, 29 P. 813 (1892); Burchinell v. Weinberger, 4 Colo. App. 6, 34 P. 911 (1893); Autrey v. Bowen, 7 Colo. App. 408, 43 P. 908 (1896); Fish v. East, 114 F.2d 177 (10th Cir. 1940).

**Creditor may secure debt by mortgage on property sold.** A bona fide creditor may, notwithstanding notice or knowledge of a sale fraudulent and void under this section, secure his debt by mortgage on the property thus sold. Allen v. Steiger, 17 Colo. 552, 31 P. 226 (1892).

**Creditor's knowledge of fraudulent sale immaterial.** Knowledge of creditors of a sale which is fraudulent and void under this section is immaterial. Cook v. Mann, 6 Colo. 21 (1881); Bassinger v. Spangler, 9 Colo. 175, 10 P. 809 (1886); Allen v. Steiger, 17 Colo. 552, 31 P. 226 (1892); Lloyd v. Williams, 6 Colo. App. 157, 40 P. 243 (1895); Willis v. Roberts, 18 Colo. App. 149, 70 P. 445 (1902); Helgert v. Stewart, 20 Colo. App. 202, 77 P. 1091 (1904); Bartell v. Griffin, 47 Colo. 569, 108 P. 171 (1910); Davis v. Patterson, 69 Colo. 226, 193 P. 662 (1920); Fish v. East, 114 F.2d 177 (10th Cir. 1940).

A sale, not accompanied by delivery and followed by actual and continued change of possession, is fraudulent and void as to creditors of the vendor, notwithstanding such creditors had actual notice of the sale. Helgert v. Stewart, 20 Colo. App. 202, 77 P. 1091 (1904); Fish v. East, 114 F.2d 177 (10th Cir. 1940).

**Voluntary property transfer to creditor not void as to other creditors.** A voluntary transfer by a debtor to one of his creditors of certain horses and mules and wagons used by the debtor at his sawmill, in trust to sell the same and to apply the proceeds in payment of certain preferred creditors, the balance being accepted by the assignee in settlement of his own claim, is not void as to other creditors under this section, where a bill of sale of the property was executed by the debtor, and delivered to the assignee, and formal possession of the property surrendered to the assignee one day, and the property removed by the assignee from the mill the next. Bailey v. Johnson, 9 Colo. 365, 12 P. 209 (1886).

**38-10-115. Creditors defined.** "Creditors", as used in section 38-10-114, includes all persons who are creditors of the vendor or assignor at any time while such goods and chattels remain in his possession or control.

**Source:** R.S. p. 340, § 15. G.L. § 1265. G.S. § 1524. R.S. 08: § 2669. C.L. § 5114. CSA: C. 71, § 15. CRS 53: § 59-1-15. C.R.S. 1963: § 59-1-15.

#### ANNOTATION

**When attaching creditor not "creditor" within section.** Where possession and control of the property had passed out of the vendor more than six months prior to the commencement of a suit by the attaching creditor, he is not a "creditor" within the definition of this section. *Weiland v. Potter*, 8 Colo. App. 79, 44 P. 769 (1896); *Hendrie & Bolthoff Mfg. Co. v. Collins*, 13 Colo. App. 8, 56 P. 815 (1899); *Jones v. Mackenzie Bros. Wall Paper & Paint Co.*, 19 Colo. App. 121, 73 P. 847 (1903).

**Wife with alimony claim is creditor.** A wife who had a claim for alimony and a suit pending to secure a divorce and compel its payment is a creditor within the purview of this section. *Gregory v. Filbeck*, 12 Colo. 379, 21 P. 489 (1888); *Hall v. Harrington*, 7 Colo. App. 474, 44 P. 365 (1896).

**Applied in** *Rizer v. McCarth*, 3 Colo. App. 348, 33 P. 191 (1893); *Fish v. East*, 114 F.2d 177 (10th Cir. 1940).

**38-10-116. Lawful agent may subscribe.** Every instrument required by any of the provisions of this article to be subscribed by any party may be subscribed by the lawful agent of such party.

**Source:** R.S. p. 340, § 16. G.L. § 1266. G.S. § 1525. R.S. 08: § 2670. C.L. § 5115. CSA: C. 71, § 16. CRS 53: § 59-1-16. C.R.S. 1963: § 59-1-16.

**Cross references:** For legality of subscription of a document by a lawful agent, see § 38-10-109.

**38-10-117. Conveyances to defraud creditors void.** (1) Every conveyance or assignment in writing or otherwise of any estate or interest in lands, goods, or things in action or of any rents and profits issuing thereupon, and every charge upon lands, goods, or things in action or upon the rents and profits thereof made with the intent to hinder, delay, or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts, or demands, and every bond or other evidence of debt given, suits commenced, or decree or judgment suffered with the like intent as against the person so hindered, delayed, or defrauded shall be void.

(2) This section shall not apply to any transfer made or obligation incurred on or after July 1, 1991, and, for the applicability of this subsection (2), the time at which any such transfer or obligation is made or incurred shall be determined in accordance with the provisions of article 8 of this title.

**Source:** R.S. p. 340, § 17. G.L. § 1267. G.S. § 1526. R.S. 08: § 2671. C.L. § 5116. CSA: C. 71, § 17. CRS 53: § 59-1-17. C.R.S. 1963: § 59-1-17. L. 91: Entire section amended, p. 1690, § 3, effective July 1.

#### ANNOTATION

- I. General Consideration.
- II. Void Conveyances.
- III. Transactions Between Husband and Wife.

#### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "Reaching Fraudulent Conveyances and Equitable Interests of

Debtors", see 27 *Dicta* 137 (1950). For article, "Property Law", see 32 *Dicta* 420 (1955). For article, "An Aspect of Estate Planning in Colorado: The Revocable Inter Vivos Trust", see 43 *Den. L.J.* 296 (1966). For article, "Deeds in Lieu of Foreclosure", see 15 *Colo. Law.* 394 (1986). For article, "Perils of Pre-Bankruptcy Planning: Transfers, Exemptions and Taxes", see 17 *Colo. Law.* 1513 (1988). For article,



"Colorado's New Fraudulent Transfer Statutes", see 20 Colo. Law. 1815 (1991).

**Object of this section** is to protect all persons against conveyances made to hinder or defraud them of their lawful suits, damages, forfeitures, debts, or demands. *Gregory v. Filbeck*, 12 Colo. 379, 21 P. 489 (1888).

**Injured party deemed creditor.** One who has sustained a personal injury by the negligence or misconduct of another is a creditor of the offending party within the meaning of this section even though his claim has not been reduced to judgment. *Thuringer v. Trafton*, 58 Colo. 250, 144 P. 866 (1914); *Chalupa v. Preston*, 65 Colo. 400, 177 P. 965 (1918).

**"Creditor"** includes persons with unlitigated claims against a defendant. *Sands v. New Age Family P'ship, Ltd.*, 897 P.2d 917 (Colo. App. 1995).

**"Obligation"** includes the assumption by the debtor of a duty to transfer an asset as a fraudulent transfer, even though no actual transfer has as yet taken place. *Sands v. New Age Family P'ship, Ltd.*, 897 P.2d 917 (Colo. App. 1995).

**Neither "transfer" nor "obligation" refers to the creditor's claim** against the debtor, but refers instead to the transaction by which the debtor sought to place assets beyond the reach of creditors. *Sands v. New Age Family P'ship, Ltd.*, 897 P.2d 917 (Colo. App. 1995).

**Hindering and delaying construed.** The hindering and delaying meant by this section as vitiating an assignment is that hindrance and delay intended to be produced by the assignor through covin and malice, or for his own benefit and advantage. *Burr v. Clement*, 9 Colo. 1, 9 P. 633 (1885).

**By listing the elements of hindrance, delay, or fraud in the disjunctive**, the statute implies that each is to have substantive consequences and a creditor need only show that the debtor acted with one of the three elements in mind to support a remedy. *Yetter Well Serv., Inc. v. Cimarron Oil Co., Inc.*, 841 P.2d 1068 (Colo. App. 1992).

**A wrongful withholding within the meaning of § 5-12-102 (1)(a) need not involve actual fraud or be tortious in nature.** Section 38-10-117 provides that any conveyance made with the intent to hinder, delay, or defraud creditors is fraudulent. *Stansbury v. Commissioner of Internal Rev.*, 102 F.3d 1088 (10th Cir. 1996); *Scott v. Commissioner of Internal Rev.*, 236 F.3d 1239 (10th Cir. 2001).

**Corporate executive of insolvent company liable as a transferee of assets for unpaid income taxes and the interest that accrued since the taxes became due.** Transferee liable under subsection (1) because conveyance was made with the intent to hinder, delay, or defraud creditors, in this case, the internal revenue service. While structuring the sale of the assets of the insolvent company, corporate executive

(transferee) obtained multiple opinions on the foreseeable tax consequences. Informed by those opinions and his corporate acumen, executive knowingly chose to take a calculated risk. *Scott v. Commissioner of Internal Rev.*, 236 F.3d 1239 (10th Cir. 2001).

**Conveyance to hinder and delay creditors is void only as to the creditor** intended to be hindered or delayed. *Lathrop v. Pollard*, 6 Colo. 424 (1882); *Italian-American Bank v. Lepore*, 79 Colo. 466, 246 P. 792 (1926).

**Transaction held to constitute conveyance with intent to hinder creditors.** *Love v. Olson*, 645 P.2d 861 (Colo. App. 1982).

**There was no evidence of intent to defraud, hinder, or delay creditors** where the evidence showed that the transferee knew of a pending lawsuit against the transferor, but expected the transferor to win the lawsuit and continue as a going concern. *Walk-In Medical Centers, Inc. v. Breuer Capital Corp.*, 778 F. Supp. 1116 (D. Colo. 1991).

**Evidence that the transferee knew of a judgment against the transferor** does not by itself show intent to defraud, hinder, or delay. *Walk-In Medical Center, Inc. v. Breuer Capital Corp.*, 778 F. Supp. 1116 (D. Colo. 1991).

**A good-faith conveyance between family members based upon a pre-existing debt** may permissibly operate as a preference of a relative's loan even though it results in delay or hindrance to other creditors. *Erjavec v. Herrick*, 827 P.2d 615 (Colo. App. 1992).

**Fraudulent conveyance not void, but voidable.** Fraudulent conveyances are not void ab initio in Colorado; they are voidable. The fraudulent transferee can convey good title to a bona fide purchaser for value. *Appel v. Steamboat Ski Corp.* (In re Smythe), 32 Bankr. 736 (Bankr. D. Colo. 1983).

**No conveyance may be adjudged "fraudulent" against creditors without proof that:** (1) The transferor was insolvent at the time of the transfer, or was rendered insolvent thereby; (2) the purpose of the conveyance was to defeat, hinder, or delay creditors; (3) the transferor acted with fraudulent intent or with an intent to benefit or to secure an advantage to himself; and (4) the transferee knew of, or participated in, the transferor's intent. *Yetter Well Serv., Inc. v. Cimarron Oil Co., Inc.*, 841 P.2d 1068 (Colo. App. 1992).

**In order to state a claim under this section to set aside a fraudulent conveyance**, a plaintiff need not first have a judgment against the debtor. *Emarine v. Haley*, 892 P.2d 343 (Colo. App. 1994).

**Lis pendens appropriate.** A proceeding to set aside a conveyance pursuant to this section falls within the type of action upon which a lis pendens pursuant to C.R.C.P. 105(f) may be recorded. *Crown Life Ins. Co. v. April Corp.*, 855 P.2d 12 (Colo. App. 1993).

**The three-year statute of limitations set forth in § 13-80-101 applies to suits brought under this section.** In re Walden, 207 Bankr. 1 (D. Colo. 1997).

**Applied** in Gutheil v. Polichio, 103 Colo. 426, 86 P.2d 972 (1939); Mohler v. Buena Vista Bank & Trust Co., 42 Colo. App. 4, 588 P.2d 894 (1978); In re Carter, 4 B.R. 692 (D. Colo. 1980); Zimmerman v. Mozer, 10 B.R. 1002 (D. Colo. 1981); Appel v. Steamboat Ski Corp. (In re Smythe), 28 Bankr. 882 (Bankr. D. Colo. 1983); Smith Office Serv., Inc. v. Kelley, 762 P.2d 791 (Colo. App. 1988).

## II. VOID CONVEYANCES.

**Fraud may be inferred from the facts and circumstances** of each case. Grimes v. Hill, 15 Colo. 359, 25 P. 698 (1890); Innis v. Carpenter, 4 Colo. App. 30, 34 P. 1011 (1893); Helm v. Brewster, 42 Colo. 25, 93 P. 1101 (1908); Fish v. East, 114 F.2d 177 (10th Cir. 1940).

**Intent of conveyance necessary determination.** The necessary and material thing to bring a case within the protection of this section is not that the party invoking its aid should have an existing cause of action or demand at the time the conveyance is made, but that the grantor intended by such conveyance to hinder, delay, or defraud creditors or other persons in the manner set forth in this section. Gregory v. Filbeck, 12 Colo. 379, 21 P. 489 (1888).

While it is true that a fraudulent intent must be participated in by both parties, grantor and grantee, or mortgagor and mortgagee, when such is the case, the conveyance or mortgage is null and void. Livingston v. Swofford Bros. Dry Goods Co., 12 Colo. App. 331, 56 P. 355 (1898); Fish v. East, 114 F.2d 177 (10th Cir. 1940).

A sale of property, though for a full consideration, may be void, if made by the owner with intent to hinder, delay, or defraud his creditors, and if the vendee participated in such intent. Helm v. Brewster, 42 Colo. 25, 93 P. 1101 (1908); Reithmann v. Godsman, 23 Colo. 202, 46 P. 684 (1896); Fish v. East, 114 F.2d 177 (10th Cir. 1940).

**Intent need only be to hinder or delay payment.** That the transferor did not intend to defraud his creditors will not defeat a suit to void a transfer as fraudulent. If the transferor's intent was merely to hinder or to delay the payment of his creditors, the transfer will be voided. United States v. Morgan, 554 F. Supp. 582 (D. Colo. 1982).

**Burden of proof to show that a conveyance is honest** and made in good faith for valuable consideration and without intent to hinder, delay, or defraud creditors is on the transferee and transferor. In re Genova v. Champion, 33 Bankr. 930 (Bankr. D. Colo. 1983).

**Once a bankruptcy trustee shows a family transfer, burden of proof shifts to the trans-**

feree and transferor to show that the transfer was honest and that there was no intent to defraud. Also, the burden of proof of solvency is upon the debtor and the transferee and not upon the trustee. In re Genova v. Champion, 33 Bankr. 930 (Bankr. D. Colo. 1983).

**Void transfer invalid even between parties.** Where an attempted transfer by deed of a party's interest in property is set aside as an attempt to defraud creditors, it is invalid as between the parties to the deed. Park State Bank v. McLean, 660 P.2d 13 (Colo. App. 1982).

**Conveyance intended to defraud future creditors void.** A conveyance intended to defraud creditors, is voidable not only as to existing, but as to future, creditors. Gregory v. Filbeck, 12 Colo. 379, 21 P. 489 (1888); Fish v. East, 114 F.2d 177 (10th Cir. 1940); House v. Johnson, 19 Colo. App. 524, 76 P. 743 (1904).

**Party need not have been existing creditor** at the time the conveyance was executed in order to invoke the protection of this section. House v. Johnson, 19 Colo. App. 524, 76 P. 743 (1904); Fish v. East, 114 F.2d 177 (10th Cir. 1940).

**Action by judgment creditor to set aside conveyance maintainable.** A judgment creditor may maintain an equitable action to set aside a fraudulent conveyance of real property by the debtor, and enforce its judgment lien thereon. Hugo Nat'l Bank v. Ashworth, 84 Colo. 362, 270 P. 553 (1928).

**Bar to money judgments implicit in remedy.** Implicit in this remedy is a bar to any money judgments against the fraudulent transferor since awarding the judgment creditor a money judgment would amount to an increase in the judgment debt owed to the judgment creditor by the fraudulent transferor. Miller v. Kaiser, 164 Colo. 206, 433 P.2d 772 (1967).

**Equity court has inherent power to award actual damages.** A court of equity has the inherent power to award actual damages under certain circumstances in order to accomplish the fulfillment of the equitable remedy. Miller v. Kaiser, 164 Colo. 206, 433 P.2d 772 (1967); Morris v. Askeland Enter., Inc., 17 P.3d 830 (Colo. 2000).

**When fraudulent transferee held personally liable.** Under special circumstances which generally involve some activity of the fraudulent transferee in causing the property involved to be depreciated in value while in his hands or causing the property, either wholly or in part, to be placed beyond the reach of the court, it is in equity's power to hold a fraudulent transferee personally liable. Miller v. Kaiser, 164 Colo. 206, 433 P.2d 772 (1967).

**Property statements and debtor's oral admission admissible as evidence.** In an action to set aside alleged fraudulent conveyances, property statements and oral admissions of the debtor are properly admitted. Gallegos v. Lajara



Livestock Loan Co., 73 Colo. 325, 215 P. 131 (1923). See *Whitescarver v. Interstate Trust Co.*, 71 Colo. 416, 207 P. 81 (1922).

**Transfer not fraudulent** because value of the property transferred was worth a great deal less than the amount owed. In *re Genova v. Triangle Truck Serv., Inc.*, 40 Bankr. 513 (Bankr. D. Colo. 1984).

### III. TRANSACTIONS BETWEEN HUSBAND AND WIFE.

**The decisions interpreting this section hold that married parties may stand in the relationship of debtor and creditor.** *Erjavec v. Herrick*, 827 P.2d 615 (Colo. App. 1992).

**Bona fide loan transaction required.** Although husband and wife may stand in the relationship of debtor and creditor, a bona fide loan transaction must be established. *Love v. Olson*, 645 P.2d 861 (Colo. App. 1982); *Erjavec v. Herrick*, 827 P.2d 615 (Colo. App. 1992).

**Lien enforceable on payment for land.** Where a debtor transferred real property to his wife without consideration, in fraud of a judgment creditor, and the wife sold and conveyed the property to another, the creditor can establish and enforce his lien on the money to be paid by the purchaser of the land. *Hugo Nat'l Bank v. Ashworth*, 84 Colo. 362, 270 P. 553 (1928).

**Wife may be "creditor"** within the protection of this section based upon a judgment obtained subsequent to the conveyance. *Linker v. Linker*, 28 Colo. App. 136, 470 P.2d 882 (1970).

**Wife's action against husband to set aside conveyance maintainable.** A wife can maintain an action to set aside a conveyance by her husband, made with fraudulent intent, so as to enable her to collect alimony awarded in a divorce suit against him, though the cause for such divorce did not arise until after the conveyance was made. *Gregory v. Filbeck*, 12 Colo. 379, 21 P. 489 (1888); *Hanscom v. Hanscom*, 6 Colo. App. 97, 39 P. 885 (1895); *Hall v. Harrington*, 7 Colo. App. 474, 44 P. 365 (1896); *Ruffenach v. Ruffenach*, 13 Colo. App. 102, 56 P. 812 (1899); *Fahey v. Fahey*, 43 Colo. 354, 96 P. 251 (1908).

**Conveyance by husband to his wife is deemed fraudulent**, without regard to intent, if the conveyance is made without fair consideration and if the husband is insolvent at the time of making such conveyance, or if, by reason of such conveyance, he is rendered unable to pay his existing debts. *Harvey v. Harvey*, 841 P.2d 375 (Colo. App. 1992).

**Parties related or married have burden of proving innocence and integrity.** In a transac-

tion between relatives or those connected in marriage, the parties thereto have the burden of establishing its innocence and integrity. *Chalupa v. Preston*, 65 Colo. 400, 177 P. 965 (1918); *Helm v. Brewster*, 42 Colo. 25, 93 P. 1101 (1908).

When a conveyance by an insolvent debtor to his wife is attacked by a creditor of the former at the time of such conveyance, the husband and wife are required to clearly establish that the transaction is honest, and that there is no intent to thereby hinder and defraud such creditor. *Helm v. Brewster*, 42 Colo. 25, 93 P. 1001 (1908); *First Nat'l Bank v. Kavanaugh*, 7 Colo. App. 160, 43 P. 217 (1895); *United States v. Morgan*, 554 F. Supp. 582 (D. Colo. 1982); *Harvey v. Harvey*, 841 P.2d 375 (Colo. App. 1992); *Erjavec v. Herrick*, 827 P.2d 615 (Colo. App. 1992); *U.S. v. Schaeffer*, 245 Bankr. 407 (D. Colo. 1999).

**When transactions between spouses are challenged under this section**, husband and wife bear the burden of establishing that the conveyance was honest, made in good faith for a valuable consideration, and without intent to hinder and defraud creditors in the collection of their judgment. *Erjavec v. Herrick*, 827 P.2d 615 (Colo. App. 1992).

**Evidence sufficient to support the inference and conclusion that husband and wife possessed fraudulent intent to hinder or delay creditor** where husband and wife admitted intention to transfer property in anticipation of an adverse outcome in litigation in favor of another creditor and the resulting depletion of husband's estate. *Erjavec v. Herrick*, 827 P.2d 615 (Colo. App. 1992).

**Conveyances wife made with intent to hinder or defraud creditors.** In *re Weyand*, 33 Bankr. 553 (Bankr. D. Colo. 1983).

**Defense of laches denied.** Where, after a fraudulent conveyance of a boardinghouse to the wife by a husband, the business was run in the same manner as before, and the wife devoted no more time nor money in improving the property and business than she would have done had the title remained in her husband, the delay of a creditor of the husband in recovering judgment and in instituting a creditor's suit to set the conveyance aside is not prejudicial to either the husband or wife, and hence laches is no defense to the bill. *Dubois v. Clark*, 12 Colo. App. 220, 55 P. 750 (1898); *Morgan v. King*, 27 Colo. 539, 63 P. 416 (1900); *Farris v. Wirt*, 16 Colo. App. 1, 63 P. 946 (1901); *Helm v. Brewster*, 42 Colo. 25, 93 P. 1101 (1908).

**38-10-118. Grant or assignment of trust.** Every grant or assignment of any existing trust in lands, goods, or things in action, unless the same is in writing and subscribed by the party making the same or by his agent lawfully authorized, shall be void.

**Source:** R.S. p. 340, § 18. G.L. § 1268. G.S. § 1527. R.S. 08: § 2672. C.L. § 5117. CSA: C. 71, § 18. CRS 53: § 59-1-18. C.R.S. 1963: § 59-1-18.

#### ANNOTATION

**Law reviews.** For article, "One Year Review of Contracts", see 38 Dicta 161 (1961). For article, "An Aspect of Estate Planning in Colorado: The Revocable Inter Vivos Trust", see 43 Den. L.J. 296 (1966).

**An express trust was created by implication in fact**, rather than theory of implied trust, in case where loyal minority members of local

church sought to recover possession of church's property from seceding majority members. Bishop and Diocese of Colo. v. Mote, 716 P.2d 85 (Colo. 1986); cert. denied, 479 U.S. 826, 107 S. Ct. 102, 93 L. Ed. 2d 52 (1986).

**Applied** in Hall v. Linn, 8 Colo. 264, 5 P. 641 (1885); Henderson v. Greeley Nat'l Bank, 111 Colo. 365, 142 P.2d 480 (1943).

**38-10-119. Conveyances void against heirs.** Every conveyance, charge, instrument, or proceeding declared to be void by the provisions of this article as against creditors or purchasers shall be equally void against the heirs, successors, personal representatives, or assignees of such creditors or purchasers.

**Source:** R.S. p. 340, § 19. G.L. § 1269. G.S. § 1528. R.S. 08: § 2673. C.L. § 5118. CSA: C. 71, § 19. CRS 53: § 59-1-19. C.R.S. 1963: § 59-1-19.

#### ANNOTATION

**Heir's claim accrued after mother's death.** A claim to set aside conveyances on the grounds of undue influence did not accrue to the heirs until the mother's death, although the heirs had knowledge of the deed in question soon after it was executed; therefore, the heirs were under no duty to institute adjudication, or guardianship,

or other proceedings during the mother's lifetime and their failure to institute legal proceedings during the mother's lifetime does not bar this action which was timely filed after her death. Gertge v. Gertge, 28 Colo. App. 246, 472 P.2d 188 (1970).

**38-10-120. Intent, question of fact - want of consideration.** The question of fraudulent intent, in all cases arising under the provisions of this article, shall be deemed a question of fact and not of law; nor shall any conveyance or charge be adjudged fraudulent against creditors or purchasers solely on the ground that it was not founded on a valuable consideration.

**Source:** R.S. p. 340, § 20. G.L. § 1270. G.S. § 1529. R.S. 08: § 2674. C.L. § 5119. CSA: C. 71, § 20. CRS 53: § 59-1-20. C.R.S. 1963: § 59-1-20.

#### ANNOTATION

**Section 38-10-114 unmodified by this section.** This section unquestionably refers to other provisions of this article which pronounce certain transactions made with a fraudulent intent void, but it does not in any manner affect or modify the conclusive presumption of law declared by § 38-10-114. Ray v. Raymond, 8 Colo. 467, 9 P. 15 (1885).

**Intention concluded from disclosed facts.** The question of intention is only a conclusion or deduction from the facts as disclosed and, if the result of the transaction is fraud, the law supplies the intention or proceeds regardless of the intention. Knapp v. Day, 4 Colo. App. 21, 34 P.

1008 (1893); Wells v. Schuster-Hax Nat'l Bank, 23 Colo. 534, 48 P. 809 (1897).

**Jury determines question of fraud.** If there is any question of fraud, it is a question of fraud in fact to be determined by the jury, and not by the court. Sickman v. Abernathy, 14 Colo. 174, 23 P. 447 (1890).

**Courts empowered to pronounce judgment of law.** The courts are not deprived of the power to pronounce the judgment of the law in any case which the facts justify. Burr v. Clement, 9 Colo. 1, 9 P. 633 (1885); People ex rel. Wilson v. Court of Appeals, 28 Colo. 442, 65 P. 42 (1901).



**One who alleges fraud must prove fraud he alleges.** *Sickman v. Abernathy*, 14 Colo. 174, 23 P. 447 (1890).

In an action by a creditor of the grantor to set aside a conveyance on the ground that it was voluntary and that it was made with the intention to hinder, delay, and defraud existing creditors, it is incumbent upon the plaintiff to prove that the conveyance was purely voluntary, or that it was made with the intention to delay and defraud creditors. *Homestead Mining Co. v. Reynolds*, 30 Colo. 330, 70 P. 422 (1902).

**Whether husband and wife met their burden of proving that they lacked the intent to**

**delay, hinder, or defraud is a question of fact** which the trial court is obligated to resolve by consideration of the facts and circumstances of each case. *Erjavec v. Herrick*, 827 P.2d 615 (Colo. App. 1992).

**Applied** in *Wilcoxon v. Morgan*, 2 Colo. 473 (1875); *Thomas v. Mackey*, 3 Colo. 390 (1870); *Burshall v. Waggoner*, 4 Colo. 256 (1878); *Knox v. McFarran*, 4 Colo. 586 (1879); *Curran v. Rothschild*, 14 Colo. App. 497, 60 P. 1111 (1900); *Homestead Mining Co. v. Reynolds*, 30 Colo. 330, 70 P. 422 (1902); *Eppich v. Blanchard*, 58 Colo. 139, 143 P. 1035 (1914); *Love v. Olson*, 645 P.2d 861 (Colo. App. 1982).

**38-10-121. Purchaser with notice of fraud.** The provisions of this article shall not be construed in any manner to affect or impair the title of a purchaser for a valuable consideration, unless it appears that such purchaser had previous notice of the fraudulent intent of his immediate grantor or of the fraud rendering void the title of such grantor.

**Source:** R.S. p. 340, § 21. G.L. § 1271. G.S. § 1530. R.S. 08: § 2675. C.L. § 5120. CSA: C. 71, § 21. CRS 53: § 59-1-21. C.R.S. 1963: § 59-1-21.

#### ANNOTATION

**Subsequent purchaser takes subject to prior vendee's rights.** Under this section and § 38-10-114 where a sale of chattels is completed as between the parties thereto, but the possession temporarily remains with the vendor, a subsequent purchaser who has knowledge of the prior transaction takes subject to the rights of the prior vendee. *McKee v. Bassick Mining Co.*, 8 Colo. 392, 8 P. 561 (1885).

**The fact that consideration is given for the transfer constitutes no defense** if the transferee has previous notice of the transferor's intent. *Yetter Well Serv., Inc. v. Cimarron Oil Company, Inc.*, 841 P.2d 1068 (Colo. App. 1992).

**Applied** in *Burdsall v. Waggoner*, 4 Colo. 256 (1878); *Welsh v. Noyes*, 10 Colo. 133, 14 P. 317 (1887).

**38-10-122. Construction of terms.** "Lands", as used in this article, means lands, tenements, and hereditaments; and "estate and interest in lands" includes every estate and interest, freehold and chattel, legal and equitable, present and future, vested and contingent in lands as defined in this section.

**Source:** R.S. p. 340, § 22. G.L. § 1272. G.S. § 1531. R.S. 08: § 2676. C.L. § 5121. CSA: C. 71, § 22. CRS 53: § 59-1-22. C.R.S. 1963: § 59-1-22.

**38-10-123. Term conveyance, how construed.** "Conveyance", as used in this article, includes every instrument in writing, except a last will and testament, whatever may be its form and by whatever name it may be known in law, by which any estate or interest in lands is created, aliened, assigned, or surrendered.

**Source:** R.S. p. 341, § 23. G.L. § 1273. G.S. § 1532. R.S. 08: § 2677. C.L. § 5122. CSA: C. 71, § 23. CRS 53: § 59-1-23. C.R.S. 1963: § 59-1-23.

**38-10-124. Credit agreements - required to be in writing.** (1) As used in this section, unless the context otherwise requires:

(a) "Credit agreement" means:

(I) A contract, promise, undertaking, offer, or commitment to lend, borrow, repay, or forbear repayment of money, to otherwise extend or receive credit, or to make any other financial accommodation;

(II) Any amendment of, cancellation of, waiver of, or substitution for any or all of the

terms or provisions of any of the credit agreements defined in subparagraphs (I) and (III) of this paragraph (a); and

(III) Any representations and warranties made or omissions in connection with the negotiation, execution, administration, or performance of, or collection of sums due under, any of the credit agreements defined in subparagraphs (I) and (II) of this paragraph (a).

(b) "Creditor" means a financial institution which offers to extend, is asked to extend, or extends credit under a credit agreement with a debtor.

(c) "Debtor" means a person who or entity which obtains credit or seeks a credit agreement with a creditor or who owes money to a creditor. -

(d) "Financial institution" means a bank, savings and loan association, savings bank, industrial bank, credit union, or mortgage or finance company.

(2) Notwithstanding any statutory or case law to the contrary, including but not limited to section 38-10-112, no debtor or creditor may file or maintain an action or a claim relating to a credit agreement involving a principal amount in excess of twenty-five thousand dollars unless the credit agreement is in writing and is signed by the party against whom enforcement is sought.

(3) A credit agreement may not be implied under any circumstances, including, without limitation, from the relationship, fiduciary or otherwise, of the creditor and the debtor or from performance or partial performance by or on behalf of the creditor or debtor, or by promissory estoppel.

**Source:** L. 89: Entire section added, p. 1438, § 1, effective March 15.

#### ANNOTATION

**Law reviews.** For article, "Limiting Lender Liability Through the Statute of Frauds", see 18 Colo. Law. 1725 (1989). For article, "Chapter 13 Bankruptcy as an Alternative to Chapter 7", see 18 Colo. Law. 2089 (1989). For comment, "Stemming the Tide of Lender Liability: Judicial and Legislative Reactions", see 67 Den. U. L. Rev. 453 (1990). For article, "The Colorado Credit Agreements Act and Its Impact on Lenders and Borrowers", see 36 Colo. Law. 31 (June 2007).

**An agreement for the purchase of commercial paper is not a financial accommodation as that term is used in the definition of "credit agreement".** Echo Acceptance Corp., 267 F.3d 1068 (10th Cir. 2001).

**In a deficiency judgment action, settlement agreement was "credit agreement" for purposes of this section and was unenforceable because it was not reduced to writing.** Pima Financial Serv. Corp. v. Selby, 820 P.2d 1124 (Colo. App. 1991).

**A federally chartered bank is a bank for purposes of subsection (1)(d), and nothing indicates that the term "bank" is limited to state-chartered banks.** The definition of "bank" in § 11-101-401 (5) does not apply to this section. To import that definition would be contrary to the obligation to apply this section broadly. Premier Farm Credit, PCA v. W-Cattle, LLC, 155 P.3d 504 (Colo. App. 2006).

**A representation or promise made in connection with a credit agreement involving more than \$25,000 is invalid unless it is in writing.** As a matter of law, reliance placed on

oral representations or promises cannot be reasonable or justifiable. Norwest Bank Lakewood v. GCC P'ship, 886 P.2d 299 (Colo. App. 1994).

**Contract providing for financing in excess of \$25,000 is a "credit agreement"** for purposes of this section, and section applies to any agreement to extend credit regardless of the context in which the agreement was formed. Univex Int'l, Inc. v. Orix Credit Alliance, Inc., 902 P.2d 877 (Colo. App. 1995), aff'd, 914 P.2d 1355 (Colo. 1996).

**Any tort claim relating to an oral credit agreement involving a principal amount greater than \$25,000 is barred by this section.** Instead of encouraging tortious behavior by lenders, such an interpretation comports with intent of the general assembly that borrowers and lenders must be sure to reduce agreement to writing to ensure enforceability of any claims they may have in the future. Hewitt v. Pitkin County Bank & Trust Co., 931 P.2d 456 (Colo. App. 1995).

**This section does not preclude relevant extrinsic evidence** offered to resolve the intended meaning of a facially ambiguous credit agreement. Fisher v. Cmty. Banks of Colo., Inc., \_\_ P.3d \_\_ (Colo. App. 2010).

**This section, requiring a signature, and not § 38-10-112, controls in cases involving a credit agreement.** Univex Int'l, Inc. v. Orix Credit Alliance, Inc., 902 P.2d 877 (Colo. App. 1995), aff'd on other grounds, 914 P.2d 1355 (Colo. 1996).

**The phrase "action or claim" in subsection (2) is not limited to claims for affirmative**



**recovery.** It is not intended to cover only claims for relief while excluding defenses to liability based on oral representations. Accordingly, this section applies to a claim of fraudulent inducement that seeks rescission of the transaction on which the creditor's claim is based. *Premier Farm Credit, PCA v. W-Cattle, LLC*, 155 P.3d 504 (Colo. App. 2006).

**This section specifically precludes assertion of a promissory estoppel claim** to enforce an unsigned credit agreement. *Univex Int'l, Inc. v. Orix Credit Alliance, Inc.*, 902 P.2d 877 (Colo. App. 1995), *aff'd*, 914 P.2d 1355 (Colo. 1996).

**There is no basis to distinguish between promissory estoppel and equitable estoppel** in this context, given that this section must be construed broadly to effectuate its purposes. *Premier Farm Credit, PCA v. W-Cattle, LLC*, 155 P.3d 504 (Colo. App. 2006).

**Borrowers made co-makers their agents in executing future modifications of a note**, in effect, by consenting to future modifications of the note in the original instrument. Modifications to note that were reduced to writing and executed by co-makers met the purpose and requirements of this section. *Crown Life Ins. Co. v. Haag Ltd. P'ship*, 929 P.2d 42 (Colo. App. 1996).

**The terms "debtor" and "creditor" do not require a direct borrower-lender relationship under the credit agreement statute of frauds.** The statute applies to a "credit agreement" that

arose from oral representations made between lenders to the same borrower. *Schoen v. Morris*, 15 P.3d 1094 (Colo. 2000); *Lang v. Bank of Durango*, 78 P.3d 1121 (Colo. App. 2003).

**A mortgage broker does not fall under the definition of "financial institution".** *Fisher v. 1st Consumers Funding, Inc.*, 160 P.3d 321 (Colo. App. 2007).

**An email qualifies as a writing for purposes of subsection (2).** *PayoutOne v. Coral Mortg. Bankers*, 602 F. Supp. 2d 1219 (D. Colo. 2009).

**Multiple emails may serve to satisfy the writing requirement.** There is no indication the credit agreement statute of frauds requires that the requisite writing be a single document. *PayoutOne v. Coral Mortg. Bankers*, 602 F. Supp. 2d 1219 (D. Colo. 2009).

**A party may not avoid the writing requirement in the credit agreement statute of frauds by arguing promissory estoppel.** *PayoutOne v. Coral Mortg. Bankers*, 602 F. Supp. 2d 1219 (D. Colo. 2009).

**A claim for unjust enrichment that arises from an oral assertion regarding a credit agreement is barred by the credit agreement statute of frauds.** Legislative history and case law strongly disfavor any type of claim involving oral credit agreements, and the credit agreement statute of frauds expressly bars all claims relating to a credit agreement unless the credit agreement is in writing. *Lang v. Bank of Durango*, 78 P.3d 1121 (Colo. App. 2003).

## JOINT RIGHTS AND OBLIGATIONS

### ARTICLE 11

#### Joint Tenancy

38-11-101. Personal property in joint tenancy - how created - vesting upon death.

**38-11-101. Personal property in joint tenancy - how created - vesting upon death.**

(1) An estate in joint tenancy in personal property is created if, in the instrument evidencing ownership of such property, it is declared that the property is conveyed, transferred, bequeathed, or held in joint tenancy or as joint tenants, whether or not additional words are used relating to tenancy in common or survivorship. The abbreviation "JTWROS" and the phrase "as joint tenants with right of survivorship" or "in joint tenancy with right of survivorship" shall have the same meaning. Upon the death of any such joint tenants, the title to and ownership of such personal property passes immediately to and vests in the surviving joint tenant or tenants. Any grantor or transferor in any such instrument of conveyance or transfer may also be one of the grantees or transferees therein.

(2) Repealed.

(3) Any such instrument evidencing ownership executed prior to July 1, 1996, as amended in compliance with subsection (1) of this section shall be deemed to have created an estate in joint tenancy.

**Source:** L. 37: p. 792, § 1. CSA: C. 92, § 17. L. 39: p. 286, § 1. CRS 53: § 76-1-5. L. 59: p. 528, § 1. C.R.S. 1963: § 76-1-5. L. 96: Entire section amended, p. 661, § 14, effective July 1. L. 2002: (2) amended, p. 1361, § 13, effective July 1. L. 2003: (2) repealed, p. 2002, § 66, effective May 22.

**Cross references:** For joint tenancy in real property, see article 31 of this title; for joint tenancy in bank accounts, see §11-105-105 and article 15 of title 15; for joint rights and obligations generally, see article 50 of title 13.

ANNOTATION

**Law reviews.** For article, “Joint Tenancy in Colorado”, see 26 Dicta 313 (1949). For article, “Simple Devices for the Transfer of Assets Without Administration”, see 27 Dicta 277 (1950). For article, “Ownership of Personal Property Accumulated During a Marriage”, see 17 Colo. Law. 623 (1988).

**Rights fixed and vested at creation of joint tenancy.** The rights are fixed and vested in the joint tenants at the time of the creation of the joint tenancy under this section. Smith v. Greenburg, 121 Colo. 417, 218 P.2d 514 (1950).

**To create joint tenancy with survivorship rights,** there must be specific language manifesting such intent; where the instrument is silent or ambiguous as to the nature of the joint estate created, it will be construed as creating a tenancy in common and not a joint tenancy, and, if legal relief is sought, the naked wording alone without meeting statutory requirements will be insufficient to create a joint tenancy. Chilson v. Reed, 154 Colo. 149, 389 P.2d 87 (1964).

Where a husband, possessing corporate stock certificates issued in his name, indorses and

delivers them to another with the request that new certificates be procured therefor naming his wife and himself as joint tenants with the right of survivorship and not as tenants in common, a joint tenancy was established. Eisenhardt v. Lowell, 105 Colo. 417, 98 P.2d 1001 (1940).

**Circumstances unnecessary for creation of joint tenancy in bank account.** It is not necessary for a joint tenant donee to have knowledge of the creation of the account, to sign a signature card, or to deposit or withdraw funds from the account in order to establish a valid joint tenancy in a bank account. Estate of Barnhart, 194 Colo. 505, 574 P.2d 500 (1978).

**In order to set aside joint tenancy properly created,** it is necessary to show that the joint tenancy was created purely for the convenience or a business necessity of the putative donor, and that no right of survivorship was intended. Estate of Barnhart v. Burkhardt, 38 Colo. App. 544, 563 P.2d 972 (1977), aff’d, 194 Colo. 505, 574 P.2d 500 (1978).

**Applied** in Sacco v. Oxley, 402 F.2d 155 (10th Cir. 1968).

TENANTS AND LANDLORDS

ARTICLE 12

Tenants and Landlords

**Law reviews:** For article, “The Effect of Zoning Violations on the Enforceability of Leases”, see 19 Colo. Law. 2077 (1990).

PART 1		38-12-200.2.	Legislative declaration.
SECURITY DEPOSITS - WRONGFUL WITHHOLDING		38-12-201.	Application of part 2.
		38-12-201.3.	Legislative declaration - increased availability of mobile home parks.
		38-12-201.5.	Definitions.
		38-12-202.	Tenancy - notice to quit.
38-12-101.	Legislative declaration.	38-12-202.5.	Action for termination.
38-12-102.	Definitions.	38-12-203.	Reasons for termination.
38-12-103.	Return of security deposit.	38-12-204.	Nonpayment of rent - notice required for rent increase.
38-12-104.	Return of security deposit - hazardous condition - gas appliance.	38-12-204.3.	Notice required for termination.
PART 2		38-12-205.	Termination prohibited.
MOBILE HOME PARK ACT		38-12-206.	Home owner meetings - assembly in common areas.
		38-12-200.1.	Short title.



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|------------|---|------------|--|
| 38-12-207. | Security deposits - legal process.  |            | and municipalities prohibited - legislative declaration. |
| 38-12-208. | Remedies.   | 38-12-302. | Definitions.   |
| 38-12-209. | Entry fees prohibited - entry fee defined - security deposit - court costs. |            | PART 4   |

- 38-12-210. Closed parks prohibited.  
 38-12-211. Selling fees prohibited.  
 38-12-212. Certain types of landlord-seller agreements prohibited.  
 38-12-212.3. Responsibilities of landlord - acts prohibited.  
 38-12-212.7. Landlord utilities account.  
 38-12-213. Rental agreement - disclosure of terms in writing.

## VICTIMS OF DOMESTIC VIOLENCE

- 38-12-214. Rules and regulations.  
 38-12-215. New developments and parks - rental of sites to dealers authorized.  
 38-12-216. Mediation, when permitted - court actions.  
 38-12-217. Notice of sale of mobile home park - notice of change in use.  
 38-12-218. Mobile home owners - right to form a cooperative.  
 38-12-219. Home owners' and landlords' rights.  
 38-12-220. Private civil right of action.  
 38-12-221. Access by counties and municipalities.

- 38-12-401. Definitions.  
 38-12-402. Protection for victims of domestic violence.

## PART 5

OBLIGATION TO MAINTAIN  
RESIDENTIAL PREMISES - UNLAWFUL  
REMOVAL

- |            |   |            |  |
|------------|---|------------|--|
| 38-12-216. | Mediation, when permitted - court actions.                    | 38-12-501. | Legislative declaration - matter of statewide concern - purposes and policies.           |
| 38-12-217. | Notice of sale of mobile home park - notice of change in use. | 38-12-502. | Definitions.   |
| 38-12-218. | Mobile home owners - right to form a cooperative.             | 38-12-503. | Warranty of habitability.  |
| 38-12-219. | Home owners' and landlords' rights.                           | 38-12-504. | Tenant's maintenance of premises.  |
| 38-12-220. | Private civil right of action.                                | 38-12-505. | Uninhabitable residential premises.  |
| 38-12-221. | Access by counties and municipalities.                        | 38-12-506. | Opt-out.   |
|            |   | 38-12-507. | Breach of warranty of habitability - tenant's remedies.                                  |
|            |   | 38-12-508. | Landlord's defenses to a claim of breach of warranty - limitations on claiming a breach. |
|            |   | 38-12-509. | Prohibition on retaliation.  |
|            |   | 38-12-510. | Unlawful removal or exclusion.   |
|            |   | 38-12-511. | Application.   |

## PART 3

LOCAL CONTROL OF RENTS  
PROHIBITED

- 38-12-301. Control of rents by counties

## PART 1

## SECURITY DEPOSITS - WRONGFUL WITHHOLDING

**38-12-101. Legislative declaration.** The provisions of this part 1 shall be liberally construed to implement the intent of the general assembly to insure the proper administration of security deposits and protect the interests of tenants and landlords.

**Source:** L. 71: p. 592, § 1. C.R.S. 1963: § 58-1-26.

## ANNOTATION

**Law reviews.** For comment, "Colorado's Wrongful Withholding of Security Deposits Act: Three Litigious Shares in an Untested Law", see 49 Den. L.J. 453 (1973). For article, "The Colorado Security Deposit Act", see 50 U. Colo. L. Rev. 29 (1978).

**Purpose.** The security deposit act was passed to control the practices of landlords who withhold, without justification, their tenants' damage deposits. *Houle v. Adams State Coll.*, 190 Colo. 406, 547 P.2d 926 (1976).

**38-12-102. Definitions.** As used in this part 1, unless the context otherwise requires:

(1) "Normal wear and tear" means that deterioration which occurs, based upon the use for which the rental unit is intended, without negligence, carelessness, accident, or abuse of

the premises or equipment or chattels by the tenant or members of his household, or their invitees or guests.

(2) "Security deposit" means any advance or deposit of money, regardless of its denomination, the primary function of which is to secure the performance of a rental agreement for residential premises or any part thereof.

**Source:** L. 71: p. 592, § 1. C.R.S. 1963: § 58-1-27.

### ANNOTATION

**Law reviews.** For comment, "Colorado's Wrongful Withholding of Security Deposits Act: Three Litigious Shares in an Untested Law", see 49 Den. L.J. 453 (1973). For article, "The Colorado Security Deposit Act", see 50 U. Colo. L. Rev. 29 (1978).

**Landlord undefined.** This section does not define the term landlord nor does it state what constitutes the landlord-tenant relationship. *Houle v. Adams State Coll.*, 190 Colo. 406, 547 P.2d 926 (1976).

The legislative intent does not expand the common-law definition of a landlord and a tenant. *Houle v. Adams State Coll.*, 190 Colo. 406, 547 P.2d 926 (1976).

**College board of trustees is not landlord.** *Houle v. Adams State Coll.*, 190 Colo. 406, 547 P.2d 926 (1976).

**Dormitory student is not tenant.** *Houle v. Adams State Coll.*, 190 Colo. 406, 547 P.2d 926 (1976).

**"Residential premise".** A furnished condominium unit containing complete sleeping and eating facilities and available for short-term rentals is a "residential premise" subject to the provisions of this act. *Haan v. Mountain Queen Condo. Ass'n, Inc.*, 717 P.2d 969 (Colo. App. 1985), rev'd on other grounds, 753 P.2d 1234 (Colo. 1988).

**The language adopted by the parties** to a rental agreement to describe a payment made by the tenant to the landlord prior to occupancy is not dispositive of the question of whether the payment constitutes a "security deposit". *Mountain Queen Condo Ass'n v. Haan*, 753 P.2d 1234 (Colo. 1988).

**Applied** in *In re Quintana*, 28 Bankr. 269 (Bankr. D. Colo. 1983).

**38-12-103. Return of security deposit.** (1) A landlord shall, within one month after the termination of a lease or surrender and acceptance of the premises, whichever occurs last, return to the tenant the full security deposit deposited with the landlord by the tenant, unless the lease agreement specifies a longer period of time, but not to exceed sixty days. No security deposit shall be retained to cover normal wear and tear. In the event that actual cause exists for retaining any portion of the security deposit, the landlord shall provide the tenant with a written statement listing the exact reasons for the retention of any portion of the security deposit. When the statement is delivered, it shall be accompanied by payment of the difference between any sum deposited and the amount retained. The landlord is deemed to have complied with this section by mailing said statement and any payment required to the last known address of the tenant. Nothing in this section shall preclude the landlord from retaining the security deposit for nonpayment of rent, abandonment of the premises, or nonpayment of utility charges, repair work, or cleaning contracted for by the tenant.

(2) The failure of a landlord to provide a written statement within the required time specified in subsection (1) of this section shall work a forfeiture of all his rights to withhold any portion of the security deposit under this section.

(3) (a) The willful retention of a security deposit in violation of this section shall render a landlord liable for treble the amount of that portion of the security deposit wrongfully withheld from the tenant, together with reasonable attorneys' fees and court costs; except that the tenant has the obligation to give notice to the landlord of his intention to file legal proceedings a minimum of seven days prior to filing said action.

(b) In any court action brought by a tenant under this section, the landlord shall bear the burden of proving that his withholding of the security deposit or any portion of it was not wrongful.

(4) Upon cessation of his interest in the dwelling unit, whether by sale, assignment, death, appointment of a receiver, or otherwise, the person in possession of the security



deposit, including but not limited to the landlord, his agent, or his executor, shall, within a reasonable time:

(a) Transfer the funds, or any remainder after lawful deductions under subsection (1) of this section, to the landlord's successor in interest and notify the tenant by mail of such transfer and of the transferee's name and address; or

(b) Return the funds, or any remainder after lawful deductions under subsection (1) of this section, to the tenant.

(5) Upon compliance with subsection (4) of this section, the person in possession of the security deposit shall be relieved of further liability.

(6) Upon receipt of transferred funds under subsection (4) (a) of this section, the transferee, in relation to such funds, shall be deemed to have all of the rights and obligations of a landlord holding the funds as a security deposit.

(7) Any provision, whether oral or written, in or pertaining to a rental agreement whereby any provision of this section for the benefit of a tenant or members of his household is waived shall be deemed to be against public policy and shall be void.

**Source:** L. 71: p. 592, § 1. C.R.S. 1963: § 58-1-28. L. 76: (2) amended, p. 314, § 67, effective May 20.

## ANNOTATION

### I. General Consideration.

### II. Treble Damages and Attorneys' Fees.

### I. GENERAL CONSIDERATION.

**Law reviews.** For comment, "Colorado's Wrongful Withholding of Security Deposits Act: Three Litigious Shares in an Untested Law", see 49 Den. L.J. 453 (1973). For article, "The Colorado Security Deposit Act", see 50 U. Colo. L. Rev. 29 (1978).

**Purpose of section.** From a consideration of the language of the entire section, it is evident that the legislative purpose of this section is to assure that tenants will not be wrongfully deprived of their security deposits, and that if so deprived they will be entitled to adequate judicial relief. Ball v. Weller, 39 Colo. App. 14, 563 P.2d 371 (1977).

This section is designed to assist tenants in vindicating their legal rights and to equalize the disparity in power which exists between landlord and tenant in conflicts over relatively small sums. Martin v. Allen, 193 Colo. 395, 566 P.2d 1075 (1977).

This section provides a court remedy against landlords who withhold security deposits willfully and wrongfully, and the tenant's attorney should be paid for the time necessary to prevail; absent reasonable attorneys' fees, the security deposit law would not be enforced. Mau v. E.P.H. Corp., 638 P.2d 777 (Colo. 1981).

**Security deposit actually belongs to tenant;** it is only security for the landlord. Turner v. Lyon, 189 Colo. 234, 539 P.2d 1241 (1975).

**Landlords not absolved from notice requirement.** The last sentence in subsection (1) does not absolve landlords from the notice requirement; it merely permits them, upon proper

notice, to apply deposits against unpaid rent. Heatherridge Mgt. Co. v. Benson, 192 Colo. 190, 558 P.2d 435 (1976).

**Justification for requiring tenants to notify landlords** prior to claiming treble damages, attorneys' fees, and court costs is to give the landlord one last week to return the security deposit. Turner v. Lyon, 189 Colo. 234, 539 P.2d 1241 (1975).

**"Willful" defined.** The term "willful" in subsection (3)(a) means "deliberate". Turner v. Lyon, 189 Colo. 234, 539 P.2d 1241 (1975).

**When retention "willful".** If the landlord deliberately fails to return the security deposit during the additional seven-day period, the retention is logically "willful" under this section. Turner v. Lyon, 189 Colo. 234, 539 P.2d 1241 (1975).

**Wrongful withholding of deposit determined.** Failure to return the deposit, coupled with failure to provide a tenant with statutorily mandated written statement of reasons for the retention, makes the withholding of a deposit wrongful. Martinez v. Steinbaum, 623 P.2d 49 (Colo. 1981).

**Deposit not "wrongfully" held.** Where respondent authorized petitioner in writing to retain that portion of his deposit equal to one month's rent, petitioner did not withhold that part of the deposit "wrongfully", within the contemplation of subsection (3)(a). Heatherridge Mgt. Co. v. Benson, 192 Colo. 190, 558 P.2d 435 (1976).

**Evidence of landlord's good faith.** The discrepancy between the amount of a security deposit retained and the amount of actual damages proved by the landlord is important evidence of his good faith. Guzman v. McDonald, 194 Colo. 160, 570 P.2d 532 (1977).

**Tenant may not accelerate statutory time requirements.** *McAuliffe v. Rooney*, 38 Colo. App. 137, 552 P.2d 1031 (1976).

Where the statutory notice was given within the one-month period allowed by subsection (1), and only nine days after the surrender of the key to the premises, and suit was commenced prior to the expiration of the additional seven-day period contemplated by the notice requirements of subsection (3)(a), award of treble damages is improper. *McAuliffe v. Rooney*, 38 Colo. App. 137, 552 P.2d 1031 (1976).

**A restrictive endorsement, by which a landlord attempts to create a waiver of a tenant's right to legal recourse, is void** under this section. *Anderson v. Rosebrook*, 737 P.2d 417 (Colo. 1987).

**A tenant cannot be compelled to arbitrate a claim for violation of the wrongful withholding of security deposits act.** The act creates a cause of action enforceable in Colorado courts; the enforceability of the statutory cause of action in a legal proceeding cannot be limited or waived by an arbitration agreement. Thus an arbitration provision that would waive this cause of action in favor of mandatory arbitration is unenforceable to the extent that it applies to an action brought under the act. *Ingold v. AIMCO/Bluffs, L.L.C. Apartments*, 159 P.3d 116 (Colo. 2007).

**Statute as basis for jurisdiction.** *Houle v. Adams State Coll.*, 190 Colo. 406, 547 P.2d 926 (1976).

**Applied in** *In re Quintana*, 28 Bankr. 269 (Bankr. D. Colo. 1983).

## II. TREBLE DAMAGES AND ATTORNEYS' FEES.

**Constitutionality of attorneys' fees provision.** The legitimate aims of subsection (3)(a) supply a rational basis for the distinction between prevailing tenant-plaintiffs, who are entitled to attorneys' fees, and prevailing landlord-defendants, who are not, and therefore the provision is constitutional. *Torres v. Portillos*, 638 P.2d 274 (Colo. 1981).

Equality of opportunity to recover attorneys' fees is not a fundamental right, and therefore the rational relationship test, not the strict scrutiny test, is the appropriate standard for equal protection review. *Torres v. Portillos*, 638 P.2d 274 (Colo. 1981).

**Entitlement to attorneys' fees.** Tenants who are successful on appeal are entitled to an award of reasonable attorneys' fees. *Martin v. Allen*, 193 Colo. 395, 566 P.2d 1075 (1977); *Kirkland v. Allen*, 678 P.2d 568 (Colo. App. 1984).

**Attorneys' fees allowable include** those incurred on appeal. *Martinez v. Steinbaum*, 623 P.2d 49 (Colo. 1981).

Attorney fees allowable include those incurred in resolving an issue as to the amount of

reasonable attorney fees incurred in the underlying litigation and those incurred on appeal. *Mau v. E.P.H. Corp.*, 638 P.2d 777 (Colo. 1981).

**Rationale for award of attorney fees.** The reason this section provides for an award of attorney fees is two-fold: (1) To insulate the award of damages from being substantially reduced by the fees; and (2) to encourage the private bar to enforce its provisions in actions which generally involve small amounts of money. *Ball v. Weller*, 39 Colo. App. 14, 563 P.2d 371 (1977); *Torres v. Portillos*, 638 P.2d 274 (Colo. 1981).

**Successful tenants are entitled to recover attorney fees for landlord's independent actions** challenging rulings and fee awards in the underlying security deposit litigation. *Mishkin v. Young*, 198 P.3d 1269 (Colo. App. 2008).

**Hearing to determine amount of attorneys' fees.** When a successful plaintiff has requested attorneys' fees in his complaint, such an award is mandatory, and it becomes incumbent upon the trial court to hold a hearing to determine the amount of reasonable attorneys' fees to be awarded. *Ball v. Weller*, 39 Colo. App. 14, 563 P.2d 371 (1977); *Kirkland v. Allen*, 678 P.2d 568 (Colo. App. 1984).

**Awarding fees without hearing error.** The trial court erred in awarding attorneys' fees to respondent without a hearing on their reasonableness. *Heatherridge Mgt. Co. v. Benson*, 192 Colo. 190, 558 P.2d 435 (1976).

**Factors considered in determining of reasonable fee.** If the fee requested is reasonable in light of community standards and the other criteria to be considered by the court, it is not appropriate for a court to take into consideration what a major client may pay the attorney on an hourly basis or the possible absence of overhead expenses comparable to those borne by lawyers in private practice. *Mau v. E.P.H. Corp.*, 638 P.2d 777 (Colo. 1981).

**When penalty provision attaches.** If a landlord does not return a security deposit within the required time, the penalty provision of subsection (3)(a) attaches to that portion of the money wrongfully retained, plus attorneys' fees, and court costs. *Turner v. Lyon*, 189 Colo. 234, 539 P.2d 1241 (1975); *Kirkland v. Allen*, 678 P.2d 568 (Colo. App. 1984).

Where landlord deliberately fails to return security deposit within the additional seven-day period following the tenant's notice to landlord of his intention to file legal proceedings, such retention is logically "willful" under subsection (3)(a) treble damages provisions. *Kirkland v. Allen*, 678 P.2d 568 (Colo. App. 1984).

**The purpose of the seven-day notice provision in subsection (3)(a)** is to give landlords one last week to avoid treble damages by returning the security deposit. *Mishkin v. Young*, 107 P.3d 393 (Colo. 2005).



**A landlord may not avoid treble damages by accounting** for a security deposit during the seven-day period established by subsection (3)(a). The seven-day period is beyond the statutory deadline of subsection (1) and, therefore, the landlord has already forfeited all rights to retain the deposit. *Mishkin v. Young*, 107 P.3d 393 (Colo. 2005).

**Statutory liability of subsection (3)(a) may be offset** by an award, if any, made to the landlord by counterclaim for damages caused by the tenant to the property, and the landlord has the burden of proving the claim by a preponderance of the evidence. *Turner v. Lyon*, 189 Colo. 234, 539 P.2d 1241 (1975).

**Treble damages action not "frivolous" merely because landlord wins.** A treble damages action under subsection (3)(a) cannot be characterized as "frivolous" or "groundless",

as used in § 13-17-101(3), merely because the landlord prevails on the merits of his defense. *Torres v. Portillos*, 638 P.2d 274 (Colo. 1981).

**Prospective renter was not entitled to treble damages** pursuant to this section since deposit paid for rental of condominium unit was not a security deposit but was instead prepayment of the entire rent for said unit. *Mountain Queen Condo. Ass'n v. Haan*, 753 P.2d 1234 (Colo. 1988).

**Statute of limitations.** The treble damages provision of this section, being penal in nature, is governed by the one-year statute of limitations; however, the recovery of the actual security deposit and the award of attorneys' fees, being remedial in nature, are limited by the six-year statute of limitations. *Carlson v. McCoy*, 193 Colo. 391, 566 P.2d 1073 (1977).

### **38-12-104. Return of security deposit - hazardous condition - gas appliance.**

(1) Anytime service personnel from any organization providing gas service to a residential building become aware of any hazardous condition of a gas appliance, piping, or other gas equipment, such personnel shall inform the customer of record at the affected address in writing of the hazardous condition and take any further action provided for by the policies of such personnel's employer. Such written notification shall state the potential nature of the hazard as a fire hazard or a hazard to life, health, property, or public welfare and shall explain the possible cause of the hazard.

(2) If the resident of the residential building is a tenant, such tenant shall immediately inform the landlord of the property or the landlord's agent in writing of the existence of the hazard.

(3) The landlord shall then have seventy-two hours excluding a Saturday, Sunday, or a legal holiday after the actual receipt of the written notice of the hazardous condition to have the hazardous condition repaired by a professional. "Professional" for the purposes of this section means a person authorized by the state of Colorado or by a county or municipal government through license or certificate where such government authorization is required. Where no person with such government authorization is available, and where there are no local requirements for government authorization, a person who is otherwise qualified and who possesses insurance with a minimum of one hundred thousand dollars public liability and property damage coverage shall be deemed a professional for purposes of this section. Proof of such repairs shall be forwarded to the landlord or the landlord's agent. Such proof may also be used as an affirmative defense in any action to recover the security deposit, as provided for in this section.

(4) If the landlord does not have the repairs made within seventy-two hours excluding a Saturday, Sunday, or a legal holiday, and the condition of the building remains hazardous, the tenant may opt to vacate the premises. After the tenant vacates the premises, the lease or other rental agreement between the landlord and tenant becomes null and void, all rights and future obligations between the landlord and tenant pursuant to the lease or other rental agreement terminate, and the tenant may demand the immediate return of all or any portion of the security deposit held by the landlord to which the tenant is entitled. The landlord shall have seventy-two hours following the tenant's vacation of the premises to deliver to the tenant all of, or the appropriate portion of, the security deposit plus any rent rebate owed to the tenant for rent paid by the tenant for the period of time after the tenant has vacated. If the seventy-second hour falls on a Saturday, Sunday, or legal holiday, the security deposit must be delivered by noon on the next day that is not a Saturday, Sunday, or legal holiday. The tenant shall provide the landlord with a correct forwarding address. No security deposit shall be retained to cover normal wear and tear. In the event that actual cause exists for retaining any portion of the security deposit, the landlord shall provide the tenant with a written statement listing the exact reasons for the retention of any portion of the security

deposit. When the statement is delivered, it shall be accompanied by payment of the difference between any sum deposited and the amount retained. The landlord is deemed to have complied with this section by mailing said statement and any payments required by this section to the forwarding address of the tenant. Nothing in this section shall preclude the landlord from withholding the security deposit for nonpayment of rent or for nonpayment of utility charges, repair work, or cleaning contracted for by the tenant. If the tenant does not receive the entire security deposit or a portion of the security deposit together with a written statement listing the exact reasons for the retention of any portion of the security deposit within the time period provided for in this section, the retention of the security deposit shall be deemed willful and wrongful and, notwithstanding the provisions of section 38-12-103 (3), shall entitle the tenant to twice the amount of the security deposit and to reasonable attorney fees.

**Source: L. 91:** Entire section added, p. 1691, § 1, effective July 1.

#### ANNOTATION

**Section does not abrogate common law remedy of constructive eviction** for hazardous condition caused by an unsafe gas appliance.

Copeland v. Lincoln, 166 P.3d 245 (Colo. App. 2007).

#### PART 2

#### MOBILE HOME PARK ACT

**38-12-200.1. Short title.** This part 2 shall be known and may be cited as the “Mobile Home Park Act”.

**Source: L. 85:** Entire section added, p. 1198, § 1, effective June 6.

**38-12-200.2. Legislative declaration.** The general assembly hereby declares that the purpose of this part 2 is to establish the relationship between the owner of a mobile home park and the owner of a mobile home situated in such park.

**Source: L. 85:** Entire section added, p. 1198, § 1, effective June 6.

#### ANNOTATION

**Any error on part of trial court in finding mobile home park could have evicted caretaker from tenant's home was harmless where other evidence in record supports court's finding that landlord failed reasonably to accommodate tenant.** Moreover, be-

cause this finding of the court related only to its conclusion to award punitive damages, it does not fatally infect court's liability determination. Boulder Meadows v. Saville, 2 P.3d 131 (Colo. App. 2000).

**38-12-201. Application of part 2.** (1) This part 2 shall apply only to manufactured homes as defined in section 42-1-102 (106) (b), C.R.S.  
(2) Repealed.

**Source: L. 73:** p. 641, § 1. **C.R.S. 1963:** § 58-2-1. **L. 75:** (1) amended, p. 1467, § 10, effective July 18. **L. 81:** (1) amended and (2) repealed, pp. 1813, 1817, §§ 1, 10, effective June 9. **L. 89:** (1) amended, p. 729, § 34, effective July 1. **L. 94:** (1) amended, p. 706, § 13, effective April 19. **L. 95:** (1) amended, p. 951, § 2, effective May 25.



## ANNOTATION

**Applied** in *Husar v. Larimer County Court*, 629 P.2d 1104 (Colo. App. 1981).

**38-12-201.3. Legislative declaration - increased availability of mobile home parks.**

The general assembly hereby finds and declares that mobile homes, manufactured housing, and factory-built housing are important and effective ways to meet Colorado's affordable housing needs. The general assembly further finds and declares that, because of the unique aspects of mobile homes and mobile home park ownership, there is a need to protect mobile home owners from eviction with short notice so as to prevent mobile home owners from losing their shelter as well as any equity in their mobile homes. The general assembly encourages local governments to allow and protect mobile home parks in their jurisdictions and to enact plans to increase the number of mobile home parks in their jurisdictions. The general assembly further encourages local governments to provide incentives to mobile home park owners to attract additional mobile home parks and to increase the viability of current parks.

**Source: L. 2005:** Entire section added, p. 110, § 4, effective August 8. **L. 2010:** Entire section amended, (SB 10-156), ch. 343, p. 1584, § 1, effective July 1.

**38-12-201.5. Definitions.** As used in this part 2, unless the context otherwise requires:

(1) "Home owner" means any person or family of such person owning a mobile home that is subject to a tenancy in a mobile home park under a rental agreement.

(1.5) "Management" or "landlord" means the owner or person responsible for operating and managing a mobile home park or an agent, employee, or representative authorized to act on said management's behalf in connection with matters relating to tenancy in the park.

(2) "Mobile home" means a single-family dwelling built on a permanent chassis designed for long-term residential occupancy and containing complete electrical, plumbing, and sanitary facilities and designed to be installed in a permanent or semipermanent manner with or without a permanent foundation, which is capable of being drawn over public highways as a unit, or in sections by special permit, or a manufactured home as defined in section 38-29-102 (6) if the manufactured home is situated in a mobile home park.

(3) "Mobile home park" or "park" means a parcel of land used for the continuous accommodation of five or more occupied mobile homes and operated for the pecuniary benefit of the owner of the parcel of land, his agents, lessees, or assignees. Mobile home park does not include mobile home subdivisions or property zoned for manufactured home subdivisions.

(4) "Mobile home space", "space", "mobile home lot" or "lot" means a parcel of land within a mobile home park designated by the management to accommodate one mobile home and its accessory buildings and to which the required sewer and utility connections are provided by the mobile home park.

(5) "Premises" means a mobile home park and existing facilities and appurtenances therein, including furniture and utilities where applicable, and grounds, areas, and existing facilities held out for the use of home owners generally or the use of which is promised to the home owner.

(6) "Rent" means any money or other consideration to be paid to the management for the right of use, possession, and occupation of the premises.

(7) "Rental agreement" means an agreement, written or implied by law, between the management and the home owner establishing the terms and conditions of a tenancy, including reasonable rules and regulations promulgated by the park management. A lease is a rental agreement.

(8) Repealed.

(9) "Tenancy" means the rights of a home owner to use a space or lot within a park on which to locate, maintain, and occupy a mobile home, lot improvements, and accessory structures for human habitation, including the use of services and facilities of the park.

**Source:** **L. 81:** Entire section added, p. 1813, § 2, effective June 9. **L. 87:** (1) R&RE, (1.5) added, (5), (7), and (9) amended, and (8) repealed, pp. 1310, 1315, §§ 2, 1, 15, effective May 8. **L. 2010:** (2) amended, (SB 10-156), ch. 343, p. 1584, § 2, effective July 1.

**38-12-202. Tenancy - notice to quit.** (1) (a) No tenancy or other lease or rental occupancy of space in a mobile home park shall commence without a written lease or rental agreement, and no tenancy in a mobile home park shall be terminated until a notice to quit has been served. Said notice to quit shall be in writing and in the form specified in section 13-40-107 (2), C.R.S. The property description required in section 13-40-107 (2), C.R.S., shall be deemed legally sufficient if it states:

- (I) The name of the landlord or the mobile home park;
- (II) The mailing address of the property;
- (III) The location or space number upon which the mobile home is situate; and
- (IV) The county in which the mobile home is situate.

(b) Service of the notice to quit shall be as specified in section 13-40-108, C.R.S. Service by posting shall be deemed legally sufficient within the meaning of section 13-40-108, C.R.S., if the notice is affixed to the main entrance of the mobile home.

(c) (I) Except as otherwise provided in subparagraph (II) of this paragraph (c), the home owner shall be given a period of not less than sixty days to remove any mobile home from the premises from the date the notice is served or posted. In those situations where a mobile home is being leased to, or occupied by, persons other than its owner and in a manner contrary to the rules and regulations of the landlord, then in that event, the tenancy may be terminated by the landlord upon giving a thirty-day notice rather than said sixty-day notice.

(II) If the tenancy is terminated on grounds specified in section 38-12-203 (1) (f), the home owner shall be given a period of not less than ten days to remove any mobile home from the premises from the date the notice is served or posted.

(2) No lease shall contain any provision by which the home owner waives his or her rights under this part 2, and any such waiver shall be deemed contrary to public policy and shall be unenforceable and void. In those situations where a mobile home is being leased to, or occupied by, persons other than its owner and in a manner contrary to the rules and regulations of the landlord, then, in that event, the tenancy may be terminated by the landlord upon giving a thirty-day notice rather than said sixty-day notice.

(3) The landlord or management of a mobile home park shall specify, in the notice required by this section, the reason for the termination, as described in section 38-12-203, of any tenancy in such mobile home park. If the tenancy is being terminated based on the mobile home or mobile home lot being out of compliance with the rules and regulations adopted pursuant to section 38-12-203 (1) (c), the notice required by this section shall include a statement advising the home owner that the home owner has a right to cure the noncompliance within thirty days of the date of service or posting of the notice to quit. The thirty-day period to cure any noncompliance set forth in this subsection (3) shall run concurrently with the sixty-day period to remove a mobile home from the premises as set forth in paragraph (c) of subsection (1) and subsection (2) of this section. Acceptance of rent by the landlord or management of a mobile home park during the thirty-day right to cure period set forth in section 38-12-203 (1) (c) shall not constitute a waiver of the landlord's right to terminate the tenancy for any noncompliance set forth in section 38-12-203 (1) (c).

**Source:** **L. 73:** p. 641, § 1. **C.R.S. 1963:** § 58-2-2. **L. 79:** (1) amended, p. 1384, § 1, effective July 1. **L. 81:** IP(1)(a) R&RE, p. 1814, § 3, effective June 9. **L. 87:** (1)(c) and (1)(d) amended, p. 1311, § 3, effective May 8. **L. 94:** (1)(c) amended, p. 703, § 1, effective April 19. **L. 96:** (2) amended, p. 670, § 2, effective July 1. **L. 99:** (3) added, p. 65, § 1, effective August 4. **L. 2000:** (3) repealed, p. 148, § 2, effective July 1. **L. 2010:** Entire section amended, (SB 10-156), ch. 343, p. 1585, § 3, effective July 1.

**Cross references:** For the form specified for notice to terminate a tenancy, see § 13-40-107 (2).



## ANNOTATION

**Applied** in *Hurricane v. Kanover, Ltd.*, 651 P.2d 1218 (Colo. 1982).

**38-12-202.5. Action for termination.** (1) The action for termination shall be commenced in the manner described in section 13-40-110, C.R.S. The property description shall be deemed legally sufficient and within the meaning of section 13-40-110, C.R.S., if it states:

- (a) The name of the landlord or the mobile home park;
- (b) The mailing address of the property;
- (c) The location or space number upon which the mobile home is situate; and
- (d) The county in which the mobile home is situate.

(2) Service of summons shall be as specified in section 13-40-112, C.R.S. Service by posting shall be deemed legally sufficient within the meaning of section 13-40-112, C.R.S., if the summons is affixed to the main entrance of the mobile home.

(3) Jurisdiction of courts in cases of forcible entry, forcible detainer, or unlawful detainer shall be as specified in section 13-40-109, C.R.S. Trial on the issue of possession shall be timely as specified in section 13-40-114, C.R.S., with no delay allowed for the determination of other issues or claims which may be severed at the discretion of the trial court.

(4) After commencement of the action and before judgment, any person not already a party to the action who is discovered to have a property interest in the mobile home shall be allowed to enter into a stipulation with the landlord and be bound thereby.

**Source: L. 79:** Entire section added, p. 1385, § 2, effective July 1.

**38-12-203. Reasons for termination.** (1) A tenancy shall be terminated pursuant to this part 2 only for one or more of the following reasons:

(a) Failure of the home owner to comply with local ordinances and state laws and regulations relating to mobile homes and mobile home lots;

(b) Conduct of the home owner, on the mobile home park premises, which constitutes an annoyance to other home owners or interference with park management;

(c) Failure of the home owner to comply with written rules and regulations of the mobile home park either established by the management in the rental agreement at the inception of the tenancy, amended subsequently thereto with the consent of the home owner, or amended subsequently thereto without the consent of the home owner on sixty days' written notice if the amended rules and regulations are reasonable; except that the home owner shall have thirty days from the date of service or posting of the notice to quit set forth in section 38-12-202 (3) to cure any noncompliance on the mobile home or mobile home lot before an action for termination may be commenced, except if local ordinances, state laws and regulations, park rules and regulations, or emergency, health, or safety situations require immediate compliance. If a home owner was in violation or noncompliance pursuant to this paragraph (c) and was given notice and a right to cure such noncompliance and within a twelve-month period from the date of service of the notice is in noncompliance of the same rule or regulation and is given notice of the second noncompliance, there shall be no right to cure the second noncompliance. Regulations applicable to recreational facilities may be amended at the reasonable discretion of the management. For purposes of this paragraph (c), when the mobile home is owned by a person other than the owner of the mobile home park, the mobile home is a separate unit of ownership, and regulations that are adopted subsequent to the unit location in the park without the consent of the home owner and that place restrictions or requirements on that separate unit are prima facie unreasonable. Nothing in this paragraph (c) shall prohibit a mobile home park owner from requiring compliance with current park unit regulations at the time of sale or transfer of the mobile home to a new owner. Transfer under this paragraph (c) shall not include transfer to a co-owner pursuant to death or divorce or to a new co-owner pursuant to marriage.

(d) (I) Condemnation or change of use of the mobile home park. When the owner of a mobile home park is formally notified by a notice of intent to acquire pursuant to section 38-1-121 (1) or other similar provision of law, or a complaint in a condemnation action from an appropriate governmental agency that the mobile home park, or any portion thereof, is to be acquired by the governmental agency or may be the subject of a condemnation proceeding, the landlord shall, within seventeen days, notify the home owners in writing of the terms of the notice of intent to acquire or complaint received by the landlord.

(II) In those cases where the landlord desires to change the use of the mobile home park and where such change of use would result in eviction of inhabited mobile homes, the landlord shall first give the owner of each mobile home subject to such eviction a written notice of the landlord's intent to evict not less than six months prior to such change of use of the land, notice to be mailed to each home owner.

(e) The making or causing to be made, with knowledge, of false or misleading statements on an application for tenancy;

(f) Conduct of the home owner or any lessee of the home owner or any guest, agent, invitee, or associate of the home owner or lessee of the home owner, that:

(I) Occurs on the mobile home park premises and unreasonably endangers the life of the landlord, any home owner or lessee of the mobile home park, any person living in the park, or any guest, agent, invitee, or associate of the home owner or lessee of the home owner;

(II) Occurs on the mobile home park premises and constitutes willful, wanton, or malicious damage to or destruction of property of the landlord, any home owner or lessee of the mobile home park, any person living in the park, or any guest, agent, invitee, or associate of the home owner or lessee of the home owner;

(III) Occurs on the mobile home park premises and constitutes a felony prohibited under article 3, 4, 6, 7, 9, 10, 12, or 18 of title 18, C.R.S.; or

(IV) Is the basis for a pending action to declare the mobile home or any of its contents a class 1 public nuisance under section 16-13-303, C.R.S.

(2) In an action pursuant to this part 2, the landlord shall have the burden of proving that the landlord complied with the relevant notice requirements and that the landlord provided the home owner with a statement of reasons for the termination. In addition to any other defenses a home owner may have, it shall be a defense that the landlord's allegations are false or that the reasons for termination are invalid.

**Source:** L. 73: p. 642, § 1. C.R.S. 1963: § 58-2-3. L. 79: (1)(d) amended, p. 1386, § 3, effective July 1. L. 81: (1)(c) amended, p. 1814, § 4, effective June 9. L. 84: (1)(c) amended, p. 976, § 1, effective July 1. L. 87: (1)(a), (1)(b), (1)(c), (1)(d), and (2) amended, p. 1311, § 4, effective May 8. L. 94: (1)(f) added, p. 703, § 2, effective April 19. L. 96: IP(1), (1)(a), (1)(c), and (2) amended, p. 671, § 3, effective July 1. L. 2010: (1)(c) and (1)(d) amended, (SB 10-156), ch. 343, p. 1586, § 4, effective July 1.

#### ANNOTATION

**Applied** in *Hurricane v. Kanover, Ltd.*, 651 P.2d 1218 (Colo. 1982); *Duhon v. Nelson*, 126 P.3d 262 (Colo. App. 2005).

**38-12-204. Nonpayment of rent - notice required for rent increase.** (1) Any tenancy or other estate at will or lease in a mobile home park may be terminated upon the landlord's written notice to the home owner requiring, in the alternative, payment of rent or the removal of the home owner's unit from the premises, within a period of not less than five days after the date notice is served or posted, for failure to pay rent when due.

(2) Rent shall not be increased without sixty days' written notice to the home owner. In addition to the amount and the effective date of the rent increase, such written notice shall include the name, address, and telephone number of the mobile home park management, if such management is a principal owner, or owner of the mobile home park and, if the owner is other than a natural person, the name, address, and telephone number of the owner's chief



executive officer or managing partner; except that such ownership information need not be given if it was disclosed in the rental agreement made pursuant to section 38-12-213.

**Source:** **L. 73:** p. 642, § 1. **C.R.S. 1963:** § 58-2-4. **L. 77:** Entire section amended, p. 1708, § 1, effective July 7. **L. 85:** Entire section amended, p. 1199, § 1, effective July 1. **L. 87:** Entire section amended, p. 1312, § 5, effective May 8.

**38-12-204.3. Notice required for termination.** (1) Where the tenancy of a mobile home owner is being terminated under section 38-12-202 or section 38-12-204, the landlord or mobile home park owner shall provide such mobile home owner with written notice as provided for in subsection (2) of this section. Service of such notice shall occur at the same time and in the same manner as service of:

- (a) The notice to quit as provided in section 38-12-202 (1); or
  - (b) The notice of nonpayment of rent as provided in section 38-12-204 (1).
- (2) The notice required under this section shall be in at least ten-point type and shall read as follows:

### **IMPORTANT NOTICE TO THE HOME OWNER:**

This notice and the accompanying notice to quit/notice of nonpayment of rent are the first steps in the eviction process. Any dispute you may have regarding the grounds for eviction should be addressed with your landlord or the management of the mobile home park or in the courts if an eviction action is filed. Please be advised that the "Mobile Home Park Act", part 2 of article 12 of title 38, Colorado Revised Statutes, may provide you with legal protection:

**NOTICE TO QUIT:** The landlord or management of a mobile home park must serve to a home owner a notice to quit in order to terminate a home owner's tenancy. The notice must be in writing and must contain certain information, including:

- The grounds for the termination of the tenancy;
- Whether or not the home owner has a right to cure under the "Mobile Home Park Act"; and
- That the home owner has a right to mediation pursuant to section 38-12-216, Colorado Revised Statutes, of the "Mobile Home Park Act".

**NOTICE OF NONPAYMENT OF RENT:** The landlord or management of a mobile home park must serve to a home owner a notice of nonpayment of rent in order to terminate a home owner's tenancy. The notice must be in writing and must require that the home owner either make payment of rent and any applicable fees due and owing or remove the owner's unit from the premises, within a period of not less than five days after the date the notice is served or posted, for failure to pay rent when due.

**CURE PERIODS:** If the home owner has a right to cure under the "Mobile Home Park Act", the landlord or management of a mobile home park cannot terminate a home owner's tenancy without first providing the home owner with a time period to cure the noncompliance. "Cure" refers to a home owner remedying, fixing, or otherwise correcting the situation or problem that caused the tenancy to be terminated pursuant to sections 38-12-202, 38-12-203, or 38-12-204, Colorado Revised Statutes.

**COMMENCEMENT OF LEGAL ACTION TO TERMINATE THE TENANCY:** After the last day of the notice period, a legal action may be commenced to take possession of the space leased by the home owner. In order to evict a home owner, the landlord or management of the mobile home park must prove:

- The landlord or management complied with the notice requirements of the "Mobile Home Park Act";

- The landlord or management provided the home owner with a statement of reasons for termination of the tenancy; and
- The reasons for termination of the tenancy are true and valid under the “Mobile Home Park Act”.

A home owner must appear in court to defend against an eviction action. If the court rules in favor of the landlord or management of the mobile home park, the home owner will have not less than 48 hours from the time of the ruling to remove the mobile home and to vacate the premises. If a tenancy is being terminated pursuant to section 38-12-203 (1) (f), Colorado Revised Statutes, the home owner shall have not less than 48 hours from the time of the ruling to remove the home and vacate the premises. In all other circumstances, if the home owner wishes to extend such period beyond 48 hours but not more than thirty days from the date of the ruling, the home owner shall prepay to the landlord an amount equal to any total amount declared by the court to be due to the landlord, as well as a pro rata share of rent for each day following the court’s ruling that the mobile home owner will remain on the premises. All prepayments shall be paid by certified check, by cashier’s check, or by wire transfer and shall be paid no later than 48 hours after the court ruling.

**Source:** L. 2000: Entire section added, p. 146, § 1, effective July 1. L. 2010: (2) amended, (SB 10-156), ch. 343, p. 1587, § 5, effective July 1.

**38-12-205. Termination prohibited.** A tenancy or other estate at will or lease in a mobile home park may not be terminated solely for the purpose of making the home owner’s space in the park available for another mobile home or trailer coach.

**Source:** L. 73: p. 642, § 1. C.R.S. 1963: § 58-2-5. L. 87: Entire section amended, p. 1312, § 6, effective May 8.

**38-12-206. Home owner meetings - assembly in common areas.** Home owners shall have the right to meet and establish a homeowners’ association. Meetings of home owners or the homeowners’ association relating to mobile home living and affairs in their park common area, community hall, or recreation hall, if such a facility or similar facility exists, shall not be subject to prohibition by the park management if the common area or hall is reserved according to the park rules and such meetings are held at reasonable hours and when the facility is not otherwise in use; except that no such meetings shall be held in the streets or thoroughfares of the mobile home park.

**Source:** L. 73: p. 642, § 1. C.R.S. 1963: § 58-2-6. L. 87: Entire section amended, p. 1313, § 7, effective May 8. L. 2005: Entire section amended, p. 109, § 1, effective August 8. L. 2010: Entire section amended, (SB 10-156), ch. 343, p. 1588, § 6, effective July 1.

**38-12-207. Security deposits - legal process.** (1) The owner of a mobile home park or his agents may charge a security deposit not greater than the amount of one month’s rent or two month’s rent for multiwide units.

(2) Legal process, other than eviction, shall be used for the collection of utility charges and incidental service charges other than those provided by the rental agreement.

**Source:** L. 73: p. 642, § 1. C.R.S. 1963: § 58-2-7. L. 81: (1) R&RE, p. 1815, § 5, effective June 9.

**38-12-208. Remedies.** (1) (a) Upon granting judgment for possession by the landlord in a forcible entry and detainer action, the court shall immediately issue a writ of restitution which the landlord shall take to the sheriff. In addition, if a money judgment has been requested in the complaint and if service was accomplished by personal service, the court shall determine and enter judgment for any amounts due to the landlord and shall



calculate a pro rata daily rent amount that must be paid for the home to remain in the park. The court may rely upon information provided by the landlord or the landlord's attorney when determining the pro rata daily rent amount to be paid by the home owner. Upon receipt of the writ of restitution, the sheriff shall serve notice in accordance with the requirements of section 13-40-108, C.R.S., to the home owner of the court's decision and entry of judgment.

(b) The notice of judgment shall state that, at a specified time not less than forty-eight hours from the entry of judgment if a tenancy is being terminated pursuant to section 38-12-203 (1) (f) and, in all other instances, not less than forty-eight hours from the entry of judgment, which may be extended to not more than thirty days after the entry of judgment if the home owner has prepaid by certified check, by cashier's check, or by wire transfer no later than forty-eight hours after the court ruling to the landlord an amount equal to any total amount declared by the court to be due to the landlord, as well as a pro rata share of rent for each day following the court's ruling that the mobile home owner will remain on the premises, the sheriff will return to serve a writ of restitution and superintend the peaceful and orderly removal of the mobile home under that order of court. The notice of judgment shall also advise the home owner to prepare the mobile home for removal from the premises by removing the skirting, disconnecting utilities, attaching tires, and otherwise making the mobile home safe and ready for highway travel.

(c) Should the home owner fail to have the mobile home safe and ready for physical removal from the premises or should inclement weather or other unforeseen problems occur at the time specified in the notice of judgment, the landlord and the sheriff may, by written agreement, extend the time for the execution of the writ of restitution to allow time for the landlord to arrange to have the necessary work done or to permit the sheriff's execution of the writ of restitution at a time when weather or other conditions will make removal less hazardous to the mobile home.

(d) If the mobile home is not removed from the landlord's land on behalf of the mobile home owner within the time permitted by the writ of restitution, then the landlord and the sheriff shall have the right to take possession of the mobile home for the purposes of removal and storage. The liability of the landlord and the sheriff in such event shall be limited to gross negligence or willful and wanton disregard of the property rights of the home owner. The responsibility to prevent freezing and to prevent wind and weather damage to the mobile home lies exclusively with those persons who have a property interest in the mobile home; except that the landlord may take appropriate action to prevent freezing, to prevent wind and weather damage, and to prevent damage caused by vandals.

(e) Reasonable removal and storage charges and the costs associated with preventing damage caused by wind, weather, or vandals can be paid by any party in interest. Those charges will run with the mobile home, and whoever ultimately claims the mobile home will owe that sum to the person who paid it.

(2) (a) Prior to the issuance of said writ of restitution, the court shall make a finding of fact based upon evidence or statements of counsel that there is or is not a security agreement on the mobile home being subjected to the writ of restitution. A written statement on the mobile home owner's application for tenancy with the landlord that there is no security agreement on the mobile home shall be prima facie evidence of the nonexistence of such security agreement.

(b) In those cases where the court finds there is a security agreement on the mobile home subject to the writ of restitution and where that holder of the security agreement can be identified with reasonable certainty, then, upon receipt of the writ of restitution, the plaintiff shall promptly inform the holder of such security agreement as to the location of the mobile home, the name of the landlord who obtained the writ of restitution, and the time when the mobile home will be subject to removal by the sheriff and the landlord.

(3) The remedies provided in part 1 of this article and article 40 of title 13, C.R.S., except as inconsistent with this part 2, shall be applicable to this part 2.

**L. 91:** (1)(d) and (1)(e) amended, p. 1695, § 3, effective July 1. **L. 2010:** (1)(a) and (1)(b) amended, (SB 10-156), ch. 343, p. 1589, § 7, effective July 1.

**Cross references:** For security deposits to secure the performance of a rental agreement and the wrongful withholding of such, see §§ 38-12-101 to 38-12-104; for the general provisions for forcible entry and detainer, see §§ 13-40-101 to 13-40-123.

**38-12-209. Entry fees prohibited - entry fee defined - security deposit - court costs.**

(1) The owner of a mobile home park, or the agent of such owner, shall neither pay to nor receive from an owner or a seller of a mobile home an entry fee of any type as a condition of tenancy in a mobile home park.

(2) As used in this section, "entry fee" means any fee paid to or received from an owner of a mobile home park or his agent except for:

(a) Rent;

(b) A security deposit against actual damages to the premises or to secure rental payments, which deposit shall not be greater than the amount allowed under this part 2. Subsequent to July 1, 1979, security deposits will remain the property of the home owner, and they shall be deposited into a separate trust account by the landlord to be administered by the landlord as a private trustee. For the purpose of preserving the corpus, the landlord will not commingle the trust funds with other money, but he is permitted to keep the interest and profits thereon as his compensation for administering the trust account.

(c) Fees charged by any state, county, town, or city governmental agency;

(d) Utilities;

(e) Incidental reasonable charges for services actually performed by the mobile home park owner or his agent and agreed to in writing by the home owner.

(3) The trial judge may award court costs and attorney fees in any court action brought pursuant to any provision of this part 2 to the prevailing party upon finding that the prevailing party undertook the court action and legal representation for a legally sufficient reason and not for a dilatory or unfounded cause.

(4) The management or the resident may bring a civil action for violation of the rental agreement or any provision of this part 2 in the appropriate court of the county in which the park is located. Either party may recover actual damages or, the court may in its discretion award such equitable relief as it deems necessary, including the enjoining of either party from further violations.

**Source:** **L. 75:** Entire section added, p. 1414, § 1, effective July 1. **L. 79:** (1), IP(2), and (2)(b) amended and (3) added, p. 1387, § 5, effective July 1. **L. 81:** (2)(b) amended and (4) added, p. 1815, §§ 6, 7, effective June 9. **L. 87:** (2)(b) and (2)(e) amended, p. 1313, § 9, effective May 8.

**38-12-210. Closed parks prohibited.** (1) The owner of a mobile home park or his agent shall not require as a condition of tenancy in a mobile home park that the prospective home owner has purchased a mobile home from any particular seller or from any one of a particular group of sellers.

(2) Such owner or agent shall not give any special preference in renting to a prospective home owner who has purchased a mobile home from a particular seller.

(3) A seller of mobile homes shall not require as a condition of sale that a purchaser locate in a particular mobile home park or in any one of a particular group of mobile home parks.

(4) The owner or operator of a mobile home park shall treat all persons equally in renting or leasing available space. Notwithstanding the foregoing, nothing in this subsection (4) shall be construed to preclude owners and operators of mobile home parks from providing housing for older persons as defined in section 24-34-502 (7) (b), C.R.S.

**Source:** **L. 75:** Entire section added, p. 1414, § 1, effective July 1. **L. 81:** (4) added, p. 1815, § 8, effective June 9. **L. 87:** (1) and (2) amended, p. 1314, § 10, effective May 8. **L. 92:** (4) amended, p. 1128, § 12, effective July 1.



**38-12-211. Selling fees prohibited.** The owner of a mobile home park or his agent shall not require payment of any type of selling fee or transfer fee by either a home owner in the park wishing to sell his mobile home to another party or by any party wishing to buy a mobile home from a home owner in the park as a condition of tenancy in a mobile home park for the prospective buyer. This section shall in no way prevent the owner of a mobile home park or his agent from applying the normal park standards to prospective buyers before granting or denying tenancy or from charging a reasonable selling fee or transfer fee for services actually performed and agreed to in writing by the home owner. Nothing in this section shall be construed to affect the rent charged. The owner of a mobile home shall have the right to place a "for sale" sign on or in his mobile home. The size, placement, and character of such signs shall be subject to reasonable rules and regulations of the mobile home park.

**Source: L. 75:** Entire section added, p. 1415, § 1, effective July 1. **L. 79:** Entire section amended, p. 1388, § 6, effective July 1. **L. 87:** Entire section amended, p. 1314, § 11, effective May 8.

**38-12-212. Certain types of landlord-seller agreements prohibited.** A seller of mobile homes shall not pay or offer cash or other consideration to the owner of a mobile home park or his agent for the purpose of reserving spaces or otherwise inducing acceptance of one or more mobile homes in a mobile home park.

**Source: L. 75:** Entire section added, p. 1415, § 1, effective July 1.

**38-12-212.3. Responsibilities of landlord - acts prohibited.** (1) (a) Except as otherwise provided in this section, a landlord shall be responsible for and pay the cost of the maintenance and repair of:

(I) Any sewer lines, water lines, utility service lines, or related connections owned and provided by the landlord to the utility pedestal or pad space for a mobile home sited in the park; and

(II) Any accessory buildings or structures, including, but not limited to, sheds and carports, owned by the landlord and provided for the use of the residents; and

(III) The premises as defined in section 38-12-201.5 (5).

(b) Any landlord who fails to maintain or repair the items delineated in paragraph (a) of this subsection (1) shall be responsible for and pay the cost of repairing any damage to a mobile home which results from such failure. The landlord shall ensure that all plumbing lines and connections owned and provided by the landlord to the utility pedestal or pad space for each mobile home in the mobile home park have plumbing that conformed to applicable law in effect at the time the plumbing was installed and that is maintained in good working order and running water and reasonable amounts of water at all times furnished to the utility pedestal or pad space and shall ensure that each pad space is connected to a sewage disposal system approved under applicable law; except that these conditions need not be met if:

(I) A mobile home is individually metered and the tenant occupying the mobile home fails to pay for water services;

(II) The local government in which the mobile home park is situated shuts off water service to a mobile home for any reason;

(III) Weather conditions present a likelihood that water pipes will freeze, water pipes to a mobile home are wrapped in heated pipe tape, and the utility company has shut off electrical service to a mobile home for any reason or the heat tape malfunctions for any reason; or

(IV) Running water is not available for any other reason outside the landlord's control.

(c) The landlord shall give a minimum of two days' notice to a mobile home owner if the water service will be disrupted for planned maintenance. The landlord shall attempt to give a reasonable amount of notice to home owners if water service is to be disrupted for any other reasons unless conditions are such that providing the notice would result in

property damage, health, or safety concerns or when conditions otherwise require emergency repair.

(2) No landlord shall require a resident to assume the responsibilities outlined in subsection (1) of this section as a condition of tenancy in the mobile home park.

(3) Nothing in this section shall be construed as:

(a) Limiting the liability of a resident for the cost of repairing any damage caused by such resident to the landlord's property or other property located in the park; or

(b) Restricting a landlord or his agent or a property manager from requiring a resident to comply with reasonable rules and regulations or terms of the rental agreement and any covenants binding upon the landlord or resident, including covenants running with the land which pertain to the cleanliness of such resident's lot and routine lawn and yard maintenance, exclusive of major landscaping projects.

**Source: L. 91:** Entire section added, p. 1679, § 1, effective April 19. **L. 2010:** (1)(a)(I) and (1)(b) amended and (1)(c) added, (SB 10-156), ch. 343, p. 1589, § 8, effective July 1.

**38-12-212.7. Landlord utilities account.** (1) Whenever a landlord contracts with a utility for service to be provided to a resident, the usage of which is to be measured by a master meter or other composite measurement device, such landlord shall remit to the utility all moneys collected from each resident as payment for the resident's share of the charges for such utility service within forty-five days of the landlord's receipt of payment.

(2) If a landlord fails to timely remit utility moneys collected from residents as required by subsection (1) of this section, such utility may, after written demand therefor is served upon the landlord, require the landlord to deposit an amount equal to the average daily charge for the usage of such utility service for the preceding twelve months multiplied by the sum of ninety.

(3) Any utility which prevails in an action brought to enforce the provisions of this section shall be entitled to an award of its reasonable attorney fees and court costs.

**Source: L. 91:** Entire section added, p. 1679, § 1, effective April 19.

**38-12-213. Rental agreement - disclosure of terms in writing.** (1) The terms and conditions of a tenancy must be adequately disclosed in writing in a rental agreement by the management to any prospective home owner prior to the rental or occupancy of a mobile home space or lot. Said disclosures shall include:

(a) The term of the tenancy and the amount of rent therefor, subject to the requirements of subsection (4) of this section;

(b) The day rental payment is due and payable;

(c) The day when unpaid rent shall be considered in default;

(d) The rules and regulations of the park then in effect;

(e) The name and mailing address where a manager's decision can be appealed;

(f) All charges to the home owner other than rent.

(2) Said rental agreement shall be signed by both the management and the home owner, and each party shall receive a copy thereof.

(3) The management and the home owner may include in a rental agreement terms and conditions not prohibited by this part 2.

(4) The terms of tenancy shall be specified in a written rental agreement subject to the following conditions:

(a) The standard rental agreement shall be for a month-to-month tenancy.

(b) Upon written request by the home owner to the landlord, the landlord shall allow a rental agreement for a fixed tenancy of not less than one year if the home owner is current on all rent payments and is not in violation of the terms of the then-current rental agreement; except that an initial rental agreement for a fixed tenancy may be for less than one year in order to ensure conformity with a standard anniversary date. A landlord shall not evict or otherwise penalize a home owner for requesting a rental agreement for a fixed period.



(c) A landlord may, in the landlord's discretion, allow a lease for a fixed period of longer than one year. In such circumstances, the requirements of paragraphs (a) and (b) of this subsection (4) shall not apply.

**Source:** L. 81: Entire section added, p. 1815, § 9, effective June 9. L. 87: IP(1), (1)(f), (2), and (3) amended, p. 1314, § 12, effective May 8. L. 2005: (1)(a) amended and (4) added, p. 109, § 2, effective August 8.

**38-12-214. Rules and regulations.** (1) The management shall adopt written rules and regulations concerning all home owners' use and occupancy of the premises. Such rules and regulations are enforceable against a home owner only if:

(a) Their purpose is to promote the convenience, safety, or welfare of the home owners, protect and preserve the premises from abusive use, or make a fair distribution of services and facilities held out for the home owners generally;

(b) They are reasonably related to the purpose for which they are adopted;

(c) They are not retaliatory or discriminatory in nature;

(d) They are sufficiently explicit in prohibition, direction, or limitation of the home owner's conduct to fairly inform him of what he must or must not do to comply.

**Source:** L. 81: Entire section added, p. 1816, § 9, effective June 9. L. 87: IP(1), (1)(a), and (1)(d) amended, p. 1315, § 13, effective May 8. L. 92: (1)(c) amended, p. 1128, § 13, effective July 1.

**38-12-215. New developments and parks - rental of sites to dealers authorized.**

(1) The management of a new mobile home park or manufactured housing community development may require as a condition of leasing a mobile home site or manufactured home site for the first time such site is offered for lease that the prospective lessee has purchased a mobile home or manufactured home from a particular seller or from any one of a particular group of sellers.

(2) A licensed mobile home dealer or a manufactured home dealer may, by contract with the management of a new mobile home park or manufactured housing community development, be granted the exclusive right to first-time rental of one or more mobile home sites or manufactured home sites.

**Source:** L. 81: Entire section added, p. 1816, § 9, effective June 9.

**38-12-216. Mediation, when permitted - court actions.** (1) In any controversy between the management and a home owner of a mobile home park arising out of the provisions of this part 2, except for the nonpayment of rent or in cases in which the health or safety of other home owners is in imminent danger, such controversy may be submitted to mediation by either party prior to the filing of a forcible entry and detainer lawsuit upon agreement of the parties.

(2) The agreement, if one is reached, shall be presented to the court as a stipulation. Either party to the mediation may terminate the mediation process at any time without prejudice.

(3) If either party subsequently violates the stipulation, the other party may apply immediately to the court for relief.

**Source:** L. 81: Entire section added, p. 1815, § 9, effective June 9; (2) amended, p. 2034, § 54, effective July 14. L. 87: (1) amended, p. 1315, § 14, effective May 8.

**38-12-217. Notice of sale of mobile home park - notice of change in use.**

(1) (a) The mobile home park owner shall notify the owners of all mobile homes in the park and the municipality in which the park is situated or, if none, the county in which the park is situated of his or her intent to change the use of the land comprising the park or to sell the park pursuant to paragraph (b) or (c) of this subsection (1), as applicable.

(b) If the mobile home park owner intends to sell the park, the notification shall be made only once for any particular contract to sell or trade and shall be by written notice mailed to each mobile home owner at the address shown on the rental agreement with the mobile home park owner at least ten days prior to the first scheduled closing for the sale or trade.

(c) If the mobile home park owner intends to change the use of the land comprising the mobile home park, the mobile home park owner shall give written notice to each mobile home owner at least one hundred eighty days before the change in use will occur. The mobile home park owner shall mail the written notice to each mobile home owner at the address shown on the rental agreement with the mobile home park owner.

(2) The provisions of paragraph (b) of subsection (1) of this section shall not apply to the sale of a mobile home park when such sale occurs between members of an immediate family, related business entities, members and managers of a limited liability company, shareholders, officers, and directors in a corporation, trustees and beneficiaries of a trust, or partners and limited liability partners in a partnership or limited liability partnership; except that such purchasers shall not change the use of the land comprising the mobile home park without complying with the notice provisions of this section. For purposes of this section, "immediate family" means persons related by blood or adoption.

**Source: L. 87:** Entire section added, p. 1316, § 1, effective July 1. **L. 2005:** Entire section amended, p. 110, § 3, effective August 8. **L. 2010:** (1)(a) and (2) amended, (SB 10-156), ch. 343, p. 1590, § 9, effective July 1.

**38-12-218. Mobile home owners - right to form a cooperative.** One or more members of a homeowners' association may, at any time, form a cooperative for the purposes of offering to purchase or finance a mobile home park. A home owner shall be a member of the homeowners' association in order to participate in the cooperative, and participation in the cooperative shall be voluntary.

**Source: L. 2005:** Entire section added, p. 110, § 4, effective August 8.

**38-12-219. Home owners' and landlords' rights.** (1) Every home owner and landlord shall have the right to the following:

(a) Protection from abuse or disregard of state or local law by the landlord and home owners;

(b) Peaceful enjoyment of the home owner's mobile home space, free from unreasonable, arbitrary, or capricious rules and enforcement thereof; and

(c) Tenancy free from harassment or frivolous lawsuits by the landlord and homeowners.

**Source: L. 2005:** Entire section added, p. 110, § 4, effective August 8.

**38-12-220. Private civil right of action.** Any home owner who owns a home in a mobile home park where the landlord has violated any provision of this article shall have a private civil right of action against the landlord. In any such action, the home owner shall be entitled to actual economic damages and reasonable attorney fees and costs if the home owner is successful in the action.

**Source: L. 2005:** Entire section added, p. 110, § 4, effective August 8. **L. 2010:** Entire section amended, (SB 10-156), ch. 343, p. 1591, § 10, effective July 1.

**38-12-221. Access by counties and municipalities.** Notwithstanding any other provision of law, upon a finding that the utilities in a park create a significant health or safety



danger to park residents, the landlord of a mobile home park shall grant county or municipal officers or employees access to the mobile home park for the purposes of investigating or conducting a study related to such danger.

**Source: L. 2010:** Entire section added, (SB 10-156), ch. 343, p. 1591, § 11, effective July 1.

### PART 3

#### LOCAL CONTROL OF RENTS PROHIBITED

**38-12-301. Control of rents by counties and municipalities prohibited - legislative declaration.** (1) The general assembly finds and declares that the imposition of rent control on private residential housing units is a matter of statewide concern; therefore, no county or municipality may enact any ordinance or resolution that would control rent on either private residential property or a private residential housing unit.

(2) For purposes of subsection (1) of this section, an ordinance or resolution that would control rent on either private residential property or a private residential housing unit shall not include:

(a) A voluntary agreement between a county or municipality and a permit applicant or property owner to limit rent on the property or unit or that is otherwise designed to provide affordable housing stock; or

(b) The placement on the title to the unit of a deed restriction that limits rent on the property or unit or that is otherwise designed to provide affordable housing stock pursuant to a voluntary agreement between a county or municipality and a permit applicant or property owner to place the deed restriction on the title.

(3) An agreement authorized pursuant to subsection (2) of this section may specify how long either private residential property or a private residential housing unit is subject to its terms, whether a subsequent property owner is subject to the agreement, and remedies for early termination agreed to by both the permit applicant or property owner and the county or municipality.

(4) Notwithstanding any other provision of this section, a county or municipality may not deny an application for a development permit as defined in section 29-20-103 (1), C.R.S., because an applicant for such a permit declines to enter into an agreement to limit rent on either private residential property or a private residential housing unit.

(5) This section is not intended to impair the right of any state agency, county, or municipality to manage and control any property in which it has an interest through a housing authority or similar agency.

**Source: L. 81:** Entire part added, p. 1818, § 1, effective June 23. **L. 2010:** Entire section amended, (HB 10-1017), ch. 208, p. 906, § 1, effective September 1.

**Editor's note:** Section 2 of chapter 208, Session Laws of Colorado 2010, provides that the act amending this section applies to agreements entered into before, on, or after September 1, 2010.

#### ANNOTATION

**Statute declaring rent control a matter of statewide importance preempted conflicting home rule town ordinance** that mandated affordable housing mitigation. *Lot Thirty-Four Venture, L.L.C. v. Town of Telluride*, 976 P.2d 303 (Colo. App. 1998), *aff'd*, 3 P.3d 30 (Colo. 2000).

**Ordinance constituted rent control because options it imposes for constructing new employee housing or deed restricting housing are within commonly understood meaning of**

**rent control.** Rent control falls within an area of mixed state and local concern. Ordinance clearly conflicts with state prohibition on rent control contained in this section. Accordingly, ordinance invalid and section does not violate home rule amendment to constitution. *Town of Telluride v. Lot Thirty-Four Venture*, 3 P.3d 30 (Colo. 2000).

**2010 amendments to this section apply retroactively** and such retroactive application does not violate the constitutional prohibition against

retrospective legislation. The general assembly clearly indicated that it intended that the amendments apply to agreements entered into before they took effect, the amendments clarified rather

than changed existing law, and the amendments were remedial in nature. *Meyerstein v. City of Aspen*, \_\_ P.3d \_\_ (Colo. App. 2011).

**38-12-302. Definitions.** As used in this part 3, unless the context otherwise requires:

(1) "Municipality" means a city or town and, in addition, means a city or town incorporated prior to July 3, 1877, whether or not reorganized, and any city, town, or city and county which has chosen to adopt a home rule charter pursuant to the provisions of article XX of the state constitution.

**Source: L. 81:** Entire part added, p. 1818, § 1, effective June 23.

#### PART 4

#### VICTIMS OF DOMESTIC VIOLENCE

**38-12-401. Definitions.** As used in this part 4, unless the context otherwise requires:

(1) "Domestic abuse" shall have the same meaning as provided in section 13-14-101 (2), C.R.S.

(2) "Domestic violence" shall have the same meaning as provided in section 18-6-800.3 (1), C.R.S.

**Source: L. 2004:** Entire part added, p. 528, § 1, effective August 4.

**38-12-402. Protection for victims of domestic violence.** (1) A landlord shall not include in a residential rental agreement or lease agreement for housing a provision authorizing the landlord to terminate the agreement or to impose a penalty on a residential tenant for calls made by the residential tenant for peace officer assistance or other emergency assistance in response to a domestic violence or domestic abuse situation. A residential tenant may not waive the residential tenant's right to call for police or other emergency assistance.

(2) (a) If a tenant to a residential rental agreement or lease agreement notifies the landlord in writing that he or she is the victim of domestic violence or domestic abuse and provides to the landlord evidence of domestic violence or domestic abuse in the form of a police report written within the prior sixty days or a valid protection order and the residential tenant seeks to vacate the premises due to fear of imminent danger for self or children because of the domestic violence or domestic abuse, then the residential tenant may terminate the residential rental agreement or lease agreement and vacate the premises without further obligation except as otherwise provided in paragraph (b) of this subsection (2).

(b) If a tenant to a residential rental agreement or lease agreement terminates the residential rental agreement or lease agreement and vacates the premises pursuant to paragraph (a) of this subsection (2), then the tenant shall be responsible for one month's rent following vacation of the premises, which amount shall be due and payable to the landlord within ninety days after the tenant vacates the premises. The landlord shall not be obligated to refund the security deposit to the tenant until such time as the tenant has paid the one month's rent pursuant to this section. Notwithstanding the provisions of section 38-12-103, the landlord and the tenant to a residential rental agreement or lease agreement may use any amounts owed to the other to offset costs for the one month's rent or the security deposit. The provisions of this paragraph (b) shall apply only if the landlord has experienced and documented damages equal to at least one month's rent as a result of the tenant's early termination of the agreement.

(3) Nothing in this part 4 authorizes the termination of tenancy and eviction of a residential tenant solely because the residential tenant is the victim of domestic violence or domestic abuse.



**Source: L. 2004:** Entire part added, p. 528, § 1, effective August 4. **L. 2005:** Entire section amended, p. 402, § 3, effective July 1.

## PART 5

### OBLIGATION TO MAINTAIN RESIDENTIAL PREMISES - UNLAWFUL REMOVAL

**Law reviews:** For article, "Colorado Implied Warranty of Habitability for Residential Tenancies: An Overview", see 38 Colo. Law. 59 (May 2009).

**38-12-501. Legislative declaration - matter of statewide concern - purposes and policies.** (1) The general assembly hereby finds and declares that the provisions of this part 5 are a matter of statewide concern. Any local government ordinance, resolution, or other regulation that is in conflict with this part 5 shall be unenforceable.

(2) The underlying purposes and policies of this part 5 are to:

(a) Simplify, clarify, modernize, and revise the law governing the rental of dwelling units and the rights and obligations of landlords and tenants;

(b) Encourage landlords and tenants to maintain and improve the quality of housing; and

(c) Make uniform the law with respect to the subject of this part 5 throughout Colorado.

**Source: L. 2008:** Entire part added, p. 1820, § 3, effective September 1.

**38-12-502. Definitions.** As used in this part 5, unless the context otherwise requires:

(1) "Common areas" means the facilities and appurtenances to a residential premises, including the grounds, areas, and facilities held out for the use of tenants generally or whose use is promised to a tenant.

(2) "Dwelling unit" means a structure or the part of a structure that is used as a home, residence, or sleeping place by a tenant.

(3) "Landlord" means the owner, manager, lessor, or sublessor of a residential premises.

(4) "Rental agreement" means the agreement, written or oral, embodying the terms and conditions concerning the use and occupancy of a residential premises.

(5) "Residential premises" means a dwelling unit, the structure of which the unit is a part, and the common areas.

(6) "Tenant" means a person entitled under a rental agreement to occupy a dwelling unit to the exclusion of others.

**Source: L. 2008:** Entire part added, p. 1820, § 3, effective September 1.

**38-12-503. Warranty of habitability.** (1) In every rental agreement, the landlord is deemed to warrant that the residential premises is fit for human habitation.

(2) A landlord breaches the warranty of habitability set forth in subsection (1) of this section if:

(a) A residential premises is uninhabitable as described in section 38-12-505 or otherwise unfit for human habitation; and

(b) The residential premises is in a condition that is materially dangerous or hazardous to the tenant's life, health, or safety; and

(c) The landlord has received written notice of the condition described in paragraphs (a) and (b) of this subsection (2) and failed to cure the problem within a reasonable time.

(3) When any condition described in subsection (2) of this section is caused by the misconduct of the tenant, a member of the tenant's household, a guest or invitee of the tenant, or a person under the tenant's direction or control, the condition shall not constitute a breach of the warranty of habitability. It shall not be misconduct by a victim of domestic violence or domestic abuse under this subsection (3) if the condition is the result of

domestic violence or domestic abuse and the landlord has been given written notice and evidence of domestic violence or domestic abuse as described in section 38-12-402 (2) (a).

(4) In response to the notice sent pursuant to paragraph (c) of subsection (2) of this section, a landlord may, in the landlord's discretion, move a tenant to a comparable unit after paying the reasonable costs, actually incurred, incident to the move.

(5) Except as set forth in this part 5, any agreement waiving or modifying the warranty of habitability shall be void as contrary to public policy.

(6) Nothing in this part 5 shall:

(a) Prevent a landlord from terminating a rental agreement as a result of a casualty or catastrophe to the dwelling unit without further liability to the landlord or tenant; or

(b) Preclude a landlord from initiating an action for nonpayment of rent, breach of the rental agreement, violation of section 38-12-504, or as provided for under article 40 of title 13, C.R.S.

**Source: L. 2008:** Entire part added, p. 1821, § 3, effective September 1.

**38-12-504. Tenant's maintenance of premises.** (1) In addition to any duties imposed upon a tenant by a rental agreement, every tenant of a residential premises has a duty to use that portion of the premises within the tenant's control in a reasonably clean and safe manner. A tenant fails to maintain the premises in a reasonably clean and safe manner when the tenant substantially fails to:

(a) Comply with obligations imposed upon tenants by applicable provisions of building, health, and housing codes materially affecting health and safety;

(b) Keep the dwelling unit reasonably clean, safe, and sanitary as permitted by the conditions of the unit;

(c) Dispose of ashes, garbage, rubbish, and other waste from the dwelling unit in a clean, safe, sanitary, and legally compliant manner;

(d) Use in a reasonable manner all electrical, plumbing, sanitary, heating, ventilating, air-conditioning, elevators, and other facilities and appliances in the dwelling unit;

(e) Conduct himself or herself and require other persons in the residential premises within the tenant's control to conduct themselves in a manner that does not disturb their neighbors' peaceful enjoyment of the neighbors' dwelling unit; or

(f) Promptly notify the landlord if the residential premises is uninhabitable as defined in section 38-12-505 or if there is a condition that could result in the premises becoming uninhabitable if not remedied.

(2) In addition to the duties set forth in subsection (1) of this section, a tenant shall not knowingly, intentionally, deliberately, or negligently destroy, deface, damage, impair, or remove any part of the residential premises or knowingly permit any person within his or her control to do so.

(3) Nothing in this section shall be construed to authorize a modification of a landlord's obligations under the warranty of habitability.

**Source: L. 2008:** Entire part added, p. 1822, § 3, effective September 1.

**38-12-505. Uninhabitable residential premises.** (1) A residential premises is deemed uninhabitable if it substantially lacks any of the following characteristics:

(a) Waterproofing and weather protection of roof and exterior walls maintained in good working order, including unbroken windows and doors;

(b) Plumbing or gas facilities that conformed to applicable law in effect at the time of installation and that are maintained in good working order;

(c) Running water and reasonable amounts of hot water at all times furnished to appropriate fixtures and connected to a sewage disposal system approved under applicable law;

(d) Functioning heating facilities that conformed to applicable law at the time of installation and that are maintained in good working order;



- (e) Electrical lighting, with wiring and electrical equipment that conformed to applicable law at the time of installation, maintained in good working order;
  - (f) Common areas and areas under the control of the landlord that are kept reasonably clean, sanitary, and free from all accumulations of debris, filth, rubbish, and garbage and that have appropriate extermination in response to the infestation of rodents or vermin;
  - (g) Appropriate extermination in response to the infestation of rodents or vermin throughout a residential premises;
  - (h) An adequate number of appropriate exterior receptacles for garbage and rubbish, in good repair;
  - (i) Floors, stairways, and railings maintained in good repair;
  - (j) Locks on all exterior doors and locks or security devices on windows designed to be opened that are maintained in good working order; or
  - (k) Compliance with all applicable building, housing, and health codes, which, if violated, would constitute a condition that is dangerous or hazardous to a tenant's life, health, or safety.
- (2) No deficiency in the common area shall render a residential premises uninhabitable as set forth in subsection (1) of this section, unless it materially and substantially limits the tenant's use of his or her dwelling unit.
- (3) Unless otherwise stated in section 38-12-506, prior to being leased to a tenant, a residential premises must comply with the requirements set forth in section 38-12-503 (1), (2) (a), and (2) (b).

**Source: L. 2008:** Entire part added, p. 1822, § 3, effective September 1.

**38-12-506. Opt-out.** (1) If a dwelling unit is contained within a mobile home park, as defined in section 38-12-201.5 (3), or if there are four or fewer dwelling units sharing common walls or located on the same parcel, as defined in section 30-28-302 (5), C.R.S., all of which have the same owner, or if the dwelling unit is a single-family residential premises:

- (a) A good faith rental agreement may require a tenant to assume the obligation for one or more of the characteristics contained in section 38-12-505 (1) (f), (1) (g), and (1) (h), as long as the requirement is not inconsistent with any obligations imposed upon a landlord by a governmental entity for the receipt of a subsidy for the residential premises; and
- (b) For any dwelling unit for which a landlord does not receive a subsidy from any governmental source, a landlord and tenant may agree in writing that the tenant is to perform specific repairs, maintenance tasks, alterations, and remodeling, but only if:
  - (I) The agreement of the parties is entered into in good faith and is set forth in a separate writing signed by the parties and supported by adequate consideration;
  - (II) The work is not necessary to cure a failure to comply with section 38-12-505 (3); and
  - (III) Such agreement does not affect the obligation of the landlord to other tenants' residential premises.

(2) For a single-family residential premises for which a landlord does not receive a subsidy from any governmental source, a landlord and tenant may agree in writing that the tenant is to perform specific repairs, maintenance tasks, alterations, and remodeling necessary to cure a failure to comply with section 38-12-505 (3), but only if:

- (a) The agreement of the landlord and tenant is entered into in good faith and is set forth in a writing that is separate from the rental agreement, signed by the parties, and supported by adequate consideration; and
  - (b) The tenant has the requisite skills to perform the work required to cure a failure to comply with section 38-12-505 (3).
- (3) To the extent that performance by a tenant relates to a characteristic set forth in section 38-12-505 (1), the tenant shall assume the obligation for such characteristic.
- (4) If consistent with this section a tenant assumes an obligation for a characteristic set forth in section 38-12-505 (1), the lack of such characteristic shall not make a residential premises uninhabitable.

**Source: L. 2008:** Entire part added, p. 1823, § 3, effective September 1.

**38-12-507. Breach of warranty of habitability - tenant's remedies.** (1) If there is a breach of the warranty of habitability as set forth in section 38-12-503 (2), the following provisions shall apply:

(a) Upon no less than ten and no more than thirty days written notice to the landlord specifying the condition alleged to breach the warranty of habitability and giving the landlord five business days from the receipt of the written notice to remedy the breach, a tenant may terminate the rental agreement by surrendering possession of the dwelling unit. If the breach is remediable by repairs, the payment of damages, or otherwise and the landlord adequately remedies the breach within five business days of receipt of the notice, the rental agreement shall not terminate by reason of the breach.

(b) A tenant may obtain injunctive relief for breach of the warranty of habitability in any court of competent jurisdiction. In any proceeding for injunctive relief, the court shall determine actual damages for a breach of the warranty at the time the court orders the injunctive relief. A landlord shall not be subject to any court order for injunctive relief if the landlord tenders the actual damages to the court within two business days of the order. Upon application by the tenant, the court shall immediately release to the tenant the damages paid by the landlord. If the tenant vacates the leased premises, the landlord shall not be permitted to rent the premises again until such time as the unit would be in compliance with the warranty of habitability set forth in section 38-12-503 (1).

(c) In an action for possession based upon nonpayment of rent in which the tenant asserts a defense to possession based upon the landlord's alleged breach of the warranty of habitability, upon the filing of the tenant's answer the court shall order the tenant to pay into the registry of the court all or part of the rent accrued after due consideration of expenses already incurred by the tenant based upon the landlord's breach of the warranty of habitability.

(d) Whether asserted as a claim or counterclaim, a tenant may recover damages directly arising from a breach of the warranty of habitability, which may include, but are not limited to, any reduction in the fair rental value of the dwelling unit, in any court of competent jurisdiction.

(2) If a rental agreement contains a provision for either party in an action related to the rental agreement to obtain attorney fees and costs, then the prevailing party in any action brought under this part 5 shall be entitled to recover reasonable attorney fees and costs.

**Source: L. 2008:** Entire part added, p. 1824, § 3, effective September 1.

**38-12-508. Landlord's defenses to a claim of breach of warranty - limitations on claiming a breach.** (1) It shall be a defense to a tenant's claim of breach of the warranty of habitability that the tenant's actions or inactions prevented the landlord from curing the condition underlying the breach of the warranty of habitability.

(2) Only parties to the rental agreement or other adult residents listed on the rental agreement who are also lawfully residing in the dwelling unit may assert a claim for a breach of the warranty of habitability.

(3) A tenant may not assert a claim for injunctive relief based upon the landlord's breach of the warranty of habitability of a residential premises unless the tenant has given notice to a local government within the boundaries of which the residential premises is located of the condition underlying the breach that is materially dangerous or hazardous to the tenant's life, health, or safety.

(4) A tenant may not assert a breach of the warranty of habitability as a defense to a landlord's action for possession based upon a nonmonetary violation of the rental agreement or for an action for possession based upon a notice to quit or vacate.

(5) If the condition alleged to breach the warranty of habitability is the result of the action or inaction of a tenant in another dwelling unit or another third party not under the direction and control of the landlord and the landlord has taken reasonable, necessary, and timely steps to abate the condition, but is unable to abate the condition due to circumstances beyond the landlord's reasonable control, the tenant's only remedy shall be termination of the rental agreement consistent with section 38-12-507 (1) (a).



(6) For public housing authorities and other housing providers receiving federal financial assistance directly from the federal government, no provision of this part 5 in direct conflict with any federal law or regulation shall be enforceable against such housing provider.

**Source: L. 2008:** Entire part added, p. 1825, § 3, effective September 1.

**38-12-509. Prohibition on retaliation.** (1) A landlord shall not retaliate against a tenant for alleging a breach of the warranty of habitability by discriminatorily increasing rent or decreasing services or by bringing or threatening to bring an action for possession in response to the tenant having made a good faith complaint to the landlord or to a governmental agency alleging a breach of the warranty of habitability.

(2) A landlord shall not be liable for retaliation under this section, unless a tenant proves that a landlord breached the warranty of habitability.

(3) Regardless of when an action for possession of the premises where the landlord is seeking to terminate the tenancy for violation of the terms of the rental agreement is brought, there shall be a rebuttable presumption in favor of the landlord that his or her decision to terminate is not retaliatory. The presumption created by this subsection (3) cannot be rebutted by evidence of the timing alone of the landlord's initiation of the action.

(4) If the landlord has a right to increase rent, to decrease service, or to terminate the tenant's tenancy at the end of any term of the rental agreement and the landlord exercises any of these rights, there shall be a rebuttable presumption that the landlord's exercise of any of these rights was not retaliatory. The presumption of this subsection (4) cannot be rebutted by evidence of the timing alone of the landlord's exercise of any of these rights.

**Source: L. 2008:** Entire part added, p. 1826, § 3, effective September 1.

**38-12-510. Unlawful removal or exclusion.** It shall be unlawful for a landlord to remove or exclude a tenant from a dwelling unit without resorting to court process, unless the removal or exclusion is consistent with the provisions of article 18.5 of title 25, C.R.S., and the rules promulgated by the state board of health for the cleanup of an illegal drug laboratory or is with the mutual consent of the landlord and tenant or unless the dwelling unit has been abandoned by the tenant as evidenced by the return of keys, the substantial removal of the tenant's personal property, notice by the tenant, or the extended absence of the tenant while rent remains unpaid, any of which would cause a reasonable person to believe the tenant had permanently surrendered possession of the dwelling unit. Such unlawful removal or exclusion includes the willful termination of utilities or the willful removal of doors, windows, or locks to the premises other than as required for repair or maintenance. If the landlord willfully and unlawfully removes the tenant from the premises or willfully and unlawfully causes the termination of heat, running water, hot water, electric, gas, or other essential services, the tenant may seek any remedy available under the law, including this part 5.

**Source: L. 2008:** Entire part added, p. 1826, § 3, effective September 1.

**38-12-511. Application.** (1) Unless created to avoid its application, this part 5 shall not apply to any of the following arrangements:

(a) Residence at a public or private institution, if such residence is incidental to detention or the provision of medical, geriatric, education, counseling, religious, or similar service;

(b) Occupancy under a contract of sale of a dwelling unit or the property of which it is a part, if the occupant is the purchaser, seller, or a person who succeeds to his or her interest;

(c) Occupancy by a member of a fraternal or social organization in the portion of a structure operated for the benefit of the organization;

(d) Transient occupancy in a hotel or motel that lasts less than thirty days;

(e) Occupancy by an employee or independent contractor whose right to occupancy is conditional upon performance of services for an employer or contractor;

(f) Occupancy by an owner of a condominium unit or a holder of a proprietary lease in a cooperative;

(g) Occupancy in a structure that is located within an unincorporated area of a county, does not receive water, heat, and sewer services from a public entity, and is rented for recreational purposes, such as a hunting cabin, yurt, hut, or other similar structure;

(h) Occupancy under rental agreement covering a residential premises used by the occupant primarily for agricultural purposes; or

(i) Any relationship between the owner of a mobile home park and the owner of a mobile home situated in the park.

(2) Nothing in this section shall be construed to limit remedies available elsewhere in law for a tenant to seek to maintain safe and sanitary housing.

**Source: L. 2008:** Entire part added, p. 1827, § 3, effective September 1.

## UNCLAIMED PROPERTY

### ARTICLE 13

#### Unclaimed Property Act

**Cross references:** For provisions concerning unclaimed utility deposits, see article 8.5 of title 40.

**Law reviews:** For article, "Colorado's Unclaimed Property Act: An Overview", see 17 Colo. Law. 57 (1988).

38-13-101.	Short title.	38-13-108.6.	Wages.
38-13-102.	Definitions and use of terms.	38-13-108.7.	Gaming chips or tokens - gaming award points - inapplicability.
38-13-103.	Property presumed abandoned - general rule.		
38-13-104.	General rules for taking custody of intangible unclaimed property.	38-13-108.8.	Property held by racetracks - inapplicability.
38-13-105.	Travelers' checks and money orders.	38-13-109.	Contents of safe deposit box or other safekeeping repository.
38-13-106.	Checks, drafts, and similar instruments issued or certified by banking and financial organizations.	38-13-109.5.	Funds owing under life insurance policies.
		38-13-109.7.	Tax refunds.
38-13-107.	Bank deposits and funds in financial organizations.	38-13-110.	Report and payment or delivery of abandoned property.
38-13-107.1.	Deposits held by utilities.	38-13-111.	Electronic notice of abandoned property.
38-13-107.3.	Refunds held by business associations.	38-13-112.	Payment or delivery of abandoned property to the administrator.
38-13-107.5.	Stock and other intangible interests in business associations.	38-13-112.5.	Public employees' retirement association - initial report of abandoned property - payment of moneys. (Repealed)
38-13-107.9.	Property of business associations held in the course of dissolution.	38-13-113.	Custody by state - holder relieved from liability - waiver of rights by owner - reimbursement of holder paying claim - reclaiming for owner - defense of holder - payment of safe deposit box or repository charges.
38-13-108.	Property held by agents and fiduciaries.		
38-13-108.2.	Property held by courts and public agencies.		
38-13-108.4.	Gift certificates and credit memos.		
38-13-108.5.	Moneys held by the public employees' retirement association.	38-13-114.	Crediting of dividends, inter-



	est, or increments to owner's account.	38-13-120.	Election to take payment or delivery.
38-13-115.	Public sale of abandoned property.	38-13-121.	Destruction or disposition of property having insubstantial commercial value - immunity from liability.
38-13-116.	Creation of funds - repeal. (Repealed)		
38-13-116.5.	Unclaimed property trust fund - creation - payments - interest - appropriations - records - rules.	38-13-122.	Periods of limitation.
		38-13-123.	Requests for reports and examination of records.
38-13-116.7.	Unclaimed property tourism promotion trust fund - creation - payments - interest - transfers.	38-13-124.	Retention of records.
		38-13-125.	Enforcement.
38-13-117.	Filing of claim with administrator.	38-13-126.	Interstate agreements and cooperation - joint and reciprocal actions with other states.
38-13-117.3.	Claims offset for child support.	38-13-127.	Interest and penalties.
38-13-117.5.	Claims offset for judicial restitution, fines, fees, costs, or surcharges.	38-13-128.	Agreements to locate reported property.
		38-13-129.	Foreign transactions.
38-13-117.7.	Claims offset for state tax delinquencies.	38-13-130.	Effect of new provisions - clarification of application.
38-13-118.	Claim of another state to recover property - procedure.	38-13-131.	Rules.
38-13-118.5.	Claim of the state or governmental agency.	38-13-132.	Uniformity of application and construction.
38-13-119.	Action to establish claim.	38-13-133.	Applicability - exclusions. (Repealed)
		38-13-134.	Application of article to other sections.

**38-13-101. Short title.** This article shall be known and may be cited as the "Unclaimed Property Act".

**Source: L. 87:** Entire article added, p. 1317, § 1, effective July 1.

**38-13-102. Definitions and use of terms.** As used in this article, unless the context otherwise requires:

- (1) "Administrator" means the state treasurer.
- (2) "Apparent owner" means the person whose name appears on the records of the holder as the person entitled to property held, issued, or owing by the holder.
- (2.5) "Attorney general" means the chief legal officer of this state.
- (3) "Banking organization" means a bank, trust company, savings bank, industrial bank, safe deposit company, or private banker or any organization defined by other law as a bank or banking organization.
- (3.5) "Business association" means a nonpublic corporation, notwithstanding the provisions of section 7-114-401, C.R.S., joint stock company, investment company, business trust, partnership, or association for business purposes of two or more individuals, whether or not for profit, including a banking organization, financial organization, insurance company, or utility.
- (4) "Domicile" means the state of incorporation of a corporation and the state of the principal place of business of an unincorporated person.
- (5) "Financial organization" means a savings and loan association, cooperative bank, building and loan association, or credit union.
- (5.3) "Gaming award points" means any marketing or promotional coupons, certificates, player award or other cards, points, or other representatives of value that:
  - (a) A licensed gaming establishment, in connection with its promotional activities, issues to a person for visiting the establishment, for using the services of the establishment, or for gambling at the establishment; and
  - (b) May be redeemed at a licensed gaming establishment for cash or any other representative of value, food, products, goods, or services.

(5.5) "Gaming chip or token" means a gaming chip, token, encoded credit certificate, or other representative of value that is issued and sold by a licensed gaming establishment for use in gaming, other than a card or similar device issued and sold by a licensed gaming establishment that is clearly identifiable on its face or encoding as being owned by a specific and designated person.

(6) "Holder" means:

(a) A person, wherever organized or domiciled, which is:

(I) In possession of property belonging to another;

(II) A trustee; or

(III) Indebted to a person on an obligation;

(b) The public employees' retirement association.

(6.5) "Insurance company" means an association, corporation, or fraternal or mutual benefit organization, whether or not for profit, which is engaged in providing insurance coverage, including accident, burial, casualty, credit life, contract performance, dental, fidelity, fire, health, hospitalization, illness, life including endowments and annuities, malpractice, marine, mortgage, surety, or wage protection insurance.

(7) (a) "Intangible property" includes:

(I) Moneys, checks, drafts, deposits, interest, dividends, and income;

(II) Credit balances, customer overpayments, gift certificates, refunds, credit memos, and unidentified remittances;

(III) Stocks and other intangible ownership interests in business associations;

(IV) Moneys deposited to redeem stocks, bonds, coupons, and other securities or to make distributions;

(IV.5) Security deposits, unpaid wages, and unused airline tickets;

(V) Amounts distributable from a trust or custodial fund established under a plan to provide health, welfare, pension, vacation, severance, retirement, death, stock purchase, profit sharing, employee savings, supplemental unemployment insurance, or similar benefits;

(VI) Amounts due and payable under the terms of insurance policies;

(VII) On and after October 1, 2002, any amount due and payable as a refund of Colorado income tax.

(VIII) Repealed.

(b) "Intangible property" does not include unclaimed capital credit payments held by cooperative electric associations and telephone cooperatives, gaming chips or tokens, or gaming award points.

(7.5) "Item" means:

(a) In regard to intangible property, the total of all accounts, credit balances, deposits, or other forms of intangible property held under the name of any one apparent owner; except that, if the same apparent owner owns intangible property of different types or classes that cannot practicably be handled or accounted for at the same time or in the same way, each such type or class may be considered a separate item;

(b) In regard to tangible personal property, the total of all such property held under the name of any one apparent owner.

(8) "Last-known address" means a description of the location of the apparent owner sufficient for the purpose of the delivery of mail.

(8.3) "Licensed gaming establishment" shall have the same meaning as set forth in section 12-47.1-103 (15), C.R.S.

(8.5) "Life insurance company" means any insurance company which is engaged in providing life or endowment insurance policies or annuity contracts.

(9) "Owner" means a depositor in the case of a deposit, a beneficiary in case of a trust other than a deposit in trust, a creditor, claimant, or payee in the case of other intangible property, or a person having a legal or equitable interest in property subject to this article or his legal representative.

(10) "Person" means an individual, business association, state or other government, governmental subdivision or agency, public corporation, public authority, estate, trust, two or more persons having a joint or common interest, or any other legal or commercial entity.



(10.3) "State" means any state, district, commonwealth, territory, insular possession, or other area subject to the legislative authority of the United States.

(10.7) "Utility" means a person who owns or operates for public use any plant, equipment, property, franchise, or license for the transmission of communications or the production, storage, transmission, sale, delivery, or furnishing of electricity, water, steam, or gas.

(11) "Verify" means the signing of an instrument, which signing constitutes the affirmation or acknowledgment of the person signing the instrument, under penalties of perjury, that the facts stated in the instrument are true and which signing is made before a person who is a notary public or who is authorized by the law of the place of execution to take acknowledgments or to administer oaths.

**Source:** L. 87: Entire article added and (7)(a)(I) and (7)(b) amended, pp. 1317, 1335, §§ 1, 6, effective July 1. L. 90: IP(6) amended and (6.5), (7)(a)(VI), and (8.5) added, p. 1632, §§ 1, 2, effective April 27. L. 92: (6) amended, p. 2108, § 3, effective March 4; (2.5), (3.5), (7)(a)(IV.5), (10.3), and (10.7) added and IP(6) and (7)(b) amended, p. 2115, § 2, effective July 1. L. 95: (7.5) added, p. 522, § 2, effective May 16. L. 2001: (7)(a)(VII) added, p. 618, § 1, effective August 8. L. 2004: (5.3), (5.5), and (8.3) added and (7)(b) amended, p. 1876, § 1, effective August 4; (7)(a)(VIII) added, p. 314, § 1, effective August 4. L. 2010: (7)(a)(VIII) repealed, (SB 10-212), ch. 412, p. 2032, § 1, effective July 1.

**Editor's note:** The amendment to subsection (6) by House Bill 92-1092 was harmonized with the amendment to the introductory portion to subsection (6) by House Bill 92-1152.

**38-13-103. Property presumed abandoned - general rule.** (1) Except as otherwise provided by this article, all intangible property, including any income or increment derived therefrom, less any lawful charges, that is held, issued, or owing in the ordinary course of a holder's business and has remained unclaimed by the owner for more than five years after it became payable or distributable is presumed abandoned.

(2) Property is payable or distributable for the purpose of this article notwithstanding the owner's failure to make demand or to present any instrument or document required to receive payment.

**Source:** L. 87: Entire article added, p. 1318, § 1, effective July 1.

**38-13-104. General rules for taking custody of intangible unclaimed property.** (1) Unless otherwise provided in this article or by other statute or local law, intangible property is subject to the custody of this state as unclaimed property if the conditions raising a presumption of abandonment under section 38-13-103 or sections 38-13-105 to 38-13-109.7 are satisfied and:

(a) The last-known address, as shown on records of the holder, of the apparent owner is in this state;

(b) The records of the holder do not reflect the identity of the person entitled to the property and it is established that the last-known address of the person entitled to the property is in this state;

(c) The records of the holder do not reflect the last-known address of the apparent owner and it is established that:

(I) The last-known address of the person entitled to the property is in this state; or

(II) The holder is a domiciliary of this state and has not previously paid or delivered the property to the state of the last-known address of the apparent owner or other person entitled to the property;

(d) The last-known address, as shown on the records of the holder, of the apparent owner is in a state that does not provide by law for the escheat or custodial taking of the property or its escheat or unclaimed property law is not applicable to the property and the holder is a domiciliary of this state;

- (e) The last-known address, as shown on the records of the holder, of the apparent owner is in a foreign nation and the holder is a domiciliary of this state; or
- (f) The transaction out of which the property arose occurred in this state and:
  - (I) (A) The last-known address of the apparent owner or other person entitled to the property is unknown; or
  - (B) The last-known address of the apparent owner or other person entitled to the property is in a state that does not provide by law for the escheat or custodial taking of the property or its escheat or unclaimed property law is not applicable to the property; and
  - (II) The holder is a domiciliary of a state that does not provide by law for the escheat or custodial taking of the property or its escheat or unclaimed property law is not applicable to the property.

**Source:** **L. 87:** Entire article added, p. 1319, § 1, effective July 1. **L. 90:** IP(1) amended, p. 1633, § 3, effective April 27. **L. 92:** IP(1) amended, p. 2116, § 3, effective July 1. **L. 2001:** IP(1) amended, p. 618, § 2, effective August 8.

**38-13-105. Travelers' checks and money orders.** (1) (a) Subject to subsection (3) of this section, any sum payable on a money order or similar written instrument, other than a third-party bank check or traveler's check, that has been outstanding for more than seven years after its issuance is presumed abandoned unless the owner, within seven years, has communicated in writing with the issuer concerning it or otherwise indicated an interest as evidenced by a memorandum or other record on file prepared by an employee of the issuer.

(b) Subject to subsection (3) of this section, any sum payable on a traveler's check that has been outstanding for more than fifteen years after its issuance is presumed abandoned unless the owner, within fifteen years, has communicated in writing with the issuer concerning it or otherwise indicated an interest as evidenced by a memorandum or other record on file prepared by an employee of the issuer.

(2) On or after July 1, 1987, a holder may not deduct from the amount of a traveler's check or money order any service fee or other charge imposed solely by reason of the failure to present the instrument for payment unless there is a valid and enforceable written contract between the issuer and the owner of the instrument pursuant to which the issuer may impose a charge and the issuer regularly imposes such charges and does not regularly reverse or otherwise cancel them.

(3) No sum payable on a traveler's check or money order or similar written instrument, other than a third-party bank check, described in subsection (1) of this section may be subjected to the custody of this state as unclaimed property unless:

(a) The records of the issuer show that the traveler's check, money order, or similar written instrument was purchased in this state;

(b) The issuer has its principal place of business in this state and the records of the issuer do not show the state in which the traveler's check, money order, or similar written instrument was purchased; or

(c) The issuer has its principal place of business in this state, the records of the issuer show the state in which the traveler's check, money order, or similar written instrument was purchased, and the laws of the state of purchase do not provide for the escheat or custodial taking of the property or its escheat or unclaimed property law is not applicable to the property.

(4) Notwithstanding any other provision of this article, subsection (3) of this section applies to sums payable on travelers' checks, money orders, and similar written instruments presumed abandoned on or after February 1, 1965, except to the extent that those sums have been paid over to a state prior to January 1, 1974.

**Source:** **L. 87:** Entire article added, p. 1319, § 1, effective July 1; entire section R&RE, p. 1333, § 1, effective July 1.

**Editor's note:** Section 7 of chapter 275, Session Laws of Colorado 1987, provided that the act set out in that chapter amending this section was effective July 1, 1987, but the governor did not approve the act until July 10, 1987.



**38-13-106. Checks, drafts, and similar instruments issued or certified by banking and financial organizations.** (1) Any sum payable on a check, draft, or similar instrument, except those subject to section 38-13-105, on which a banking or financial organization is directly liable, including a cashier's check and a certified check, which has been outstanding for more than five years after it was payable or after its issuance if payable on demand is presumed abandoned unless the owner, within five years, has communicated in writing with the banking or financial organization concerning it or otherwise indicated an interest as evidenced by a memorandum or other record on file prepared by an employee thereof.

(2) On or after July 1, 1987, a holder may not deduct from the amount of any instrument subject to this section any service fee or other charge imposed solely by reason of the failure to present the instrument for payment unless there is a valid and enforceable written contract between the holder and the owner of the instrument pursuant to which the holder may impose a charge and the holder regularly imposes such charges and does not regularly reverse or otherwise cancel them.

**Source:** L. 87: Entire article added, p. 1320, § 1, effective July 1; (2) amended, p. 1334, § 2, effective July 1.

**Editor's note:** Section 7 of chapter 275, Session Laws of Colorado 1987, provided that the act set out in that chapter amending subsection (2) was effective July 1, 1987, but the governor did not approve the act until July 10, 1987.

**38-13-107. Bank deposits and funds in financial organizations.** (1) Any demand, savings, or matured time deposit with a banking or financial organization, including a deposit that is automatically renewable, and any funds paid toward the purchase of a share, a mutual investment certificate, or any other interest in a banking or financial organization is presumed abandoned unless the owner, within five years, has:

(a) In the case of a deposit, increased or decreased its amount or presented the passbook or other similar evidence of the deposit for the crediting of interest;

(b) Communicated in writing with the banking or financial organization concerning the property;

(c) Otherwise indicated an interest in the property as evidenced by a memorandum or other record on file prepared by an employee of the banking or financial organization;

(d) Owned other property to which paragraph (a), (b), or (c) of this subsection (1) applies and unless the banking or financial organization communicates in writing with the owner with regard to the property that would otherwise be presumed abandoned under this subsection (1) at the address to which communications regarding the other property regularly are sent; or

(e) Had another relationship with the banking or financial organization concerning which the owner has:

(I) Communicated in writing with the banking or financial organization; or

(II) Otherwise indicated an interest as evidenced by a memorandum or other record on file prepared by an employee of the banking or financial organization and unless the banking or financial organization communicates in writing with the owner with regard to the property that would otherwise be abandoned under this subsection (1) at the address to which communications regarding the other relationship regularly are sent.

(2) For purposes of subsection (1) of this section, "property" includes interest and dividends.

(3) On or after July 1, 1987, a holder may not impose, with respect to property described in subsection (1) of this section, any service fee or other charge due solely to dormancy or inactivity or cease payment of interest unless:

(a) There is an enforceable written contract between the holder and the owner of the property pursuant to which the holder may impose such fee or charge or cease payment of interest;

(b) For property in excess of two dollars, the holder, no more than three months before the initial imposition of those charges or cessation of interest, has given written notice to

the owner of the amount of those fees or charges at the last-known address of the owner stating that those fees or charges will be imposed or that interest will cease, but the notice provided in this section need not be given with respect to fees or charges imposed or interest ceased before July 1, 1987; and

(c) The holder regularly imposes such fees or charges or ceases payment of interest and does not regularly reverse or otherwise cancel them or retroactively credit interest with respect to the property.

(4) Any property described in subsection (1) of this section that is automatically renewable is matured for purposes of subsection (1) of this section upon the expiration of its initial time period, but, in the case of any renewal to which the owner consents at or about the time of renewal by communicating in writing with the banking or financial organization or otherwise indicating consent as evidenced by a memorandum or other record on file prepared by an employee of the organization, the property is matured upon the expiration of the last time period for which consent was given. If, at the time provided for delivery in section 38-13-112, a penalty or forfeiture in the payment of interest would result from the delivery of the property, the time for delivery is extended until the time when no penalty or forfeiture would result.

**Source: L. 87:** Entire article added, p. 1320, § 1, effective July 1; (3) amended, p. 1334, § 3, effective July 1. **L. 93:** (2) amended, p. 1074, § 2, effective July 1.

**Editor's note:** Section 7 of chapter 275, Session Laws of Colorado 1987, provided that the act set out in that chapter amending subsection (3) was effective July 1, 1987, but the governor did not approve the act until July 10, 1987.

**38-13-107.1. Deposits held by utilities.** Except as otherwise provided for unclaimed utility deposits under section 40-8.5-106, C.R.S., a deposit, including any interest thereon, made after January 1, 1992, by a subscriber with a utility to secure payment or any sum paid in advance after January 1, 1992, for utility services to be furnished, less any lawful deductions, that remains unclaimed by the owner for more than one year after termination of the services for which the deposit or advance payment was made is presumed abandoned.

**Source: L. 92:** Entire section added, p. 2116, § 4, effective July 1.

**38-13-107.3. Refunds held by business associations.** Except to the extent otherwise ordered by the court or administrative agency, any sum that a business association has been ordered to refund by a court or administrative agency which has remained unclaimed by the owner for more than one year after it became payable in accordance with the final determination or order providing for the refund, whether or not the final determination or order requires any person entitled to a refund to make a claim for it, is presumed abandoned.

**Source: L. 92:** Entire section added, p. 2116, § 4, effective July 1.

**38-13-107.5. Stock and other intangible interests in business associations.** (1) Except as provided in subsections (2) and (5) of this section, stock or other intangible ownership interest in a business association, the existence of which is evidenced by records available to the association, is presumed abandoned, and, with respect to the interest, the association is the holder if a dividend, distribution, or other sum payable as a result of the interest has remained unclaimed by the owner for five years and the owner within five years has not:

(a) Communicated in writing with the association regarding the interest or a dividend, distribution, or other sum payable as a result of the interest; or

(b) Otherwise communicated with the association regarding the interest or a dividend, distribution, or other sum payable as a result of the interest, as evidenced by a memorandum or other record on file with the association prepared by an employee of the association.



(2) At the expiration of a five-year period following the failure of the owner to claim a dividend, distribution, or other sum payable to the owner as a result of the interest, the interest is not presumed abandoned unless there have been at least five dividends, distributions, or other sums paid during the period, none of which has been claimed by such owner. If five dividends, distributions, or other sums are paid during the five-year period, the period leading to a presumption of abandonment commences on the date payment of the first such unclaimed dividend, distribution, or other sum became due and payable. If five dividends, distributions, or other sums are not paid during the presumptive period, the period continues to run until there have been five dividends, distributions, or other sums that have not been claimed by the owner.

(3) The running of the five-year period of abandonment ceases immediately upon the occurrence of a communication pursuant to subsection (1) of this section. If any future dividend, distribution, or other sum payable to the owner as a result of the interest is subsequently not claimed by such owner, a new period of abandonment commences and relates back to the time a subsequent dividend, distribution, or other sum became due and payable.

(4) At the time an interest is presumed abandoned under this section, any dividend, distribution, or other sum then held for or owing to the owner as a result of the interest, and not previously presumed abandoned, is presumed abandoned.

(5) This article does not apply to:

(a) Any stock or other intangible ownership interest enrolled in a plan that provides for the automatic reinvestment of dividends, distributions, or other sums payable as a result of the interest unless the records available to the administrator of the plan show, with respect to any intangible ownership interest not enrolled in the reinvestment plan, that the owner has not within five years communicated in the manner described in subsection (1) of this section; or

(b) The unclaimed patronage credits of agricultural marketing and supply cooperatives as defined in subchapter T of the federal "Internal Revenue Code of 1986".

**Source: L. 92:** Entire section added, p. 2116, § 4, effective July 1.

**Editor's note:** Subchapter T of the federal "Internal Revenue Code of 1986", referenced in paragraph (b) of subsection (5), is located at 26 U.S.C. sec. 1381 et seq.

**38-13-107.9. Property of business associations held in the course of dissolution.** Intangible property distributable in the course of a dissolution of a business association which remains unclaimed by the owner for more than one year after the date specified for final distribution is presumed abandoned.

**Source: L. 92:** Entire section added, p. 2118, § 4, effective July 1.

**38-13-108. Property held by agents and fiduciaries.** (1) Intangible property and any income or increment derived therefrom held in a fiduciary capacity for the benefit of another person is presumed abandoned unless the owner, within three years after it has become payable or distributable, has increased or decreased the principal, accepted payment of principal or income, communicated concerning the property, or otherwise indicated an interest as evidenced by a memorandum or other record on file prepared by the fiduciary.

(2) Funds in an individual retirement account or a retirement plan for self-employed individuals or similar account or plan established pursuant to the internal revenue laws of the United States are not payable or distributable within the meaning of subsection (1) of this section unless, under the terms of the account or plan, distribution of all or part of the funds would then be mandatory.

(3) For the purpose of this section, a person who holds property as an agent for a business association is deemed to hold the property in a fiduciary capacity for that business association alone, unless the agreement between him and the business association provides otherwise.

(4) For the purposes of this article, a person who is deemed to hold property in a fiduciary capacity for a business association alone is the holder of the property only insofar as the interest of the business association in the property is concerned, and the business association is the holder of the property insofar as the interest of any other person in the property is concerned.

**Source: L. 87:** Entire article added, p. 1322, § 1, effective July 1.

**38-13-108.2. Property held by courts and public agencies.** (1) Except as set forth in subsection (2) of this section, intangible property held for the owner by a court, state or other government, governmental subdivision or agency, public corporation, or public authority which remains unclaimed by the owner for more than one year after becoming payable or distributable is presumed abandoned.

(2) Any overbid, as defined in section 38-38-100.3, that is equal to or greater than twenty-five dollars and that remains unclaimed for five years from the date of sale is presumed abandoned.

**Source: L. 92:** Entire section added, p. 2118, § 4, effective July 1. **L. 2012:** Entire section amended, (SB 12-030), ch. 96, p. 314, § 1, effective September 1.

**38-13-108.4. Gift certificates and credit memos.** (1) Except as provided in subsection (3) of this section, a gift certificate or a credit memo issued in the ordinary course of an issuer's business which remains unclaimed by the owner for more than five years after becoming payable or distributable is presumed abandoned.

(2) In the case of a gift certificate, the amount presumed abandoned is the price paid by the purchaser for the gift certificate. In the case of a credit memo, the amount presumed abandoned is the amount credited to the recipient of the memo.

(3) The provisions of this section shall apply to any gift certificate issued by a business that is redeemable in cash and not to any gift certificate issued for food, products, goods, or services.

**Source: L. 92:** Entire section added, p. 2118, § 4, effective July 1. **L. 93:** (1) amended and (3) added, p. 1075, § 4, effective July 1.

**38-13-108.5. Moneys held by the public employees' retirement association.** (1) For the purposes of this section, unless the context otherwise requires:

(a) "Account left inactive" means the contributions of any nonvested member who has terminated employment with an employer if such member's member contribution account with the association has been left inactive.

(b) "Association" means the public employees' retirement association created pursuant to section 24-51-201, C.R.S.

(c) "Benefit" shall have the same meaning as that provided for such term in section 24-51-101 (7), C.R.S.

(d) "Benefit recipient" shall have the same meaning as that provided for such term in section 24-51-101 (8), C.R.S.

(e) "Employer" shall have the same meaning as that provided for such term in section 24-51-101 (20), C.R.S.

(f) "Member" shall have the same meaning as that provided for such term in section 24-51-101 (29), C.R.S.

(g) "Unclaimed benefit" means a benefit owed to any benefit recipient if such benefit remains unpaid.

(h) "Unclaimed member refund" means the contributions of a member who has terminated employment with an employer and who has requested a refund of such contributions if such refund remains unpaid.

(2) Any moneys and any accrued interest which are held by the association for accounts left inactive, unclaimed benefits, or unclaimed member refunds shall be presumed to be



abandoned if such moneys remain unclaimed for more than five years after such moneys become payable or distributable pursuant to the provisions of article 51 of title 24, C.R.S., unless the owner of such moneys, within five years, has:

- (a) Communicated in writing with the association concerning such moneys; or
  - (b) Otherwise indicated an interest in such moneys as evidenced by a memorandum or other record on file prepared by an employee of the association.
- (3) Property which is presumed to be abandoned pursuant to the provisions of this section shall be the only property held by the association which is subject to the provisions of this article.

**Source: L. 92:** Entire section added, p. 2109, § 4, effective March 4.

**38-13-108.6. Wages.** Unpaid wages, including wages represented by unrepresented payroll checks, owing in the ordinary course of the holder's business which remain unclaimed by the owner for more than one year after becoming payable are presumed abandoned.

**Source: L. 92:** Entire section added, p. 2118, § 4, effective July 1.

#### ANNOTATION

**Law reviews.** For article, "State Laws: A Growing Minefield for Employers", see 23 Colo. Law. 1089 (1994).

**38-13-108.7. Gaming chips or tokens - gaming award points - inapplicability.** This article shall not apply to gaming award points and gaming chips or tokens issued or sold by a licensed gaming establishment before, on, or after August 4, 2004, except to the extent the state has taken custody of any gaming award points or gaming chips or tokens on or before January 1, 2004.

**Source: L. 2004:** Entire section added, p. 1877, § 2, effective August 4.

**38-13-108.8. Property held by racetracks - inapplicability.** This article shall not apply to any intangible unclaimed property held by a racetrack, as that term is defined in section 12-60-102 (26), C.R.S.

**Source: L. 92:** Entire section added, p. 2118, § 4, effective July 1. **L. 93:** Entire section amended, p. 1239, § 12, effective July 1.

**38-13-109. Contents of safe deposit box or other safekeeping repository.** All tangible and intangible property held in a safe deposit box or any other safekeeping repository in this state in the ordinary course of the holder's business and proceeds resulting from the sale of the property permitted by any other law, which remain unclaimed by the owner for more than five years after the lease or rental period on the box or other repository has expired, are presumed abandoned.

**Source: L. 87:** Entire article added, p. 1322, § 1, effective July 1.

**38-13-109.5. Funds owing under life insurance policies.** (1) Funds held or owing under any life or endowment insurance policy or annuity contract that has matured or terminated are presumed abandoned if unclaimed for more than five years after the funds became due and payable as established from the records of the insurance company holding or owing the funds; except that property described in paragraph (b) of subsection (3) of this section is presumed abandoned if unclaimed for more than two years.

(2) If a person other than the insured or annuitant is entitled to the funds and an address of the person is not known to the company or it is not definite and certain from the records of the company who is entitled to the funds, it is presumed that the last-known address of the person entitled to the funds is the same as the last-known address of the insured or annuitant according to the records of the company.

(3) For purposes of this article, a life or endowment insurance policy or annuity contract not matured by actual proof of the death of the insured or annuitant according to the records of the company is matured and the proceeds due and payable if:

(a) The company knows that the insured or annuitant has died; or

(b) (I) The insured has attained, or would have attained if he were living, the limiting age under the mortality table on which the reserve is based;

(II) The policy was in force at the time the insured attained, or would have attained, the limiting age specified in subparagraph (I) of this paragraph (b); and

(III) Neither the insured nor any other person appearing to have an interest in the policy within the preceding two years, according to the records of the company, has assigned, readjusted, or paid premiums on the policy, subjected the policy to a loan, corresponded in writing with the company concerning the policy, or otherwise indicated an interest as evidenced by a memorandum or other record on file prepared by an employee of the company.

(4) For purposes of this article, the application of an automatic premium loan provision or other nonforfeiture provision contained in an insurance policy does not prevent a policy from being matured or terminated under subsection (1) of this section if the insured has died or the insured or the beneficiary of the policy otherwise has become entitled to the proceeds thereof before the depletion of the cash surrender value of a policy by the application of such provisions.

(5) If the laws of this state or the terms of the life insurance policy require the company to give notice to the insured or owner that an automatic premium loan provision or other nonforfeiture provision has been exercised, and the notice given to an insured or owner whose last-known address according to the records of the company is in this state is undeliverable, the company shall make a reasonable search to ascertain the policyholder's correct address to which the notice must be mailed.

(6) Notwithstanding any other provision of law to the contrary, if the company learns of the death of the insured or annuitant and the beneficiary has not communicated with the insurer within four months after such death, the company shall take reasonable steps to pay the proceeds to the beneficiary.

(7) Commencing July 1, 1992, every change of beneficiary form issued by an insurance company under any life or endowment insurance policy or annuity contract to an insured or owner who is a resident of this state shall request the following information:

(a) The name of each beneficiary, or if a class of beneficiaries is named, the name of each current beneficiary in the class;

(b) The address of each beneficiary; and

(c) The relationship of each beneficiary to the insured.

**Source: L. 90:** Entire section added, p. 1633, § 4, effective April 27.

**38-13-109.7. Tax refunds.** (1) On and after October 1, 2002, any amount due and payable as a refund of Colorado income tax or grant for property taxes, rent, or heat or fuel expenses assistance represented by a warrant that has not been presented for payment within six months from the date of issuance of the warrant and that has been forwarded by the department of revenue to the administrator pursuant to section 39-21-108 (5), C.R.S., is presumed abandoned.

(2) Repealed.

(3) On and after October 1, 2010, any amount due and payable, as a refund of a tax imposed or assessed by the department of revenue that is not addressed in subsection (1) of this section, represented by a warrant that has not been presented for payment within six



months from the date of issuance of the warrant and that has been forwarded by the department to the administrator pursuant to section 39-21-108 (7), C.R.S., is presumed abandoned.

**Source:** **L. 2001:** Entire section added, p. 618, § 3, effective August 8. **L. 2004:** Entire section amended, p. 314, § 2, effective August 4. **L. 2010:** (2) repealed, (SB 10-212), ch. 412, p. 2032, § 1, effective July 1; (3) added, (SB 10-186), ch. 309, p. 1455, § 2, effective August 11.

**38-13-110. Report and payment or delivery of abandoned property.** (1) (a) A person holding property, tangible or intangible, presumed abandoned and subject to custody as unclaimed property under this article shall report to the administrator concerning the property as provided in this section.

(b) If a person is not subject to the requirements of this subsection (1) because the person does not hold any property, tangible or intangible, presumed abandoned under this article or the person meets the criteria established in paragraph (e) of subsection (4) of this section, the person shall not be required to notify the administrator of the person's exemption from this subsection (1).

(2) The report must include:

(a) Except with respect to money orders, the name, if known, and last-known address, if any, of each person appearing from the records of the holder to be the owner of property presumed abandoned under this article;

(a.5) In the case of unclaimed funds of twenty-five dollars or more held or owing under any life or endowment insurance policy or annuity contract, the name, if known, and the last-known address, if any, of the insured or annuitant and of the beneficiary according to the records of the insurance company holding or owing the funds;

(b) In the case of the contents of a safe deposit box or other safekeeping repository or of other tangible property, a description of the property and the place where it is held and may be inspected by the administrator and any amounts owing to the holder;

(c) The nature and identifying number, if any, or a description of the property and the amount appearing from the records to be due, but items of value under twenty-five dollars each may be reported in the aggregate;

(d) The date the property became payable, demandable, or returnable and the date of the last transaction with the apparent owner with respect to the property; and

(e) Other information the administrator prescribes by rule as necessary for the administration of this article.

(3) If the person holding property presumed abandoned and subject to custody as unclaimed property is a successor to other persons who previously held the property for the apparent owner or the holder has changed his name while holding the property, he shall file with his report any such prior name and all known names and addresses of each previous holder of the property.

(4) (a) The report required by subsection (1) of this section shall be filed and, pursuant to section 38-13-112, payment or delivery of abandoned property shall be made before November 1 of each year as of June 30 next preceding, with the initial report to be filed before November 1, 1987, except as provided in paragraphs (b), (c), (d), and (e) of this subsection (4).

(b) Notwithstanding the provisions of paragraph (a) of this subsection (4), the report of any life insurance company must be filed and, pursuant to section 38-13-109.5, payment or delivery of funds held or owing and presumed abandoned shall be made before May 1 of each year as of December 31 next preceding, with the initial report to be filed before May 1, 1991.

(c) On written request by any person required to file a report and, pursuant to section 38-13-112, pay or deliver abandoned property, the administrator may postpone the reporting date. However, the reporting date for the initial report filed by insurance companies, other than life insurance companies pursuant to paragraph (a) of this subsection (4), under this article as required by section 38-13-130 (2) shall in no case be postponed beyond December 30, 1990.

(d) Notwithstanding the provisions of paragraph (a) of this subsection (4), the public employees' retirement association shall file an initial report on or before June 1, 1992. The public employees' retirement association shall file subsequent reports in conformance with the requirements of paragraph (a) of this subsection (4) on or before November 1, 1993, and on or before November 1 of each year thereafter.

(e) (I) Any business association with annual gross receipts of less than five hundred thousand dollars that holds property, tangible or intangible, acquired during the immediately preceding five-year period of an aggregate value under three thousand five hundred dollars shall not be subject to the requirements of paragraph (a) of this subsection (4) and section 38-13-112 until such time as the aggregate value of such property acquired during the immediately preceding five-year period exceeds three thousand five hundred dollars; except that, if any such business association holds an item of property of any one apparent owner acquired during such period of an aggregate value over two hundred fifty dollars, such business association shall report and pay or deliver such property to the administrator in accordance with paragraph (a) of this subsection (4) and section 38-13-112.

(II) Any organization exempt from taxation under section 501 (c) (3) of the federal "Internal Revenue Code of 1986", 26 U.S.C. 501 (c) (3), or its successor statute, that receives contributions totaling one million dollars or more annually and that holds property, tangible or intangible, acquired during the immediately preceding five-year period of an aggregate value under three thousand five hundred dollars shall not be subject to the requirements of paragraph (a) of this subsection (4) and section 38-13-112 until such time as the aggregate value of such property acquired during the immediately preceding five-year period exceeds three thousand five hundred dollars; except that, if any such organization holds an item of property of any one apparent owner acquired during such period of an aggregate value over two hundred fifty dollars, such organization shall report and pay or deliver such property to the administrator in accordance with paragraph (a) of this subsection (4) and section 38-13-112.

(III) Any organization exempt from taxation under section 501 (c) (3) of the federal "Internal Revenue Code of 1986", 26 U.S.C. 501 (c) (3), or its successor statute, that receives contributions totaling less than one million dollars annually shall not be subject to the requirements of paragraph (a) of this subsection (4) and section 38-13-112.

(5) Except as provided in subsection (6) of this section, not more than one hundred twenty days before filing the report and, pursuant to section 38-13-112, paying or delivering the abandoned property required by this section, the holder in possession of property presumed abandoned and subject to custody as unclaimed property under this article shall send written notice to the apparent owner's last-known address, informing such owner that the holder is in possession of property subject to this article if:

(a) The holder has in its records an address for the apparent owner which the holder's records do not disclose to be inaccurate;

(b) The claim of the apparent owner is not barred by the statute of limitations; and

(c) The property has a value of fifty dollars or more.

(6) (a) (Deleted by amendment, L. 95, p. 523, § 3, effective May 16, 1995.)

(b) The public employees' retirement association shall comply with the requirements of subsection (5) of this section with regard to reports filed by the public employees' retirement association on or before November 1, 1993, and on or before November 1 of each year thereafter.

**Source:** L. 87: Entire article added, p. 1322, § 1, effective July 1; (4) amended, p. 1335, § 1, effective July 1. L. 90: (2)(a.5) added and (4) amended, p. 1634, §§ 5, 6, effective April 27. L. 92: (4)(a) and IP(5) amended and (4)(d) and (6) added, pp. 2110, 2111, §§ 5, 6, effective March 4; (4) and IP(5) amended, p. 2118, § 5, effective July 1. L. 93: (4)(a) amended and (4)(e) added, p. 1075, § 5, effective July 1. L. 95: (1), IP(2), (4)(d), (4)(e), and (6)(a) amended, p. 523, § 3, effective May 16.

**Editor's note:** Amendments to subsections (4) and (5) by House Bill 92-1092 and House Bill 92-1152 were harmonized.



**38-13-111. Electronic notice of abandoned property.** (1) The administrator shall maintain an electronic, alphabetical list of the owners of unclaimed property and shall make such list available to the public on the world wide web. The administrator shall provide to each county treasurer and public library in the state a written copy of the list of owners of unclaimed property in that county. The office of the treasurer shall also maintain a written copy of the list of unclaimed property owners.

(2) The electronic, alphabetical list of the names of owners of unclaimed property maintained pursuant to subsection (1) of this section shall include the following information:

(a) (Deleted by amendment, L. 2004, p. 1148, § 1, effective August 4, 2004.)

(b) A statement that information concerning the property may be obtained by any person possessing an interest in the property by addressing an inquiry to the administrator; and

(c) (I) A statement that any person claiming an interest in the property must file a proof of claim with the administrator pursuant to section 38-13-117.

(II) (Deleted by amendment, L. 95, p. 524, § 4, effective May 16, 1995.)

(3) (Deleted by amendment, L. 2004, p. 1148, § 1, effective August 4, 2004.)

(4) Not later than March 1 of the year immediately following the report required by section 38-13-110 or, in the case of property reported by life insurance companies, not later than September 1 of the year of the report required by section 38-13-110, the administrator shall mail a notice to each person whose last-known address is listed in the report and who appears to be entitled to property of the value of fifty dollars or more presumed abandoned under this article and any beneficiary of a life or endowment insurance policy or annuity contract for whom the administrator has a last-known address.

(5) The mailed notice must contain:

(a) A statement that property is being held to which the addressee appears entitled; and

(b) A statement that any person claiming an interest in property being held must file a proof of claim with the administrator pursuant to section 38-13-117.

(6) This section is not applicable to sums payable on money orders and other written instruments presumed abandoned under section 38-13-105.

(7) The administrator shall limit the amount of moneys expended for publication and necessary correspondence pursuant to this section to not more than two percent of the previous year's paid claims from the unclaimed property trust fund created in section 38-13-116.5.

**Source:** L. 87: Entire article added, p. 1323, § 1 effective July 1. L. 90: (1), (2)(c), and (4) amended, p. 1635, § 7, effective April 27. L. 92: (1), (2)(c), and (4) amended, p. 2111, § 7, effective March 4; (2)(b), (2)(c), and (5) amended, p. 2119, § 6, effective July 1. L. 95: (1), (2)(c)(II), and (4) amended, p. 524, § 4, effective May 16. L. 2004:(1), IP(2), (2)(a), and (3) amended and (7) added, p. 1148, § 1, effective August 4; (2)(c)(I) amended, p. 1205, § 82, effective August 4.

**Editor's note:** Amendments to subsection (2)(c) by House Bill 92-1092 and House Bill 92-1152 were harmonized.

**38-13-112. Payment or delivery of abandoned property to the administrator.**

(1) (a) Except as otherwise provided in subsection (2) of this section, a person who is required to file a report under section 38-13-110 shall pay or deliver to the administrator all abandoned property required to be reported at the time such report is filed.

(b) (I) A holder may voluntarily, prior to payment or delivery of said abandoned property, deduct and retain two percent of the value of the property or twenty-five dollars whichever is more per item.

(II) Holders that are banking or financial organizations and holders of dividends, royalties, or other items that are backed by an underlying share, interest, insurance policy, or annuity contract may voluntarily, prior to payment or delivery of said abandoned property, deduct and retain two percent of the value of the property or twenty-five dollars, whichever is more per item; except that, if the abandoned property is a demand, savings, or

matured time deposit or funds held or owing under an insurance policy or annuity contract, the holder may deduct and retain two percent of the value of the property or twenty-five dollars, whichever is less.

(c) A holder may also deduct any sum due and owing from the value of the property prior to delivery.

(2) (a) If the owner establishes the right to receive the abandoned property to the satisfaction of the holder before the property has been delivered or if it appears that for some other reason the presumption of abandonment is erroneous, the holder need not pay or deliver the property to the administrator, and the property will no longer be presumed abandoned. In that case, the holder shall file with the administrator a written explanation of the proof of claim or of the error in the presumption of abandonment.

(b) The provisions of subsection (1) of this section shall apply to any payment or delivery of abandoned property by the public employees' retirement association if such property was included in a report required to be filed by the public employees' retirement association on or before November 1, 1993, or on or before November 1 of any succeeding year.

**Source:** L. 87: Entire article added, p. 1324, § 1, effective July 1. L. 89: (1) amended, p. 1646, § 26, effective June 5. L. 92: (2) amended, p. 2112, § 8, effective March 4; (1) amended, p. 2120, § 7, effective July 1. L. 95: Entire section amended, p. 525, § 5, effective May 16.

#### **38-13-112.5. Public employees' retirement association - initial report of abandoned property - payment of moneys. (Repealed)**

**Source:** L. 92: Entire section added, p. 2110, § 4, effective March 4. L. 95: Entire section repealed, p. 526, § 6, effective May 16.

**38-13-113. Custody by state - holder relieved from liability - waiver of rights by owner - reimbursement of holder paying claim - reclaiming for owner - defense of holder - payment of safe deposit box or repository charges.** (1) (a) Upon the payment or delivery of property to the administrator, the state assumes custody and responsibility for the safekeeping of the property. A person who pays or delivers property to the administrator in good faith is relieved of all liability to the extent of the value of the property paid or delivered for any claim then existing or which thereafter may arise or be made in respect to the property.

(b) Any person appearing to be an owner of property paid or delivered to the administrator pursuant to this article may notify the administrator on a form prescribed by the administrator that the person waives the right to claim the property. Upon receipt of such notice, the administrator shall transfer the property to the CoverColorado cash fund created in section 10-8-530 (2), C.R.S. After the property is transferred to the fund, the state shall no longer be responsible for the safekeeping of the property and shall be relieved of all liability to the extent of the value of the property for any claim that may arise or be made with respect to the property.

(2) A holder who has paid money to the administrator pursuant to this article may make payment to any person appearing to the holder to be entitled to payment, and, upon filing proof of payment and proof that the payee was entitled thereto, the administrator shall promptly reimburse the holder for the payment without imposing any fee or other charge. If reimbursement is sought for a payment made on a negotiable instrument, including a money order, the holder must be reimbursed under this subsection (2) upon filing proof that the instrument was duly presented and that payment was made to a person who appeared to the holder to be entitled to payment. The holder must be reimbursed for payment made under this subsection (2) even if the payment was made to a person whose claim was barred under section 38-13-122 (1).

(3) A holder who has delivered property other than money to the administrator pursuant to this article may reclaim the property if still in the possession of the administrator, without



paying any fee or other charge, upon filing proof that the owner has claimed the property from the holder.

(4) The administrator may accept the holder's affidavit as sufficient proof of the facts that entitle the holder to recover money and property under this section.

(5) If the holder pays or delivers property to the administrator in good faith and thereafter another person claims the property from the holder or another state claims the money or property under its laws relating to escheat or abandoned or unclaimed property, the administrator, upon written notice of the claim, shall defend the holder against the claim and indemnify the holder against any liability on the claim.

(6) For the purposes of this section, "good faith" means that:

(a) Payment or delivery was made in a reasonable attempt to comply with this article;

(b) The person delivering the property was not a fiduciary then in breach of trust in respect to the property and had a reasonable basis for believing, based on the facts then known to him, that the property was abandoned for the purposes of this article; and

(c) There is no showing that the records pursuant to which the delivery was made did not meet reasonable commercial standards of practice in the industry.

(7) Property removed from a safe deposit box or other safekeeping repository is received by the administrator subject to the holder's right under this subsection (7) to be reimbursed for the actual cost of the opening of such repository and subject to any valid lien or contract providing for the holder to be reimbursed for unpaid rent or storage charges. The administrator shall reimburse or pay the holder for such costs out of the proceeds remaining after deducting the administrator's selling cost.

**Source: L. 87:** Entire article added, p. 1325, § 1, effective July 1. **L. 2004:** (1) amended, p. 1877, § 3, effective August 4.

**38-13-114. Crediting of dividends, interest, or increments to owner's account.** Whenever property other than money is paid or delivered to the administrator under this article, the owner is entitled to receive from the administrator any dividends, interest, or other increments realized or accruing on the property at or before liquidation or conversion thereof into money.

**Source: L. 87:** Entire article added, p. 1326, § 1, effective July 1.

**38-13-115. Public sale of abandoned property.** (1) Except as provided in subsections (2), (3), and (5) of this section, the administrator, within three years after the receipt of abandoned property, shall sell it to the highest bidder at public sale in whatever city in the state affords in the judgment of the administrator the most favorable market for the property involved. The administrator may decline the highest bid and reoffer the property for sale if in the judgment of the administrator the bid is insufficient. If in the judgment of the administrator the probable cost of sale exceeds the value of the property, it need not be offered for sale. Any sale held under this section must be preceded by a single publication of notice, at least three weeks in advance of sale, in a newspaper of general circulation in the county in which the property is to be sold.

(2) Securities listed on an established stock exchange must be sold at prices prevailing on the exchange at the time of sale. Other securities may be sold over the counter at prices prevailing at the time of sale or by any other method the administrator considers advisable.

(3) Unless the administrator considers it to be in the best interest of the state to do otherwise, all securities delivered to the administrator shall be held for at least one year before he or she may sell them. On and after July 1, 2004, the administrator shall take all reasonable action to sell the securities delivered to him or her as provided in this section. All proceeds collected from the sale of securities pursuant to this section shall be deposited in the unclaimed property tourism promotion trust fund created in section 38-13-116.7.

(4) The purchaser of property at any sale conducted by the administrator pursuant to this article takes the property free of all claims of the owner or previous holder thereof and

of all persons claiming through or under them. The administrator shall execute all documents necessary to complete the transfer of ownership.

(5) The administrator shall retain or loan to the Colorado state veterans center at Homelake or to an alternate state facility selected by the administrator that has appropriate and secure space suitable for public display any military medal or decoration or other military award or citation that is delivered to the administrator pursuant to section 38-13-113 until the owner of the property claims the property in accordance with section 38-13-117 (1) and the administrator allows the claim pursuant to section 38-13-117 (3).

**Source:** **L. 87:** Entire article added, p. 1326, § 1, effective July 1. **L. 2002:** (1) amended and (5) added, p. 319, § 1, effective August 7. **L. 2004:** (3) amended, p. 1262, § 2, effective May 27. **L. 2012:** (5) amended, (HB 12-1063), ch. 149, p. 537, § 6, effective May 3.

**Cross references:** For the legislative declaration in the 2004 act amending subsection (3), see section 1 of chapter 322, Session Laws of Colorado 2004.

### **38-13-116. Creation of funds - repeal. (Repealed)**

**Source:** **L. 87:** Entire article added, p. 1326, § 1, effective July 1. **L. 89:** (1) amended and (2) repealed, p. 1440, §§ 1, 2, effective April 6. **L. 90:** (1) amended and (3) added, p. 1635, § 8, effective April 27; (3)(b) amended, p. 641, § 3, effective July 1; (3)(b)(II) added by revision, p. 641, § 5. **L. 93:** (3)(b) amended, p. 1025, § 4, effective June 2; (1) amended and (4) added, p. 1075, § 6, effective July 1. **L. 95:** (3)(b)(III) added and (4)(a) amended, p. 526, §§ 7, 8, effective May 16. **L. 97:** (3)(b)(I), (4)(b), and (4)(c) amended, p. 622, § 22, effective July 1. **L. 2000:** Entire section amended, p. 400, § 3, effective August 2.

**Editor's note:** Subsection (5) provided for the repeal of this section, effective July 1, 2001. (See L. 2000, p. 400.)

**38-13-116.5. Unclaimed property trust fund - creation - payments - interest - appropriations - records - rules.** (1) (a) There is hereby created in the state treasury the unclaimed property trust fund. The principal in the trust fund shall consist of all moneys collected by the administrator under this article. On July 1, 2001, any moneys in the abandoned property fund, the unclaimed insurance moneys fund, or the business associations unclaimed moneys fund created in section 38-13-116 shall be transferred to and shall become a part of the trust fund.

(b) Except as provided in subsections (2) and (2.7) of this section, the principal of the trust fund shall not be expended except to pay claims made pursuant to this article. Moneys comprising the principal of the trust fund shall not constitute fiscal year spending of the state for purposes of section 20 of article X of the state constitution and are not subject to appropriation by the general assembly.

(c) All interest derived from the deposit and investment of moneys in the trust fund shall be credited to the trust fund.

(d) The moneys in the unclaimed property trust fund shall not revert to the general fund at the end of any fiscal year.

(2) (a) For the 2001-02 fiscal year and each fiscal year thereafter, the general assembly shall make annual appropriations out of the principal of the unclaimed property trust fund for the direct and indirect costs of administering this article, except as provided for the payment of contract auditor services in paragraph (b) of this subsection (2).

(b) Moneys in the unclaimed property trust fund shall be continuously appropriated to the state treasurer for the payment of contract auditor services. Any moneys appropriated for the payment of contract auditor services shall be paid from revenues collected by contract auditors.

(c) As soon as feasible after April 22, 2009, the state treasurer shall promulgate rules in accordance with article 4 of title 24, C.R.S., as may be necessary to administer payment for contract auditor services, including any rules necessary to:



- (I) Specify the requirements or expertise of contract auditors;
  - (II) Adequately protect unclaimed property while the property is in the possession of the contract auditor; and
  - (III) Prevent identity theft and the sale or transfer of personal identifying information obtained by the contract auditor during the course of the contract auditor's duties.
- (d) Any moneys appropriated to the department of the treasury pursuant to this subsection (2) shall constitute fiscal year spending for purposes of section 20 of article X of the state constitution.

(2.5) Repealed.

(2.6) Notwithstanding any provision of this section to the contrary:

(a) On June 1, 2009, the state treasurer shall deduct fifty million dollars from the unclaimed property trust fund and transfer such sum to the general fund; and

(b) On July 1, 2009, the state treasurer shall deduct twenty-five million dollars from the unclaimed property trust fund and transfer such sum to the general fund.

(2.7) (a) Repealed.

(a.5) (I) On and after January 1, 2009, the state treasurer shall transmit to CoverColorado an amount of the principal and interest in the trust fund equal to the amount requested pursuant to section 10-8-530 (1) (c), C.R.S., minus:

(A) The claims paid pursuant to this article for each fiscal year;

(B) The reserve amount necessary to pay anticipated claims; and

(C) Publications and correspondence expenses pursuant to section 38-13-111 (7).

(II) Upon receipt of a request for a supplemental transmittal pursuant to section 10-8-530 (1) (d), C.R.S., the state treasurer shall transmit to CoverColorado an amount of the principal and interest in the trust fund equal to the amount so requested.

(b) Repealed.

(c) The treasurer shall report to the general assembly annually any transmission of moneys to CoverColorado pursuant to this subsection (2.7).

(d) (Deleted by amendment, L. 2008, p. 1260, § 5, effective July 1, 2008.)

(3) Before crediting any moneys to the trust fund pursuant to subsection (1) of this section, the administrator shall record the name and last-known address of each person appearing from the holders' reports to be entitled to the property. The record shall be available for public inspection during all reasonable business hours.

**Source:** L. 2000: Entire section added, p. 399, § 1, effective August 2. L. 2001: (1)(c) amended, p. 1052, § 40, effective July 1. L. 2002: (1)(b) and (2) amended and (2.5) added, p. 161, § 1, effective March 27; (1)(b) amended, p. 679, § 1, effective March 28. L. 2004: (1)(b) and (1)(c) amended and (2.7) added, p. 1149, § 2, effective August 4. L. 2008: (2.7)(a), (2.7)(b), and (2.7)(d) amended and (2.7)(a.5) added, p. 1260, § 5, effective July 1. L. 2009: (2) amended, (HB 09-1301), ch. 173, p. 772, § 1, effective April 22; (2.6) added, (SB 09-279), ch. 367, p. 1931, § 21, effective June 1. L. 2010: (2.5) repealed, (HB 10-1422), ch. 419, p. 2121, § 172, effective August 11. L. 2011: (1)(b) amended, (HB 11-1303), ch. 264, p. 1174, § 88, effective August 10.

**Editor's note:** (1) Section 38-13-116 referenced in subsection (1) was repealed, effective July 1, 2001.

(2) Subsections (2.7)(a)(II) and (2.7)(b)(II) provided for the repeal of subsections (2.7)(a) and (2.7)(b), respectively, effective January 1, 2009. (See L. 2008, p. 1260.)

**38-13-116.7. Unclaimed property tourism promotion trust fund - creation - payments - interest - transfers.** (1) There is hereby created in the state treasury the unclaimed property tourism promotion trust fund. The principal in the trust fund shall consist of all proceeds collected by the administrator from the sale of securities pursuant to section 38-13-115.

(2) The principal of the unclaimed property tourism promotion trust fund shall not be expended except to pay claims made pursuant to this article. Moneys comprising the principal of the trust fund that are credited to or expended from the trust fund to pay claims shall not constitute fiscal year spending of the state for purposes of section 20 of article X

of the state constitution, and such moneys shall be deemed custodial funds that are not subject to appropriation by the general assembly.

(3) (a) Beginning with the 2008-09 state fiscal year, the interest derived from the deposit and investment of moneys in the unclaimed property tourism promotion trust fund shall be credited to the following funds:

(I) Twenty-five percent of the interest to the Colorado state fair authority cash fund created in section 35-65-107 (1), C.R.S., subject to appropriation by the general assembly pursuant to section 35-65-107 (3) (b), C.R.S.;

(II) Sixty-five percent of the interest to the agriculture management fund created in section 35-1-106.9, C.R.S., subject to appropriation by the general assembly pursuant to section 35-1-106.9, C.R.S.; and

(III) (A) Ten percent of the interest to the Colorado travel and tourism promotion fund created in section 24-49.7-106 (1), C.R.S., subject to appropriation by the general assembly pursuant to section 24-49.7-106 (3), C.R.S., for use in the promotion of agritourism in the state. For the purposes of this subparagraph (III), "agritourism" means the practice of engaging in activities, events, and services that have been provided to consumers for recreational, entertainment, or educational purposes at a farm, ranch, or other agricultural, horticultural, or agribusiness operation in order to allow consumers to experience, learn about, and participate in various facets of agricultural industry, culinary pursuits, natural resources, and heritage.

(B) The board of directors of the Colorado tourism office created in section 24-49.7-103, C.R.S., shall consult annually, and execute a memorandum of understanding, with the commissioner of agriculture regarding the expenditure of moneys appropriated pursuant to sub-subparagraph (A) of this subparagraph (III) in order to coordinate agritourism promotion efforts.

(b) Any moneys that are credited to and expended from the Colorado state fair authority cash fund, the agriculture management fund, or the travel and tourism promotion fund pursuant to this subsection (3) shall constitute fiscal year spending of the state for purposes of section 20 of article X of the state constitution.

(4) The moneys in the unclaimed property tourism promotion trust fund shall not revert to the general fund at the end of any fiscal year.

(5) Notwithstanding any provision of this section to the contrary, on July 1, 2009, the state treasurer shall deduct five million dollars from the unclaimed property tourism promotion trust fund and transfer such sum to the general fund.

**Source: L. 2004:** Entire section added, p. 1262, § 3, effective May 27. **L. 2008:** (3) amended, p. 864, § 1, effective February 27, 2009. **L. 2009:** (5) added, (SB 09-279), ch. 367, p. 1929, § 13, effective June 1.

**Cross references:** For the legislative declaration in the 2004 act adding this section, see section 1 of chapter 322, Session Laws of Colorado 2004.

**38-13-117. Filing of claim with administrator.** (1) A person, excluding another state, this state, or a governmental agency of this state, claiming an interest in any property paid or delivered to the administrator may file with him or her a claim on a form prescribed by the administrator and verified by the claimant. If the value of the property claimed is one hundred dollars or less, the administrator may waive the requirement that the claimant verify the claim. The administrator shall require the claimant to submit his or her social security number or federal employer identification number, whichever is applicable. The social security number or federal employer identification number shall not become part of the public records of the administrator.

(2) The administrator shall consider each claim and give written notice within ninety days after the filing of the claim to the claimant if the claim is denied in whole or in part. The notice may be given by mailing it to the last-known address, if any, stated in the claim as the address to which such notice is to be sent. If no address for notice is stated in the claim, the notice may be mailed to the last-known address, if any, of the claimant as stated



in the claim. No notice of denial need be given if the claim fails to state either the last-known address to which such notice is to be sent or the current address of the claimant.

(3) (a) Subject to the provisions of sections 38-13-117.3, 38-13-117.5, and 38-13-117.7, if a claim is allowed, the administrator shall pay over or deliver to the claimant the property or the amount the administrator actually received or the net proceeds if it has been sold by the administrator, together with any additional amount required by section 38-13-114. If the property claimed was interest-bearing to the owner on the date of surrender by the holder, the administrator also shall pay simple interest at a rate of six percent a year or any lesser rate the property earned while in the possession of the holder. Such interest begins to accrue when the property is delivered to the administrator and ceases on the expiration of five years after delivery or the date on which payment is made to the owner. No interest on interest-bearing property is payable for any period before July 1, 1987.

(b) The administrator shall pay or deliver to the public employees' retirement association the amount necessary to purchase service credit pursuant to section 24-51-503, C.R.S., if the owner of an account left inactive or an unclaimed member refund described in section 38-13-108.5 (1) requests restoration of service credit which was forfeited when funds were transferred to the abandoned property fund.

(4) Any holder who pays the owner for property that has been delivered to the state and which, if claimed from the administrator, would be subject to subsection (3) of this section shall add interest as provided in subsection (3) of this section. The added interest must be repaid to the holder by the administrator in the same manner as the principal is repaid.

**Source:** L. 87: Entire article added, p. 1327, § 1, effective July 1. L. 92: (3)(b) added, p. 2112, § 9, effective March 4. L. 2004: (1) amended, p. 1877, § 4, effective August 4. L. 2005: (1) and (3)(a) amended, p. 699, § 4, effective August 8.

**Editor's note:** Section 9 of House Bill 92-1092 does not conform to the C.R.S. numbering format; therefore, (3)(a) in House Bill 92-1092 has been subsequently relettered to (3)(b).

**38-13-117.3. Claims offset for child support.** (1) Before paying a claim in an amount exceeding six hundred dollars pursuant to section 38-13-117 (3), the administrator shall offset against the amount of the claim the claimant's obligations to pay current child support, child support debt, retroactive child support, child support arrearages, child support costs, or child support when combined with maintenance. The administrator may enter into a memorandum of understanding with the department of human services to implement this section and section 26-13-118.5, C.R.S.

(2) (a) If a claimant owes current child support, child support debt, retroactive child support, child support arrearages, child support costs, or child support when combined with maintenance, and also owes restitution or fines, fees, costs, or surcharges as described in section 38-13-117.5 or delinquent state taxes, penalties, or interest as described in section 38-13-117.7, or both, the unclaimed property offset against the current child support, child support debt, retroactive child support, child support arrearages, child support costs, or child support when combined with maintenance shall take priority and be applied first.

(b) If a claimant owes both restitution or fines, fees, costs, or surcharges and delinquent state taxes, penalties, or interest, after payment in accordance with paragraph (a) of this subsection (2), if applicable, any remaining unclaimed property shall be applied first toward the payment of the outstanding restitution or fines, fees, costs, or surcharges and processed in accordance with section 38-13-117.5 and then applied to the payment of delinquent state taxes, penalties, or interest and processed in accordance with section 38-13-117.7.

(c) If a claimant owes restitution or fines, fees, costs, or surcharges or delinquent state taxes, penalties, or interest, after payment in accordance with paragraph (a) of this subsection (2), if applicable, any remaining unclaimed property shall be applied toward the payment of the outstanding restitution or fines, fees, costs, or surcharges and processed in accordance with section 38-13-117.5 or toward the delinquent state taxes, penalties, or interest and processed in accordance with section 38-13-117.7, whichever is applicable.

**Source:** L. 2005: Entire section added, p. 699, § 5, effective August 8.

**38-13-117.5. Claims offset for judicial restitution, fines, fees, costs, or surcharges.**

(1) Before paying a claim in an amount exceeding six hundred dollars pursuant to section 38-13-117 (3), the administrator shall offset against the amount of the claim the claimant's outstanding court fines, fees, costs, or surcharges or restitution. The administrator may enter into a memorandum of understanding with the judicial department to implement this section and sections 16-11-101.6 (6) and 16-18.5-106.7, C.R.S.

(2) If a claimant owes fines, fees, costs, or surcharges or restitution as described in this section and also owes current child support, child support debt, retroactive child support, child support arrearages, child support costs, or child support when combined with maintenance as described in section 38-13-117.3 or delinquent state taxes, penalties, or interest as described in section 38-13-117.7, or both, the unclaimed property offsets shall be applied in accordance with the priority set forth in section 38-13-117.3 (2).

**Source: L. 2005:** Entire section added, p. 700, § 5, effective August 8.

**38-13-117.7. Claims offset for state tax delinquencies.** (1) Before paying a claim in an amount exceeding six hundred dollars pursuant to section 38-13-117 (3), the administrator shall compare the social security number or federal employer identification number of the claimant with the numbers certified by the department of revenue for the purpose of the unclaimed property offset as provided in section 39-21-121, C.R.S.

(2) If the social security number or federal employer identification number of a claimant appears among the numbers certified by the department of revenue pursuant to section 39-21-121, C.R.S., the administrator shall suspend the payment of the claim until the requirements of section 39-21-121, C.R.S., are met. If, after consulting with the department, the administrator determines that the claimant is obligated to pay the amounts certified under section 39-21-121, C.R.S., the administrator shall withhold from the amount of the unclaimed property paid to the claimant an amount equal to the amount of delinquent state taxes, penalties, or interest. If the amount of the unclaimed property is less than or equal to the amount of delinquent state taxes, penalties, or interest, the administrator shall withhold the entire amount of the unclaimed property. The administrator shall transmit any unclaimed property so withheld to the department for disbursement as directed in section 39-21-121, C.R.S.

(3) If a claimant owes delinquent state taxes, penalties, or interest as described in this section and also owes current child support, child support debt, retroactive child support, child support arrearages, child support costs, or child support when combined with maintenance as described in section 38-13-117.3 or restitution or fines, fees, costs, or surcharges as described in section 38-13-117.5, or both, the unclaimed property offset shall be applied in accordance with the priority set forth in section 38-13-117.3 (2).

**Source: L. 2005:** Entire section added, p. 700, § 5, effective August 8.

**38-13-118. Claim of another state to recover property - procedure.** (1) At any time after property has been paid or delivered to the administrator under this article, another state may recover the property if:

(a) The property was subjected to custody by this state because the records of the holder did not reflect the last-known address of the apparent owner when the property was presumed abandoned under this article and the other state establishes that the last-known address of the apparent owner or other person entitled to the property was in that state and that, under the laws of that state, the property escheated to or was subject to a claim of abandonment by that state;

(b) The last-known address of the apparent owner or other person entitled to the property, as reflected by the records of the holder, is in the other state and, under the laws of that state, the property has escheated to or become subject to a claim of abandonment by that state;

(c) The records of the holder were erroneous in that they did not accurately reflect the actual owner of the property and the last-known address of the actual owner is in the other



state and, under the laws of that state, the property escheated to or was subject to a claim of abandonment by that state;

(d) The property was subjected to custody by this state under section 38-13-104 (1) (f) and, under the laws of the state of domicile of the holder, the property has escheated to or become subject to a claim of abandonment by that state; or

(e) The property is the sum payable on a money order or other similar instrument that was subjected to custody by this state under section 38-13-105 and the instrument was purchased in the other state and, under the laws of that state, the property escheated to or became subject to a claim of abandonment by that state.

(2) The claim of another state to recover escheated or abandoned property must be presented in a form prescribed by the administrator, who shall decide the claim within ninety days after it is presented. The administrator shall allow the claim if he determines that the other state is entitled to the abandoned property under subsection (1) of this section.

(3) The administrator shall require a state, before recovering property under this section, to agree to indemnify this state and its officers and employees against any liability on a claim for the property.

**Source: L. 87:** Entire article added, p. 1327, § 1, effective July 1.

**38-13-118.5. Claim of the state or governmental agency.** At any time after property has been paid or delivered to the administrator under this article, if the administrator determines that the state or a state governmental agency owns the property, the administrator may transfer the property to an operating account of the state or the agency.

**Source: L. 2004:** Entire section added, p. 1877, § 5, effective August 4.

**38-13-119. Action to establish claim.** A person aggrieved by a decision of the administrator or whose claim has not been acted upon within ninety days after its filing may bring an action to establish the claim in a court of competent jurisdiction, naming the administrator as a defendant. The action must be brought within ninety days after the decision of the administrator or within one hundred eighty days after the filing of the claim if he has failed to act on it. If the aggrieved person establishes the claim in an action against the administrator, he shall be entitled to an award of costs and reasonable attorney fees.

**Source: L. 87:** Entire article added, p. 1328, § 1, effective July 1.

**38-13-120. Election to take payment or delivery.** (1) The administrator may decline to receive any property reported under this article that the administrator considers to have a value less than the expense of giving notice and of sale. If the administrator elects not to receive custody of the property, the holder shall be notified within one hundred twenty days after filing the report required under section 38-13-110.

(2) A holder, with the written consent of the administrator and upon conditions and terms prescribed by him, may report and deliver property before the property is presumed abandoned. Property delivered under this subsection (2) must be held by the administrator and is not presumed abandoned until such time as it otherwise would be presumed abandoned under this article.

**Source: L. 87:** Entire article added, p. 1328, § 1, effective July 1. **L. 92:** (1) amended, p. 2113, § 10, effective March 4. **L. 95:** (1) amended, p. 527, § 9, effective May 16.

**38-13-121. Destruction or disposition of property having insubstantial commercial value - immunity from liability.** If the administrator determines after investigation that any property delivered under this article has insubstantial commercial value, the administrator may destroy or otherwise dispose of the property at any time. No action or proceeding may be maintained against the state or any officer or against the holder for or on account of any action taken by the administrator pursuant to this section.

**Source: L. 87:** Entire article added, p. 1329, § 1, effective July 1.

**38-13-122. Periods of limitation.** (1) The expiration, before or after July 1, 1987, of any period of time specified by contract, statute, or court order, during which a claim for money or property can be made or during which an action or proceeding may be commenced or enforced to obtain payment of a claim for money or to recover property, does not prevent the money or property from being presumed abandoned or affect any duty to file a report or to pay or deliver abandoned property to the administrator as required by this article.

(2) No action or proceeding may be commenced by the administrator with respect to any duty of a holder under this article more than five years after the duty arose.

**Source:** L. 87: Entire article added, p. 1329, § 1, effective July 1.

**38-13-123. Requests for reports and examination of records.** (1) The administrator may require any person who has not filed a report to file one stating whether or not the person is holding any unclaimed property reportable or deliverable under this article.

(2) Except as otherwise provided in subsection (7) of this section, the administrator, at reasonable times and upon reasonable notice, may examine the records of any person to determine whether the person has complied with the provisions of this article. The administrator may conduct the examination even if the person believes he is not in possession of any property reportable or deliverable under this article.

(3) If a person is treated under section 38-13-107 as the holder of the property only insofar as the interest of the business association in the property is concerned, the administrator, pursuant to subsection (2) of this section, may examine the records of the person if the administrator has given the notice required by subsection (2) of this section to both the person and the business association at least ninety days before the examination.

(4) If an examination of the records of a person results in the disclosure of property reportable and deliverable under this article, the administrator may assess the cost of the examination against the holder at the rate of fifty dollars a day for each examiner, but in no case may the charges exceed the value of the property found to be reportable and deliverable. The cost of examination made pursuant to subsection (3) of this section may be imposed only against the banking or financial organization.

(5) On or after July 1, 1987, if a holder fails to maintain records in existence on or after July 1, 1987, that are required by section 38-13-124 and, in addition, if the records of the holder available for the periods subject to this article are insufficient to permit the preparation of a report pursuant to section 38-13-110, then the administrator may require the holder to report and pay such amounts as may reasonably be estimated from any available records.

(6) Repealed.

(7) Any examination under this section of the records of a business association with annual gross receipts of less than five hundred thousand dollars arising from a report filed under this article by such an association shall be conducted by the administrator within three years from the date of filing such report.

**Source:** L. 87: Entire article added, p. 1329, § 1, effective July 1; (5) amended and (6) added, p. 1335, § 5, effective July 1. L. 92: (5) amended, p. 2113, § 11, effective March 4; (6) repealed, p. 2120, § 8, effective July 1. L. 93: (2) amended and (7) added, p. 1076, § 7, effective July 1. L. 95: (1) and (5) amended, p. 527, § 10, effective May 16.

**Editor's note:** Section 7 of chapter 275, Session Laws of Colorado 1987, provides that the act set out in that chapter amending subsection (5) and enacting subsection (6) is effective July 1, 1987, but the governor did not approve the act until July 10, 1987.

**38-13-124. Retention of records.** (1) Every holder required to file a report under section 38-13-110, as to any property for which it has obtained the last-known address of the owner, shall maintain a record of the name and last-known address of the owner for five



years after the property becomes reportable, except to the extent that a shorter time is provided in subsection (2) of this section or by rule of the administrator.

(2) Any banking or financial organization that sells in this state its money orders or other similar written instruments, other than third-party bank checks on which the banking or financial organization is directly liable, or that provides such instruments to others for sale in this state, shall maintain a record of those instruments while they remain outstanding, indicating the state and date of issue for three years after the date the property is reportable.

**Source:** L. 87: Entire article added, p. 1330, § 1, effective July 1. L. 92: (1) amended, p. 2113, § 12, effective March 4. L. 95: (1) amended, p. 527, § 11, effective May 16.

**38-13-125. Enforcement.** The administrator may bring an action in a court of competent jurisdiction to enforce this article.

**Source:** L. 87: Entire article added, p. 1330, § 1, effective July 1.

**38-13-126. Interstate agreements and cooperation - joint and reciprocal actions with other states.** (1) The administrator may enter into agreements with other states to exchange information needed to enable this or another state to audit or otherwise determine unclaimed property that it or another state may be entitled to subject to a claim of custody. The administrator by rule may require the reporting of information needed to enable compliance with agreements made pursuant to this section and prescribe the form of such reporting.

(2) To avoid conflicts between the administrator's procedures and the procedures of administrators in other jurisdictions that enact unclaimed property legislation, the administrator, so far as is consistent with the purposes, policies, and provisions of this article, before adopting, amending, or repealing rules, shall advise and consult with administrators in other jurisdictions that enact such legislation and take into consideration the rules of administrators in those jurisdictions.

(3) The administrator may join with other states to seek enforcement of this article against any person who is or may be holding property reportable under this article.

(4) At the request of another state, the attorney general of this state may bring an action in the name of the administrator of the other state in any court of competent jurisdiction to enforce the unclaimed property laws of the other state against a holder in this state of property subject to escheat or a claim of abandonment by the other state if the other state has agreed to pay expenses incurred by the attorney general in bringing the action.

(5) The administrator may request that the attorney general of another state or any other person bring an action in the name of the administrator in the other state. This state shall pay all expenses including attorney fees in any action under this subsection (5). Any expenses paid pursuant to this subsection (5) may not be deducted from the amount that is subject to the claim by the owner under this article.

**Source:** L. 87: Entire article added, p. 1330, § 1, effective July 1.

**38-13-127. Interest and penalties.** (1) A person who fails to pay or deliver property within the time prescribed by this article shall pay to the administrator interest at the annual rate of eighteen percent on the property or value thereof from the date the property should have been paid or delivered.

(2) A person who willfully fails to render any report or perform other duties required under this article shall pay a civil penalty of one hundred dollars for each day the report is withheld or the duty is not performed, but not more than five thousand dollars.

(3) A person who willfully fails to pay or deliver property to the administrator as required under this article shall pay a civil penalty equal to twenty-five percent of the value of the property that should have been paid or delivered.

(4) A person who willfully refuses after written demand by the administrator to pay or deliver property to the administrator as required under this article shall pay a civil penalty,

in addition to any other civil penalty provided by this section, of three times the value of any property held by said person.

(5) (a) Any business association with annual gross receipts of less than five hundred thousand dollars that, in good faith compliance, acts within the scope of the duties and responsibilities of this article shall be immune from the penalties and interest of this section for failure to pay or deliver property or to render any report required by this article. For purposes of this article, there shall be a presumption of good faith compliance when such a business association has filed the initial or annual report required by this article and a principal of such business association has attested, as evidenced by such principal's signature on such report, that such business association has made reasonable efforts to determine if such business holds any property presumed abandoned under this article. The presumption of good faith compliance may be rebutted by the administrator upon a showing by a preponderance of evidence that such a business association's actions were knowingly false, deliberately misleading, or made for a malicious purpose.

(b) The administrator shall explain what constitutes good faith compliance with regard to the reporting and payment or delivery requirements of this article in any document, manual, or request distributed by the administrator to such a business association in connection with this article.

**Source:** L. 87: Entire article added, p. 1331, § 1, effective July 1. L. 93: (5) added, p. 1077, § 8, effective July 1.

**38-13-128. Agreements to locate reported property.** (1) All agreements to pay compensation to recover or assist in the recovery of property reported under section 38-13-110 entered into within twenty-four months after the date payment or delivery is made under section 38-13-112 are unenforceable.

(2) Any agreement to pay compensation to recover or assist in the recovery of property reported under section 38-13-110 entered into more than twenty-four months, but less than thirty-six months, after the date payment or delivery is made under section 38-13-112 is enforceable if:

- (a) The agreement is in writing and signed by the owner of the property;
- (b) The agreement describes the property to be recovered;
- (c) The agreement sets forth the nature of the services to be provided; and
- (d) The compensation to be paid under the terms of the agreement is not in excess of twenty percent of the market value of the recoverable property.

(3) Any agreement to pay compensation to recover or assist in the recovery of property reported under section 38-13-110 entered into thirty-six months or more after the date payment or delivery is made under section 38-13-112 is enforceable if:

- (a) The agreement is in writing and signed by the owner of the property;
- (b) The agreement describes the property to be recovered;
- (c) The agreement sets forth the nature of the services to be provided; and
- (d) The compensation to be paid under the terms of the agreement is not in excess of thirty percent of the market value of the recoverable property.

(4) Nothing in subsections (2) and (3) of this section shall be construed to prohibit an owner from asserting, at any time, that a written, signed agreement to recover or assist in the recovery of property is based on excessive or unjust consideration.

(5) The restrictions on agreements to pay compensation to recover or assist in the recovery of property set forth in this section shall not apply to any agreement to pay compensation to recover or assist in the recovery of property reported under section 38-13-110 if such property has a total value of less than one thousand dollars.

**Source:** L. 87: Entire article added, p. 1331, § 1, effective July 1. L. 92: Entire section amended, p. 2113, § 13, effective March 4. L. 95: Entire section amended, p. 528, § 12, effective May 16. L. 98: Entire section amended, p. 106, § 1, effective August 5.



**38-13-129. Foreign transactions.** This article does not apply to any property held, due, and owing in a foreign country and arising out of a foreign transaction.

**Source:** L. 87: Entire article added, p. 1331, § 1, effective July 1.

**38-13-130. Effect of new provisions - clarification of application.** (1) This article does not relieve a holder of a duty that arose before July 1, 1987, to report, pay, or deliver property. A holder who did not comply with the law in effect before July 1, 1987, is subject to the applicable enforcement and penalty provisions that then existed, and they are continued in effect for the purpose of this subsection (1), subject to section 38-13-122 (2).

(2) (a) The initial report filed under this article for property that was not required to be reported before July 1, 1987, but that is subject to this article must include all items of property for which the presumption of abandonment first arose during the five-year period preceding July 1, 1987, as if this article had been in effect during that period.

(b) The initial report filed under this article for property that was not required to be reported before July 1, 1992, but that is subject to this article must include all items of property for which the presumption of abandonment first arose during the five-year period preceding July 1, 1992, as if this article had been in effect during that period. Any person who has not reported as of July 1, 1992, shall not be penalized for not reporting prior to November 1, 1993.

**Source:** L. 87: Entire article added, p. 1331, § 1, effective July 1. L. 92: (2) amended, p. 2120, § 9, effective July 1. L. 95: (2) amended, p. 528, § 13, effective July 1.

**38-13-131. Rules.** The administrator shall adopt rules and regulations pursuant to section 24-4-103, C.R.S., to effectuate the purposes of this article.

**Source:** L. 87: Entire article added, p. 1331, § 1, effective July 1.

**38-13-132. Uniformity of application and construction.** This article shall be applied and construed so as to effectuate its general purpose to make uniform the law with respect to the subject of this article among states enacting similar legislation.

**Source:** L. 87: Entire article added, p. 1331, § 1, effective July 1.

**38-13-133. Applicability - exclusions. (Repealed)**

**Source:** L. 87: Entire article added, p. 1331, § 1, effective July 1. L. 88: Entire section amended, p. 1433, § 21, effective June 11. L. 90: Entire section amended, p. 1636, § 9, effective April 27. L. 92: Entire section amended, p. 2114, § 14, effective March 4. L. 93: Entire section repealed, p. 1075, § 3, effective July 1.

**38-13-134. Application of article to other sections.** This article applies to any unclaimed or intangible property as provided in this article; but, where there is a conflict between this article and a specific statutory provision or local law relating to the disposition of tangible or intangible unclaimed property, such specific statutory provision or local law shall control the disposition of said property.

**Source:** L. 87: Entire article added, p. 1332, § 1, effective July 1. L. 92: Entire section amended, p. 2120, § 10, effective July 1.

**LOANED PROPERTY****ARTICLE 14****Loans to Museums**

38-14-101.	Legislative declaration.	38-14-107.	Responsibilities of owners of loaned property.
38-14-102.	Definitions.	38-14-108.	Museum's lien for expenses.
38-14-103.	Limitations on recovery of loaned property.	38-14-109.	Representations as to ownership.
38-14-104.	Termination of loans by museums.	38-14-110.	Disputed ownership.
38-14-105.	Manner of giving notice.	38-14-111.	Title of property purchased from museum.
38-14-106.	Notice upon accepting loaned property.	38-14-112.	Property not to escheat.

**38-14-101. Legislative declaration.** The general assembly hereby finds and declares that the growth and maintenance of museum collections, both public and private, is a matter of general public interest to the citizens of Colorado. Because museums of all kinds depend upon loans of various articles of property to augment their collections and because uncertainty regarding title to and responsibility for loaned property is a hindrance to museums in their efforts to maintain, repair, and dispose of property in their possession, it is the purpose of this article to fairly and reasonably allocate responsibilities and to provide rules for the determination of title and financial responsibilities in certain cases.

**Source: L. 88:** Entire article added, p. 1250, § 1, effective April 14.

**38-14-102. Definitions.** As used in this article, unless the context otherwise requires:

(1) "Loaned property" means any property accepted by a museum which is not accompanied by a transfer of title.

(2) "Museum" means a nonprofit or public institution which is organized and operated primarily for the purpose of collecting, cataloging, exhibiting, or archiving objects of educational, scientific, historical, or aesthetic interest and the collection of which is generally open to the public. The term includes, without limitation, historical societies, parks, monuments, and libraries.

(3) "Owner" and "lender" mean the actual owner of loaned property or his duly authorized agent, trustee, conservator, custodian, heir, or fiduciary, whether an individual, association, trust, partnership, corporation, or any similar organization capable of having an interest in property.

(4) "Property" means all tangible objects, animate and inanimate, collected or maintained by a museum for educational, historic, or exhibition purposes.

**Source: L. 88:** Entire article added, p. 1250, § 1, effective April 14.

**38-14-103. Limitations on recovery of loaned property.** (1) Subject to the contrary terms of any written agreement, no action may be brought for damages or the recovery of any loaned property when:

(a) Seven years have passed without written contact between the museum and the lender and the lender's identity or current address is unknown to the museum; or

(b) More than one hundred twenty days have passed since a museum has given written notice of termination of a loan pursuant to section 38-14-104 and the lender has not reclaimed the loaned property; except that no lender shall be prejudiced in this regard for want of reasonable cooperation from the museum holding his loaned property.

**Source: L. 88:** Entire article added, p. 1251, § 1, effective April 14.

**38-14-104. Termination of loans by museums.** (1) A museum may give written notice of termination of a loan at any time after the expiration of a loan made for a specified



period or at any time if the loan is for an indefinite period. Any loan not evidenced by a writing stating the term of the loan and signed by the lender shall be deemed a loan for an indefinite period.

(2) Notice given under this section shall contain:

- (a) A description of the loaned property sufficient to identify it;
- (b) The last-known name and address of the lender;
- (c) The date of the loan or the date the loaned property was accepted by the museum if the loan was not evidenced by a writing;
- (d) The name, address, and telephone number of the appropriate officer or official at the museum to be contacted regarding the loan;
- (e) A statement referring the lender to this article and informing him that failure to reclaim his loaned property within one hundred twenty days shall result in the loss of all rights in said property.

**Source:** L. 88: Entire article added, p. 1251, § 1, effective April 14.

**38-14-105. Manner of giving notice.** The notice required in section 38-14-103 (1) (b) shall be sufficient when mailed by certified mail, return receipt requested, delivery restricted to owner as defined in section 38-14-102 (3), to the last-known address of the lender as reflected in the records of the museum.

**Source:** L. 88: Entire article added, p. 1251, § 1, effective April 14.

**38-14-106. Notice upon accepting loaned property.** On and after July 1, 1988, when a museum accepts loaned property or receives written notice of a change in ownership of loaned property, the museum shall inform the lender or new lender within thirty days, in writing, of the provisions of section 38-14-103. Where notice is not given in accordance with this section, the provisions of section 38-14-103 (1) (b) shall not apply.

**Source:** L. 88: Entire article added, p. 1251, § 1, effective April 14.

**38-14-107. Responsibilities of owners of loaned property.** In all cases it shall be the responsibility of the owner of loaned property to notify the museum in writing of his identity and current address. It shall be the responsibility of any new owner acquiring loaned property to notify the museum within sixty days of his name and address. Any owner of loaned property shall, upon request from a museum holding loaned property, promptly provide evidence of ownership satisfactory to the museum. This section shall apply to all changes in ownership, whether by sale, gift, devise, operation of law, or any other means. So long as a museum deals honestly and in good faith, no museum shall be prejudiced by reason of any failure to deal with the true owner of any loaned property if the owner has failed to comply with the requirements of this section.

**Source:** L. 88: Entire article added, p. 1252, § 1, effective April 14.

**38-14-108. Museum's lien for expenses.** When the lender of loaned property is unknown, a museum shall have a lien against the value of specific loaned property for expenses reasonably necessary to protect the loaned property from ordinary decay and deterioration due to natural causes, from theft, or from vandalism.

**Source:** L. 88: Entire article added, p. 1252, § 1, effective April 14.

**38-14-109. Representations as to ownership.** A museum shall not be liable for actions taken in reasonable reliance upon the representations of one who first transfers an item of property to the museum that he is the true owner of the loaned property.

**Source: L. 88:** Entire article added, p. 1252, § 1, effective April 14.

**38-14-110. Disputed ownership.** In cases of disputed ownership of loaned property, a museum shall not be held liable for its refusal to surrender loaned property in its possession except in reliance upon a court order or judgment.

**Source: L. 88:** Entire article added, p. 1252, § 1, effective April 14.

**38-14-111. Title of property purchased from museum.** When a museum which acquired title to loaned property pursuant to section 38-14-103 sells said property, the purchaser shall acquire good title free of all claims and defenses.

**Source: L. 88:** Entire article added, p. 1252, § 1, effective April 14.

**38-14-112. Property not to escheat.** Loaned property in the possession of a museum at the time of the owner's death which would otherwise escheat to the state under section 15-11-105 or 15-12-914, C.R.S., shall not so escheat but shall become the property of the museum to which it is then loaned.

**Source: L. 88:** Entire article added, p. 1252, § 1, effective April 14.

## LIENS

### ARTICLE 20

#### Lien on Personal Property

**Cross references:** For general tax liens, see articles 1 to 13 of title 39; for enforcement of tax liens, see article 20 of title 39; for mortgages and trust deeds on real property, see articles 35 and 37 to 40 of this title; for judgment liens, see article 52 of title 13; for liens on motor vehicles, see article 6 of title 42; for partido contracts, see § 35-54-106.

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##### LIEN ON PERSONAL PROPERTY

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## PART 1

## LIEN ON PERSONAL PROPERTY

**38-20-101. Definitions.** As used in this article, unless the context otherwise requires:

(1) "Customer" means any person who:

(a) Hires a molder to fabricate, cast, or otherwise prepare a die, tool, mold, form, or pattern for the purpose of manufacturing, assembling, casting, fabricating, or otherwise making a product; or

(b) Provides a molder with a die, tool, mold, form, or pattern for the purpose of manufacturing, assembling, casting, fabricating, or otherwise making a product.

(2) "Mold" means a die, tool, mold, form, or pattern.

(3) "Molder" means any person who fabricates, casts, or otherwise prepares or uses a die, tool, mold, form, or pattern for the purpose of manufacturing, assembling, casting, fabricating, or otherwise preparing a product. "Molder" includes, but is not limited to, a tool or die maker. A molder shall not be deemed to be a warehouse as defined in section 4-7-102 (a) (13), C.R.S.

(3.5) "Pet animals" means dogs, cats, or other domestic animals, except livestock as defined in section 38-20-202 (6).

(4) "Rent temporary shelter" or "rent temporary trailer space" means shelter or trailer space that is rented for a fee for a period of time not exceeding one month, but excluding month to month tenancies that have been in effect at least four months.

**Source:** L. 71: p. 951, § 3. C.R.S. 1963: § 86-1-15. L. 98: Entire section amended, p. 363, § 1, effective September 30. L. 2005: (3.5) added, p. 637, § 1, effective May 27. L. 2006: (3) amended, p. 505, § 56, effective September 1.

**38-20-102. Lien for care and feeding of pet animals - landlord.** (1) (a) Any feeder, veterinarian, or other person to whom pet animals are entrusted for the purpose of feeding, keeping, boarding, or medical care shall have a lien, which shall be superior to all other liens, upon such pet animals for the amount that may be due for such feeding, keeping, boarding, or medical care and for all costs incurred in enforcing such lien.

(b) If the lienholder complies with the provisions of section 38-20-103 and the pet animals referred to in paragraph (a) of this subsection (1) are sold, exchanged, or otherwise disposed of to another from the premises of the lienholder by anyone other than the lienholder acting on his or her own behalf, the lien created by this subsection (1) shall continue and attach to the proceeds received or receivable therefrom. This lien shall also be superior to all other liens.

(2) The keeper of any hotel, motel, inn, or boardinghouse or any other person who rents temporary shelter to transient guests shall have a lien upon the personal property of such transient guests found upon the premises for the amount that may be due for lodging and boarding services rendered and for all costs incurred in enforcing such lien, and such liens shall apply to the personal property of transient guests who rent temporary trailer space in any trailer court or auto court in this state. The provisions of this section shall not apply to motor vehicles owned by such transient guests parked on the premises of such hotel, motel, inn, or boardinghouse or to stolen property.

(3) (a) Any person who rents furnished or unfurnished rooms or apartments for the housekeeping purposes of his tenants, as well as the keeper of a trailer court who rents trailer space, shall have a lien upon the tenant's personal property that is then on or in the rental premises. The value of the lien shall be for the amount of unpaid board, lodging, or rent, and for reasonable costs incurred in enforcing the lien, not including attorney fees. The lien shall be upon the household furniture, goods, appliances, and other personal property of the tenant and members of his household then being upon the rental premises, but exclusive of small kitchen appliances, cooking utensils, beds, bedding, necessary wearing apparel, personal or business records and documents, and the personal effects of the tenant and the members of his household.

(b) In the event the tenant has vacated the premises, the landlord shall allow the tenant and members of his household access to the premises at any reasonable time and in a reasonable manner to remove any property not covered by the lien.

(c) In the event the tenant has not vacated the premises, the landlord or his agent may enter upon the premises at any reasonable time for the purpose of asserting the lien and, in a reasonable manner and peaceably, the landlord may assert dominion over the personal property covered by the lien. Assertion of the lien provided in this section in a manner which substantially interferes with the tenant's right to reasonably occupy and enjoy the premises is unlawful and shall cause forfeiture of the lien and shall give rise to an action for damages.

**Source:** L. 1883: p. 237, § 1. G.S. § 2118. R.S. 08: § 4013. C.L. § 6428. L. 29: p. 440, § 1. CSA: C. 101, § 1. CRS 53: § 86-1-1. L. 61: p. 512, § 1. C.R.S. 1963: § 86-1-1. L. 71: p. 949, § 1. L. 77: (1) amended, p. 1709, § 1, effective May 18. L. 2005: (1) amended, p. 637, § 2, effective May 27.

## ANNOTATION

- I. General Consideration.
- II. Lien of Agistor.
- III. Lien of Landlord.

### I. GENERAL CONSIDERATION.

**Law reviews.** For note, "The Landlord's Lien in Colorado", see 27 Dicta 447 (1950). For note, "The Landlord's Lien in Colorado Practice and Under the Bankruptcy Act", see 40 U. Colo. L. Rev. 402 (1968). For note, "Housing the Poor: A Study of the Landlord-Tenant Relationship", see 41 U. Colo. L. Rev. 541 (1969). For article, "The Rights of Landlords in Tenants' Personal Property", see 57 Den. L. J. 685 (1980). For article, "Colorado's Landlord Lien Statute: Equal Protection and Due Process Infirmities", see 11 Colo. Law. 1867 (1982). For article, "The Colorado Agistor's Lien Statute: Scope, Enforcement and Due Process", see 16 Colo. Law. 989 (1987). For article, "Agricultural Lending in a Troubled Economy", see 16 Colo. Law. 1773 (1987).

**Section is in derogation of common law** and must be strictly construed. McKee Livestock Co. v. Menzel, 70 Colo. 308, 201 P. 52 (1921).

**Possession is essential to support lien** and that possession must be exclusive. McKee Livestock Co. v. Menzel, 70 Colo. 308, 201 P. 52 (1921).

**Applied** in Wall v. Garrison, 11 Colo. 515, 19 P. 469 (1888); Longnecker v. Shields, 1 Colo. App. 264, 28 P. 659 (1891); Noxon v. Glaze, 11 Colo. App. 503, 53 P. 827 (1898); Rohrer v. Ross, 53 Colo. 328, 125 P. 489 (1912); Sorrells v. Sigel-Campion Live Stock Comm'n Co., 27 Colo. App. 154, 148 P. 279 (1915); Scanlan v. LaCoste, 59 Colo. 449, 149 P. 835 (1915).

### II. LIEN OF AGISTOR.

**Agistment defined.** Agistment is where a person takes in and feeds or depastures horses,

cattle, or similar animals upon the lands for reward. Auld v. Travis, 5 Colo. App. 535, 39 P. 357 (1895).

**Lien for agistment is purely statutory.** Auld v. Travis, 5 Colo. App. 535, 39 P. 357 (1895); Rohrer v. Ross, 53 Colo. 328, 125 P. 489 (1912).

**Livery-stable keeper had no lien at common law.** Wall v. Garrison, 11 Colo. 515, 19 P. 469 (1888).

**Lien is for food and care expended** upon the cattle of another where the cattle are entrusted to the agistor's care. Auld v. Travis, 5 Colo. App. 535, 39 P. 357 (1895).

**No lien exists in favor of mere hired servant** of the owner. McKee Livestock Co. v. Menzel, 70 Colo. 308, 201 P. 52 (1921).

**Absent custody of stock, ranchman lacks lien.** Ranchman has no lien where he only sold the feed to be consumed by the animals which remained in the custody of their owner; the ranchman had no other custody of the stock then that which flowed from the permission to use his yards for feeding purposes. Tabor v. Salisbury, 3 Colo. App. 335, 33 P. 190 (1893).

**Trespass or trover actions maintainable by agistor against wrongdoer.** Once an animal is delivered into the agistor's possession and is subject to his control, the agistor's possession is so exclusive that he may maintain an action in trespass or trover against a wrongdoer for any injury to their possession. Auld v. Travis, 5 Colo. App. 535, 39 P. 357 (1895).

**Agistor is responsible only for ordinary negligence.** Auld v. Travis, 5 Colo. App. 535, 39 P. 357 (1895).

**Intervenor's release of cattle to sheriff pursuant to writ of execution was not voluntary and, therefore, was not a waiver of agistor's lien.** La Junta Prod. Credit Ass'n v. Schroder, 800 P.2d 1360 (Colo. App. 1990).

**Agistor's lien has priority status over the rights and claims of a perfected security interest.** La Junta Prod. Credit Ass'n v. Schroder, 800 P.2d 1360 (Colo. App. 1990).



### III. LIEN OF LANDLORD.

**“Any person who rents furnished or unfurnished rooms” construed.** The general words, “any person who rents furnished or unfurnished rooms”, are construed as applicable to persons renting rooms for lodging purposes; they are not intended to include the owners of business houses, who rent their rooms solely for purposes of business. *Morse v. Morrison*, 16 Colo. App. 449, 66 P. 169 (1901).

Storerooms without counters or shelving, offices without desks, safes, or chairs are not the kind of unfurnished rooms contemplated by this section. *Morse v. Morrison*, 16 Colo. App. 449, 66 P. 169 (1901).

**Applicability of subsection (3) (a).** Subsection (3) (a) applies to hotels, boardinghouses, rooming houses, and the like. *McDonnell v. Solomon*, 64 Colo. 226, 170 P. 951 (1918).

**Landlord has lien on furniture for unpaid rent.** Where A rented to S a partially furnished room, and S bought of T a small lot of furniture and placed it in the room, then S left the room while in debt for room rent and sold his furniture back to T in payment of a balance owed on purchase price, A has a valid lien on the furniture for the unpaid rent, and T is not entitled to recover such furniture by replevin without first paying to A the amount of his lien. *Albers v. Turley*, 10 Colo. App. 450, 51 P. 530 (1897).

**Innkeeper - bailee must exercise ordinary care of property.** Where the status of an innkeeper was that of a bailee holding property upon which he had a lien as security for a sum due, he is bound to ordinary diligence and ordinary care. *Murray v. Marshall*, 9 Colo. 482, 13 P. 589 (1886).

**38-20-103. Pet animal contract to be filed.** All contracts, or copies thereof, made by the owner of any pet animal with any other person, including a feeder, for the caring for the same for pay, or on shares, or in any other manner may be filed with the county clerk and recorder of the county where the owners or either of them reside, if they reside in the state, and, if the owners or either of them do not reside in the state, the copies may be filed with the county clerk and recorder of the county in which the contract was made. When such copies are so filed they shall be notice to everyone of the contents of such contracts and of the legal effect thereof.

**Source:** L. 1887: p. 417, § 1. R.S. 08: § 6381. C.L. § 6429. CSA: C. 101, § 2. CRS 53: § 86-1-2. C.R.S. 1963: § 86-1-2. L. 77: Entire section amended, p. 1709, § 2, effective May 18. L. 2005: Entire section amended, p. 638, § 3, effective May 27.

### ANNOTATION

**Section is not to be interpreted as recording statute,** noncompliance with which authorizes bona fide purchasers and encumbrancers to deal with the person in possession as owner. *Clay, Robinson & Co. v. Atencio*, 74 Colo. 17, 218 P. 906 (1923).

**Recording of agistor's contract is not necessary** to preserve the rights of the owner. *Clay, Robinson & Co. v. Atencio*, 74 Colo. 17, 218 P. 906 (1923).

### 38-20-104. Landlord to retain property - sale. (Repealed)

**Source:** L. 1889: p. 188, § 4. R.S. 08: § 3006. C.L. § 6430. L. 29: p. 441, § 2. CSA: C. 101, § 3. CRS 53: § 86-1-3. C.R.S. 1963: § 86-1-3. L. 71: p. 950, § 2. L. 75: Entire section repealed, p. 1419, § 9, effective April 24.

**38-20-105. Lien of common carrier.** Every common carrier of goods or passengers who, at the request of the owner of any personal goods, carries, conveys, or transports the same from one place to another and every other person who safely keeps or stores any personal property at the request of the owner or person lawfully in possession thereof shall have a lien upon all such personal property for his reasonable charges for the transportation, storage, or keeping thereof and for all reasonable and proper advances made thereon by him, in accordance with the usage and custom of common carriers and warehousemen.

**Source:** L. 1883: p. 237, § 2. G.S. § 2119. R.S. 08: § 4014. C.L. § 6431. CSA: C. 101, § 4. CRS 53: § 86-1-4. C.R.S. 1963: § 86-1-4. L. 76: Entire section amended, p. 314, § 68, effective May 20.

**Cross references:** For liens of warehousemen and enforcement thereof, see §§ 4-7-209 and 4-7-210; for lien of a carrier on goods covered by a bill of lading and enforcement thereof, see §§ 4-7-307 and 4-7-308.

#### ANNOTATION

**Law reviews.** For article, "Mechanics' Liens Relative to Oil and Gas Operations — Part II", see 34 Dicta 373 (1957). For article, "Impact of the Uniform Commercial Code on Colorado Law", see 42 Den. L. Ctr. J. 67 (1965).

**Condition that towing carriers must agree to release personal property items inside a towed vehicle to the owner before payment of**

**any accrued charges in order to be on a rotation towing list** of the Colorado state patrol does not conflict with this section. *Jam Action, Inc. v. Colo. State Patrol*, 890 P.2d 210 (Colo. App. 1994).

**Applied** in *Jackson v. Price*, 112 Colo. 97, 146 P.2d 892 (1944).

**38-20-106. Lien for labor.** Any mechanic or other person who makes, alters, repairs, or bestows labor upon any article of personal property, at the request of the owner of such personal property or his agent shall have a lien upon such property for the amount due for such labor done or material furnished and for all costs incurred in enforcing such lien.

**Source:** L. 1883: p. 237, § 3. G.S. § 2120. L. 1889: p. 233, § 2. R.S. 08: § 4015. C.L. § 6432. CSA: C. 101, § 5. CRS 53: § 86-1-5. C.R.S. 1963: § 86-1-5.

**Cross references:** For mechanic's liens on land and fixtures, see article 22 of this title.

#### ANNOTATION

**Law reviews.** For article, "The Rights of Landlords in Tenants' Personal Property", see 57 Den. L. J. 685 (1980).

**Mechanic's performance of contract essential to creation of lien.** A mechanic who, under contract, bestows labor upon a chattel for its improvement is entitled to retain the possession thereof until he has been paid for his services, but performance of the contract is essential to the creation of the lien and the existence of the right of improvement. *Hillsburg v. Harrison*, 2 Colo. App. 298, 30 P. 355 (1892).

**Lien imports right to hold and detain property.** The lien provided in this section imports simply the right to hold and detain the property. *Wenz v. McBride*, 20 Colo. 195, 36 P. 1105 (1894).

**Employee not invested with possession of bricks burned.** The employment of defendant in error to burn brick does not invest him with

such possession of the brick as is requisite to support a lien under this section. *Wenz v. McBride*, 20 Colo. 195, 36 P. 1105 (1894).

**Tailor entitled to possess garments made by him.** A tailor, to whom material was furnished to be made into garments, is a mechanic entitled to hold possession of the garments until the price of labor which he has put on them for their betterment is paid by the employer if he fulfilled his contract. *Hillsburg v. Harrison*, 2 Colo. App. 298, 30 P. 355 (1892).

**Proof of delivery for repairs required for lien claim.** One claiming a lien upon a wagon for repairs must make it appear from an averment of facts that it was delivered to him for the purpose of such repairs. *Rohrer v. Ross*, 53 Colo. 328, 125 P. 489, 1914B Ann. Cas. 315 (1912).

**Applied** in *Denver Motor Fin. Co. v. Stevens*, 128 Colo. 531, 265 P.2d 224 (1953).

**38-20-106.2. Molders' liens - creation - notice.** (1) A molders' lien shall attach to all of a customer's molds in a molder's possession for which a balance is due from such customer for any manufacturing or fabrication work performed and materials furnished. A molders' lien shall be for the amount due for any such work performed or materials furnished, including interest at the rate specified in section 38-22-101 (5), unless otherwise agreed, and for all costs incurred in enforcing such lien, including attorney fees if specified by contract. The amount of such lien shall be determined by the value of any such manufacturing or fabrication work performed and material furnished unless the cost of such work and materials is otherwise specified by contract. A molder may retain possession of a mold until all charges are paid for such lien, unless a claim is made to such mold by the holder of a prior lien or by the holder of a lien of public record.



(2) A molders' lien created pursuant to this section shall be considered a security interest for the purposes of section 18-5-206, C.R.S.

(3) No lien created by this section shall have priority over a lien of public record, including a lien filed pursuant to title 4, C.R.S., regardless of when the financing statement or notice of lien was filed or recorded.

**Source: L. 98:** Entire section added, p. 364, § 2, effective September 30.

**38-20-106.5. Motor vehicle repair garages - restoration of liens.** (1) A motor vehicle repair garage which is entitled to a lien under section 38-20-106 for motor vehicle repairs and which has released the motor vehicle upon receipt of payment for such repairs in the form of a check, draft, or order for the payment of money upon any bank, depository, person, firm, or corporation shall be entitled to the restoration of the lien if the check, draft, or order is not honored for full payment or is dishonored upon its presentment and if the maker, issuer, or drawer fails, within twelve days after receiving notice from the motor vehicle repair garage of nonpayment or dishonor, to pay the check, draft, or order. In the event such motor vehicle repair garage has released the motor vehicle upon an open account, the motor vehicle repair garage shall be entitled to restoration of the lien if the total amount as agreed upon by the parties is not paid when due as agreed upon by the parties and if the debtor fails, within twelve days after receiving notice from the motor vehicle repair garage of nonpayment, to pay the amount due. Restoration of such lien shall entitle the motor vehicle repair garage to regain possession of the motor vehicle. In regaining possession, the motor vehicle repair garage may proceed without judicial process if this can be done without breach of the peace or may proceed by action.

(2) "Notice", as used in subsection (1) of this section, means notice given to the person entitled thereto, either in person or in writing. Such notice in writing shall be conclusively presumed to have been given when deposited by registered or certified mail, return receipt requested and postage prepaid, in the United States mail and addressed to such person at his address as it appears on the invoice or such check, draft, or order or, in the case of an open account, as it appears on the account records of the motor vehicle repair garage. Any notice regarding an open account may only be given subsequent to nonpayment.

**Source: L. 77:** Entire section added, p. 1924, § 2, effective January 1, 1978. **L. 81:** Entire section amended, p. 1820, § 1, effective July 1.

**38-20-107. Commencement of foreclosure action.** (1) If any such charges for which a lien is given by section 38-20-102, 38-20-105, 38-20-106, or 38-20-106.2 or for which a lien is restored by section 38-20-106.5 are not paid within thirty days after the same become due and payable, the mechanic, innkeeper, or other person to whom such lien is given may file a foreclosure action in the county or district court of the county or city and county in which the contract or agreement between the lienholder and the owner of the property was signed or entered into, in which the owner resided at the time the contract or agreement was entered into, in which the owner resides at the time the foreclosure action is commenced or in which the work was performed, or, in the case of a lien created pursuant to section 38-20-106.2, in which any work was performed or materials were furnished. In the event that the lienholder does not foreclose the lien by commencing a judicial action within sixty days and if, under section 38-20-106, within ninety days after charges become due and payable, the lien shall terminate. However, such period of limitation may be extended by agreement between the parties for an additional period not to exceed thirty days. For the purposes of this subsection (1), if the contract between the owner and the lienholder provides for installment or continuing payments, installments or continuing payments shall be deemed to be due after default of any installment or payment or at the time the final installment or payment is due and payable at the option of the lienholder.

(2) If the lienholder sells or otherwise disposes of the property of the owner without substantially complying with this article, the owner is entitled to recover from the lienholder

the value of the property, but in no event less than one hundred dollars, and reasonable attorney fees.

(3) Nothing in this article shall require a lienholder to commence a judicial action to foreclose his lien if the property held is abandoned as defined in section 38-20-116.

**Source:** L. 1883: p. 238, § 4. G.S. § 2121. R.S. 08: § 4016. C.L. § 6433. CSA: C. 101, § 6. CRS 53: § 86-1-6. C.R.S. 1963: § 86-1-6. L. 64: p. 289, § 222. L. 75: Entire section amended, p. 1416, § 1, effective April 24. L. 77: (1) amended, p. 1710, § 3, effective May 18. L. 81: (1) amended, p. 1821, § 2, effective July 1. L. 87: (1) amended, p. 1583, § 44, effective July 10. L. 98: (1) amended, p. 364, § 3, effective September 30. L. 2005: (1) amended, p. 638, § 4, effective May 27.

#### ANNOTATION

**Law reviews.** For article, "Impact of the Uniform Commercial Code on Colorado Law", see 42 Den. L. Ctr. J. 67 (1965). For article, "The Rights of Landlords in Tenants' Personal Property", see 57 Den. L. J. 685 (1980). For article, "The Colorado Agistor's Lien Statute: Scope, Enforcement and Due Process", see 16 Colo. Law. 989 (1987).

**Once his lien has terminated, lienholder has no further right to withhold possession of**

the lien property, and the owner of property subject to the lien is entitled to recover for any damages incurred from unlawful retention. White v. Jackson, 41 Colo. App. 433, 586 P.2d 243 (1978).

**Applied** in Tarantino v. Martin, 43 Colo. App. 308, 602 P.2d 906 (1979).

**38-20-108. Foreclosure action - procedure.** (1) In any foreclosure action, the lienholder or the lienholder's attorney, by complaint, shall show to the court the following:

(a) That the lienholder did perform a specified service for the defendant which entitles such lienholder to a lien on personal property owned by the defendant pursuant to the provisions of section 38-20-102, 38-20-105, 38-20-106, or 38-20-106.2;

(b) That said service was performed at the request of the defendant or his agent;

(c) A particular description of the property upon which the lien is claimed and a statement of its actual value;

(d) That the defendant has failed to pay charges within thirty days after the same became due and payable;

(e) That notice of demand for charges has been given to the owner personally or by registered mail at the owner's last-known address;

(f) An itemized description of the charges for labor performed and parts replaced if a lien is claimed under section 38-20-106;

(g) An itemized description of the charges for any work performed and materials furnished, including interest at the rate specified in section 38-22-101 (5), unless otherwise agreed, and for all costs incurred in enforcing such lien, including attorney fees if specified by contract if a lien is claimed under section 38-20-106.2.

(2) Upon filing the complaint, the clerk of the court shall issue a summons as in other cases; except that it shall command the defendant to appear before the court at a place named in such summons and at a time and on a day which shall be not less than three nor more than five days from the day of issuing the same to answer the complaint of plaintiff. The summons shall also contain a statement addressed to the defendant stating: "If you fail to file with the court, at or before the time for appearance specified in the summons, an answer to the complaint, denying or admitting all of the material allegations of the complaint, judgment by default may be taken against you for the lien charges described in the complaint, for costs as provided in this article, and for any other relief to which the plaintiff is entitled."

(3) If either party requests a delay in trial longer than five days, the court, in its discretion, upon good cause shown, may require either of the parties to give bond in an amount to be fixed by the court for the payment to the opposing party of such amount as



he may be entitled to due to the delay. The bond shall be secured by two or more sureties, by one corporate surety authorized to do business in this state, or by cash bond, to be approved by the court.

**Source:** **L. 1883:** p. 238, § 5. **G.S. § 2122. R.S. 08:** § 4017. **C.L. § 6434. CSA:** C. 101, § 7. **CRS 53:** § 86-1-7. **C.R.S. 1963:** § 86-1-7. **L. 64:** p. 289, § 223. **L. 75:** Entire section R&RE, p. 1417, § 2, effective April 24. **L. 77:** (2) R&RE, p. 1710, § 4, effective May 18. **L. 98:** IP(1) and (1)(a) amended and (1)(g) added, p. 365, § 4, effective September 30.

#### ANNOTATION

**Law reviews.** For article, "The Rights of Landlords in Tenants' Personal Property", see 57 Den. L. J. 685 (1980). For article, "The Colorado Agistor's Lien Statute: Scope, Enforcement and Due Process", see 16 Colo. Law. 989 (1987).

**38-20-109. Lienor may sell - procedure.** (1) When the lienor has received a judgment and after giving ten days' prior notice of the time and place of such sale, with a description of the property to be sold, by one publication in some newspaper published in the county wherein he or she resides or, if there is no such newspaper, by posting in three public places within such county and after delivering to the owner of such personal property or, if he or she does not reside in the county, transmitting by mail to him or her at his or her usual place of abode, if known, a copy of such notice, he or she may proceed to sell all such personal property, or so much thereof as may be necessary, at public auction, for cash in hand, at any public place within such county between the hours of 10 a.m. and 4 p.m. of the day appointed. From the proceeds thereof he or she may pay the reasonable costs of such foreclosure, notice, and sale and any necessary and reasonable charges for the preserving, maintaining, feeding, boarding, or caring for the property on which he or she has a lien, together with the reasonable cost of keeping such property up to the time of sale, but the reasonable costs of keeping such property up to the time of sale shall not exceed ninety dollars. He or she shall render the residue of the proceeds and of the property unsold to the owner.

(2) Where property upon which the lien is being foreclosed is in danger of serious and immediate decay or waste or is likely to depreciate rapidly in value pending the determination of the issue or where the keeping of it will be attended with great expense, the lienholder, as plaintiff to the action, may apply to the court, upon due notice as the court may direct, for a sale thereof; and, thereupon, the court in its discretion may order the property sold in the manner provided for in said order, and the proceeds of said sale shall be deposited with the clerk of the court to abide the further order of the court. Upon application for such order for sale, the court in its discretion, upon good cause shown, may require the plaintiff to give bond in an amount to be fixed by the court for the payment to the defendant of such amount as the defendant may be entitled to for damages sustained by the defendant in the event of wrongful foreclosure. The bond shall be secured by two or more sureties, by one corporate surety authorized to do business in this state, or by cash bond, to be approved by the court.

**Source:** **L. 1883:** p. 238, § 6. **G.S. § 2123. R.S. 08:** § 4018. **C.L. § 6435. CSA:** C. 101, § 8. **CRS 53:** § 86-1-8. **C.R.S. 1963:** § 86-1-8. **L. 75:** Entire section amended, p. 1417, § 3, effective April 24. **L. 77:** Entire section amended, p. 1710, § 5, effective May 18. **L. 2005:** (1) amended, p. 638, § 5, effective May 27.

**Cross references:** For publication of legal notices, see part 1 of article 70 of title 24.

## ANNOTATION

**Law reviews.** For article, "Impact of the Uniform Commercial Code on Colorado Law", see 42 Den. L. Ctr. J. 67 (1965). For article, "The Rights of Landlords in Tenants' Personal Property", see 57 Den. L. J. 685 (1980).

For article, "Colorado's Landlord Lien Statute: Equal Protection and Due Process Infirmities", see 11 Colo. Law. 1867 (1982). For article, "The Colorado Agistor's Lien Statute: Scope, Enforcement and Due Process", see 16 Colo. Law 989 (1987).

**Automobile titleholder denied recovery for failure to pay lienor.** An automobile titleholder, who instituted a replevin action against a parking lot owner to recover possession of the car which the parking lot owner retained under a claim of lien for storage charges, cannot prevail in his suit where he failed to pay, or make a legal tender of, the reasonable charges due the lienor. *Jackson v. Price*, 112 Colo. 97, 146 P.2d 892 (1944).

**38-20-110. Sale void, when. (Repealed)**

**Source:** L. 1883: p. 239, § 7. G.S.: § 2124. R.S. 08: § 4019. C.L. § 6436. CSA: C. 101, § 9. CRS 53: § 86-1-9. C.R.S. 1963: § 86-1-9. L. 75: Entire section repealed, p. 1419, § 9, effective April 24.

**38-20-111. Lienor may purchase.** At such sale the person to whom such lien is given may become the purchaser.

**Source:** L. 1883: p. 239, § 8. G.S. § 2125. R.S. 08: § 4020. C.L. § 6437. CSA: C. 101, § 10. CRS 53: § 86-1-10. C.R.S. 1963: § 86-1-10.

**38-20-112. Sale continued - when - record.** In any case where the property to be sold cannot conveniently be sold in one day, the sale may be continued from day to day at the place of sale. Upon the completion of such sale, the person to whom the lien is given shall cause a bill of sale thereof to be filed with the court in which judgment was taken, in which shall be set down the sum for which each separate article of property was sold and the name of the purchaser. The court shall record such bill of sale in its docket and preserve the original thereof.

**Source:** L. 1883: p. 239, § 9. G.S. § 2126. R.S. 08: § 4021. C.L. § 6438. CSA: C. 101, § 11. CRS 53: § 86-1-11. C.R.S. 1963: § 86-1-11. L. 64: p. 289, § 224. L. 75: Entire section amended, p. 1418, § 4, effective April 24.

**38-20-113. Lien no bar to suit for charges.** Nothing in this article shall take away the right of action of the party to whom such lien is given to satisfy his judgment pursuant to law and the Colorado rules of civil procedure for his charges or for any residue thereof after sale of such property.

**Source:** L. 1883: p. 239, § 10. G.S. § 2127. R.S. 08: § 4022. C.L. § 6439. CSA: C. 101, § 12. CRS 53: § 86-1-12. C.R.S. 1963: § 86-1-12. L. 75: Entire section amended, p. 1418, § 5, effective April 24.

## ANNOTATION

**Law reviews.** For article, "Enforcement of Security Interests in Colorado", see 25 Rocky Mt. L. Rev. 1 (1952).



**38-20-114. Clerk of sale.** At such sale the person to whom such lien is given may appoint a clerk and crier.

**Source:** L. 1883: p. 239, § 11. G.S. § 2128. R.S. 08: § 4023. C.L. § 6440. CSA: C. 101, § 13. CRS 53: § 86-1-13. C.R.S. 1963: § 86-1-13.

**38-20-115. Sale fees.** Clerks of the county or district court may charge for recording each bill of sale a fee as authorized by section 13-32-104, C.R.S.

**Source:** L. 1883: p. 239, § 12. G.S. § 2129. R.S. 08: § 4024. C.L. § 6411. CSA: C. 6441, § 14. CRS 53: § 86-1-14. C.R.S. 1963: § 86-1-14. L. 64: p. 290, § 225. L. 75: Entire section R&RE, p. 1418, § 6, effective April 24. L. 87: Entire section amended, p. 1583, § 45, effective July 10.

**38-20-116. Abandoned property - notice of sale - definitions.** (1) Property is presumed to be abandoned if the owner has failed to contact the lienholder for a period of not less than thirty days and the lienholder, in good faith, is without knowledge of any evidence indicating that the owner does not intend to abandon the property.

(2) At least fifteen days prior to selling or otherwise disposing of abandoned property, the lienholder shall notify the owner of the proposed manner and date of disposition by transmitting said notice to the owner's last known address by registered or certified mail, return receipt requested, signed by the addressee only. The lienholder shall maintain in his records for a period of one year a copy of said notice together with the return receipt signed by the addressee, or, if said notice is returned unclaimed, said notice and the proof of return unclaimed shall be so maintained. If the written notice is returned unclaimed, the lienholder shall publish said notice at least one day in a newspaper in the county in which the property is located or, if no newspaper is published in that county, then a newspaper in some adjoining county.

(2.5) (a) The provisions of this subsection (2.5) shall apply to abandoned motor vehicles at repair shops.

(b) For purposes of this subsection (2.5), unless the context otherwise requires:

(I) "Abandoned motor vehicle" means a motor vehicle:

(A) That has been left at a repair shop by the motor vehicle's owner, the owner's agent, or an operator hired by the owner or owner's agent;

(B) That the repair shop has offered to repair and for which the repair shop has prepared an estimate of repair costs;

(C) That the owner or the owner's agent has refused to authorize repairs to, has refused to remove from the repair shop upon request, or has refused to pay for authorized and completed repairs to the vehicle. If a repair shop is unable, despite good faith efforts, to obtain a response from the owner or the owner's agent regarding the authorization of repairs, payment for authorized and completed repairs, or the removal of a motor vehicle, the owner or owner's agent shall be deemed to have refused to grant authorization, make payment, or remove the motor vehicle five working days following the repair shop's last good faith effort to contact the owner or owner's agent.

(D) That is not the subject of sale negotiations or a sale agreement between the owner or the owner's agent and the repair shop.

(II) "Department" means the department of revenue.

(III) "Division" means the division of motor vehicles in the department.

(IV) "Lienholder" means a person who holds a security interest in a motor vehicle under article 9 of title 4, C.R.S. For purposes of this subsection (2.5) only, "lienholder" shall not refer to the holder of a lien established pursuant to section 38-20-106.

(c) If a repair shop seeks to obtain a certificate of title for an abandoned motor vehicle for purposes of selling such vehicle, a repair shop, or where practicable, its agent, shall:

(I) At least fifteen days after the vehicle becomes an abandoned motor vehicle, establish the retail fair market value of the vehicle either by reference to sources generally accepted

within the insurance industry, including price guide books and computerized valuation services, or by seeking a Colorado licensed automobile dealer or certified appraisal;

(II) (A) Have the abandoned motor vehicle inspected and a verification of vehicle identification number completed by a peace officer certified pursuant to section 42-5-206, C.R.S. Such inspection shall not be over one year old when the repair shop or its agent seeks to obtain a certificate of title to the abandoned motor vehicle.

(B) If the verification of the vehicle identification number reveals that the vehicle is stolen, the peace officer completing the verification shall recover and secure the motor vehicle and notify its rightful owner.

(III) Request a Colorado title record search of the vehicle identification number of the abandoned motor vehicle from the division or check the electronic system implemented by the department as required in section 42-4-2103 (3) (c) (III), C.R.S., to obtain correct information relating to any owner and lienholder of the abandoned motor vehicle as represented in the department records. In addition to requesting a Colorado title record search, if the abandoned motor vehicle is an out-of-state vehicle, the repair shop or its agent shall request a title and lien search from the other state.

(IV) Use the information provided through the Colorado title record search or out-of-state title and lien search to notify by certified mail the owner of record, including an out-of-state owner of record, and all lienholders of its possession of the abandoned motor vehicle. The notice shall specify the location of the repair shop and that, unless claimed within thirty calendar days after the date the notice was sent, as determined from the postmark on the notice, the motor vehicle is subject to sale. The repair shop or its agent shall keep the proof of notification on file for three years from the date of mailing.

(V) Purchase a surety bond for twice the retail fair market value of the abandoned motor vehicle as established under subparagraph (I) of this paragraph (c);

(VI) Write a statement under penalty of perjury that includes the following information:

(A) That the repair shop or its agent notified the owner and any lienholders of the abandoned motor vehicle as required in subparagraph (IV) of this paragraph (c) and that neither the owner nor any lienholder has attempted to claim the abandoned motor vehicle within the time prescribed in subparagraph (IV) of this paragraph (c);

(B) The business name and address of the repair shop;

(C) The year, make, model, and vehicle identification number of the abandoned motor vehicle;

(D) The date the abandoned motor vehicle was left at the repair shop;

(E) The name of the person who left the abandoned motor vehicle at the repair shop. The repair shop or its agent shall provide a copy of any estimate as defined in section 42-9-102 (1.5), C.R.S., or work order as defined in section 42-9-102 (6), C.R.S. If the parties entered into an oral agreement, the repair shop shall provide the record of such communication as specified in section 42-9-104 (1) (c), C.R.S.

(F) Whether the abandoned motor vehicle is roadworthy as defined in section 42-6-102 (15), C.R.S.; and

(VII) (A) Not less than thirty days after the postmarked date of the notice mailed pursuant to subparagraph (IV) of this paragraph (c), present documentation of the requirements specified in subparagraphs (I) to (VI) of this paragraph (c) to the county motor vehicle office in the county in which the repair shop is located and apply for a certificate of title for the abandoned motor vehicle.

(B) If the retail fair market value of the abandoned motor vehicle is less than two hundred dollars, the sale shall be made only for the purpose of junking, scrapping, or dismantling the motor vehicle, and the purchaser thereof shall not, under any circumstances, be entitled to a certificate of title. The repair shop shall cause to be executed and delivered to the person purchasing the motor vehicle a bill of sale. The bill of sale shall state that the purchaser acquires no right to a certificate of title for such vehicle. The repair shop shall promptly submit together to the department a report of sale and a copy of the bill of sale and shall also deliver a copy of the report of sale to the purchaser of the motor vehicle. Upon receipt of any report of sale with supporting documents on any sale made pursuant to this sub-subparagraph (B), the department shall purge the records for the vehicle as provided in



section 42-4-2109 (1) (b) and shall not issue a new certificate of title for the vehicle. Any certificate of title issued in violation of this sub-subparagraph (B) shall be void.

(d) (I) After the repair shop or its agent has obtained a certificate of title for the abandoned motor vehicle as specified in paragraph (c) of this subsection (2.5), the repair shop or its agent shall sell the motor vehicle in a commercially reasonable manner at a public or private sale.

(II) Nothing in this paragraph (d) shall require a repair shop to be a licensed dealer pursuant to article 6 of title 12, C.R.S., for purposes of selling a motor vehicle pursuant to this section.

(e) The department may promulgate rules in accordance with article 4 of title 24, C.R.S. or create department-approved forms as may be appropriate to satisfy the requirements of this subsection (2.5).

(3) (a) The following provisions shall apply to molds, as defined in section 38-20-101:

(I) In the absence of an agreement to the contrary, a customer shall have all rights and title to any mold in the possession of a molder that was used to perform work for such customer; except that, if a customer has not claimed possession of a mold within three years following its last prior use, such mold shall be presumed to be abandoned by the customer and all rights and title to such mold shall be transferred to the molder who shall destroy or otherwise dispose of such mold as abandoned property in accordance with this section. For purposes of this subsection (3), "within three years following its last prior use" means any period following the last prior use of the mold and includes periods preceding September 30, 1998.

(II) Any molder who desires to have all rights and title to a mold shall send written notice to the customer's last-known address by registered or certified mail return receipt requested, signed by the addressee only. If the written notice is returned unclaimed, the molder shall publish said notice at least one day in a newspaper of general circulation in the area in which the mold is located. Such written notice shall clearly indicate that the molder intends to terminate the customer's rights and title to the mold described in such notice and shall include a recitation of the customer's rights, as set forth in this section.

(III) If a customer does not respond to the written notice sent pursuant to subparagraph (II) of this paragraph (a) within one hundred twenty days after the date of such notice to claim possession of the mold or does not make other contractual arrangements with the molder for storage of such mold, all rights and title of the customer to such mold shall transfer to the molder. Such molder may then destroy or otherwise dispose of the mold without risk of liability to the customer.

(IV) The molder shall maintain in such molder's records for a period of one year a copy of the notice sent pursuant to subparagraph (II) of this paragraph (a), together with the return receipt signed by the addressee, or, if said notice is returned unclaimed, said notice and the proof of return unclaimed shall be so maintained.

(b) Nothing in this subsection (3) shall require a molder to commence a judicial action to foreclose on a molder's lien if such mold is abandoned, as such term is defined in this section, and nothing in this subsection (3) shall be interpreted to eliminate any right of action a molder may have against a customer for unpaid charges, damages, costs, or attorney fees, if provided for by contract.

**Source:** L. 75: Entire section added, p. 1418, § 7, effective April 24. L. 98: (3) added, p. 365, § 5, effective September 30. L. 2008: (2.5) added, p. 539, § 1, effective January 1, 2009. L. 2009: (2.5)(c)(III) amended, (HB 09-1322), ch. 317, p. 1706, § 1, effective June 1; (2.5)(a) and IP(2.5)(b) amended, (SB 09-292), ch. 369, p. 1980, § 113, effective August 5.

#### ANNOTATION

**Law reviews.** For article, "The Rights of Landlords in Tenants' Personal Property", see 57 Den. L. J. 685 (1980).

**Section 42-4-1101 prevails over abandonment.** Removal and storage of abandoned vehicles is specifically provided for in § 42-4-

1101 and that special section will prevail over the more general abandonment provisions in this section. *Calabrese v. Hall*, 42 Colo. App. 347, 593 P.2d 1387 (1979).

**Lienholder liable if owner not supplied notice of sale.** Failure of lienholder to provide

owners the notice of sale required by subsection (2) makes lienholder liable to the owners pursuant to § 38-20-107 (2). *Tarantino v. Martin*, 43 Colo. App. 308, 602 P.2d 906 (1979).

## PART 2

### AGISTOR'S LIEN ACT

**38-20-201. Short title.** This part 2 shall be known and may be cited as the "Agistor's Lien Act".

**Source: L. 96:** Entire part added, p. 1387, § 11, effective July 1.

**38-20-202. Definitions.** As used in this part 2, unless the context otherwise requires:

(1) "Abandoned" means having forsaken entirely or neglected or refused to pay for feeding, herding, pasturing, keeping, ranching, boarding, or medical care for any livestock held by an agistor, its owner, or an owner's agent.

(2) "Agent" means any person who contracts for the feeding, herding, pasturing, keeping, ranching, or boarding of livestock or the provision of medical care for livestock.

(3) "Agistor" means any rancher, farmer, feeder, herder of cattle, livery stable keeper, veterinarian, or other person to whom livestock are entrusted by the owner for feeding, herding, pasturing, keeping, ranching, or boarding, or providing medical care.

(4) "Board" means the state board of stock inspection commissioners created in section 35-41-101, C.R.S.

(5) "Continuing payment" means charges that are due and owing to an agistor and do not have a definite termination date.

(6) "Livestock" means horses, mules, asses, cattle, sheep, hogs, and alternative livestock as defined in section 35-41.5-102 (1), C.R.S.

(7) "Public livestock market" means a public livestock market licensed pursuant to article 55 of title 35, C.R.S.

**Source: L. 96:** Entire part added, p. 1387, § 11, effective July 1.

**38-20-203. Agistor's lien.** (1) An agistor shall have a lien upon the livestock entrusted to its care for any amount that may be due for feeding, herding, pasturing, keeping, ranching, or boarding such livestock, for medical care provided to such livestock, and for all costs incurred in enforcing such lien, including attorney fees. The provisions of this section shall not apply to stolen livestock.

(2) An agistor's lien shall be effective for the entire period during which the livestock are held by the agistor, and if the livestock referenced in subsection (1) of this section are sold, exchanged, or otherwise disposed of from the premises of the lienor by anyone other than the lienor acting on his or her own behalf or the lienor's agent, the lien created by this section shall continue and shall attach to the proceeds received or receivable from such disposition. To the extent an agistor's lien remains effective, such lien shall be superior to all other liens.

**Source: L. 96:** Entire part added, p. 1388, § 11, effective July 1.

**38-20-204. Agistor's lien - filing requirement.** An agistor's lien created pursuant to this part 2 shall be filed with the secretary of state or the county clerk where the livestock are located. The filing of an agistor's lien shall constitute notice of the contents and legal effect of the lien.



**Source: L. 96:** Entire part added, p. 1388, § 11, effective July 1.

**38-20-205. Foreclosure.** (1) (a) If any charges for which a lien has been filed pursuant to section 38-20-204 are not paid not more than thirty days after the date such charges are due, the lienor or the lienor's assignee may file a foreclosure action in the county or district court of the county or city and county in which:

- (I) The contract between the lienor and the owner of the livestock was entered into;
- (II) The owner resided at the time the foreclosure action commenced; or
- (III) The livestock are located.

(b) For purposes of this subsection (1), if the contract between the owner and the lienor provides for continuing payments, such payments may be deemed to be due after the default of any installment or payment, at the option of the lienor.

(2) If a lienor sells or otherwise disposes of an owner's livestock without substantially complying with this article, such owner may recover from the lienor the value of the livestock less the lienor's cost of caring for such livestock, but in no event less than one hundred dollars.

(3) Nothing in this article shall require a lienor to commence a judicial action to foreclose on an agistor's lien if the livestock is abandoned, as defined in section 38-20-207.

(4) With respect to any foreclosure action brought under this article, a copy of the complaint shall be provided to the board before it may be filed with a court. The failure to provide such copy is not jurisdictional but shall be required by a court. The complaint shall show:

(a) That the lienor performed a service for the livestock owner, entitling the lienor to a lien on the owner's livestock pursuant to section 38-20-203;

(b) That the service described in paragraph (a) of this subsection (4) was performed at the written or verbal request of the owner or owner's agent;

(c) A description of the livestock, including the age, color, sex, markings, scars, brands, earmarks, a statement of the lien's actual value, and, if known, the registration number upon which the lien is claimed. A livestock group of twenty or more may be identified by common and accepted industry practice.

(d) That a notice of demand has been provided to the owner or the owner's agent by certified mail at their last-known address, or if not known, that personal notice was provided pursuant to section 38-20-206 (1) (a);

(e) An itemized list of the fair market value of the charges that are due and unpaid under the lien; and

(f) That a copy of the complaint has been provided to the board.

(5) (a) A court shall examine any complaint filed pursuant to this article without delay. If satisfactory, the court shall order the owner to show cause why the livestock should not be sold pursuant to the procedures in this article, which order shall include the date and time for a hearing. Such hearing shall be held not more than ten working days after the date of the issuance of the order.

(b) The court order set forth in paragraph (a) of this subsection (5) shall be served on the owner at least five days before the hearing date and shall inform such owner of:

(I) His or her right to appear and present testimony at the hearing;

(II) The fact that his or her failure to appear at the hearing may result in the entry of a judgment by default for the lien charges described in the complaint, the costs provided in this part 2, attorney's fees, and any other relief to which the plaintiff is entitled.

(6) If either party requests that the hearing date be delayed more than five days, the court, in its discretion and upon good cause shown, may require the requesting party to post bond. The bond amount shall be sufficient to pay the opposing party such amount as he or she may be entitled because of the delay. The bond shall be secured by two or more sureties, one corporate surety authorized to do business in this state, or a cash or property bond, whichever the court may approve.

**Source: L. 96:** Entire part added, p. 1388, § 11, effective July 1.

**38-20-206. Sale of livestock - procedure.** (1) A lienor who receives a judgment on an agistor's lien may proceed to sell such livestock necessary to satisfy the lien. The sale shall take place not more than forty-five days after entry of judgment at the nearest public livestock market in this state. In addition:

(a) The lienor shall provide notice to the owner at least fifteen days before any sale. The notice shall include the time and place of the sale and a description of the livestock to be sold. Such notice shall be served by:

(I) Publication in one newspaper published in the county of the lienor's residence; or

(II) Posting in three public places within the county of the lienor's residence and delivering a copy to the owner or the owner's agent. If a copy is to be delivered to the owner's agent and such agent does not reside in the county of the lienor's residence, a copy of the notice shall be published in a newspaper published in the county of the agent's residence, or, if no newspaper is published in such county, a copy shall be mailed to such agent's place of residence.

(b) The purchaser shall receive a transfer of the registration papers for the purchased livestock by the public livestock market and the pertinent organization or registry.

(c) The public livestock market shall:

(I) Pay to the agistor from the sale proceeds the reasonable cost of the foreclosure, notice, sale, and the reasonable and necessary charges incurred by the agistor for preserving, maintaining, feeding, boarding, pasturing, caring, and keeping the livestock up to the date of the sale. The reasonable cost of keeping the livestock up to the date of the sale shall not exceed five dollars per head per day.

(II) Forward the remainder of the sale proceeds and render any unsold livestock to the court for distribution to the owner or the owner's agent. If the owner and the owner's agent are not known and there are sale proceeds to be forwarded, such proceeds shall be returned to the board. The board shall deposit such proceeds in its estray fund and make a record of such deposit, identifying the livestock and stating the amount realized from the sale. The board shall pay proceeds from the estray fund to any secured party that has filed a lien against the livestock sold and has submitted a claim for payment to the board. Such payments shall be made only to the extent of the amount owed to the secured party. Such record shall be open to public inspection.

(2) (a) When livestock are in danger of serious and immediate decay or waste, or are likely to rapidly depreciate in value pending foreclosure proceedings, or where the keeping of such livestock will be attended with great expense, the lienor may, upon providing such notice as the court may require, apply to the court for an immediate sale. The court, in its discretion, may order that the livestock be sold and that the sale proceeds be deposited with the clerk of the court pending further order of such court.

(b) Upon receiving an application pursuant to paragraph (a) of this subsection (2), a court may, upon good cause shown, require the lienor to post bond for such amount as the defendant may be entitled for damages sustained in the event of wrongful foreclosure. Such bond shall be secured by two or more sureties, one corporate surety authorized to do business in this state, or a cash bond, whichever is approved by the court.

(3) The lienor may purchase the livestock and may bid all or any portion of the fair market value of the lien.

(4) When the livestock cannot be sold in one day, the sale may be continued on a day-to-day basis. Upon completion of the sale, the public livestock market shall file a bill of sale with the court that entered judgment of foreclosure. Such bill of sale shall include the amount for which each animal was sold and the name of each purchaser. The court shall record such bill of sale in its docket and shall preserve the original.

**Source:** L. 96: Entire part added, p. 1390, § 11, effective July 1.

**38-20-207. Abandoned livestock - notice - disposition.** (1) Livestock shall be presumed abandoned if:

(a) The owner or owner's agent has failed to contact the lienor within ten days after service of notice under section 38-20-206;



- (b) The lienor, in good faith, has no reasonable grounds to believe that the owner does not intend to abandon the livestock; and
- (c) The agistor has sent written notice of abandonment pursuant to the publication procedures in this article.
- (2) The board shall care for and dispose of any abandoned livestock pursuant to section 35-44-112, C.R.S.
- (3) After paying all expenses incurred, the board shall pay the agistor for the cost of herding or caring for such livestock, not to exceed the fair market value of the actual cost of such herding or caring or five hundred dollars per head, whichever is less.
- (4) (a) Any surplus funds forwarded to the state board of stock inspection commissioners shall be deposited in the estray fund of said board in the manner described in section 38-20-206.
- (b) If the owner of livestock presumed to be abandoned is found within three years after the date of the sale of such livestock, the net amount received from the sale shall be paid to the owner, less the following amounts, upon said owner proving ownership to the satisfaction of the board:
  - (I) A sum determined by the board by rule for each abandoned animal, to be retained by the state board of stock inspection commissioners;
  - (II) The amount of any judgment awarded the lienor; and
  - (III) Any amounts owed to a secured party that has filed a lien against the livestock presumed to be abandoned and submitted a claim to the board.
- (c) A current livestock inspection certificate shall be prima facie evidence of ownership.

**Source:** L. 96: Entire part added, p. 1391, § 11, effective July 1. L. 2004: (4)(b)(I) amended, p. 651, § 16, effective July 1.

**38-20-208. Lien no bar.** Nothing in this article shall prohibit a lienor, after the sale of livestock pursuant to this article, from pursuing further action to fully satisfy a judgment on an agistor's lien.

**Source:** L. 96: Entire part added, p. 1392, § 11, effective July 1.

**38-20-209. Lien as security interest.** A lien created pursuant to this article shall be considered a security interest for purposes of section 18-5-206, C.R.S.

**Source:** L. 96: Entire part added, p. 1392, § 11, effective July 1.

**38-20-210. Recording fees.** Any clerk of a county or district court may, pursuant to section 13-32-104, C.R.S., charge a fee for recording bills of sale under this article.

**Source:** L. 96: Entire part added, p. 1392, § 11, effective July 1.

ARTICLE 21

Lien for Services

38-21-101.	Persons entitled to special lien.	38-21-105.	Disposition of proceeds of sale. (Deleted by amendment)
38-21-102.	Lienor may sell or dispose.	38-21-106.	Notice posted in receiving office.
38-21-103.	Sale for storage charges - disposal.		
38-21-104.	How notice given.		

**38-21-101. Persons entitled to special lien.** Every person who, while lawfully in possession of an article of personal property, renders any service to the owner of such property, by labor or skill, has a special lien thereon, dependent on possession, for the

compensation, if any, which is due from the owner for such service. Every laundry proprietor, person conducting a laundry business, dry cleaning establishment proprietor, and person conducting a dry cleaning establishment has a general lien, dependent on possession, upon all personal property in such person's possession belonging to a customer, for the balance due from such customer for laundry work and for the balance due from such customer for dry cleaning work, but nothing in this section shall be construed to confer a lien in favor of a wholesale dry cleaner on materials received from a dry cleaning establishment proprietor or a person conducting a dry cleaning establishment. The terms "person" and "proprietor", as used in this article, include an individual, firm, partnership, association, corporation, and company.

**Source:** L. 47: p. 648, § 1. CSA: C. § 101, § 14(1). CRS 53: § 86-2-1. C.R.S. 1963: § 86-2-1. L. 94: Entire article amended, p. 461, § 1, effective March 31.

**38-21-102. Lienor may sell or dispose.** (1) Any garments, clothing, wearing apparel, household goods, or any other items that remain in the possession of a person, on which cleaning, pressing, glazing, laundering, or washing has been done, alterations or repairs have been made, or materials or supplies have been used or furnished, for a period of ninety days or more after the completion of such services or labor may be sold. The person to whom such charges are payable and owing shall first notify the owner of such property of the time and place of such sale pursuant to section 38-21-104. Property that is to be placed in storage after any of the services or labor mentioned in this section shall not be affected by the provisions of this section.

(2) If any garments, clothing, wearing apparel, household goods, or any other items are left with a launderer or retail dry cleaner for laundering or dry cleaning and are not reclaimed by the customer within one hundred eighty days, the launderer or dry cleaner may, without any liability or responsibility for such garments, clothing, wearing apparel, household goods, or any other items and without notification to the customer, dispose of such items in any manner suitable to the launderer or dry cleaner.

**Source:** L. 47: p. 648, § 2. CSA: C. § 101, § 14(2). CRS 53: § 86-2-2. C.R.S. 1963: § 86-2-2. L. 94: Entire article amended, p. 461, § 1, effective March 31. L. 95: Entire section amended, p. 153, § 1, effective April 7.

**38-21-103. Sale for storage charges - disposal.** (1) All garments, clothing, wearing apparel, household goods, and any other items on which any of the services or labor mentioned in section 38-21-102 have been performed and then placed in storage by agreement, remaining in the possession of a person without the reasonable or agreed charges having been paid for a period of ninety days, may be sold. The person to whom the charges are payable and owing shall first notify the owner of such property of the time and place of sale pursuant to section 38-21-104. Persons operating as warehouses or warehousemen shall not be affected by this section.

(2) If any garments, clothing, wearing apparel, household goods, or any other items are left for laundering or dry cleaning and placed in storage without the reasonable or agreed charges having been paid and are not reclaimed by the customer within one hundred eighty days, the person holding such property may, without any liability or responsibility for such garments, clothing, wearing apparel, household goods, or any other items and without notification to the customer, dispose of such items in any manner it deems suitable.

**Source:** L. 47: p. 648, § 2. CSA: C. § 101, § 14(2). CRS 53: § 86-2-3. C.R.S. 1963: § 86-2-3. L. 94: Entire article amended, p. 462, § 1, effective March 31. L. 95: Entire section amended, p. 153, § 2, effective April 7.

**38-21-104. How notice given.** (1) The notice required in this article shall be satisfied by mailing a registered letter, with a return address marked thereon, addressed to the owner of the property if an address was given at the time of delivery of the property, stating that



the garments, clothing, wearing apparel, household goods, or any other items on which any of the services or labor mentioned in section 38-21-102 have been performed shall be sold unless they are reclaimed within thirty days after the date of the notice. The notice shall also include the time and place of the sale. The cost of posting or mailing said letter shall be added to the charges.

(2) (Deleted by amendment, L. 94, p. 462, § 1, effective March 31, 1994.)

(3) Whether or not an address was given at the time of delivery of the property, the person holding such property may dispose of any item after one hundred eighty days without notice pursuant to the provisions of section 38-21-102 (2) or section 38-21-103 (2).

**Source:** L. 47: p. 648, § 2. CSA: C. § 101, § 14(2). CRS 53: § 86-2-4. C.R.S. 1963: § 86-2-4. L. 94: Entire article amended, p. 462, § 1, effective March 31. L. 95: (1) amended and (3) added, p. 154, § 3, effective April 7.

**Cross references:** For publication of legal notices, see part 1 of article 70 of title 24.

### **38-21-105. Disposition of proceeds of sale. (Deleted by amendment)**

**Source:** L. 47: p. 648, § 2. CSA: C. § 101, § 14(2). CRS 53: § 86-2-5. C.R.S. 1963: § 86-2-5. L. 94: Entire article amended, p. 463, § 1, effective March 31.

**38-21-106. Notice posted in receiving office.** Each person taking advantage of this article must keep posted in a prominent place in such person's receiving office at all times a notice which shall read as follows:

"All articles cleaned, pressed, glazed, laundered, washed, altered, or repaired and not reclaimed within ninety days may be sold, and such items may be disposed of after one hundred eighty days."

**Source:** L. 47: p. 648, § 2. CSA: C. § 101, § 14(2). CRS 53: § 86-2-6. C.R.S. 1963: § 86-2-6. L. 94: Entire article amended, p. 463, § 1, effective March 31. L. 95: Entire section amended, p. 154, § 4, effective April 7.

## **ARTICLE 21.5**

### **Self-service Storage Facility Liens**

38-21.5-101.	Definitions.	38-21.5-104.	Notice posted in office.
38-21.5-102.	Lien established.	38-21.5-105.	Additional liens.
38-21.5-103.	Enforcement of lien.		

**38-21.5-101. Definitions.** As used in this article, unless the context otherwise requires:

(1) "Default" means the failure to perform in a timely manner any obligation or duty set forth in this article or the rental agreement.

(1.5) "Electronic mail" or "e-mail" means an electronic message or an executable program or computer file that contains an image of a message that is transmitted between two or more computers or electronic terminals. The term includes electronic messages that are transmitted within or between computer networks.

(2) "Last-known address" means that postal address or e-mail address provided by the occupant in the latest rental agreement or in a subsequent written notice of a change of address.

(3) "Occupant" means a person, or his sublessee, successor, or assign, entitled to the use of the storage space at a self-service storage facility under a rental agreement, to the exclusion of others.

(4) "Owner" means the owner, operator, lessor, or sublessor of a self-service storage facility, his agent, or any other person authorized by him to manage the facility or to receive rent from an occupant under a rental agreement.

(5) “Personal property” means movable property not affixed to land and includes, but is not limited to, goods, merchandise, and household items.

(6) “Rental agreement” means any written agreement or lease that establishes or modifies the terms, conditions, rules, or any other provisions concerning the use and occupancy at a self-service storage facility and that contains a notice stating that all articles stored under the terms of such agreement will be sold or otherwise disposed of if no payment has been received for a continuous thirty-day period. The agreement must contain a provision directing the occupant to disclose any lienholders with an interest in property that is or will be stored in the self-service storage facility.

(7) “Self-service storage facility” means any real property designed and used for the purpose of renting or leasing individual storage space to occupants who are to have access to such facility for the purpose of storing and removing personal property. No occupant shall use a self-service storage facility for residential purposes. A self-service storage facility is not a warehouse as used in sections 4-7-209 and 4-7-210, C.R.S. If an owner issues any warehouse receipt, bill of lading, or other document of title for the personal property stored, the owner and the occupant are subject to the provisions of the “Uniform Commercial Code”, and the provisions of this article do not apply.

(8) “Vehicle” means any item of personal property required to be registered with the department of revenue pursuant to section 42-3-103, C.R.S.

(9) “Verified mail” means any method of mailing that is offered by the United States postal service and that provides evidence of mailing.

(10) “Watercraft” means any vessel, including a personal watercraft, as defined in section 33-13-102, C.R.S.

**Source:** L. 80: Entire article added, p. 700, § 1, effective July 1. L. 2011: (1.5), (8), (9), and (10) added and (2) and (6) amended, (SB 11-039), ch. 92, p. 271, § 1, effective August 10.

**38-21.5-102. Lien established.** Where a rental agreement, as defined in section 38-21.5-101 (6), is entered into between the owner and the occupant, the owner of a self-service storage facility and his or her heirs, executors, administrators, successors, and assigns have a lien upon all personal property located at the self-service storage facility for rent, labor, or other charges, present or future, in relation to the personal property and for expenses necessary for its preservation or expenses reasonably incurred in its sale or other disposition pursuant to this article. The lien attaches as of the date the personal property is brought to the self-service storage facility and continues so long as the owner retains possession and until the default is corrected, or a sale is conducted, or the property is otherwise disposed of to satisfy the lien. Prior to taking enforcement action pursuant to section 38-21.5-103 (1) (b), the owner shall determine if a financing statement concerning the property to be sold or otherwise disposed of has been filed with the secretary of state in accordance with part 5 of article 9 of title 4, C.R.S.

**Source:** L. 80: Entire article added, p. 701, § 1, effective July 1. L. 2001: Entire section amended, p. 1447, § 43, effective July 1. L. 2011: Entire section amended, (SB 11-039), ch. 92, p. 274, § 3, effective August 10.

**38-21.5-103. Enforcement of lien.** (1) An owner’s lien, as provided for a claim that has become due, may be satisfied as follows:

(a) No enforcement action shall be taken by the owner until the occupant has been in default continuously for a period of thirty days.

(b) After the occupant has been in default continuously for thirty days, the owner may begin enforcement action if the occupant has been notified in writing. The owner shall deliver the notice in person or by verified mail or electronic mail to the last-known address of the occupant and shall provide the notice to any lienholder with an interest in the property to be sold or otherwise disposed of, of whom the owner has knowledge through the disclosure provision on the rental agreement, as evidenced by a financing statement filed



with the secretary of state, or through the owner's receipt of other written notice of such interest from the lienholder.

(c) The notice shall include:

(I) An itemized statement of the owner's claim showing the sum due at the time of the notice and the date when the sum became due;

(II) A brief and general description of the personal property subject to the lien. Such description shall be reasonably adequate to permit the person notified to identify such property; except that any container including, but not limited to, a trunk, valise, or box that is locked, fastened, sealed, or tied in a manner which deters immediate access to its contents may be described as such without describing its contents.

(III) A notification of denial of access to the personal property, if such denial is permitted under the terms of the rental agreement, which notification shall provide the name, street address, and telephone number of the owner or his designated agent whom the occupant may contact to respond to such notification;

(IV) A demand for payment within a specified time not less than fifteen days after delivery of the notice;

(V) A conspicuous statement that, unless the claim is paid within the time stated in the notice, the personal property will be advertised for sale or other disposition and will be sold or otherwise disposed of at a specified time and place.

(d) If the owner sends notice of a pending sale of property to the occupant's last-known e-mail address and does not receive a response, return receipt, or delivery confirmation from the same e-mail address, the owner must send notice of the sale to the occupant by verified mail to the occupant's last-known postal address before proceeding with the sale.

(e) (I) After the expiration of the time given in the notice, the owner shall advertise the sale of the personal property either by:

(A) Publishing an advertisement of the sale once a week for two consecutive weeks in a periodical that circulates weekly or more frequently in the county where the self-service storage facility is located; or

(B) Advertising the sale in any other commercially reasonable manner. The manner of advertisement is deemed commercially reasonable if at least three independent bidders attend the sale at the time and place advertised.

(II) As used in this paragraph (e), "independent bidder" means a bidder who is not related to and who has no controlling interest in, or common pecuniary interest with, the owner or any other bidder.

(f) (Deleted by amendment, L. 2011, (SB 11-039), ch. 92, p. 272, § 2, effective August 10, 2011.)

(g) (I) Any sale or other disposition of the personal property must be held at the self-service storage facility or at the nearest suitable place to where the personal property is held or stored.

(II) If the property upon which the lien is claimed is a vehicle or watercraft, and rent and other charges related to the property remain unpaid or unsatisfied for sixty days:

(A) The owner may have the property towed from the self-service storage facility by an independent towing carrier holding current and valid operating authority from the Colorado public utilities commission; and

(B) The owner is not liable for the property, or for any damages to the property, once the towing carrier takes possession of the property.

(III) The owner is not liable for identity theft or other harm resulting from the misuse of information contained in documents or electronic storage media:

(A) That are part of the occupant's property sold or otherwise disposed of; and

(B) Of which the owner did not have actual knowledge.

(h) Before any sale or other disposition of personal property pursuant to this section, the occupant may pay the amount necessary to satisfy the lien and the reasonable expenses incurred under this section and thereby redeem the personal property. Upon receipt of such payment, the owner shall return the personal property, and thereafter the owner shall have no liability to any person with respect to such personal property.

(i) A purchaser in good faith of the personal property sold to satisfy a lien as provided in this article takes the property free of any rights of persons against whom the lien was

valid and free of any rights of a secured creditor, despite noncompliance by the owner with the requirements of this section.

(j) In the event of a sale under this section, the owner may satisfy his lien from the proceeds of the sale, subject to the rights of any prior lienholder. The lien rights of such prior lienholder are automatically transferred to the proceeds of the sale. If the sale is made in good faith and is conducted in a reasonable manner, the owner shall not be subject to any surcharge for a deficiency in the amount of a prior secured lien but shall hold the balance, if any, for delivery to the occupant, lienholder, or other person in interest. If the occupant, lienholder, or other person in interest does not claim the balance of the proceeds within three years of the date of sale, it shall become the property of the owner without further recourse by the occupant, lienholder, or other person in interest.

(k) Nothing in this section affects the rights and liabilities of the owner or the occupant if:

- (I) The requirements of this article are not satisfied;
- (II) The sale of the personal property is not in conformity with the notice of sale; or
- (III) There is a willful violation of this article.

**Source: L. 80:** Entire article added, p. 701, § 1, effective July 1. **L. 2011:** IP(1), (1)(b), (1)(d), (1)(e), (1)(f), (1)(g), and (1)(k) amended, (SB 11-039), ch. 92, p. 272, § 2, effective August 10.

**38-21.5-104. Notice posted in office.** Each owner acting pursuant to this article shall keep posted in a prominent place in his office at all times a notice which shall read as follows:

“All articles stored by a rental agreement, and charges not having been paid for thirty days, will be sold or otherwise disposed of to pay charges.”

**Source: L. 80:** Entire article added, p. 703, § 1, effective July 1.

**38-21.5-105. Additional liens.** Nothing in this article shall be construed as in any manner impairing or affecting the right of parties to create liens by special contract or agreement, nor shall it in any manner affect or impair other liens arising at common law or in equity, or by any statute of this state.

**Source: L. 80:** Entire article added, p. 703, § 1, effective July 1.

## ARTICLE 22

### General Mechanics' Lien

**Cross references:** For liens on motor vehicles, see article 6 of title 42.

38-22-101.	Liens in favor of whom - when filed - definition of person.	38-22-110.	Action commenced within six months.
38-22-102.	Payments - effect.	38-22-111.	Joinder of parties - consolida- tion of actions.
38-22-103.	Attaching of lien - enforce- ment.	38-22-112.	Allegations of complaint.
38-22-104.	Lien on mining property.	38-22-113.	Hearing - judgment - sum- mons - defense.
38-22-105.	Property subject to lien - no- tice.	38-22-114.	Disposition of proceeds - exe- cution.
38-22-105.5.	Notice of lien law.	38-22-115.	Parties to action.
38-22-106.	Priority of lien - attachments.	38-22-116.	Costs.
38-22-107.	Lien attaches to water rights and franchises.	38-22-117.	Assignment of lien - failure to support lien.
38-22-108.	Rank of liens.	38-22-118.	Satisfaction of lien - failure to release.
38-22-109.	Lien statement.		



38-22-119.	Agreement to waive - effect.	38-22-127.	Moneys for lien claims made
38-22-120.	Rules of civil procedure apply.		trust funds - disbursements - penalty.
38-22-121.	Liens of surveyors and engineers.	38-22-128.	Excessive amounts claimed.
38-22-122.	Lien under two contracts - effect.	38-22-129.	Principal contractor may provide bond prior to commencement of work.
38-22-123.	Payment to avoid invalid.	38-22-130.	Payment of claims by surety.
38-22-124.	Other remedies not barred.	38-22-131.	Substitution of bond allowed.
38-22-125.	Bona fide purchaser.	38-22-132.	Lien to be discharged.
38-22-126.	Disburser - notice - duty of owner and disburser.	38-22-133.	Action to be brought on bond or undertaking.

**38-22-101. Liens in favor of whom - when filed - definition of person.** (1) Every person who furnishes or supplies laborers, machinery, tools, or equipment in the prosecution of the work, and mechanics, materialmen, contractors, subcontractors, builders, and all persons of every class performing labor upon or furnishing directly to the owner or persons furnishing labor, laborers, or materials to be used in construction, alteration, improvement, addition to, or repair, either in whole or in part, of any building, mill, bridge, ditch, flume, aqueduct, reservoir, tunnel, fence, railroad, wagon road, tramway, or any other structure or improvement upon land, including adjacent curb, gutter, and sidewalk, and also architects, engineers, draftsmen, and artisans who have furnished designs, plans, plats, maps, specifications, drawings, estimates of cost, surveys, or superintendence, or who have rendered other professional or skilled service, or bestowed labor in whole or in part, describing or illustrating, or superintending such structure, or work done or to be done, or any part connected therewith, shall have a lien upon the property upon which they have furnished laborers or supplied machinery, tools, or equipment or rendered service or bestowed labor or for which they have furnished materials or mining or milling machinery or other fixtures, for the value of such laborers, machinery, tools, or equipment supplied, or services rendered or labor done or laborers or materials furnished, whether at the instance of the owner, or of any other person acting by the owner's authority or under the owner, as agent, contractor, or otherwise for the laborers, machinery, tools, or equipment supplied, or work or labor done or services rendered or laborers or materials furnished by each, respectively, whether supplied or done or furnished or rendered at the instance of the owner of the building or other improvement, or the owner's agent; and every contractor, architect, engineer, subcontractor, builder, agent, or other person having charge of the construction, alteration, addition to, or repair, either in whole or in part, of said building or other improvement shall be held to be the agent of the owner for the purposes of this article.

(2) In case of a contract for the work, between the reputed owner and a contractor, the lien shall extend to the entire contract price, and such contract shall operate as a lien in favor of all persons performing labor or services or furnishing laborers or materials under contract, express or implied, with said contractor, to the extent of the whole contract price; and after all such liens are satisfied, then as a lien for any balance of such contract price in favor of the contractor.

(3) All such contracts shall be in writing when the amount to be paid thereunder exceeds five hundred dollars, and shall be subscribed by the parties thereto. The contract, or a memorandum thereof, setting forth the names of all the parties to the contract, a description of the property to be affected thereby, together with a statement of the general character of the work to be done, the estimated total amount to be paid thereunder, together with the times or stages of the work for making payments, shall be filed by the owner or reputed owner, in the office of the county clerk and recorder of the county where the property, or the principal portion thereof, is situated before the work is commenced under and in accordance with the terms of the contract. In case such contract, or a memorandum thereof, is not so filed, the labor done and materials furnished by all persons shall be deemed to have been done and furnished at the personal instance of the owner, and such persons shall have a lien for the value thereof.

(4) For the purposes of this article, the value of labor done shall include, but not be limited to, the payments required under any labor contract to any trust established for the

provision of any pension, profit-sharing, vacation, health and welfare, prepaid legal services, or apprentice training benefits for the use of the employees of any contractors, and the trustee of any such trust shall have a lien therefor.

(5) All claimants who establish the right to a lien or claim under any of the provisions of this article shall be entitled to receive interest on any such lien or claim at the rate provided for under the terms of any contract or agreement under which the laborers were furnished or the labor or material was supplied or, in the absence of an agreed rate, at the rate of twelve percent per annum.

(6) For purposes of this article, "person" means a natural person, firm, association, corporation, or other legal entity; except that it shall not include a labor organization as defined in section 24-34-401 (6), C.R.S.

**Source:** L. 1899: p. 261, § 1. R.S. 08: § 4025. C.L. § 6442. CSA: C. 101, § 15. CRS 53: § 86-3-1. C.R.S. 1963: § 86-3-1. L. 65: p. 849, § 1. L. 69: p. 692, § 1. L. 75: (4) and (5) added, p. 1422, § 1, effective October 1. L. 2000: (1), (2), and (5) amended and (6) added, p. 204, § 1, effective August 2.

**Cross references:** For liens for surveyors and civil and mining engineers, see § 38-22-121.

## ANNOTATION

- I. General Consideration.
- II. The Lien.
- III. Persons Entitled to Liens.
  - A. In General.
  - B. Materialmen.
  - C. Subcontractors.
  - D. Others.
- IV. Contracts Between Owner and Contractor.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "An Introduction to Security", see 16 Rocky Mt. L. Rev. 27 (1943). For article, "Enforcement of Security Interests in Colorado", see 25 Rocky Mt. L. Rev. 1 (1952). For article, "Statutory Redemption in Colorado", see 30 Dicta 79 (1953). For article, "Property Law", see 32 Dicta 420 (1955). For article, "One Year Review of Contracts", see 36 Dicta 19 (1959). For article, "One Year Review of Contracts", see 37 Dicta 1 (1960). For article, "One Year Review of Property", see 37 Dicta 89 (1960). For article, "Homestead v. Mechanic's Lien", see 40 Den. L. Ctr. J. 2 (1963). For article, "Problems of Buying a House Which Is To Be Constructed", see 37 U. Colo. L. Rev. 457 (1965). For note, "General Mechanics' Lien Laws in Colorado: 1965 Amendments", see 39 U. Colo. L. Rev. 105 (1966). For comment on constitutionality of mechanic's lien, see 49 U. Colo. L. Rev. 127 (1977). For case note, "Colorado Mechanic's Lien Statute: Is Due Process Provided?" see 49 U. Colo. L. Rev. 127 (1977). For article, "Assemblage, Design and Construction for Real Estate Developments", see 11 Colo. Law. 2297 (1982). For article, "Collecting Pre- and Post-Judgment Interest in Colorado: A Primer", see 15 Colo. Law. 753

(1986). For article, "An Update of Appendices from Collecting Pre- and Post-Judgment Interest in Colorado", see 15 Colo. Law. 990 (1986). For article, "The Mechanics' Lien Trust Fund Statute — Theft or Not Theft", see 16 Colo. Law. 1968 (1987).

**Annotator's note.** Cases material to this section, decided prior to its earliest source L. 1899, p. 261, § 1, have been included in the annotations to this section.

**Purpose of article.** The purpose of the mechanics' lien law is to benefit and protect those who supply labor, materials, or services which enhance the value or condition of another's property. *Brannan Sand & Gravel v. F.D.I.C.*, 928 P.2d 1337 (Colo. App. 1996), *aff'd*, 940 P.2d 393 (Colo. 1997).

The underlying rationale and principle upon which the mechanic's lien is conferred by this article is to preclude unjust enrichment. *3190 Corp. v. Gould*, 163 Colo. 356, 431 P.2d 466 (1967); *Kobayashi v. Meehleis Steel Co.*, 28 Colo. App. 327, 472 P.2d 724 (1970); *Ridge Erection Co. v. Mountain States Tel. & Tel. Co.*, 37 Colo. App. 477, 549 P.2d 408 (1976).

The mechanics' lien laws are designed for the benefit and protection of mechanics and others and should be construed in favor of lien claimants. *Barnard v. McKenzie*, 4 Colo. 251 (1878); *Lindemann v. Belden Consol. Mining & Milling Co.*, 16 Colo. App. 342, 65 P. 403 (1901); *Chicago Lumber Co. v. Newcomb*, 19 Colo. App. 265, 74 P. 786 (1903); *Sontag v. Abbott*, 140 Colo. 351, 344 P.2d 961 (1959); *3190 Corp. v. Gould*, 163 Colo. 356, 431 P.2d 466 (1967); *Thirteenth St. Corp. v. A-1 Plumbing & Heating Co.*, 640 P.2d 1130 (Colo. 1982).

The right to a mechanic's lien given by this section is based upon considerations of natural



justice, namely that one who has enhanced the value of property by attaching thereto his materials or labor shall have a lien therefor. *Farmer's Irrigation Co. v. Kamm*, 55 Colo. 440, 135 P. 766 (1913); *Bishop v. Moore*, 137 Colo. 263, 323 P.2d 897 (1958); *3190 Corp. v. Gould*, 163 Colo. 356, 431 P.2d 466 (1967); *Kobayashi v. Meehleis Steel Co.*, 28 Colo. App. 327, 472 P.2d 724 (1970).

This section affords additional security to protect persons whose labor or materials enhance the value of real property. By granting to persons who fall within its provisions an in rem recovery against the land, this section creates an alternative remedy which is broader than an in personam contract action. *C & W Elec., Inc. v. Casa Dorado Corp.*, 34 Colo. App. 117, 523 P.2d 137 (1974).

**Applicability of section.** This section confines its operation to the establishment of liens. *Hayutin v. Gibbons*, 139 Colo. 262, 338 P.2d 1032 (1959).

The mechanics' lien law does not purport to create personal liability of a landowner for obligations incurred by a contractor in the performance of his contract, but only authorizes the creation of a lien for improvements upon the land of the owner. *Brannan Sand & Gravel Co. v. Santa Fe Land & Imp. Co.*, 138 Colo. 314, 332 P.2d 892 (1958); *Brannan Sand & Gravel v. F.D.I.C.*, 928 P.2d 1337 (Colo. App. 1996), rev'd on other grounds, 940 P.2d 393 (Colo. 1997).

The provisions of this section do not apply to labor performed or material furnished upon or for public works, for the purpose of fastening a lien upon public property. *Western Lumber & Pole Co. v. Golden*, 23 Colo. App. 461, 130 P. 1027 (1913); *Florman v. Sch. Dist. No. 11*, 6 Colo. App. 319, 40 P. 469 (1895).

**Under common law, public property not subject to foreclosure.** The relation-back provisions of § 38-22-106 (1) do not abrogate the common law to allow a claimant to foreclose a lien after streets had been dedicated and accepted. *City of Westminster v. Brannan Sand & Gravel Co.*, 970 P.2d 393 (Colo. 1997).

**Section should be liberally construed in lien claimant's favor.** This section should be construed in a most liberal and comprehensive manner in favor of lien claimants, but it cannot be judicially extended so as to be applied to cases which do not fall within its provisions. *Chambers v. Nation*, 178 Colo. 124, 497 P.2d 5 (1972); *Barnard v. McKenzie*, 4 Colo. 251 (1878); *Rara Avis Gold & Silver Mining Co. v. Bouscher*, 9 Colo. 385, 12 P. 433 (1886); *Greeley, S.L. & P.R.R. v. Harris*, 12 Colo. 226, 20 P. 764 (1888); *Williams v. Uncompahgre Canal Co.*, 13 Colo. 469, 22 P. 806 (1889); *Rico Reduction & Mining Co. v. Musgrave*, 14 Colo. 79, 23 P. 458 (1890); *Empire Land & Canal Co. v. Engley*, 18 Colo. 388, 33 P. 153 (1893); *Cary Hdwe. Co. v. McCarty*, 10 Colo. App. 200, 50 P.

744 (1897); *Chicago Lumber Co. v. Newcomb*, 19 Colo. App. 265, 74 P. 786 (1903); *Kern v. Guiry Bros. Wall Paper Co.*, 60 Colo. 286, 153 P. 87 (1915); *Consumers' Lumber & Inv. Co. v. Hayutin*, 75 Colo. 483, 226 P. 860 (1924); *Bushman Constr. Co. v. Air Force Academy Hous., Inc.*, 327 F.2d 481 (10th Cir. 1964); *Ridge Erection Co. v. Mountain States Tel. & Tel. Co.*, 37 Colo. App. 477, 549 P.2d 408 (1976); *Tighe v. Kenyon*, 681 P.2d 547 (Colo. App. 1984); *Ragsdale Bros. Roofing v. United Bank*, 744 P.2d 750 (Colo. App. 1987); *Skillstaff of Colo. v. Centex Real Estate*, 973 P.2d 674 (Colo. App. 1998).

Although the mechanic's lien statute is to be liberally construed in favor of lien claimants, it is to be strictly construed in determining whether the right to a lien exists. *Richter Plumbing and Heating v. Rademacher*, 729 P.2d 1009 (Colo. App. 1986); *Brannan Sand & Gravel v. F.D.I.C.*, 928 P.2d 1337 (Colo. App. 1996), rev'd on other ground, 940 P.2d 393 (Colo. 1997).

Those who wish to claim the benefits of the lien must prove compliance with all statutory requirements necessary to establishing entitlement thereto. *Richter Plumbing and Heating v. Rademacher*, 729 P.2d 1009 (Colo. 1986).

This section is to be construed liberally in favor of the creation of liens. *Amco Elec. Co. v. First Nat'l Bank*, 622 P.2d 608 (Colo. App. 1981); *Woodcrest Homes, Inc. v. First Nat'l Bank*, 15 B.R. 886 (D. Colo. 1981).

**Article should be strictly construed to extent that no act required to be done and essential to constitute a lien may be omitted.** *Williams v. Uncompahgre Canal Co.*, 13 Colo. 469, 22 P. 806 (1889); *Cannon v. Williams*, 14 Colo. 21, 23 P. 456 (1890); *Empire Land & Canal Co. v. Engley*, 18 Colo. 388, 33 P. 153 (1893); *Arkansas River, Land, Reservoir & Canal Co. v. Flinn*, 3 Colo. App. 381, 33 P. 1006 (1893); *Rice v. Carmichael*, 4 Colo. App. 84, 34 P. 1010 (1893); *Small v. Foley*, 8 Colo. App. 435, 47 P. 64 (1896); *Cary Hdwe. Co. v. McCarty*, 10 Colo. App. 200, 50 P. 744 (1897); *Maher v. Shull*, 11 Colo. App. 322, 52 P. 1115 (1898).

**Section must be strictly construed in determining the question as to whether the right to a lien exists.** *Cary Hdwe. Co. v. McCarty*, 10 Colo. App. 200, 50 P. 744 (1897); *Lindemann v. Belden Consol. Mining & Milling Co.*, 16 Colo. App. 342, 65 P. 403 (1901); *Fleming v. Prudential Ins. Co.*, 19 Colo. App. 126, 73 P. 752 (1903).

**Where the inquiry relating to whether a person asserting a lien or the work for which he claims it comes within this section or whether the statutory requirements necessary to initiate the lien have been complied with, this section must be strictly construed.** *Cary Hdwe. Co. v. McCarty*, 10 Colo. App. 200, 50 P. 744 (1897); *Lindemann v. Belden Consol. Mining & Milling Co.*, 16 Colo. App. 342, 65 P. 403

(1901); *Fleming v. Prudential Ins. Co.*, 19 Colo. App. 126, 73 P. 752 (1903).

**Equitable rules govern mechanic's liens.** The statutory proceedings to enforce rights under the mechanic's lien law are in their nature equitable, and equitable rules govern in their administration. *Williams v. Uncompahgre Canal Co.*, 13 Colo. 469, 22 P. 806 (1889).

**Remedy is cumulative.** The remedy provided by this section is cumulative and, notwithstanding the fact that a claimant has a right to a lien, he may pursue his remedy for a money judgment. *Hayutin v. Gibbons*, 139 Colo. 262, 338 P.2d 1032 (1959).

**Statutory remedy requires strict construction.** The remedy by lien is purely statutory and is to be strictly construed. *Brannan Sand & Gravel Co. v. Santa Fe Land & Imp. Co.*, 138 Colo. 314, 332 P.2d 892 (1958).

**Substantial compliance.** Since this section gives a remedy unknown at common law or in equity, its provisions must be at least substantially complied with, otherwise no lien will attach. *Greeley S.L. & P.R.R. v. Harris*, 12 Colo. 226, 20 P. 764 (1888).

The remedial requirements of this section must be complied with; full compliance gives a claimant a legal right to enforce. *Hanna v. Colo. Sav. Bank*, 3 Colo. App. 28, 31 P. 1020 (1892).

**Lien claimant may pursue his remedy for a money judgment** notwithstanding his right to a lien. *Buttermore v. Firestone Tire and Rubber Co.*, 721 P.2d 701 (Colo. App. 1986).

**This section and § 38-22-104 to be construed together.** Whether a lien is claimed under this section or § 38-22-104 is immaterial because both sections are to be construed together. *Smith v. Stroehle Mach. & Supply Co.*, 109 Colo. 460, 126 P.2d 341 (1942).

**Lien claimant is entitled to interest on valid judgment.** *Am. Factors Assocs. v. Triangle Heating & Sheet Metal Co.*, 31 Colo. App. 240, 503 P.2d 163 (1972).

**Applicability of subsection (5).** Subsection (5) is a special statute which is applicable to a mechanic lien claim only, and not to a claim grounded in the trust lien provision, § 38-22-127. *First Com. Corp. v. First Nat'l Bancorporation, Inc.*, 572 F. Supp. 1430 (D. Colo. 1983).

**Subsection (5) prevails over § 5-12-102.** Subsection (5), which is applicable to mechanic's lien claims only, prevails over the general interest statute, § 5-12-102. *Weather Eng'g & Mfg., Inc. v. Pinon Springs Condominiums, Inc.*, 192 Colo. 495, 563 P.2d 346 (1977).

**Claimant not charged with another's mistake resulting in noncompletion.** The claimant is not to be charged with another's mistake in judgment which results in the noncompletion of the project. *Seracuse Lawler & Partners, Inc. v. Copper Mt.*, 654 P.2d 1328 (Colo. App. 1982).

**A water well more properly fits within article 24 of title 38 than article 22 of title 38,** as article 24 specifically addresses sinking a hole into the earth to obtain a natural resource below it. Article 24 controls, because it has more specific provisions that supplement the general provisions of article 22. *Aspen Drilling Co., Inc. v. Hayes*, 876 P.2d 86 (Colo. App. 1994).

**Statute as basis for jurisdiction.** See *Boulder Lumber Co. v. Alpine of Nederland, Inc.*, 626 P.2d 724 (Colo. App. 1981).

**Applied in** *Curtis v. Nunns*, 54 Colo. 554, 131 P. 403 (1913); *Laverents v. Craig*, 74 Colo. 297, 225 P.250 (1923); *Protheroe v. Bonser*, 94 Colo. 95, 28 P.2d 807 (1933); *Kvols v. Lonsdale*, 164 Colo. 125, 433 P.2d 330 (1967); *Trustees of Carpenters & Millwrights Health Benefit Trust Fund v. Angel-Haus Condominium, Ltd.*, 36 Colo. App. 133, 535 P.2d 259 (1975); *Daniel v. M.J. Dev., Inc.*, 43 Colo. App. 92, 603 P.2d 947 (1979); *Trustees of Colo. Carpenters & Millwrights Health Benefits Trust Fund v. Pinkard Constr. Co.*, 199 Colo. 35, 604 P.2d 683 (1979); *Climax Molybdenum Co. v. Specialized Installers, Inc.*, 12 B.R. 546 (D. Colo. 1981); *Everitt Lumber Co. v. Prudential Ins. Co. of Am.*, 660 P.2d 925 (Colo. App. 1983).

## II. THE LIEN.

**Principle established by subsection (1).** In general, subsection (1) establishes the principle that where labor has been performed a lien shall be had for the value of that labor. *Ridge Erection Co. v. Mountain States Tel. & Tel. Co.*, 37 Colo. App. 477, 549 P.2d 408 (1976).

Subsection (1) provides that every person who supplies material or labor shall have a lien upon the property upon which they have supplied materials or labor. *Sperry & Mock, Inc. v. Security Sav. & Loan Ass'n*, 37 Colo. App. 357, 549 P.2d 412 (1976).

A mechanic's lien established under this section is based upon the principle that one who has enhanced the value of property by his labor or material is entitled to a superior lien if he follows certain prescribed procedures. *Amco Elec. Co. v. First Nat'l Bank*, 622 P.2d 608 (Colo. App. 1981).

**A "lien" is a claim on property by a person who has added value to that property.** In *re Regan*, 151 P.3d 1281 (Colo. 2007).

**Mechanic's lien is statutory creature.** A mechanic's or miner's lien is the creature of the statute, and attaches only by virtue of work being done or materials furnished under a contract, express or implied, with the owner of the property upon which the lien is claimed. *Davidson v. Jennings*, 27 Colo. 187, 60 P. 354 (1900); *Tritch v. Norton*, 10 Colo. 337, 15 P. 680 (1887); *Rico Reduction & Mining Co. v. Musgrave*, 14 Colo. 79, 23 P. 458 (1890).



The right to a mechanic's lien has no existence except by virtue of the statute. *Florman v. Sch. Dist. No. 11*, 6 Colo. App. 319, 40 P. 469 (1895); *Sayre-Newton Lumber Co. v. Union Bank*, 6 Colo. App. 541, 41 P. 844 (1895); *Small v. Foley*, 8 Colo. App. 435, 47 P. 64 (1896); *Lindemann v. Belden Consol. Mining & Milling Co.*, 16 Colo. App. 342, 65 P. 403 (1901); *Chicago Lumber Co. v. Newcomb*, 19 Colo. App. 265, 74 P. 786 (1903); *Grimm v. Yates*, 58 Colo. 268, 145 P. 696 (1914).

**Section is direct lien statute.** *Armour & Co. v. McPhee & McGinnity Co.*, 85 Colo. 262, 275 P. 12 (1929).

**Direct lien statute expressly authorizes lien arising out of contract**, either express or implied. *Home Pub. Market Co. v. Fallis*, 72 Colo. 48, 209 P. 641 (1922).

**When right to lien created.** The right to a lien must be created at the time or before material or labor is furnished. It cannot be created afterward. *C & W Elec., Inc. v. Casa Dorado Corp.*, 34 Colo. App. 117, 523 P.2d 137 (1974).

**A mechanic's lien is founded on contract** with the owner, either directly or indirectly. *Johnston v. Bennett*, 6 Colo. App. 362, 40 P. 847 (1895); *Wilkins v. Abell*, 26 Colo. 462, 58 P. 612 (1899); *Griffin v. Seymour*, 15 Colo. App. 487, 63 P. 809 (1900).

There must be a contract with the owner, either directly or indirectly, before a lien may attach. *Thirteenth St. Corp. v. A-1 Plumbing & Heating Co.*, 640 P.2d 1130 (Colo. 1982).

It is the affirmative contractual relation of the owner of property to the improvement made or work performed upon which the claimant's right to the lien is based. *C & W Elec., Inc. v. Casa Dorado Corp.*, 34 Colo. App. 117, 523 P.2d 137 (1974).

An owner is not subject to a lien under subsection (1) unless the owner or owner's agent has contracted for the architectural services. *Seracuse Lawler & Partners, Inc. v. Copper Mt.*, 654 P.2d 1328 (Colo. App. 1982).

**Section contains exhaustive list of lienable work.** This section contains an express and exhaustive list of lienable work, and courts are not at liberty to add to it. *Woodcrest Homes, Inc. v. First Nat'l Bank*, 11 B.R. 342, aff'd in part and rev'd on other grounds, 15 B.R. 886 (D. Colo. 1981).

Labor performed or materials furnished for purposes other than those specified cannot be made the foundation of a lien. *Arkansas River Land, Reservoir & Canal Co. v. Nelson*, 4 Colo. App. 438, 36 P. 307 (1894).

**The provisions of this section do not authorize a lien** upon property other than the property upon which services were rendered or for which fixtures were supplied, and only to the extent of the value of the labor, services, and materials rendered upon the property. *Schmidt Const. Co. v. Fast*, 776 P.2d 1175 (Colo. App. 1989).

**Enforcement proceeding of liens deemed statutory.** The proceeding to enforce liens of mechanics, laborers, and materialmen is purely statutory. *Cornell v. Conine-Eaton Lumber Co.*, 9 Colo. App. 225, 47 P. 912 (1897).

The procedure established for the perfection and foreclosure of a mechanic's lien is wholly statutory and was unknown at common law or equity. *Trustees of Mtg. Trust of Am. v. District Court*, 621 P.2d 310 (Colo. 1980).

**Section limits mechanic's lien to:** (1) The property upon which the labor, services, and material are bestowed or rendered; and (2) the extent of the value of the labor, services, and material rendered upon the property. *Brannan Sand & Gravel Co. v. Santa Fe Land & Imp. Co.*, 138 Colo. 314, 332 P.2d 892 (1958); *Bushman Constr. Co. v. Air Force Academy Hous., Inc.*, 327 F.2d 481 (10th Cir. 1964); *Woodcrest Homes, Inc. v. First Nat'l Bank*, 11 B.R. 342, aff'd in part and rev'd on other grounds, 15 B.R. 886 (D. Colo. 1981).

Where work intended to benefit development property was not performed upon such property but rather upon adjacent land, foreclosure of lien against development property not allowed. *Beeman Bros. v. First Interstate Bank*, 784 P.2d 836 (Colo. App. 1989).

**Party asserting lien has burden of proving it;** he must ascertain that the party with whom he deals holds such a relation to the work being done as will entitle him to claim a lien for the work or material which he furnishes. *Davidson v. Jennings*, 27 Colo. 187, 60 P. 354 (1900); *Tritch v. Norton*, 10 Colo. 337, 15 P. 680 (1887); *Rico Reduction & Mining Co. v. Musgrave*, 14 Colo. 79, 23 P. 458 (1890).

**Proof required as basis for lien.** In an action to enforce a mechanic's lien, it must be pleaded and affirmatively shown that the labor performed was for one or more of the purposes specified in this section, in order that it may be made the foundation of a lien. *Lindemann v. Belden Consol. Mining & Milling Co.*, 16 Colo. App. 342, 65 P. 403 (1901); *Arkansas River, Land, Reservoir & Canal Co. v. Flinn*, 3 Colo. App. 381, 33 P. 1006 (1893); *Arkansas River, Land, Reservoir & Canal Co. v. Nelson*, 4 Colo. App. 438, 36 P. 307 (1894).

Mechanic's lien laws can be sustained only upon the theory that the lien is engrafted upon the interest of the owner because he has consented to the improvement in such a way as to permit a lien, and, in order for a lien to attach, the circumstances must be such as to show consent of the owner or to justify an inference of it. *Stewart v. Talbott*, 58 Colo. 563, 146 P. 771 (1915); *Rico Reduction & Mining Co. v. Musgrave*, 14 Colo. 79, 23 P. 458 (1890).

**Establishment of claimant as contractual agent required.** The lien claimant of a valid lien must establish, by proper proof, that he is the contractual agent, either directly or indirectly, or

such owner relative to the making of the improvement or furnishing the material for which the lien is claimed. *Stewart v. Talbott*, 58 Colo. 563, 146 P. 771 (1915).

**Proof that contracting party has unencumbered interest.** If a contractor proposes erecting a building, and furnishing materials or putting labor on a lot it behooves him to examine and assure himself of the fact that the person with whom he contemplates making his contract, or for whose benefit he is about to employ means or labor, has such an interest or title unencumbered as will enable him to avail himself of a valid or efficient lien. *Tritch v. Norton*, 10 Colo. 337, 15 P. 680 (1887).

Ownership of the building, structure, or improvement, and the doing of the work thereon or the rendering services or furnishing material therefor at the instance of such owner or his agent, plus ownership in the same person of the land upon which such structure or improvement is erected or place, are essential, under this section, to the validity of a lien upon such land. *Stewart v. Talbott*, 58 Colo. 563, 146 P. 771 (1915); *Burleigh Bldg. Co. v. Merchant Brick & Bldg. Co.*, 13 Colo. App. 455, 59 P. 83 (1899).

**Establishment that indebtedness exists in claimant's favor required.** A prime requisite to the establishment of a valid mechanic's lien is that an indebtedness exist in favor of a claimant for labor or materials, and where labor performed or materials furnished are in breach of a contract and so unsatisfactory as to require that either or both be redone at equal or greater expense to a property owner, they are without value and do not constitute an indebtedness. *Bishop v. Moore*, 137 Colo. 263, 323 P.2d 897 (1958); *Bushman Constr. Co. v. Air Force Academy Hous., Inc.*, 327 F.2d 481 (10th Cir. 1964).

A prime requisite to the establishment of a valid lien is that an indebtedness exists in favor of the claimant for labor or materials. *Sperry & Mock, Inc. v. Security Sav. & Loan Ass'n*, 37 Colo. App. 357, 549 P.2d 412 (1976).

**Where owner receives nothing of value subcontractor lacks right to lien.** Where the owner receives nothing of value, a subcontractor has no right to a mechanic's lien, and this is so although he might not be responsible for the conditions resulting in the defective performance. *Bishop v. Moore*, 137 Colo. 263, 323 P.2d 897 (1958); *Brannan Sand & Gravel Co. v. Santa Fe Land & Imp. Co.*, 138 Colo. 314, 332 P.2d 892 (1958).

**Showing that materials delivered were actually used unnecessary.** It is not necessary for the lien claimant to show that the materials delivered were actually used in the building against which the lien is sought because, where the statutory lien conferred is direct in its nature, one asserting an otherwise valid mechanic's lien will not have his lien defeated by the default of another party, even though such other party's

default renders worthless the improvements for which the lien is claimed. *Kobayashi v. Meehleis Steel Co.*, 28 Colo. App. 327, 472 P.2d 724 (1970); *Ragsdale Bros. Roofing v. United Bank*, 744 P.2d 750 (Colo. App. 1987).

**Services in planning and superintending work and erection of mill within section.** Plaintiff's services in planning and superintending development work and the erection of the mill were labor upon the property within the meaning of this section. *Bushman Constr. Co. v. Air Force Academy Hous., Inc.*, 327 F.2d 481 (10th Cir. 1964).

**Repair work and material included in claim for lien.** If, during the progress of construction of a building, repairs become necessary to the completed portion, the work and material for repairs may be included in and made a part of the account for construction and for which a mechanic's lien is claimed. *Cary Hdwe. Co. v. McCarty*, 10 Colo. App. 200, 50 P. 744 (1897).

**Off-site improvements lienable.** A mechanic's lien against an entire subdivision is valid when a portion of the materials supplied and labor performed was on land beneath publicly dedicated streets and outside of the formal boundaries of the subdivision property. *Woodcrest Homes, Inc. v. First Nat'l Bank*, 15 B.R. 886 (D. Colo. 1981).

**Contractor's tools and appliances not with section.** A contractor's aids, such as his tools and appliances, not intended to go into the structure or to be consumed, but to be taken away when the job is done, are not within this section. *Bushman Constr. Co. v. Air Force Academy Hous., Inc.*, 327 F.2d 481 (10th Cir. 1964).

**Rental fees for equipment not basis for lien.** Rental fees for equipment provided to a contractor did not serve as a basis for a lien. *Bushman Constr. Co. v. Air Force Academy Hous., Inc.*, 327 F.2d 481 (10th Cir. 1964).

**The inquiry of trial court is limited to determining what labor, services, and material were rendered by a plaintiff to the property upon which a lien is claimed.** *Brannan Sand & Gravel Co. v. Santa Fe Land & Imp. Co.*, 138 Colo. 314, 332 P.2d 892 (1958).

**Plaintiff entitled to lien absent contract.** Where the plaintiff furnished materials to contractor for a building, and there was neither a contract nor memorandum, the materials were deemed to have been furnished at the instance of the owner of the building to be improved, and the plaintiff is entitled to lien. *Monks v. Searle*, 118 Colo. 493, 197 P.2d 158 (1948).

**There can be no statutory agent until the owner, either directly or through some contractual agent thereunto authorized, has moved forward in the construction of the improvement.** *Stewart v. Talbott*, 58 Colo. 563, 146 P. 771, 1916C Ann. Cas. 1116 (1915).



**Owner's liability fixed by agent.** Where the statutory agent of the owner employed the plaintiff to perform services and labor which he did perform, the liability of the owner to the plaintiff, for the purposes of a lien, was fixed, and the owner could not escape its liability upon the sole contention that, in bringing the suit, the plaintiff failed to allege that he was employed a part of the time by the agent, as principal contractor, and the remainder of the time by him, as subcontractor. *Kennicott-Patterson Transf. Co. v. Modern Smelting & Ref. Co.*, 26 Colo. App. 135, 141 P. 144 (1914).

**Property owner not bound by unauthorized act.** The owner of property cannot be bound nor his property charged with a lien by the unauthorized act of a lessee in having improvements made on the leased property. *Fisher v. McPhee & McGinnity Co.*, 24 Colo. App. 420, 135 P. 132 (1913).

**Lessee as statutory agent.** A lessee is not by virtue of the relationship alone the statutory agent of the lessor for the making of improvements. *Terminal Drilling Co. v. Jones*, 84 Colo. 279, 269 P. 894 (1928).

**Contract denying lessee's authority to bind lessor's interest valid.** A contract expressly denying to a lessee the authority to bind the interest of the lessors with a mechanic's lien is valid. *Stewart v. Talbott*, 58 Colo. 563, 146 P. 771 (1915).

**Lien claim reduced by damages resulting from claimant's breach of contract.** Damages suffered by property owners as a result of the general contractor's breach of his contract to build may be used to reduce the lien claim of that contractor even though his claim includes undisputed amounts which are owed to subcontractors where those subcontractors are not parties to the action and have not filed mechanic's liens. *Barlow v. Staples*, 28 Colo. App. 93, 470 P.2d 909 (1970).

**Unpaid fringe benefit contributions are not part of the value of "labor done"** for which a lien may be claimed under subsection (1). *Ridge Erection Co. v. Mountain States Tel. & Tel. Co.*, 37 Colo. App. 477, 549 P.2d 408 (1976).

**Later furnishing material and labor does not validate prematurely filed claim.** Since there would be no debt until the materials had been furnished or labor performed, the fact that the materials were later furnished and labor was later performed would not validate a lien claim that had been prematurely filed when no debt existed. *Sperry & Mock, Inc. v. Security Sav. & Loan Ass'n*, 37 Colo. App. 357, 549 P.2d 412 (1976).

**Lien statement inadequate under subsection (4).** A lien statement which is defective as a matter of law because the name of each person who performed the labor which is the basis for the mechanic's lien does not appear on the lien statement would also be inadequate under the

amendatory language of subsection (4). *Ridge Erection Co. v. Mountain States Tel. & Tel. Co.*, 37 Colo. App. 477, 549 P.2d 408 (1976).

**Wall-to-wall carpeting held to be improvement.** See *Amco Elec. Co. v. First Nat'l Bank*, 622 P.2d 608 (Colo. App. 1981).

**Architect's preliminary work constitutes the commencement of an improvement or a structure.** *Seracuse Lawler & Partners, Inc. v. Copper Mt.*, 654 P.2d 1328 (Colo. App. 1982).

### III. PERSONS ENTITLED TO LIENS.

#### A. In General.

**Section contains enumeration of classes of persons entitled to claim.** This section contains an express and exhaustive enumeration of those classes of persons entitled to claim a mechanic's lien and those classes of acts for which such a lien may be claimed. *Ridge Erection Co. v. Mountain States Tel. & Tel. Co.*, 37 Colo. App. 477, 549 P.2d 408 (1976).

**Who may acquire liens.** Only those persons in whose favor the right to liens is given can acquire them. *Sayre-Newton Lumber Co. v. Union Bank*, 6 Colo. App. 541, 41 P. 844 (1895); *Lindemann v. Belden Consol. Mining & Milling Co.*, 16 Colo. App. 342, 65 P. 403 (1901); *Grimm v. Yates*, 58 Colo. 268, 145 P. 696 (1914).

**Under the plain language of subsection (1), "person" includes a corporation, without limitation.** Nothing in the statute imposes a residency requirement, whether upon individuals or corporations. There is nothing in the context of the mechanic's lien statutes as a whole that indicates a legislative intent to exclude foreign corporations, whether authorized to do business in the state or not, from the class of persons that may claim a lien. *Bob Blake Builders, Inc. v. Gramling*, 18 P.3d 859 (Colo. App. 2001).

**Persons with ownership interest not included in scope of section.** Persons with ownership interests in the property to which they attempt to claim a lien are not included within the protection of this section. *Damrell v. Creagar*, 42 Colo. App. 281, 599 P.2d 262 (1979).

**This section does not include those who merely furnish labor for the benefit of the contractor.** *Kern v. Guiry Bros. Wall Paper Co.*, 60 Colo. 286, 153 P. 87 (1915); *Skillstaff of Colo. v. Centex Real Estate*, 973 P.2d 674 (Colo. App. 1998).

Although this section has been amended numerous times since 1915 but the language in subsection (1) has not changed significantly, it is presumed that the general assembly agreed with this interpretation. *Skillstaff of Colo. v. Centex Real Estate*, 973 P.2d 674 (Colo. App. 1998).

Applying this interpretation, the court did not err in finding this section inapplicable to a tem-

porary personnel agency. *Skillstaff of Colo. v. Centex Real Estate*, 973 P.2d 674 (Colo. App. 1998).

**Trustees have no lien claim for unpaid contributions to employee trusts.** Conspicuously absent from the list of classes of persons entitled to claim a mechanic's lien and classes of acts for which such a lien may be claimed is the express grant of a lien claim to trustees for unpaid contributions to employee trusts. *Ridge Erection Co. v. Mountain States Tel. & Tel. Co.*, 37 Colo. App. 477, 549 P.2d 408 (1976).

**Claimants must bring themselves within section's purview.** Persons claiming the benefit of this section must bring themselves clearly within its purview, as belonging to some class in whose favor the remedy is allowed, because outside of the terms of this section, no lien can attach. *Pitschke v. Pope*, 20 Colo. App. 328, 78 P. 1077 (1904); *Groth v. Stahl*, 3 Colo. App. 8, 30 P. 1051 (1892).

This section is to be construed liberally in favor of lien claimants. However, it is incumbent upon the claimant to prove that he is entitled to the benefits of the section. *C & W Elec., Inc. v. Casa Dorado Corp.*, 34 Colo. 117, 523 P.2d 137 (1974).

**Lien failed absent owner's request for work done.** Where claimant was employed by defendant to perform labor on modular homes in defendant's factory, claimant's mechanic's lien failed because at the time claimant's labor was performed no owner of real property had requested either directly or indirectly that the work be done. *C & W Elec., Inc. v. Casa Dorado Corp.*, 34 Colo. App. 117, 523 P.2d 137 (1974).

**When third-party's lien attaches.** When a third-party lien claimant is involved, the vital question is whether the improvement was affixed to the property with the intention that it should become part of the premises. If it was, then the lien may attach to the owner's property. *Thirteenth St. Corp. v. A-1 Plumbing & Heating Co.*, 640 P.2d 1130 (Colo. 1982).

## B. Materialmen.

**Section gives to materialmen direct lien,** regardless of the state of the account between the owner and the contractor. *Great W. Sugar Co. v. Gilcrest Lumber Co.*, 25 Colo. App. 1, 136 P. 553 (1913).

**Materialman must prove knowledge of use of material.** The materialman must, at the time when he furnishes his material, know that it is to be used in some particular building; in the absence of proof of this character, he has failed to establish his right to maintain a lien. *Tabor-Pierce Lumber Co. v. Int'l. Trust Co.*, 19 Colo. App. 108, 75 P. 150 (1903); *Salzer Lumber Co. v. Lindenmeier*, 54 Colo. 491, 131 P. 442 (1913); *Beco Equip. Co. v. Box*, 44 Colo. App. 88, 608 P.2d 850 (1980).

It is necessary to prove that at the time the material was furnished there was a mutual understanding between the materialman and the contractor that the material was furnished to be used in the construction of a particular building or the improvement of certain property; or, at least, that there was such understanding upon the part of the materialman, and, in the absence of such proof, the lien cannot be sustained. *Milwaukee Gold Mining Co. v. Tomkins-Cristy Hdwe. Co.*, 26 Colo. App. 155, 141 P. 527 (1914).

**Material must be furnished to be actually used** and wrought into the structure to become a part thereof, or to be directly consumed to its betterment, and be of the kind called for in the contract between the owner and contractor, or between the contractor and subcontractor, before a lien will lie therefor; it is unnecessary that the material, in all cases, shall be actually used and wrought into the structure. *Farmer's Irrigation Co. v. Kamm*, 55 Colo. 440, 135 P. 766 (1913).

In order to give a materialman a lien, material must be furnished to be used in the construction in the sense that it is to be wrought up in the structure so as to become a part of it when completed, or that the material is to be directly consumed in the structure so as to improve it. *Farmer's Irrigation Co. v. Kamm*, 55 Colo. 440, 135 P. 766 (1913); *Small v. Foley*, 8 Colo. App. 435, 47 P. 64 (1896).

**No lien existed for materials furnished to be used as aids.** No lien existed for materials furnished to be used about the construction, as an aid to the contractor in the performance of his work, as his tools and appliances are aids, and which were not intended to go into the structure, or to be directly consumed in its betterment, but were to be taken away when the work was completed, as the tools and appliances are taken away. *Farmer's Irrigation Co. v. Kamm*, 55 Colo. 440, 135 P. 766 (1913).

It is the duty of the materialman to ascertain whether or not such material is of the kind required by the subcontractor under his contract to put into the structure, for an agent constituted for a particular purpose and under a limited and circumscribed power cannot bind his principal by any act beyond his authority. *Farmer's Irrigation Co. v. Kamm*, 55 Colo. 440, 135 P. 766 (1913).

**Where materialman knows materials to be used elsewhere, lien unenforceable.** If the materialman furnished material with knowledge that some of it was to be used in the construction of other buildings, it could not, as against a mortgage, enforce a lien for the material it knew was to be so used, because such material could not be said to have been furnished for the purpose of being used in the construction of the building upon which a lien is claimed. Mortgage



Brokerage Co. v. Barr Lumber Co., 91 Colo. 445, 16 P.2d 32 (1932).

**Lien of materialman is independent of contract** between the owner and the principal contractor. *Lewis v. Martin*, 30 Colo. App. 342, 492 P.2d 877 (1971).

**Privity of contract obviates necessity of materialmen contacting owner.** Privity of contract between owners of the property and materialmen is created by this section wherein the contractor is made the agent of the owner, and obviates the necessity of the materialmen contacting the owner in any manner whatsoever. *W.B. Barr Lumber Co. v. Thompson*, 131 Colo. 347, 281 P.2d 1016 (1955).

**Materialman's right to lien not deprived by contractor's defective work.** Defective work done by the general contractor or his employees, which results in damage or a lack of benefit to the owners, does not deprive a materialman of his right to a lien. *Lewis v. Martin*, 30 Colo. App. 342, 492 P.2d 877 (1971).

Because the rule that where the labor or materials furnished are in breach of the contract and so unsatisfactory as to require that either or both be redone at equal or greater expense, clearly they are without value to the property owner and do not constitute an indebtedness, has no application in dealing with the lien of materialmen for materials supplied for the construction of a building if there has been neither claim nor proof that the materials provided at the request of the general contractor were either defective, unsuitable, or not required for the building, and there is no allegation of any wrongdoing on the part of the materialmen. *Lewis v. Martin*, 30 Colo. App. 342, 492 P.2d 877 (1971).

**Lumber company had no contractual relationship with homeowners** who purchased prefabricated kit to construct a log home where lumber company merely wholesaled materials to seller of kits and delivered them at its arrangement. *Schneider v. J.W. Metz Lumber Co.*, 715 P.2d 329 (Colo. 1986).

**Lumber company not entitled to mechanics' lien on homeowners' property** because log home company which sold prefabricated kits not considered as principal contractor nor considered as agent of lumber company. *Schneider v. J.W. Metz Lumber Co.*, 715 P.2d 329 (Colo. 1986).

#### C. Subcontractors.

**"Subcontractor".** Any person who agrees to perform a substantial, specified portion of the work of construction of a given building which is the subject of a general construction contract in accordance with the plans and specifications of such contract is a subcontractor or an owner's statutory agent within the meaning of this article, and this applies even though he does not

undertake to incorporate such portion of the projected structure into the building itself. *Kobayashi v. Meehleis Steel Co.*, 28 Colo. App. 327, 472 P.2d 724 (1970).

Where steel products were furnished to one who admittedly was engaged in the construction of significant components of the building, which components, if acceptable, were destined for incorporation into the building structure, the fact that the party constructing the building components was away from the jobsite and in effect a subcontractor is without significance since, as a matter of statutory construction, such a person would be a subcontractor within the meaning of this article. *Kobayashi v. Meehleis Steel Co.*, 28 Colo. App. 327, 472 P.2d 724 (1970).

**One contracting to do particular part of work entitled to lien.** Where one contracts with the principal contractor to do some particular part of the work and to furnish material and labor for that purpose, he may be entitled to a lien for the value of both. *Kern v. Guiry Bros. Wall Paper Co.*, 60 Colo. 286, 153 P. 87 (1915).

**Agency between subcontractor and owner is special.** While this section makes the subcontractor the agent of the owner, the agency thus created is a special one and the authority is limited to the procurement of material reasonably sufficient and necessary to go into the structure in accordance with the terms of the contract. *Farmer's Irrigation Co. v. Kamm*, 55 Colo. 440, 135 P. 766 (1913).

**Section gives to subcontractors direct lien,** regardless of the state of the account between the owner and the contractor. *Great W. Sugar Co. v. Gilcrest Lumber Co.*, 25 Colo. App. 1, 136 P. 553 (1913).

**Conceptions of right to subcontractor's lien.** There are two distinct conceptions of the right to a subcontractor's lien recognized by the statutes of the various states: (1) That such liens are allowed by statute through a species of equitable subrogation to the contract between the owner and his contractor; and (2) that such liens are allowed because of the enhanced value of the property caused by the labor and material so contributed to it by the consent of the owner through his contractor, made his agent by this section; the latter is the conception adopted in this state. *Great W. Sugar Co. v. Gilcrest Lumber Co.*, 25 Colo. App. 1, 136 P. 553 (1913).

**Protected claimants are those who have a direct relationship with the contractor** or one whose acts in purchasing labor and materials are imputed to him. Although subcontractors are not in privity of contract with the owner of the property they are in privity with the general contractor. *Western Metal v. Acoustical and Const.*, 851 P.2d 875 (Colo. 1993).

**Amount for which subcontractor is entitled** to his statutory lien and action is not always to be measured by the extent of his valid claim against the principal contractor because, where,

by the default or neglect of the principal contractor, the subcontractor is obliged to remain idle, and suffers loss in consequence, he may undoubtedly recover of the contractor; but such damages could constitute no valid claim against the owner. *Tabor v. Armstrong*, 9 Colo. 285, 12 P. 157 (1886).

**Subcontractors not paid by contractor entitled to lien.** By agreeing to make check payable to both contractor and subcontractor jointly, the project owner ratified the account between the contractor and subcontractor. This is sufficient basis for a personal judgment against the project owner. *Buttermore v. Firestone Tire and Rubber Co.*, 721 P.2d 701 (Colo. App. 1986).

#### D. Others.

**Subsection (1) expressly includes architects and engineers** in the class of those eligible for mechanic's liens. *Bankers Trust Co. v. El Paso Pre-Cast Co.*, 192 Colo. 468, 560 P.2d 457 (1977).

An architect who, pursuant to a contract with the owner of real property, prepares plans and specifications for construction of improvements upon that property may assert a mechanic's lien even though the improvements are not subsequently erected. *James H. Stewart & Assoc. v. Naredel of Colo., Inc.*, 39 Colo. App. 552, 571 P.2d 738 (1977).

An owner who directly authorizes another to hire an architect to draft plans for improvements on the owner's property may be subject to an architect's lien. *Chambliss/Jenkins Assocs. v. Forster*, 650 P.2d 1315 (Colo. App. 1982).

An architect who provides plans for proposed property improvements at a property owner's request, is permitted to file a lien against the owner's property. *Seracuse Lawler & Partners, Inc. v. Copper Mt.*, 654 P.2d 1328 (Colo. App. 1982).

An architect who performs work which constitutes basic services under a contract and at the request of the owner is entitled to impose a mechanics lien for such work. *Sheldon v. Platte Valley Sav.*, 794 P.2d 1083 (Colo. App. 1990).

**Initial architects entitled to lien for preparation of original plans.** Where architects prepared plans for the construction of a building and thereafter other architects prepared plans which were used, but in which were incorporated fundamental principles, features, and treatment contained in the original plans, the first architects, having rendered their services upon the faith and credit of the real property and building to be erected thereon, were entitled to a lien for their services. *Park Lane Props. v. Fisher*, 89 Colo. 591, 5 P.2d 577 (1931).

**Superintendence of building construction lienable.** The superintendence of the construction of a building is work for which this section gives a lien, but going to distant places to hurry

up the parties who had contracted to furnish material for the building was not superintending the work of construction, nor is it embraced in any of the classes of service for which a lien is given by this section. *Pitschke v. Pope*, 20 Colo. App. 328, 78 P. 1077 (1904).

**Services performed by attorney for a developer are not lienable items** under the mechanics' lien statute. *Laurence J. Rich v. First Interstate*, 807 P.2d 1199 (Colo. App. 1990).

**Engineers who perform professional services have a lien against the property upon which they rendered services if the services are performed at the request of the owner or a person acting under the owner's authority, even though no building or improvement is ever constructed.** Such professional services constitute work done on a building, structure, or other improvements. *Merrick & Co. v. Estate of Verzuh*, 987 P.2d 950 (Colo. App. 1999).

## IV. CONTRACTS BETWEEN OWNER AND CONTRACTOR.

**Subsections (2) and (3) must be strictly construed**, and the claimant must be held to a strict compliance with these provisions before the lien can be held to attach. *Mahe v. Shull*, 11 Colo. App. 322, 52 P. 1115 (1898).

**These provisions cannot be extended by implication** so as to embrace within them and render liable a person who was in no sense a party to the contract under which the work was done. *Mahe v. Shull*, 11 Colo. App. 322, 52 P. 1115 (1898).

**Contracts which must be recorded** are those entered into between the reputed owner and a contractor, in which certain work is contracted to be done and a certain price is contracted to be paid. *Mahe v. Shull*, 11 Colo. App. 322, 52 P. 1115 (1898).

**Written contract filed to establish lien not required of architect.** It is not necessary that an architect, in order to have a lien on property for services rendered in preparing plans, specifications, and estimates for a building, have a written contract filed of record, covering such services. *Home Pub. Market Co. v. Fallis*, 72 Colo. 48, 209 P. 641 (1922).

**Filing of copy of contract shall be complete.** The statutory filing of a copy of a building contract or memorandum thereof to protect the owner against certain liens, requires that the substance of the contract, including plans and specifications, if they are made a part thereof, shall be incorporated in the statement that is filed, because this section is imperative and requires that the filing shall not be partial, but complete. *Armour & Co. v. McPhee & McGinnity Co.*, 85 Colo. 262, 275 P. 12 (1929).

**Contracts in excess of \$500, provided for in subsection (3), refer only to a contract for work to be done or materials furnished in which a**



"contract price" is to be paid by the owner to the contractor, and not to the contract contained in an ordinary lease in which all payments provided for are to be made by the lessee to the owner. *Empire Coal Co. v. Rosa*, 26 Colo. App. 230, 142 P. 192 (1914).

**Object in requiring filing of contract where contract price exceeds \$500.** The object in requiring the contract to be filed, where the contract price exceeds \$500 under this section, is to protect the owner against liens over and above his contract price and to give general information to all persons who may desire to furnish materials or perform labor on the structure. *Armour & Co. v. McPhee & McGinnity Co.*, 85 Colo. 262, 275 P. 12 (1929).

A purpose of the requirement as to filing the contract or a memorandum is to give notice to a claimant so that he may act intelligently in reference to serving the notice on the owner. *Great W. Sugar Co. v. Gilcrest Lumber Co.*, 25 Colo. App. 1, 136 P. 553 (1913); *Chicago Lumber Co. v. Newcomb*, 19 Colo. App. 265, 74 P. 786 (1903).

**No right to lien exists where contractor fails to perform.** Where a contractor fails to perform his contract, no right to a lien, either of the contractor or of the subcontractor, exists. *Bishop v. Moore*, 137 Colo. 263, 323 P.2d 897 (1958).

**Effect of owner's failure to file.** Because of the owner's failure to file with the county recorder the contract or a memorandum thereof, all claims for materials furnished and labor done are deemed to have been furnished and done at the instance of the owner and the lien attaches to the full value of such labor and material, irrespective of the state of the account between the owner and the principal contractor. *Armour & Co. v. McPhee & McGinnity Co.*, 85 Colo. 262, 275 P. 12 (1929); *Chicago Lumber Co. v. Newcomb*, 19 Colo. App. 265, 74 P. 786 (1903).

**Status of lien claimant changed for failure to file contract.** Where the contract is not filed for record, the lien claimant's status is changed with respect to the time for filing a lien, that is, it becomes a principal contractor and therefore by statute is given three (now four) months from the completion of the work within which to file the lien statement. *W.B. Barr Lumber Co. v.*

*Thompson*, 131 Colo. 347, 281 P.2d 1016 (1955).

**Lessor's liability not enlarged by failure to record contract.** Failure to record a contract between lessee and contractor does not enlarge liability of lessor who was not a party to the contract. *Terminal Drilling Co. v. Jones*, 84 Colo. 279, 269 P. 894 (1928).

**Personal liability imposed for entire amount of contract.** This section does not impose a personal liability for the entire amount of a contract involved in a mechanic's lien claim upon a landowner where no privity of contract is shown between him and the lien claimant; the landowner's liability in such case is limited to the value of the labor or materials incorporated in the improvements upon his property. *Brannan Sand & Gravel Co. v. Santa Fe Land & Imp. Co.*, 138 Colo. 314, 332 P.2d 892 (1958).

**Subsection (2) does not enlarge the lien rights of the contractor** beyond the reasonable value of the materials, labor, and services furnished by it, as provided in this section when construed in its entirety. Rather, if a contract is timely recorded, its price represents the maximum value of all liens that can be asserted. *Heating & Plumbing Engineers v. H.J. Wilson*, 698 P.2d 1364 (Colo. App. 1984).

**Proof required to relieve owner from contractual liability.** If the owner of the premises wishes to relieve itself from liability for the labor performed under such contracts, it is necessary that it should show that the contracts were in writing, and that such contracts, or a memorandum thereof, were filed for record, because it is a matter of defense. *Kennicott-Patterson Transf. Co. v. Modern Smelting & Ref. Co.*, 26 Colo. App. 135, 141 P. 144 (1914).

**Contractual interest rate applies to lien.** The general assembly, by using the clause "any contract or agreement", in subsection (5), has evidenced an intent that the contractual interest rate agreed upon between the claimant and the tenant will apply to a lien against the owner's property. *Thirteenth St. Corp. v. A-1 Plumbing & Heating Co.*, 640 P.2d 1130 (Colo. 1982).

**The contract price is the maximum amount which can be encumbered by a mechanics' lien** and late charges are not lienable pursuant to this section. *Independent Trust v. Stan Miller, Inc.*, 796 P.2d 483 (Colo. 1990).

**38-22-102. Payments - effect.** (1) No part of the contract price, by the terms of any such contract, shall be made payable, nor shall the same, or any part thereof, be paid in advance of the commencement of the work, but the contract price, by the terms of the contract, shall be made payable in installments, or upon estimates, at specified times after the commencement of the work, or on the completion of the whole work; but at least the following percentages of the total contract price shall be made payable at least thirty-five days after the final completion of the contract:

(a) Fifteen percent of the first two hundred fifty thousand dollars of the contract price;

(b) Ten percent of the contract price in excess of two hundred fifty thousand dollars up to and including five hundred thousand dollars;

(c) Five percent of the contract price in excess of five hundred thousand dollars up to and including seven hundred fifty thousand dollars;

(d) Two percent of the contract price in excess of seven hundred fifty thousand dollars.

(2) No payment made prior to the time when the same is due, under the terms and conditions of the contract, shall be valid for the purpose of defeating, diminishing, or discharging any lien in favor of any person, except the contractor or other person to or for whom the payment is made, but as to such liens, such payment shall be deemed as if not made and shall be applicable to such liens, notwithstanding that the contractor or other person to or for whom it was paid may thereafter abandon his contract, or be or become indebted to the reputed owner in any amount for damages or otherwise or for nonperformance of his contract or otherwise.

(3) As to all liens, except those of principal contractors, the whole contract price shall be payable in money, and shall not be diminished by any prior or subsequent indebtedness, offset, or counterclaim in favor of the reputed owner and against the principal contractor, and no alteration of such contract shall affect any lien acquired under the provisions of this article. In case such contracts and alterations thereof do not conform substantially to the provisions of this section, the labor done and laborers or materials furnished by all persons other than the principal contractor shall be deemed to have been done and furnished at the personal instance and request of the person who contracted with the principal contractor, they shall have a lien for the value thereof.

(3.5) Any provisions of this section to the contrary notwithstanding, it shall be an affirmative defense in any action to enforce a lien pursuant to this article that the owner or some person acting on the owner's behalf has paid an amount sufficient to satisfy the contractual and legal obligations of the owner, including the initial purchase price or contract amount plus any additions or change orders, to the principal contractor or any subcontractor for the purpose of payment to the subcontractors or suppliers of laborers, materials, or services to the job, when:

(a) The property is an existing single-family dwelling unit;

(b) The property is a residence constructed by the owner or under a contract entered into by the owner prior to its occupancy as the owner's primary residence; or

(c) The property is a single-family, owner-occupied dwelling unit, including a residence constructed and sold for occupancy as a primary residence. This paragraph (c) shall not apply to a developer or builder of multiple residences except for the residence that is occupied as the primary residence of the developer or builder.

(4) Any of the persons mentioned in section 38-22-101, except a principal contractor, at any time may give to the owner, or reputed owner, or to the superintendent of construction, agent, architect, or to the financing institution or other person disbursing construction funds, a written notice that they have performed labor or furnished laborers or materials to or for a principal contractor, or any person acting by authority of the owner or reputed owner, or that they have agreed to and will do so, stating in general terms the kind of labor, laborers, or materials and the name of the person to or for whom the same was or is to be done, or performed, or both, and the estimated or agreed amount in value, as near as may be, of that already done or furnished, or both, and also of the whole agreed to be done or furnished, or both.

(5) Such notice may be given by delivering the same to the owner or reputed owner personally, or by leaving it at his residence or place of business with some person in charge; or by delivering it either to his superintendent of construction, agent, architect, or to the financing institution or other person disbursing construction funds, or by leaving it either at their residence or place of business with some person in charge. No such notice shall be invalid or insufficient by reason of any defect of form, provided it is sufficient to inform the owner or reputed owner of the substantial matters provided for in this section, or to put him upon inquiry as to such matters.

(6) Upon such notice being given, it is the duty of the person who contracted with the principal contractor to withhold from such principal contractor, or from any other person acting under such owner or reputed owner, and to whom, by said notice, the said labor, laborers, or materials, have been furnished or agreed to be furnished, sufficient money due or that may become due to said principal contractor, or other persons, to satisfy such claim



and any lien that may be filed therefor for record under this article, including reasonable costs provided for in this article.

(7) The payment of any such lien, which has been acknowledged by such principal contractor, or other person acting under such owner or reputed owner in writing to be correct, or which has been established by judicial determination, shall be taken and allowed as an offset against any moneys which may be due from the owner, or reputed owner to such principal contractor, or the person for whom such work and labor was performed or furnished.

**Source:** L. 1899: p. 263, § 2. R.S. 08: § 4026. C.L. § 6443. CSA: C. 101, § 16. CRS 53: § 86-3-2. C.R.S. 1963: § 86-3-2. L. 65: p. 850, § 2. L. 69: p. 692, § 2. L. 87: (3.5) added, p. 1336, § 1, effective May 25. L. 2000: (3), IP(3.5), (3.5)(b), (4), (6), and (7) amended, p. 205, § 2, effective August 2.

## ANNOTATION

- I. General Consideration.
- II. Notice.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "Property Law", see 32 Dicta 420 (1955). For article, "Mechanics' Liens Relative to Oil and Gas Operations — Part II", see 34 Dicta 373 (1957).

**Section relates to manner of making payments.** Hayutin v. Gibbons, 139 Colo. 262, 338 P.2d 1032 (1959).

**Sections provide contract form between owner and principal contractor.** This section and § 38-22-101 provide the form of a contract which may be entered into by the owner and the principal contractor to enable the latter to secure a lien for himself and to enable the former to confine the liabilities to which his property may be subjected to the contract price. Chicago Lumber Co. v. Newcomb, 19 Colo. App. 265, 74 P. 786 (1903).

**Parties not prohibited from entering into different contract.** This section and § 38-22-101, do not prohibit the parties from entering into another and different contract, and there is no interference with, or abridgment of, their right to contract as they may see fit. Chicago Lumber Co. v. Newcomb, 19 Colo. App. 265, 74 P. 786 (1903).

**Agency of principal contractor limited.** The agency of a principal contractor, under § 38-22-101 and this section, is a limited agency for the purpose of creating a lien only. Brannan Sand & Gravel Co. v. Santa Fe Land & Imp. Co., 138 Colo. 314, 332 P.2d 892 (1958).

**Payment of debt constitutes bar to enforcement of lien.** Where the debt for which a lien is claimed has been paid in a manner which is binding upon the party asserting the lien, payment of such debt constitutes a bar to the enforcement of the lien. Am. Irrigation Co. v. Fadenrecht, 30 Colo. App. 28, 489 P.2d 1060 (1971).

**For purposes of this section, a lien arises on the date it was perfected rather than the date**

**materials were provided.** Wholesale Specialties v. Vill. Homes, 820 P.2d 1170 (Colo. App. 1991).

**Regardless of contractor's status as an owner,** payment of purchase price or contract amount by homeowner to contractor triggered a complete affirmative defense thereby barring enforcement of plumber's mechanic lien against the homeowner. Koch Plumbing and Heating v. Brown, 835 P.2d 610 (Colo. App. 1992).

**Affirmative defense of payment does not require proof of a specific intent** on the part of homeowners that the purchase price paid for homes be "for the purpose of payment to the subcontractors and new suppliers". Wholesale Specialties v. Vill. Homes, 820 P.2d 1170 (Colo. App. 1991).

**Subsection (3.5) was enacted to protect homeowners from paying for their home twice simply because a general contractor had not paid its subcontractors, and once the homeowner pays the general contractor the full purchase price, the protections in subsection (3.5) immediately apply.** Wholesale Specialties v. Vill. Homes, Ltd., 820 P.2d 1170 (Colo. App. 1991); Crissey Fowler Lumber v. FCIB, 8 P.3d 536 (Colo. App. 2000).

Under the plain language of subsection (3.5), where mechanics' liens are recorded prior to full payment by the homeowner, the homeowner cannot assert the defense of full payment because the initial purchase price had not been paid prior to recordation of the liens. Crissey Fowler Lumber v. FCIB, 8 P.3d 536 (Colo. App. 2000).

Because the homeowners had paid their original contractor only part of the purchase price before the liens were recorded, the circumstances did not trigger the intended protection of subsection (3.5) against liens filed after the payment of the full purchase price. Crissey Fowler Lumber v. FCIB, 8 P.3d 536 (Colo. App. 2000).

**Applied in** Ditto v. Jackson, 3 Colo. App. 281, 33 P. 81 (1893); Aste v. Wilson, 14 Colo. App. 323, 59 P. 846 (1900); Great W. Sugar Co.

v. Gilcrest Lumber Co., 25 Colo. App. 1, 136 P. 553 (1913); First Com. Corp. v. First Nat'l Bancorporation, Inc., 572 F. Supp. 1430 (D. Colo. 1983).

giving personal notice to the owner of claims against the principal contractor is not a mandatory, but it is a permissive, provision. Armour & Co. v. McPhee & McGinnity Co., 85 Colo. 262, 275 P. 12 (1929).

## II. NOTICE.

**Notice provision of subsection (4) deemed permissive.** Subsection (4) which provides for

**38-22-103. Attaching of lien - enforcement.** (1) The liens granted by this article shall extend to and cover so much of the lands whereon such building, structure, or improvement is made as may be necessary for the convenient use and occupation of such building, structure, or improvement, and the same shall be subject to such liens. In case any such building occupies two or more lots or other subdivisions of land, such several lots or other subdivisions shall be deemed one lot for the purposes of this article, and the same rule shall hold in cases of any other such improvements that are practically indivisible, and shall attach to all machinery and other fixtures used in connection with any such lands, buildings, mills, structures, or improvements.

(2) When the lien is for work done or labor or material furnished for any entire structure, erection, or improvement, such lien shall attach to such building, erection, or improvement for or upon which the work was done, or laborers or materials furnished in preference to any prior lien or encumbrance, or mortgage upon the land upon which the same is erected or put, and any person enforcing such lien may have such building, erection, or improvement sold under execution and the purchaser at any such sale may remove the same within thirty days after such sale.

(3) Any lien provided for by this article shall extend to and embrace any additional or greater interest in any of such property acquired by such owner at any time subsequent to the making of the contract or the commencement of the work upon such structure and before the establishment of such lien by process of law, and shall extend to any assignable, transferable, or conveyable interest of such owner or reputed owner in the land upon which such building, structure, or other improvement is erected or placed.

(4) Whenever any person furnishes any laborers or materials or performs any labor, for the erection, construction, addition to, alteration, or repair of two or more buildings, structures, or other improvements, when they are built and constructed by the same person and under the same contract, it is lawful for the person so furnishing such laborers or materials or performing such labor to divide and apportion the same among the buildings, structures, or other improvements in proportion to the value of the laborers or materials furnished for and the labor performed upon or for each of said buildings, structures, or other improvements and to file with his or her lien claim therefor a statement of the amount so apportioned to each building, structure, or other improvement. This lien claim when so filed may be enforced under the provisions of this article in the same manner as if said laborers or materials had been furnished and labor performed for each of said buildings, structures, or other improvements separately; but if the cost or value of such labor, laborers, or materials cannot be readily and definitely divided and apportioned among the several buildings, structures, or other improvements, then one lien claim may be made, established, and enforced against all such buildings, structures, or other improvements, together with the ground upon which the same may be situated, and in such case for the purposes of this article, all such buildings, structures, and improvements shall be deemed one building, structure, or improvement, and the land on which the same are situated as one tract of land.

**Source:** L. 1899: p. 265, § 3. R.S. 08: § 4027. C.L. § 6444. CSA: C. 101, § 17. CRS 53: § 86-3-3. C.R.S. 1963: § 86-3-3. L. 2000: (2) and (4) amended, p. 206, § 3, effective August 2.



## ANNOTATION

- I. General Consideration.
- II. Estate or Interest Subject to Lien.
- III. Lien on Land Necessary for Building.
- IV. Lien on "Entire Structure".
- V. Blanket Liens.
- VI. Lien on Fixtures.

## I. GENERAL CONSIDERATION.

**Purposes of mechanics' lien laws.** Mechanics' lien laws are designed for the benefit and protection of mechanics and materialmen, and should be construed in favor of lien claimants. *Darien v. Hudson*, 134 Colo. 213, 302 P.2d 519 (1956); *Ragsdale Bros. Roofing v. United Bank*, 744 P.2d 750 (Colo. App. 1987).

**Section applies to construction of new improvements** as distinguished from expansion, repair, and remodeling of existing improvements. *Lew Hammer, Inc. v. Dash, Inc.*, 42 Colo. App. 414, 599 P.2d 948 (1979).

**Section does not create a lien separate and distinct from § 38-22-101** but merely defines the scope and extent of such liens. *F.M. Hall & Co. v. Southwest Props.*, 747 P.2d 688 (Colo. App. 1987).

**Inception of right to lien arises from estoppel.** The inception of a right to a lien under this section, coupled with § 38-22-105, arises from estoppel. *Stewart v. Talbott*, 58 Colo. 563, 146 P. 771 (1915).

**Mechanics' lien is prior lien upon improvement.** This section and §§ 38-22-105 and 38-22-106 make a mechanic's lien a prior lien upon the improvement, while an existing mortgage remains a prior lien upon the land. *Atkinson v. Colo. Title & Trust Co.*, 59 Colo. 528, 151 P. 457 (1915); *Darien v. Hudson*, 134 Colo. 213, 302 P.2d 519 (1956); *Ragsdale Bros. Roofing v. United Bank*, 744 P.2d 750 (Colo. App. 1987).

**Mechanics' liens are not entitled to priority under this section over a pre-existing deed of trust expressly intended to secure a loan for construction if: (1) The deed is recorded prior to attachment of the mechanics' liens and (2) the loan proceeds are used for construction purposes.** *1st Choice Bank v. Fisher Mech. Contractors, Inc.*, 15 P.3d 1100 (Colo. App. 2000).

**Mechanics' liens are junior and subordinate to an existing deed of trust on the land occupied by the improved building.** *Darien v. Hudson*, 134 Colo. 213, 302 P.2d 519 (1956).

**Mechanic's lien filed to secure payment for labor and materials furnished to remodel an existing structure is subordinate to the lien of a trust deed** which was in no manner connected with such remodeling, but was recorded more than two years prior thereto and covered the land and all improvements thereon. *Stinnett v.*

*Modern Homes*, 142 Colo. 176, 350 P.2d 197 (1960).

Where a deed of trust was given for a loan with the understanding that the loan was to be used for the construction of a building, and the deed of trust, recorded before work on the building was begun, expressly covered the building to be erected the lien of the deed of trust took priority over mechanics' liens to the extent that the loan was actually applied to payment of labor and materials used in the construction of the building. *Joralman v. McPhee*, 31 Colo. 26, 71 P. 419 (1903).

**When lien not held subordinate to deed of trust.** Where a portion of money borrowed and secured by a deed of trust is by agreement to be used in improvement of the property, it is unjust to hold that lien claimants furnishing labor and material for such improvements should be relegated to the position of subordinate lien holders. *Darien v. Hudson*, 134 Colo. 213, 302 P.2d 519 (1956).

**Absent language which clearly indicates an intention to waive a mechanics' lien**, it will not be supposed that the laborer or materialman intended to relinquish absolutely his statutory right to claim a lien beyond the amount of consideration received. *Ragsdale Bros. Roofing v. United Bank*, 744 P.2d 750 (Colo. App. 1987).

**Mechanics' liens are an exception to the general rule** that priorities under the recording statute are established based on the order in which they are recorded. Mechanics' liens are granted priority over the previously recorded interests in specific circumstances. *Ragsdale Bros. Roofing v. United Bank*, 744 P.2d 750 (Colo. App. 1987).

**Applied** in *Sayre-Newton Lumber Co. v. Union Bank*, 6 Colo. App. 541, 41 P. 844 (1895); *State Bank v. Plummer*, 54 Colo. 144, 129 P. 819 (1912); *Terminal Drilling Co. v. Jones*, 84 Colo. 279, 269 P. 894 (1928); *In re Ben Boldt, Jr., Floral Co.*, 37 F.2d 499 (10th Cir. 1930); *Jones v. Mawson-Peterson Lumber Co.*, 112 Colo. 493, 150 P.2d 795 (1944); *Trustees of Mtg. Trust of Am. v. District Court*, 621 P.2d 310 (Colo. 1980); *Climax Molybdenum Co. v. Specialized Installers, Inc.*, 12 B.R. 546 (D. Colo. 1981).

## II. ESTATE OR INTEREST SUBJECT TO LIEN.

**Section gives lien upon whatever interest owner had when work was begun**, and to another or greater interest whenever acquired before the lien is enforced. *Home Pub. Mkt. Co. v. Fallis*, 72 Colo. 48, 209 P. 641 (1922); *Sontag v. Abbott*, 140 Colo. 351, 344 P.2d 961 (1959).

**Lien which attaches is not limited to estate in fee**, but extends to any interest of the person

that is transferable, assignable, or conveyable in the real estate at whose instance and upon which a building, structure, or improvement is erected. *Horn v. Clark Hdwe. Co.*, 54 Colo. 522, 131 P. 405, 45 L.R.A. (n.s.) 100 (1913).

**Leasehold interest may be subjected to lien.** *Cary Hdwe. Co. v. McCarty*, 10 Colo. App. 200, 50 P. 744 (1897); *Horn v. Clark Hdwe. Co.*, 54 Colo. 522, 131 P. 405 (1913).

**One may be "owner" without legal title.** That one who does not have legal title may be the "owner", within the meaning of § 38-22-105, is recognized in subsection (3), which provides that the lien shall extend to any assignable, transferable, or conveyable interest of such owner in the land upon which such building, structure or other improvement shall be erected or placed. *Home Pub. Mkt. Co. v. Fallis*, 72 Colo. 48, 209 P. 641 (1922); *Bankers' Bldg. & Loan Ass'n v. Fleming Bros. Lumber Co.*, 83 Colo. 335, 264 P. 1087 (1928); *Sontag v. Abbott*, 140 Colo. 351, 344 P.2d 961 (1959).

**Extension of lien to property jointly owned.** Whether or not a mechanic's lien may ever be extended to or decreed upon property not embraced in the lien statement, it cannot be extended to and decreed upon such property owned jointly by the owner of the property, included in the statement, and her husband, where no facts were shown to exist which would entitle the lien claimant to a lien upon the husband's interest. *Perkins v. Boyd*, 16 Colo. App. 266, 65 P. 350 (1901).

**Improvement as joint undertaking of lessor and lessee.** Where the facts and circumstances disclose that the improvement is the joint undertaking of both the lessor and lessee, the interest in the land of both may be held under the mechanics' lien law for the improvements so made, but in the absence of such proof only the interest of the lessee is liable. *Bankers' Bldg. & Loan Ass'n v. Fleming Bros. Lumber Co.*, 83 Colo. 335, 264 P. 1087 (1928).

**When optionee deemed owner of real estate within article's purview.** Where the holder of an option to purchase real estate causes building materials to be delivered thereon to thereafter be used in the construction of improvements on the land, and where the option thereafter ripens into fee ownership, the optionee is an owner of real estate within the coverage of this article, and, as such, empowered to impress such a lien upon the real estate to which he directs the delivery of building materials. *Sontag v. Abbott*, 140 Colo. 351, 344 P.2d 961 (1959).

**Liens attach to interest acquired at foreclosure sale.** Mechanics' liens attach to the interest acquired by the purchaser at a foreclosure sale through the public trustee's deed. *Bankers' Bldg. & Loan Ass'n v. Fleming Bros. Lumber Co.*, 83 Colo. 335, 264 P. 1087 (1928).

**Lien for work done under streets and outside subdivision permitted.** A mechanic's lien

against an entire subdivision is valid when a portion of the materials supplied and labor performed was on land beneath publicly dedicated streets and outside of the formal boundaries of the subdivision property. *Woodcrest Homes, Inc. v. First Nat'l Bank*, 15 B.R. 886 (D. Colo. 1981).

### III. LIEN ON LAND NECESSARY FOR BUILDING.

**Land and building subject to lien.** When a vendor requires the construction of a building upon the land contracted to be conveyed, and it is built, the land as well as the building is subject to a lien. *Stewart v. Talbott*, 58 Colo. 563, 146 P. 771 (1915); *Colo. Gold Dredging Co. v. Stearns-Roger Mfg. Co.*, 60 Colo. 412, 153 P. 765 (1915).

**Lien is granted on as much land as is necessary** for the use and occupation of the building, that is, all the land which is benefitted and whose value is increased by the improvement. *Hess Flume Co. v. La Junta Sub. Land Co.*, 63 Colo. 236, 166 P. 246 (1917).

**Lots need not be contiguous to be lienied together.** There is no provision that lots must be contiguous, nor any requirement, except that there must be one contract for all the lots and that the lien must be such as not to be readily and definitely apportioned, because it is the entirety of the contract, not of the lands, that determines the right. *Buerger Inv. Co. v. B.F. Salzer Lumber Co.*, 77 Colo. 401, 237 P. 162 (1925).

**Quantity of land necessary for convenient use presumable.** Although the lienor is only entitled to the quantity of land necessary for the convenient use and occupancy of the buildings erected, it will be presumed that, in the absence of pleading or proof to the contrary, when the complaint described the land by legal subdivisions and avers that the buildings were erected thereon, the land described is necessary for the convenient use and occupancy of the buildings. *Seely v. Neill*, 37 Colo. 198, 86 P. 334 (1906).

### IV. LIEN ON "ENTIRE STRUCTURE".

**Construction of "for any entire structure".** The phrase, "for any entire structure", in subsection (2), is not used to designate a completed from an uncompleted building, but to distinguish new structures not before existing, from betterments, repairs, improvements, and the like on previously constructed or existing improvements. *Atkinson v. Colo. Title & Trust Co.*, 59 Colo. 528, 151 P. 457 (1915); *Stinnett v. Modern Homes*, 142 Colo. 176, 350 P.2d 197 (1960); *Powder Mtn. Painting v. Peregrine Joint Venture*, 899 P.2d 279 (Colo. App. 1994).

**Word "entire", found in subsection (2), is not to be limited** to those cases where the lienor



may have contracted for or put up the whole structure. *Church v. Smithea*, 4 Colo. App. 175, 35 P. 267 (1893).

**Structure lienable even if never completed.** Labor performed and material furnished for an entire structure gives a lien upon such structure, though it is never completed. *Atkinson v. Colo. Title & Trust Co.*, 59 Colo. 528, 151 P. 457 (1915).

**Lien on entire structure superior to prior executed deed of trust.** The lien of a mechanic for work done in the construction of an entire building on unimproved property is, as to the structure, superior to that of a deed of trust executed prior to the performance of the work. *Church v. Smithea*, 4 Colo. App. 175, 35 P. 267 (1893).

**Lienors' rights where entire structure placed on property subject to prior encumbrance.** Where an entire structure is put on the property subject to a prior encumbrance, this section gives the contractor or the lienors, separately or conjointly, the privilege to assert their rights against the newly erected building, and the prior encumbrancer loses nothing to which his security has affixed itself, nor does the lienor get anything beyond that which he may have put on the land. *Church v. Smithea*, 4 Colo. App. 175, 35 P. 267 (1893).

**Enforcement of lien where improvement consists of walls and foundations.** In enforcing the lien on an improvement where the improvement consists of basement walls and foundations which cannot be removed and continue to retain any value, this article does not contemplate a course that will destroy the value of the improvement; the only way the improvement can be effectively reached to satisfy the lien against it is to sell the entire property as a whole and pursue some equitable course with the fund realized from the sale which will afford the greatest protection to the rights of all the parties. *Atkinson v. Colo. Title & Trust Co.*, 59 Colo. 528, 151 P. 457 (1915).

**Landscaping may constitute expansion of existing improvement.** Where landscaping is added to land upon which other improvements have already been erected, the landscaping constitutes the expansion of an existing improvement. *Lew Hammer, Inc. v. Dash, Inc.*, 42 Colo. App. 414, 599 P.2d 948 (1979).

**Lien filed against entire project for partial work deemed proper.** Where the work is done as a part of an entire project, and could not be readily and definitely divided, it is proper to file a lien against the entire project. *Plateau Supply Co. v. Bison Meadows Corp.*, 31 Colo. App. 205, 500 P.2d 162 (1972).

**Allegation or proof of portion of road upon which material used unnecessary.** Since subsection (3) gives a lien upon the entire structure for which work or materials are furnished, hence it is unnecessary, in proceedings to enforce a

lien for materials furnished in the construction of a railroad, for plaintiffs to allege or prove upon what portion of the road the material was used. *Barnes v. Colo. Springs & C.C.D. Ry.*, 42 Colo. 461, 94 P. 570 (1908).

## V. BLANKET LIENS.

The term "blanket lien" is commonly used to refer to "a single lien . . . made, established, and enforced against two or more improvements," although the statute does not specify a name for such liens. *Brickman Group, Ltd. v. Compass Bank*, 83 P.3d 1167 (Colo. App. 2003), *aff'd*, 107 P.3d 955 (Colo. 2005).

**Claimant has choice of apportionment or blanket lien** where former cannot readily be made. *Buerger Inv. Co. v. B.F. Salzer Lumber Co.*, 77 Colo. 401, 237 P. 162 (1925).

**Lien extends to multiple buildings where treated as one building.** Where several buildings are erected upon a tract of land but are all designated for a united enjoyment or common use, they are to be treated as one building in relation to a mechanic's lien claim; thus, although the lien claimant may have performed work on, or furnished materials for, only one of such buildings, his lien extends to the whole. *Cary Hdwe. Co. v. McCarty*, 10 Colo. App. 200, 50 P. 744 (1897).

**When sales to different parties covered by single lien.** Where material was sold partly to the owner, and partly to the contractor or agent of the owner, but it appeared sufficiently, however, in evidence that it was sold for one purpose on one contract, on one set of buildings, one lien was permitted. *Buerger Inv. Co. v. B.F. Salzer Lumber Co.*, 77 Colo. 401, 237 P. 162 (1925).

**When materialman may file claim on different property as one claim.** Where material was furnished for the building of three houses and was used indiscriminately in three buildings, and the houses were built crosswise on four platted lots so that each house occupied part of the four lots without any segregation or division of the lots or description of the land on which the different houses were built, the materialman was not required at his peril to subdivide his claim and assign to each house as built the proportion of the debt which it ought in equity to bear, but might file his entire claim on all the houses and lots as one claim. *Sprague Inv. Co. v. Mouat Lumber & Inv. Co.*, 14 Colo. App. 107, 60 P. 179 (1899).

**Lien not invalidated by omission of owner's name in statement for lien.** The omission of the name of one owner in a statement for a blanket lien does not invalidate the whole lien. *Buerger Inv. Co. v. B.F. Salzer Lumber Co.*, 77 Colo. 401, 237 P. 162 (1925).

**A blanket lien that omits property that benefitted from the mechanics' materials and work is valid against the property that is in-**

cluded in the lien statement. *Brickman Group, Ltd. v. Compass Bank*, 83 P.3d 1167 (Colo. App. 2003), *aff'd*, 107 P.3d 955 (Colo. 2005).

**Effect of release of part of property covered by blanket lien.** The mere release of a part of the property covered by a blanket lien does not effect a release of the remainder. *Buerger Inv. Co. v. B.F. Salzer Lumber Co.*, 77 Colo. 401, 237 P. 162 (1925); *Brickman Group, Ltd. v. Compass Bank*, 83 P.3d 1167 (Colo. App. 2003), *aff'd*, 107 P.3d 955 (Colo. 2005).

**When amount allowable under lien to be prorated.** Where the value of the labor and material can be readily divided and apportioned and the lien is asserted against only a portion of the lienable property, then the amount to be allowed under the lien must be prorated according to the apportionment. *Plateau Supply Co. v. Bison Meadows Corp.*, 31 Colo. App. 205, 500 P.2d 162 (1972).

**A trial court's refusal to award pre-sale apportionment of lien**, if supported by evidence, must stand. Court did not abuse its discretion in refusing apportionment where trust corporation's request for apportionment was based solely on the relative land holdings of parcel owners and presented no evidence that labor and material provided by lienors could be readily and equitably divided between land owners. *Miller, Inc. v. Breckenridge Resort*, 779 P.2d 1365 (Colo. App. 1989), *aff'd in part and rev'd in part on other grounds sub nom. Indep. Trust v. Stan Miller, Inc.*, 796 P.2d 483 (Colo. 1990).

**38-22-104. Lien on mining property.** The provisions of this article shall apply to all persons who do work or furnish laborers or materials, or mining, milling, or other machinery or other fixtures, as provided in section 38-22-101, for the working, preservation, prospecting, or development of any mine, lode, or mining claim or deposit yielding metals or minerals of any kind, or for the working, preservation, or development of any such mine, lode, or deposit, in search of any such metals or minerals; and to all persons who do work upon or furnish laborers or materials, mining, milling, and other machinery or other fixtures, as provided in section 38-22-101, upon, in, or for any shaft, tunnel, mill, or tunnel site, incline, adit, drift, or any draining or other improvement of or upon any such mine, lode, deposit, or tunnel site; and to every miner or other person who does work upon or furnishes any laborers, coal, power, provisions, timber, powder, rope, nails, candles, fuse, caps, rails, spikes, or iron, or other materials whatever, as provided in section 38-22-101, upon any mine, lode, deposit, mill, or tunnel site. But when two or more lodes, mines, or deposits owned or claimed by the same person are worked through a common shaft, tunnel, incline, adit, drift, or other excavation, then all the mines, mining claims, lodes, deposits, and tunnel and mill sites so owned and worked or developed, for the purpose of this article shall be deemed one mine. This section is not applicable to the owner of any mine, lode, mining claim, deposit, mill, or tunnel where the work or labor has been performed for or the laborers or materials furnished to a lessee.

**Source:** L. 1899: p. 266, § 4. R.S. 08: § 4028. L. 15: p. 332, § 1. C.L. § 6445. CSA: C. 101, § 18. CRS 53: § 86-3-4. C.R.S. 1963: § 86-3-4. L. 2000: Entire section amended, p. 207, § 4, effective August 2.

## VI. LIEN ON FIXTURES.

**Fixtures of leasehold estate lienable.** A leasehold estate may be the subject of a lien, and logically, it must follow that whatever is a fixture of that estate can be subjected to the same lien. *Horn v. Clark Hdwe. Co.*, 54 Colo. 522, 131 P. 405 (1913).

**Article need not be fastened to freehold.** It is not now considered as absolutely necessary that an article be actually fastened to the freehold in order to make it a part thereof. *Dawson v. Scruggs-Vandervoort Barney Realty Co.*, 84 Colo. 152, 268 P. 584 (1928).

**All-important questions concerning lien of fixtures** are the intention of the person who brings the fixture upon the land, the use to which it is to be applied, and its fitness for that use. *Dawson v. Scruggs-Vandervoort Barney Realty Co.*, 84 Colo. 152, 268 P. 584 (1928).

**Installation of electric lighting and wiring system lienable.** The installation of a complete new electric lighting and wiring system in a hotel building constituted one entire improvement and entitled plaintiff to a lien by virtue of the provisions of this section. *Longton v. Husung*, 91 Colo. 501, 16 P.2d 423 (1932).

**Refrigerator plant connected to building subject to lien.** A refrigerating plant, connected to a building by brine pipes and brackets, is part of the freehold, and one furnishing new brine pipes is entitled to a mechanic's lien thereon. *Dawson v. Scruggs-Vandervoort Barney Realty Co.*, 84 Colo. 152, 268 P. 584 (1928).



## ANNOTATION

- I. General Consideration.
- II. Persons Entitled to Lien.
- III. Labor or Materials Furnished Lessees.

**I. GENERAL CONSIDERATION.**

**Law reviews.** For article, "Mechanics' Liens Relative to Oil and Gas Operations", see 34 Dicta 207 (1957).

**Purpose of section** is to broaden and not to restrict the scope of this article. *Chain O'Mines v. Lewison*, 100 Colo. 186, 66 P.2d 802 (1937).

**Provisions of section are governed by** the same rules that apply to a lien upon other property. *Wilkins v. Abell*, 26 Colo. 462, 58 P. 612 (1899); *Milwaukee Gold Mining Co. v. Tomkins-Cristy Hdwe. Co.*, 26 Colo. App. 155, 141 P. 527 (1914).

**Services rendered must be at owner's instance.** The services rendered, for which a lien is provided thereby, must be such as were rendered at the instance of the owner, or some one of the enumerated persons acting for him. *Wilkins v. Abell*, 26 Colo. 462, 58 P. 612 (1899).

**Work for which lien on mine is given** is that which is performed in the development and conservation of the mine and the results of which become incorporated with the mine so as to constitute a part of its value. *Barnard v. McKenzie*, 4 Colo. 251 (1878); *Int'l. Trust Co. v. Lowe*, 66 Colo. 131, 180 P. 579 (1919); *Climax Molybdenum Co. v. Specialized Installers, Inc.*, 12 B.R. 546 (D. Colo. 1981).

Planning and superintending development work upon the mines and in planning and supervising the erection of the mill and machinery are services for which a lien on a mine are given. *Rara Avis Gold & Silver Mining Co. v. Bouscher*, 9 Colo. 385, 12 P. 433 (1886).

**Dredge for operation of placer is improvement of the land** within the meaning of this section. *Colo. Gold Dredging Co. v. Stearns-Roger Mfg. Co.*, 60 Colo. 412, 153 P. 765 (1915); *Tiger Placers Co. v. Fisher*, 98 Colo. 221, 54 P.2d 891 (1936).

**No lien permitted where lienable and nonlienable items confused.** Where proper services are so confused with nonlienable items that the value thereof cannot be ascertained, no lien can be allowed. *Empire Coal Co. v. Rosa*, 26 Colo. App. 230, 142 P. 192 (1914).

**Extraction work done for mine not lienable.** Work done in the extraction of coal, from a coal mine, does not give a lien. *Empire Coal Co. v. Rosa*, 26 Colo. 230, 142 P. 192 (1899).

**Words "deposit yielding metals or minerals" include** gold bearing sands or gravels, which are commonly known as placers. *Colo. Gold Dredging Co. v. Stearns-Roger Mfg. Co.*, 60 Colo. 412, 153 P. 765 (1915).

**Applied in** *Folsom v. Cragen*, 11 Colo. 205, 17 P. 515 (1887); *Davidson v. Jennings*, 27 Colo. 187, 60 P. 354 (1900); *Schweizer v. Mansfield*, 14 Colo. App. 236, 59 P. 843 (1900); *Antlers Park Regent Mining Co. v. Cunningham*, 29 Colo. 284, 68 P. 226 (1902); *Ontario-Colo. Gold Mining Co. v. MacKenzie*, 19 Colo. App. 298, 74 P. 791 (1903); *Clark Hdwe. Co. v. Centennial Tunnel Mining Co.*, 22 Colo. App. 174, 123 P. 322 (1912); *Grimm v. Yates*, 58 Colo. 268, 145 P. 696 (1914).

**II. PERSONS ENTITLED TO LIEN.**

**Right to lien is given only to those who work or furnish material** for the working, preservation, or development of the property, or who should do work or furnish materials upon any shaft, tunnel, incline, adit, drift, or draining of a mine, lode, or deposit. *Lindemann v. Belden Consol. Mining & Milling Co.*, 16 Colo. App. 342, 65 P. 403 (1901); *Chain O'Mines v. Lewison*, 100 Colo. 186, 66 P.2d 802 (1937).

**No mention is made of architects, engineers, or of any professional service** at all as is the case in § 38-22-101; if, therefore, under its terms, anyone could acquire a lien for professional services, it must be clearly of that character of service which could be properly denominated work actually done for the working, preservation, or development of the property. *Lindemann v. Belden Consol. Mining & Milling Co.*, 16 Colo. App. 342, 65 P. 403 (1901).

**Professional mining expert and geologist not entitled to mechanic's lien** on a mine for work done in exploring, examining, and considering a mine with reference to its mineral character and capacity to produce valuable and precious metals, and with reference to the quantity of ore in such mine and its value, and for making a report thereon, done under a contract with the owner. *Lindemann v. Belden Consol. Mining & Milling Co.*, 16 Colo. App. 342, 65 P. 403 (1901).

**Disbursing agent and accountant not entitled to lien.** *Rara Avis Gold & Silver Mining Co. v. Bouscher*, 9 Colo. 385, 12 P. 433 (1886).

**When general manager of mining company not entitled to lien for salary.** Where the general manager of a mining company serving at a salary, under employment for a term of years, took an active part in the framing and issue of a series of bonds, secured by mortgage of the company's properties, he is not entitled to a lien for his salary, as against the bondholder. *Int'l. Trust Co. v. Lowe*, 66 Colo. 131, 180 P. 579 (1919).

**Those performing work for mine's development entitled to lien.** Those, who under contract with the purchaser of a mining claim, perform work for its development, or for

discharging the annual assessment required by an act of congress in case of an unpatented claim, are, under this section, entitled to a lien for the value of their labor. *Pike v. Empfield*, 21 Colo. App. 161, 120 P. 1054 (1912).

**Mining engineer entitled to lien for professional service about mine.** A mining engineer is entitled to a lien for surveys, superintendence, or other professional services about the mine under § 38-22-101. *Int'l. Trust Co. v. Lowe*, 66 Colo. 131, 180 P. 579 (1919).

### III. LABOR OR MATERIALS FURNISHED LESSEES.

**No lien attaches to mine owner's interest for material furnished lessee.** A mechanic's lien will not attach to the interest of the owner of a mine, for work done or material furnished a lessee in working or developing the mine, where the work is done or material furnished at the instance of, or under contract with, one whose

only interest is that of lessee. *Wilkins v. Abell*, 26 Colo. 462, 58 P. 612 (1899); *Williams v. Eldora-Enterprise Gold Mining Co.*, 35 Colo. 127, 83 P. 780 (1905); *Milwaukee Gold Mining Co. v. Tomkins-Cristy Hdwe. Co.*, 26 Colo. App. 155, 141 P. 527 (1914); *Empire Coal Co. v. Rosa*, 26 Colo. App. 230, 142 P. 192 (1914).

**Proof required to establish lien for lessees' miners.** Miners who work for lessees may not have a lien on the property of the lessor simply because they were hired by the lessee and worked on the property, because there must be some showing to the point that the owner of the realty was in some manner obligated, either because he was a privy and party to the contract of employment or because in some other way than by the lease, he authorized the lessee to contract or because the agreement by its terms gave the lessee authority. *Little Valeria Mining & Milling Co. v. Ingersoll*, 14 Colo. App. 240, 59 P. 970 (1900); *Empire Coal Co. v. Rosa*, 26 Colo. App. 230, 142 P. 192 (1914).

**38-22-105. Property subject to lien - notice.** (1) Any building, mill, manufactory, bridge, ditch, flume, aqueduct, reservoir, tunnel, fence, railroad, wagon road, tramway, and every structure or other improvement mentioned in this article, constructed, altered, added to, removed to, or repaired, either in whole or in part, upon or in any land with the knowledge of the owner or reputed owner of such land, or of any person having or claiming an interest therein, otherwise than under a bona fide prior recorded mortgage, deed of trust, or other encumbrance, or prior lien shall be held to have been erected, constructed, altered, removed, repaired, or done at the instance and request of such owner or person, including landlord or vendor, who by lease or contract has authorized such improvements, but so far only as to subject his interest to a lien therefor as provided in this section.

(2) Such interest so owned or claimed shall be subject to any lien given by the provisions of this article, unless such owner or person within five days after obtaining notice of the erection, construction, alteration, removal, addition, repair, or other improvement, gives notice that his or her interests shall not be subject to any lien for the same by serving a written or printed notice to that effect, personally, upon all persons performing labor or furnishing laborers, materials, machinery, or other fixtures therefor, or within five days after such owner or person has obtained notice of the erection, construction, alteration, removal, addition, repair, or other improvement, or notice of the intended erection, construction, alteration, removal, addition, repair, or other improvement gives such notice by posting and keeping posted a written or printed notice in some conspicuous place upon said land or upon the building or other improvements situate thereon.

(3) This section shall not apply to coowners of unincorporated canals, ditches, flumes, aqueducts, and reservoirs nor to the enforcement of article 23 of this title. The provisions of this section shall not be construed to apply to any owner or person claiming any interest in such property, the interest of whom is subject to a lien pursuant to the provisions of section 38-22-101.

**Source:** L. 1899: p. 267, § 5. R.S. 08: § 4029. C.L. § 6446. CSA: C. 101, § 19. CRS 53: § 86-3-5. C.R.S. 1963: § 86-3-5. L. 65: p. 851, § 3. L. 2000: (2) amended, p. 207, § 5, effective August 2.



## ANNOTATION

- I. General Consideration.
- II. Improvements Made with Knowledge of Owner.
- III. Notice by Owner.
- IV. Pleading and Practice.

## I. GENERAL CONSIDERATION.

**Law reviews.** For note, "Uranium Mining Lease", see 27 Rocky Mt. L. Rev. 425 (1955). For article, "Mechanics' Liens Relative to Oil and Gas Operations — Part II", see 34 Dicta 373 (1957). For comment on Lierz v. Cook (cited below), see 30 Rocky Mt. L. Rev. 220 (1958).

**Section has no application to improvements made pursuant to contract,** direct or indirect, with the owner of the land. Williams v. Uncompahgre Canal Co., 13 Colo. 469, 22 P. 806 (1889); Miller v. Davis, 26 Colo. App. 483, 145 P. 714 (1914); Stapp v. Carb-Ice Corp., 122 Colo. 526, 224 P. 2d 935 (1950).

**Section gives lien for improvements not authorized by any contract** between the owner and the person at whose instance they are being constructed, when by his seeming acquiescence through silence, it would be inequitable to relieve his property from a lien for such improvements. Fisher v. McPhee & McGinnity Co., 24 Colo. App. 420, 135 P. 132 (1913); Grimm v. Yates, 58 Colo. 268, 145 P. 696 (1914).

A mechanics' lien may attach to property pursuant to this section, though the owner did not contract for the architectural services. Seracuse Lawler & Partners, Inc. v. Copper Mt., 654 P.2d 1328 (Colo. App. 1982).

**Equitable ownership sufficient to come within section.** It is not necessary that the owner shall have the legal title in order to come within the provisions of this section; equitable ownership is sufficient. Bankers' Bldg. & Loan Ass'n v. Fleming Bros. Lumber Co., 83 Colo. 335, 264 P. 1087 (1928).

**One joint tenant may create lien on his own interest** in land in favor of a mechanic. Rico Reduction & Mining Co. v. Musgrave, 14 Colo. 79, 23 P. 458 (1890).

**Lien claimants not required to investigate tenant's authority.** This section does not impose a duty upon lien claimants to investigate the authority of the tenant to contract for improvements. Thirteenth St. Corp. v. A-1 Plumbing & Heating Co., 640 P.2d 1130 (Colo. 1982).

**Architect who does not participate in activities enumerated in this section** is not authorized to file a lien pursuant to this section. Chambliss/Jenkins Assocs. v. Forster, 650 P.2d 1315 (Colo. App. 1982).

**Claimant not charged with another's mistake resulting in noncompletion.** The claimant is not to be charged with another's mistake in

judgment which results in the noncompletion of the project. Seracuse Lawler & Partners, Inc. v. Copper Mt., 654 P.2d 1328 (Colo. App. 1982).

**Colorado's mechanics' lien statute does not impose any personal liability upon a landowner for work done on the property.** Personal liability is permitted only if a contract is proved on which a party may recover regardless of the lien statute. DCB Const. v. Central City Devel. Co., 940 P.2d 958 (Colo. App. 1996), aff'd on other grounds, 965 P.2d 115 (Colo. 1998).

**Applied** in O'Byrne v. Stirn, 106 Colo. 167, 103 P.2d 13 (1940); Samett v. Whelan, 147 Colo. 41, 362 P.2d 559 (1961); Denver Decorators, Inc. v. Twin Teepee Lodge, Inc., 163 Colo. 343, 431 P.2d 8 (1967).

## II. IMPROVEMENTS MADE WITH KNOWLEDGE OF OWNER.

**Purpose of knowledge provision of subsection (1)** is to provide a lien for improvements when by the owner's seeming acquiescence through silence it would be inequitable to relieve his property from a lien for such improvements. A-1 Plumbing & Heating Co. v. Thirteenth St. Corp., 44 Colo. App. 13, 616 P.2d 141 (1980), aff'd in part and rev'd on other grounds, 640 P.2d 1130 (Colo. 1982).

**"Knowledge" means notice.** "Knowledge", as it is used in subsection (1), is virtually synonymous with notice. Thirteenth St. Corp. v. A-1 Plumbing & Heating Co., 640 P.2d 1130 (Colo. 1982).

**Landlord need not have actual knowledge of possible lien.** Section requires only that landlord have notice that materials or labor are being furnished to provide improvements to his property; he need not have actual knowledge that his interests will be subjected to mechanics' liens. A-1 Plumbing & Heating Co. v. Thirteenth St. Corp., 44 Colo. App. 13, 616 P.2d 141 (1980) aff'd in part and rev'd on other grounds, 640 P.2d 1130 (Colo. 1982).

**Owner's knowingly permitting improvement fastens lien.** This section fastens the lien on the owner's land by his knowingly permitting the property to be improved. Johnson v. Stover, 71 Colo. 445, 207 P. 595 (1922).

## III. NOTICE BY OWNER.

**Purpose of the posting provision of subsection (2)** is to protect suppliers or laborers who enter upon a job site without knowledge of the owner's nonliability. Uni-Build Corp. v. Colo. Sem., 650 P.2d 1300 (Colo. App. 1982).

**Burden of giving notice is on owner.** The burden of notifying the lien claimant that the owner's interest will not be subject to a mechan-

ic's lien is on the owner. *Thirteenth St. Corp. v. A-1 Plumbing & Heating Co.*, 640 P.2d 1130 (Colo. 1982).

**Section provides for actual or constructive notice at owner's option.** *Stewart v. Talbott*, 58 Colo. 563, 146 P. 771 (1915).

**Section does not expressly or impliedly exclude other actual notice** which may be given. *Stewart v. Talbott*, 58 Colo. 563, 146 P. 771 (1915).

**Once received, notice effective for entire period of construction.** Once a person receives notice, whether it be by personal service or by posting, the notice is effective as to that person for the entire period of construction. *Uni-Build Corp. v. Colo. Sem.*, 650 P.2d 1300 (Colo. App. 1982).

**Owner's notice not inconsistent with recording statute.** That an owner can give notice that his interest is not to be subjected to a lien is not at all inconsistent with the recording statute, article 35 of this title, under whose provisions the same notice can be given in another way; the two statutes can and should be read together and both permitted to stand. *Stewart v. Talbott*, 58 Colo. 563, 146 P. 771 (1915).

**Vendor may relieve premises of lien by posting notice.** The vendor of a mining claim may, by posting the proper notice, relieve the premises of any lien on behalf of those who perform development work under contract with the purchaser. *Pike v. Empfield*, 21 Colo. App. 161, 120 P. 1054 (1912).

**Purchaser at foreclosure sale required to give notice.** The purchaser at a foreclosure sale becomes the owner, within the meaning of this section, and when it failed to give the statutory notice after it obtained notice of the improvement, its interest is subject to a mechanic's lien. *Bankers' Bldg. & Loan Ass'n v. Fleming Bros. Lumber Co.*, 83 Colo. 335, 264 P. 1087 (1928).

**Purchaser as vendor's agent may be required to post notice.** If the contract of sale provides that the purchaser shall post and maintain the notice, he is thereby made the agent of the vendor for this purpose, and his neglect to post the notice is the neglect of the vendor so that the premises are chargeable with the lien. *Pike v. Empfield*, 21 Colo. App. 161, 120 P. 1054 (1912).

**Owner of property leased for oil-well drilling not within section.** Where a lease of property authorizes the drilling of an oil well thereon, the owner of the land is not within subsection (2), requiring the giving of notice to prevent liens attaching to his estate occasioned by drilling operations. *Terminal Drilling Co. v. Jones*, 84 Colo. 279, 269 P. 894 (1928).

**Owner not required to post notice where lessee authorized to make improvements.** Where a lessee in possession is authorized by the terms of his lease to make alterations or improvements to the leasehold and the same is

done by the lien claimant solely at the request of the lessee, no lien will be sustained upon the property of the lessor, and no notice of nonliability need be posted by the property owner. *Lierz v. Cook*, 136 Colo. 221, 315 P.2d 535 (1957).

**Prior lienor not required to give notice.** A vendor having a lien for balance due on purchase price is a prior lienor within the meaning of this section, and thus is not required to give notice to a lumber company furnishing materials to the vendee. *Baughman v. Foster Lumber Co.*, 108 Colo. 37, 113 P.2d 423 (1941).

**Effect of failure of tenant in common to give required notice.** The effect of the failure of a tenant in common to give the notice required by this section is to make a lien for materials furnished prior to a sale of the land superior to her portion of an incumbrance given to secure the purchase price. *Seely v. Neill*, 37 Colo. 198, 86 P. 334 (1906).

**Where estate not chargeable by landowner's failure to give notice.** Where work done is such as is authorized by agreement between the landowner and the person at whose instance such work is performed, and is not such as entitles those performing it to a lien, the estate of the landowner does not become chargeable by his failure to give the notice required by this subsection (2). *Grimm v. Yates*, 58 Colo. 268, 145 P. 696 (1914).

**Posting of nonliability notice insufficient to preclude liability under theory of unjust enrichment.** *F.M. Hall & Co. v. Southwest Props.*, 747 P.2d 688 (Colo. App. 1987).

**Section does not preclude posting of nonliability notice before notice of intended construction is received.** *F.M. Hall & Co. v. Southwest Props.*, 747 P.2d 688 (Colo. App. 1987).

**Filing a notice of nonliability under Colorado's lien statute, thereby preventing a lien from attaching to an owner's interest in property, does not foreclose a direct claim against a landowner under some contractual theory of liability.** *DCB Const. v. Central City Devl. Co.*, 940 P.2d 958 (Colo. App. 1996), *aff'd* on other grounds, 965 P.2d 115 (Colo. 1998).

#### IV. PLEADING AND PRACTICE.

**Section furnishes rule of evidence, by which, in the first instance, the failure of an owner with knowledge to give the notice therein specified raises the presumption that the owner consented that his property be subjected to a lien; to overcome this presumption that the owner consented that his property be subject to a lien, the owner must go forward with evidence to show that he could not reasonably give the notice, or that he had already effectually given actual notice or such constructive notice as would be given by recording a lease with a provision that the lessor's interest should not be**



subject to a lien. *Stewart v. Talbott*, 58 Colo. 563, 146 P. 771 (1915).

**Subsection (3) constitutes affirmative defense** which, in order to be availed of, must be pleaded by defendant. *Clark Hdwe. Co. v. Centennial Tunnel Mining Co.*, 22 Colo. App. 174, 123 P. 322 (1912).

**Facts bringing case within section must be specifically alleged.** Where the party seeking enforcement of a lien relies upon the failure of the landowner to give the notice required by this section, his complaint must specifically allege facts which bring the case within the terms of this section. *Empire Coal Co. v. Rosa*, 26 Colo. App. 230, 142 P. 192 (1914).

**Allegations and proof required to enforce lien.** One seeking to enforce a lien under this section for improvements made, with the knowledge of the owner, must both allege and prove

such knowledge and, further must allege and prove that the materials for which the lien is claimed were furnished to be used in the particular improvement in question. *Milwaukee Gold Mining Co. v. Tomkins-Cristy Hdwe. Co.*, 26 Colo. App. 155, 141 P. 527 (1914).

**When allegation or proof of owner's failure to give notice unnecessary.** Where it was alleged that an improvement was made with the owner's knowledge, it is not necessary to further allege or prove that the owner did not give the notice of nonliability provided for in this section. *Fisher v. McPhee & McGinnity Co.*, 24 Colo. App. 420, 135 P. 132 (1913).

**Architect's preliminary work constitutes the commencement of an improvement** or a structure. *Seracuse Lawler & Partners, Inc. v. Copper Mt.*, 654 P.2d 1328 (Colo. App. 1982).

**38-22-105.5. Notice of lien law.** (1) Upon issuing a building permit for the improvement, restoration, remodeling, or repair of or the construction of improvements or additions to residential property, the agency or other authority issuing the permit shall send a written notice, as set forth in subsection (2) of this section, by first-class mail addressed to the property for which the permit was issued.

(2) The notice shall be in at least ten-point bold-faced type, if printed, or in capital letters, if typewritten, shall identify the contractor by name and address, and shall state substantially as follows:

**IMPORTANT NOTICE TO OWNERS: UNDER COLORADO LAW, SUPPLIERS, SUBCONTRACTORS, OR OTHER PERSONS FURNISHING LABORERS OR PROVIDING LABOR OR MATERIALS FOR WORK ON YOUR RESIDENTIAL PROPERTY MAY HAVE A RIGHT TO COLLECT THEIR MONEY FROM YOU BY FILING A LIEN AGAINST YOUR PROPERTY. A LIEN CAN BE FILED AGAINST YOUR RESIDENCE WHEN A SUPPLIER, SUBCONTRACTOR, OR OTHER PERSON IS NOT PAID BY YOUR CONTRACTOR FOR SUCH LABORERS, LABOR, OR MATERIALS. HOWEVER, IN ACCORDANCE WITH THE COLORADO GENERAL MECHANICS' LIEN LAW, SECTIONS 38-22-102 (3.5) AND 38-22-113 (4), COLORADO REVISED STATUTES, YOU HAVE AN AFFIRMATIVE DEFENSE IN ANY ACTION TO ENFORCE A LIEN IF YOU OR SOME PERSON ACTING ON YOUR BEHALF HAS PAID YOUR CONTRACTOR AND SATISFIED YOUR LEGAL OBLIGATIONS.**

**YOU MAY ALSO WANT TO DISCUSS WITH YOUR CONTRACTOR, YOUR ATTORNEY, OR YOUR LENDER POSSIBLE PRECAUTIONS, INCLUDING THE USE OF LIEN WAIVERS OR REQUIRING THAT EVERY CHECK ISSUED BY YOU OR ON YOUR BEHALF IS MADE PAYABLE TO THE CONTRACTOR, THE SUBCONTRACTOR, AND THE SUPPLIER FOR AVOIDING DOUBLE PAYMENTS IF YOUR PROPERTY DOES NOT SATISFY THE REQUIREMENTS OF SECTIONS 38-22-102 (3.5) AND 38-22-113 (4), COLORADO REVISED STATUTES.**

**YOU SHOULD TAKE WHATEVER STEPS NECESSARY TO PROTECT YOUR PROPERTY.**

(3) The notice prescribed by this section shall not be required when a building permit is issued for new residential construction or for residential property containing more than four living units.

(4) As used in this section:

(a) "New residential construction" means the construction or addition of living units on real property that was previously unimproved or was used for nonresidential purposes.

(b) "Residential property" means any real property, including improvements, containing living units used for human habitation.

(5) To offset the cost of issuing the notice required by this section, the appropriate authority may raise the fee for a building permit by one dollar.

(6) The failure of the agency or other authority which issues building permits to provide the notice required by this section shall not be an affirmative defense to any lien claimed pursuant to the provisions of this article; nor shall the agency or any employee of the agency incur liability as a result of such failure.

(7) The agency or other authority which issues building permits may deliver the notice required by this section personally to the owner of the property, in lieu of mailing the notice as provided by subsection (1) of this section.

**Source:** L. 79: Entire section added, p. 1389, § 1, effective January 1, 1980. L. 81: Entire section R&RE, p. 1822, § 1, effective July 1. L. 88: (2) R&RE, p. 1253, § 1, effective April 14. L. 2000: (2) amended, p. 208, § 6, effective August 2.

**38-22-106. Priority of lien - attachments.** (1) All liens established by virtue of this article shall relate back to the time of the commencement of work under the contract between the owner and the first contractor, or, if said contract is not in writing, then such liens shall relate back to and take effect as of the time of the commencement of the work upon the structure or improvement, and shall have priority over any lien or encumbrance subsequently intervening, or which may have been created prior thereto but which was not then recorded and of which the lienor, under this article, did not have actual notice. Nothing contained in this section, however, shall be construed as impairing any valid encumbrance upon any such land duly made and recorded prior to the signing of such contract or the commencement of work upon such improvements or structure.

(2) No attachment, garnishment, or levy under an execution upon any money due or to become due to a contractor from the owner or reputed owner of any such property subject to any such lien shall be valid as against such lien of a subcontractor or materialmen, and no such attachment, garnishment, or levy upon any money due to a subcontractor or materialmen of the second class, as provided in section 38-22-108 (1) (b), from the contractor shall be valid as against any lien of a laborer employed by the day or piece, who does not furnish any material as classified in this article.

**Source:** L. 1899: p. 268, § 6. R.S. 08: § 4030. C.L. § 6447. CSA: C. 101, § 20. CRS 53: § 86-3-6. C.R.S. 1963: § 86-3-6.

## ANNOTATION

- I. General Consideration.
- II. Time When Lien Attaches.
- III. Priority of Liens.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "The Perennial Problem of Security Priority and Recordation", see 24 Rocky Mt. L. Rev. 180 (1952). For note, "Real Property Relative Priority of Liens — Federal Tax Lien Priority: A Judicial Frankenstein", see 34 Dicta 186 (1957). For article, "One Year Review of Property", see 37 Dicta 89 (1960).

**Lien for paving of streets may not relate back prior to dedication and acceptance of streets by city.** Section does not abrogate common law rule that public property not subject to

foreclosure. *City of Westminster v. Brannan Sand & Gravel Co.*, 970 P.2d 393 (Colo. 1997).

**Mechanics' lien laws are designed for the benefit and protection of mechanics and materialmen and should be construed in favor of lien claimants.** *Darien v. Hudson*, 134 Colo. 213, 302 P.2d 519 (1956).

**Lien on building and improvements is given preference over any prior lien or encumbrance upon the land on which it is erected.** *Darien v. Hudson*, 134 Colo. 213, 302 P.2d 519 (1956); *Kennicott-Patterson Transf. Co. v. Modern Smelting & Ref. Co.*, 26 Colo. App. 135, 141 P. 144 (1914).

**Liens or encumbrances subject to recording act.** This section subjects every lien or encumbrance to the effect of the recording act, except such of which the mechanic lienors had actual notice as of the date of the commence-



ment of the work, and they are rendered non-effective as against such lienors and are subordinate to their rights. *Credit Fin. Corp. v. Hale & Perry, Inc.*, 66 F.2d 357 (10th Cir. 1933).

**Rule of caveat emptor applies against mechanic** as well as in the case of a vendee. *Tritch v. Norton*, 10 Colo. 337, 15 P. 680 (1887).

**Contractor must ascertain interest of other contracting party.** If a contractor proposes to erect a building or to put labor or materials on a piece of ground, it behooves him to assure himself of the fact that the person with whom he contemplates making his contract, or for whose benefit he is about to employ means or labor, has such an interest or title unincumbered as will enable him to avail himself of a valid lien. *Tritch v. Norton*, 10 Colo. 337, 15 P. 680 (1887).

**Effect of garnishment.** This section does not say that a garnishment of money due a contractor shall be invalid as against the claim of a subcontractor, but only as against the lien of a subcontractor, and when a subcontractor's lien is perfected, a garnishment made while the lien was still inchoate would become invalid by reason of the relation back of the perfected lien; but, if there should never be a perfected lien, the garnishment would be effectual. *Schradskey v. Dunklee*, 9 Colo. App. 394, 48 P. 666 (1897).

**Applied** in *Small v. Foley*, 8 Colo. App. 435, 47 P. 64 (1896); *Chicago Lumber Co. v. Dillon*, 13 Colo. App. 196, 56 P. 989 (1899); *State Bank v. Plummer*, 54 Colo. 144, 129 P. 819 (1912); *Park Lane Props. v. Fisher*, 89 Colo. 591, 5 P.2d 577 (1931); *3190 Corp. v. Gould*, 163 Colo. 356, 431 P.2d 466 (1967); *Lew Hammer, Inc. v. Dash, Inc.*, 42 Colo. App. 414, 599 P.2d 948 (1979); *Trustees of Mtg. Trust of Am. v. District Court*, 621 P.2d 310 (Colo. 1980); *Boulder Lumber Co. v. Alpine of Nederland, Inc.*, 626 P.2d 724 (Colo. App. 1981).

## II. TIME WHEN LIEN ATTACHES.

**When lien begins.** The lien of the mechanic or materialman begins with the commencement of the work or furnishing of the material under an express or implied contract with the employer and attaches upon whatever estate the latter may have at the commencement of such work or the furnishing of such materials. *Tritch v. Norton*, 10 Colo. 337, 15 P. 680 (1887); *Chain O'Mines v. Lewison*, 100 Colo. 186, 66 P.2d 802 (1937); *Sontag v. Abbott*, 140 Colo. 351, 344 P.2d 961 (1959).

**Lien relates to date first item furnished.** Where it is fairly inferable from the evidence that supplies furnished for the operation of a mine, at different times during a series of months, were furnished under a single contract, the transaction will be regarded as a single one, and the lien allowed therefor will relate to the date of the first item furnished. *Int'l. Trust Co. v. Clark Hdwe. Co.*, 66 Colo. 210, 180 P. 300

(1919); *Sontag v. Abbott*, 140 Colo. 351, 344 P.2d 961 (1959).

**Architect's lien relates back to time of commencement of his work** on his plans and drawings for the proposed building and is not limited to the time of commencement of actual work on a structure. *Sontag v. Abbott*, 140 Colo. 351, 344 P.2d 961 (1959).

The services of an architectural firm and an engineering firm in preparing preliminary plans and drawings for a project and in performing engineering work, respectively, constituted "commencement of the work upon the structure or improvement" under subsection (1). *Bankers Trust Co. v. El Paso Pre-Cast Co.*, 192 Colo. 468, 560 P.2d 457 (1977); *Weather Eng'g & Mfg., Inc. v. Pinon Springs Condominiums, Inc.*, 192 Colo. 495, 563 P.2d 346 (1977).

**Mechanics' lien not avoided under federal bankruptcy code section** which allows the trustee to avoid a lien not perfected or enforceable on the date the petition is filed since, under this section, a mechanics' lien, once perfected, relates back to time of commencement of work. *In re Cantrup*, 38 Bankr. 148 (Bankr. D. Colo. 1984).

**Mechanics' lien relates back to the commencement of the work** which in this case was the date on which the subcontractor received notice that it won the contract and began performance. *General Growth Dev. v. A & P Steel, Inc.*, 678 F. Supp. 243 (D. Colo. 1988).

**Failure to perfect lien relates back.** As a perfected lien has relation backward and holds the land from the time of the commencement of the work, so a failure to perfect the lien also relates back; and, if there is finally no lien, there was none from the beginning. *Schradskey v. Dunklee*, 9 Colo. App. 394, 48 P. 666 (1897).

**Statute presupposes the existence of either a written or oral communication between the first contractor and the owner or lessee in order for a lien to attach.** *Printz Servs. Corp. v. Main Elect., Ltd.*, 949 P.2d 77 (Colo. App. 1997).

**Whether one is "first contractor" depends on time contract entered.** Whether one is a "first contractor" does not depend upon whether the contract is in writing, but rather, at what time the contract, either express or implied, is entered into with the owner. *Bankers Trust Co. v. El Paso Pre-Cast Co.*, 192 Colo. 468, 560 P.2d 457 (1977).

## III. PRIORITY OF LIENS.

**Priority provisions strictly construed.** Priority relates to perfection of the lien, not to the remedial portions of the mechanics' lien statute, and therefore, the statute's provisions governing priority should be strictly construed. *Powder Mtn. Painting v. Peregrine Joint Venture*, 899 P.2d 279 (Colo. App. 1994).

**This section makes subsequent mortgages junior to valid prior mechanics' liens.** Howard v. Fisher, 86 Colo. 493, 283 P. 1042 (1929).

**Mechanics' liens subordinate to prior deed of trust on land.** Mechanics' liens are junior and subordinate to an existing deed of trust on the land occupied by the building. Darien v. Hudson, 134 Colo. 213, 302 P.2d 519 (1956).

A deed or mortgage, recorded before a contract to perform labor was made, or work commenced thereunder, would take precedence over a mechanic's lien. Folsom v. Cragen, 11 Colo. 205, 17 P. 515 (1887); Tritch v. Norton, 10 Colo. 337, 15 P. 680 (1887).

**Mechanics' liens subordinate to prior deed of trust on land and future building.** Where a deed of trust was given for a loan with the understanding that the loan was to be used for the construction of a building, and the deed of trust expressly covered the building to be erected, and where it was recorded before work on the building was begun, the lien of the deed of trust took priority over mechanics' liens to the extent that the money advanced under the deed was actually applied to payment of labor and materials used in the construction of the building. Joralmon v. McPhee, 31 Colo. 26, 71 P. 419 (1903).

**Purchase money lien is not entitled to preference** over those asserted by mechanics' lien

claimants. Sontag v. Abbott, 140 Colo. 351, 344 P.2d 961 (1959).

**Priority of federal tax liens.** United States v. Vorreiter, 134 Colo. 543, 307 P.2d 475, rev'd, 355 U.S. 15, 78 S. Ct. 19, 2 L. Ed. 2d 23 (1957).

**Purchaser's title paramount to later encumbrances upon property.** The title of a purchaser at a sale foreclosing a mechanic's lien is paramount to all encumbrances upon the property after the commencement of the building. Cornell v. Conine-Eaton Lumber Co., 9 Colo. App. 225, 47 P. 912 (1897).

**Plaintiff must prove encumbrance is inferior to lien.** Where the complaint alleged that an encumbrance was subject to and inferior to the rights and lien of plaintiff, it was necessary for plaintiff to prove that the encumbrance was inferior to its lien. Kennicott-Patterson Transf. Co. v. Modern Smelting & Ref. Co., 26 Colo. App. 135, 141 P. 144 (1914).

**"Actual notice" defined.** "Actual notice", as used in subsection (1), is such notice as is positively proved to have been given to a party directly and personally, or such as the party is presumed to have received personally because the evidence within the party's knowledge was sufficient to put the party upon inquiry. Powder Mtn. Painting v. Peregrine Joint Venture, 899 P.2d 279 (Colo. App. 1994).

**38-22-107. Lien attaches to water rights and franchises.** Such liens likewise shall attach to rights of water and rights-of-way that may pertain in any manner to any kind of property specified in this article and to which such liens attach. In the case of corporations such liens shall attach to all the franchises and charter privileges that may pertain in any manner to said specified property.

**Source: L. 1899:** p. 269, § 7. **R.S. 08:** § 4031. **C.L.** § 6448. **CSA:** C. 101, § 21. **CRS 53:** § 86-3-7. **C.R.S. 1963:** § 86-3-7.

**38-22-108. Rank of liens.** (1) Every person given a lien by this article whose contract, either express or implied, is with the owner or reputed owner or owner's agent or other representative, is a principal contractor and all others are subcontractors; and in every case in which different liens are claimed against the same property, the rank of each lien, or class of liens, as between the different lien claimants, shall be declared and ordered to be satisfied in the decree or judgment in the following order named:

(a) The liens of all those who were laborers or mechanics working by the day or piece, but without furnishing material therefor, either as principal or subcontractors;

(b) The liens of all other subcontractors and of all materialmen whose claims are either entirely or principally for laborers, materials, machinery, or other fixtures, furnished either as principal contractors or subcontractors;

(c) The liens of all other principal contractors and all moneys realized in any actions for the satisfaction of liens against the same improvements or structures shall be paid out in the order above designated.

**Source: L. 1899:** p. 269, § 8. **R.S. 08:** § 4032. **C.L.** § 6449. **CSA:** C. 101, § 22. **CRS 53:** § 86-3-8. **C.R.S. 1963:** § 86-3-8. **L. 2000:** IP(1), (1)(b), and (1)(c) amended, p. 208, § 7, effective August 2.



## ANNOTATION

**Materialmen includes** a company furnishing steel to be used in the erection of a building. *Atkinson v. Colo. Title & Trust Co.*, 59 Colo. 528, 151 P. 457 (1915).

**Materialman furnishing materials directly to owner treated as principal contractor.** A materialman furnishing materials directly to the owner is treated as a principal contractor under

this article. *First Nat'l Bank v. Sam McClure & Son*, 163 Colo. 473, 431 P.2d 460 (1967).

**Applied in** *Bankers Trust Co. v. El Paso Pre-Cast Co.*, 192 Colo. 468, 560 P.2d 457 (1977); *Weather Eng'g & Mfg., Inc. v. Pinon Springs Condominiums, Inc.*, 192 Colo. 495, 563 P.2d 346 (1977).

**38-22-109. Lien statement.** (1) Any person wishing to use the provisions of this article shall file for record, in the office of the county clerk and recorder of the county wherein the property, or the principal part thereof, to be affected by the lien is situated, a statement containing:

(a) The name of the owner or reputed owner of such property, or in case such name is not known to him, a statement to that effect;

(b) The name of the person claiming the lien, the name of the person who furnished the laborers or materials or performed the labor for which the lien is claimed, and the name of the contractor when the lien is claimed by a subcontractor or by the assignee of a subcontractor, or, in case the name of such contractor is not known to a lien claimant, a statement to that effect;

(c) A description of the property to be charged with the lien, sufficient to identify the same; and

(d) A statement of the amount due or owing such claimant.

(2) Such statement shall be signed and sworn to by the party, or by one of the parties, claiming such lien, or by some other person in his or their behalf, to the best knowledge, information, and belief of the affiant; and the signature of any such affiant to any such verification shall be a sufficient signing of the statement.

(3) In order to preserve any lien for work performed or laborers or materials furnished, there must be a notice of intent to file a lien statement served upon the owner or reputed owner of the property or the owner's agent and the principal or prime contractor or his or her agent at least ten days before the time of filing the lien statement with the county clerk and recorder. Such notice of intent shall be served by personal service or by registered or certified mail, return receipt requested, addressed to the last known address of such persons, and an affidavit of such service or mailing at least ten days before filing of the lien statement with the county clerk and recorder shall be filed for record with said statement and shall constitute proof of such service.

(4) All such lien statements claimed for labor and work by the day or piece, but without furnishing laborers or materials therefor, must be filed for record after the last labor for which the lien claimed has been performed and at any time before the expiration of two months next after the completion of the building, structure, or other improvement.

(5) Except as provided in subsections (10) and (11) of this section, the lien statements of all other lien claimants must be filed for record at any time before the expiration of four months after the day on which the last labor is performed or the last laborers or materials are furnished by such lien claimant.

(6) New or amended statements may be filed within the periods provided in this section for the purpose of curing any mistake or for the purpose of more fully complying with the provisions of this article.

(7) No trivial imperfection in or omission from the said work or in the construction of any building, improvement, or structure, or of the alteration, addition to, or repair thereof, shall be deemed a lack of completion, nor shall such imperfection or omission prevent the filing of any lien statement or filing of or giving notice, nor postpone the running of any time limit within which any lien statement shall be filed for record or served upon the owner

or reputed owner of the property or such owner's agent and the principal or prime contractor or his or her agent, or within which any notice shall be given. For the purposes of this section, abandonment of all labor, work, services, and furnishing of laborers or materials under any unfinished contract or upon any unfinished building, improvement, or structure, or the alteration, addition to, or repair thereof, shall be deemed equivalent to a completion thereof. For the purposes of this section, "abandonment" means discontinuance of all labor, work, services, and furnishing of laborers or materials for a three-month period.

(8) Subject to the prior termination of the lien under the provisions of section 38-22-110, no lien claimed by virtue of this article shall hold the property, or remain effective longer than one year from the filing of such lien, unless within thirty days after each annual anniversary of the filing of said lien statement there is filed in the office of the county clerk and recorder of the county wherein the property is located an affidavit by the person or one of the persons claiming the lien, or by some person in his behalf, stating that the improvements on said property have not been completed.

(9) Upon the filing of the notice required and the commencement of an action, within the time and in the manner required by said section 38-22-110, no annual affidavit need be filed thereafter.

(10) Within the applicable time period provided in subsections (4) and (5) of this section and subject to the provisions of section 38-22-125, any lien claimant granted a lien pursuant to section 38-22-101 may file with the county clerk and recorder of the county in which the real property is situated a notice stating the legal description or address or such other description as will identify the real property; the name of the person with whom he has contracted; and the claimant's name, address, and telephone number. One such notice may be filed upon more than one property, and, in the case of a subdivision, one notice may describe only the part thereof upon which the claimant has or will obtain a lien pursuant to section 38-22-101. The filing of said notice shall serve as notice that said person may thereafter file a lien statement and shall extend the time for filing of the mechanic's lien statement to four months after completion of the structure or other improvement or six months after the date of filing of said notice, whichever occurs first. Unless sooner terminated as provided in subsection (11) of this section, the notice provided for in this subsection (10) shall automatically terminate six months after the date said notice is filed. In the event that said structure or other improvements have not been completed prior to the termination of said notice, a claimant, prior to said termination date, may file a new or amended notice which shall remain effective for an additional period of six months after the date of filing or four months after the date of completion of said structure or other improvements, whichever occurs first.

(11) Upon termination of agreement to provide labor, laborers, or materials, the owner, or someone in such owner's behalf, may demand from the person filing said notice a termination of said notice, which termination shall identify the properties upon which labor has not been performed or to which laborers or materials have not been furnished and as to which said notice is terminated. Upon the filing of said termination in the office of the county clerk and recorder in the county wherein said property is situated, such notice no longer constitutes notice as provided in subsection (10) of this section as to the property described in said termination.

(12) The notices provided for in subsections (10) and (11) of this section shall be recorded in the office of the county clerk and recorder of the county wherein the real property is located.

**Source:** L. 1899: p. 269, § 9. R.S. 08: § 4033. C.L. § 6450. CSA: C. 101, § 23. CRS 53: § 86-3-9. L. 55: p. 537, § 1. C.R.S. 1963: § 86-3-9. L. 65: pp. 851, 856, §§ 4, 6. L. 75: (3) R&RE and (4), (5), (7), and (10) amended, pp. 1420, 1422, 1423, §§ 1, 2, 3, effective October 1. L. 79: (8), (10), and (11) amended and (12) R&RE, pp. 1390, 1391, §§ 2, 3, effective January 1, 1980. L. 83: (10) amended, p. 1229, § 16, effective July 1. L. 2000: IP(1), (1)(b), (3) to (5), (7), and (11) amended, p. 209, § 8, effective August 2.



## ANNOTATION

- I. General Consideration.
- II. Contents of Lien Statement.
  - A. In General.
  - B. Name of Owner or Reputed Owner.
  - C. Name of Claimant.
  - D. Description of Property.
  - E. Amount of Indebtedness.
  - F. Verification.
  - G. Service of Notice.
  - H. Time of Filing.
- III. Completion of Work or Contract.
  - A. In General.
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## I. GENERAL CONSIDERATION.

**Law reviews.** For article, "Property Law", see 32 Dicta 420 (1955). For article, "Highlights of the 1955 Colorado Legislative Session — Security Transactions", see 28 Rocky Mt. L. Rev. 76 (1955). For article, "Mechanic's Liens — The 'Intent' Provisions Explored", see 11 Colo. Law. 1492 (1982). For article, "Assemblage, Design and Construction for Real Estate Developments", see 11 Colo. Law. 2297 (1982). For article, "The Mechanics' Lien Trust Fund Statute — Theft or Not Theft", see 16 Colo. Law. 1968 (1987).

**Construction lenders not deprived of due process.** This article does not deprive construction lenders of property without due process of law, even though lien statements are filed ex parte, without prior hearing, and contain conclusory allegations of entitlement to a lien, and the lien may be extended indefinitely by filing an affidavit stating that the improvement has not been completed. *Bankers Trust Co. v. El Paso Pre-Cast Co.*, 192 Colo. 468, 560 P.2d 457 (1977).

To require the full panoply of due process protections before filing a lien statement would impair the notice function of the lien statements. *Bankers Trust Co. v. El Paso Pre-Cast Co.*, 192 Colo. 468, 560 P.2d 457 (1977).

**Purpose of this section is to** assure that the owner is given notice of liens filed by persons with whom he has not dealt directly. *First Nat'l Bank v. Sam McClure & Son*, 163 Colo. 473, 431 P.2d 460 (1967); *Tighe v. Kenyon*, 681 P.2d 547 (Colo. App. 1984).

**Where the charges at issue are in the nature of taxes, the lien is already perfected.** Pursuant to § 32-1-1001 (1)(j)(I), a district's fees constitute a perpetual lien on and against the property served; therefore, it was unnecessary for a special district to serve a notice of intent to file a lien statement because the district's lien was perpetual and perfected. *Skyland Metro. Dist. v. Mtn. W. Enter., LLC*, 184 P.3d 106 (Colo. App. 2007).

**Materialman furnishing materials directly to owner treated as principal contractor.** A materialman furnishing materials directly to the owner is treated as a principal contractor under the mechanics' lien statutes. *First Nat'l Bank v. Sam McClure & Son*, 163 Colo. 473, 431 P.2d 460 (1967).

**Filing of lien notice in county where land located.** The party who claims a lien shall file his notice in every county wherein the land or property is located, on which the lien is claimed to cover. *Arkansas River, Land, Reservoir & Canal Co. v. Flinn*, 3 Colo. App. 381, 33 P. 1006 (1893).

**Claimant's status changes where contract not filed as required.** Where the contract is not filed for record as required by this section, the lien claimant's status is changed with respect to the time for filing a lien, that is, it becomes a principal contractor and therefore by subsection (5) is given three (now four) months from the completion of the work within which to file the lien statement. *W.B. Barr Lumber Co. v. Thompson*, 131 Colo. 347, 281 P.2d 1016 (1955).

**Indebtedness must exist in favor of claimant.** A prime requisite to the establishment of a valid lien is that an indebtedness exists in favor of the claimant for labor or materials. *Sperry & Mock, Inc. v. Security Sav. & Loan Ass'n*, 37 Colo. App. 357, 549 P.2d 412 (1976).

**Assignment of lien claim.** *Medical Arts Bldg., Inc. v. Ervin*, 127 Colo. 458, 257 P.2d 969 (1953).

**Applied in** *Rico Reduction & Mining Co. v. Musgrave*, 14 Colo. 79, 23 P. 458 (1890); *Branham v. Nye*, 9 Colo. App. 19, 47 P. 402 (1896); *Perkins v. Boyd*, 16 Colo. App. 266, 65 P. 350 (1901); *Sickman v. Wollett*, 31 Colo. 58, 71 P. 1107 (1903); *Tabor-Pierce Lumber Co. v. Int'l. Trust Co.*, 19 Colo. App. 108, 75 P. 150 (1903); *Clark Hdwe. Co. v. Centennial Tunnel Mining Co.*, 22 Colo. App. 174, 123 P. 322 (1912); *Curtis v. Nunns*, 54 Colo. 554, 131 P. 403 (1913); *Atkinson v. Colo. Title & Trust Co.*, 59 Colo. 528, 151 P. 457 (1915); *Armour & Co. v. McPhee & McGinnity Co.*, 85 Colo. 262, 275 P.12 (1929); *Chain O'Mines v. Lewison*, 100 Colo. 186, 66 P.2d 802 (1937); *Trustee Co. v. Bresnahan*, 119 Colo. 311, 203 P.2d 499 (1949); *Lierz v. Cook*, 136 Colo. 221, 315 P.2d 535 (1957); *Bulow v. Ward Terry & Co.*, 155 Colo. 560, 396 P.2d 232 (1964); *Am. Factors Assocs. v. Triangle Heating & Sheet Metal Co.*, 31 Colo. App. 240, 503 P.2d 163 (1972); *Meurer, Serafini & Meurer, Inc. v. Skiland Corp.*, 38 Colo. App. 61, 551 P.2d 1089 (1976); *Jordan v. Lone Pines, Ltd.*, 41 Colo. App. 152, 580 P.2d 1273 (1978); *Amco Elec. Co. v. First Nat'l Bank*, 42 Colo. App. 124, 596 P.2d 70 (1979).

## II. CONTENTS OF LIEN STATEMENT.

### A. In General.

#### **Statement of completion time not required.**

The statement is not required to state the time of the completion of the work, and a recital of the time of such completion in the statement is not binding on the lienor; he may show by other evidence that the work was completed at a later date. *Burleigh Bldg. Co. v. Merchant Brick & Bldg. Co.*, 13 Colo. App. 455, 59 P. 83 (1899).

**Showing of dates material furnished permissible.** Lienor may show when either the first or the last material was furnished. *Mouat Lumber & Inv. Co. v. Freeman*, 7 Colo. App. 152, 42 P. 1040 (1895).

**Statement not avoided by misstatement of unrequired material.** A statement which contains everything required will not be avoided because it contains a statement or a misstatement of something not required and not material. *Bitter v. Mouat Lumber & Inv. Co.*, 10 Colo. App. 307, 51 P. 519 (1897), *aff'd*, 27 Colo. 120, 59 P. 403 (1899).

A statement in part for articles not the subject of lien will not vitiate the claim if it was not wilfully false, and the court will permit the claimant by proof to make the necessary segregation, throw out the value of such articles, and declare a lien for the remainder. *Lowell Hdwe. Co. v. May*, 59 Colo. 475, 149 P. 831 (1915); *Barnes v. Colo. Springs & C.C.D. Ry.*, 42 Colo. 461, 94 P. 570 (1908).

**Nondeceptive mistakes overlooked.** Mistakes that do not tend to deceive parties interested may be overlooked. *Cannon v. Williams*, 14 Colo. 21, 23 P. 456 (1890); *Wigham Excavating v. Colo. Fed. S & L*, 796 P.2d 23 (Colo. App. 1990).

When an account embraced in a lien statement includes items which cannot be made the subject of the lien claimed, it will not defeat the right thereto for the value of those items which are properly chargeable as a lien. *Rice v. Rhone*, 49 Colo. 41, 111 P. 585 (1910).

The requirement of subsection (1)(a) that a subcontractor on filing a lien statement shall give the name of the contractor to whom material was sold or work performed is for the benefit of the owner, and where a party named in the statement as the contractor was in fact the agent of the owner of the property and purchased the material as such agent, the owner could not be misled. *Bitter v. Mouat Lumber & Inv. Co.*, 10 Colo. App. 307, 51 P. 519 (1897), *aff'd*, 27 Colo. 120, 59 P. 403 (1899).

**Proof of identification not precluded by prior misidentification.** That a claimant identified itself as a subcontractor in the lien statement does not preclude it from pleading and proving facts showing it to be a principal contractor. *First Nat'l Bank v. Sam McClure & Son*, 163 Colo. 473, 431 P.2d 460 (1967).

### B. Name of Owner or Reputed Owner.

**Failure to name the true owner does not void the lien statement.** *Campbell v. Graham*, 144 Colo. 532, 357 P.2d 366, 94 A.L.R.2d 1165 (1960).

Lien statement is not void because it fails to name the actual owners of the property. *McIntire & Quiros of Colo., Inc. v. Westinghouse Credit Corp.*, 40 Colo. App. 398, 576 P.2d 1026 (1978).

**"Reputed owner" is defined as one who has to all appearances the title to, and possession of, the property.** *Moore Elec. Co. v. Ambassador Bldr. Corp.*, 653 P.2d 90 (Colo. App. 1982).

**"Reputed" construed.** The word "reputed", referred to in subsection (1)(a), has a much weaker sense than its derivation would appear to warrant, importing merely a supposition or opinion derived or made up from outward appearances, and often unsupported by fact, and the term "reputed owner" is frequently employed in this sense. *Lowell Hdwe. Co. v. May*, 59 Colo. 475, 149 P. 831 (1915).

**If name of owner is not known, it need not be given** and an affidavit to that effect is sufficient, and where the name of the reputed owner is given, no such affidavit is required. *Lowell Hdwe. Co. v. May*, 59 Colo. 475, 149 P. 831 (1915).

**It is sufficient to designate a particular person in the conjunctive** as owner and reputed owner, or in the alternative as owner or reputed owner where a statement of the name of the owner or reputed owner is required. *Lowell Hdwe. Co. v. May*, 59 Colo. 475, 149 P. 831 (1915).

**Owner at date lien filed deemed person charged.** The owner at the date the lien is filed is the owner who is to be named as the person charged. *Rice v. Carmichael*, 4 Colo. App. 84, 34 P. 1010 (1893); *Sprague Inv. Co. v. Mouat Lumber & Inv. Co.*, 14 Colo. App. 107, 60 P. 179. (1899).

**Lien claimant only chargeable with knowledge of property ownership.** A lien claimant can only be charged with knowledge of the ownership of property as apparent upon the public records. *Bitter v. Mouat Lumber & Inv. Co.*, 10 Colo. App. 307, 51 P. 519 (1897), *aff'd*, 27 Colo. 120, 59 P. 403 (1899).

**Statement incorrectly designating owner defective against subsequent lienors.** Statement designating owner of an equitable title instead of the owner of the legal title is defective and invalid as against subsequent encumbrancers and lienors although good as against the equitable owner. *Sprague Inv. Co. v. Mouat Lumber & Inv. Co.*, 14 Colo. App. 107, 60 P. 179 (1899).

### C. Name of Claimant.

**Name of each person performing labor must be set out.** There can be no substantial



compliance with the requirements of subsection (1)(b) unless the name of each person who performed the labor which is the basis for a mechanic's lien appears on the lien statement. *Ridge Erection Co. v. Mountain States Tel. & Tel. Co.*, 37 Colo. App. 477, 549 P.2d 408 (1976).

**It was not necessary for contractor to name in the statement of lien each subcontractor hired to perform the contract** or to list the amounts owed to those subcontractors individually in order to fulfill the requirements of this section where the contractor dealt directly with the developer and thus was the "person" who furnished the labor. *FCC Constr., Inc. v. Casino Creek Holdings*, 916 P.2d 1196 (Colo. App. 1996).

**Where contracts were made with person who held an interest which was part of the "labor done" claimable under § 38-22-101(1)**, the person has standing to claim a lien under this section and the names of the persons who actually performed the labor were not required. *Tighe v. Kenyon*, 681 P.2d 547 (Colo. App. 1984).

**A verification and second signature is only required** when the notice of lien form is signed on behalf of the claimant by another, and is not required when the lien claimant personally signs the form. *Sheldon v. Platte Valley Sav.*, 794 P.2d 1083 (Colo. App. 1990).

#### D. Description of Property.

**Object of a description of the land** is to give notice to creditors of, and purchasers from the owners of the property, hence, it is permissible in determining the sufficiency of a description, to consider the interest of the parties to the suit and the rights to be affected. *Cary Hdwe. Co. v. McCarty*, 10 Colo. App. 200, 50 P. 744 (1897).

**Property must be mentioned in statement for lien to attach.** No lien can attach to property other than that mentioned in the lien statement. *First Nat'l Bank v. Sam McClure & Son*, 163 Colo. 473, 431 P.2d 460 (1967).

**Property descriptions in lien statements are adequate so long as they are "sufficient to identify"** the property. *McIntire & Quiros of Colo., Inc. v. Westinghouse Credit Corp.*, 40 Colo. App. 398, 576 P.2d 1026 (1978).

**Sufficient identification is constituted by** description which distinguishes the property sought to be charged from every other piece of property and a notice which gives the numbers of the lots, block, and addition, regardless of the fact that there is no mention of the city, county, or state in which the property is located. *Sayre-Newton Lumber Co. v. Park*, 4 Colo. App. 482, 36 P. 445 (1894); *Pacific Lumber Co. v. Watters*, 74 Colo. 147, 219 P. 782 (1923).

**Description enabling party familiar with locality to identify premises sufficient.** If there

is enough in the description to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty to the exclusion of others, it is sufficient. *Cary Hdwe. Co. v. McCarty*, 10 Colo. App. 200, 50 P. 744 (1897).

**Description of property by metes and bounds sufficient.** A legal description of property by metes and bounds in a lien statement serves the function of accurate identification of the property. *McIntire & Quiros of Colo., Inc. v. Westinghouse Credit Corp.*, 40 Colo. App. 398, 576 P.2d 1026 (1978).

**Effect of variance in description.** A variance between the description set forth in the lien statement and the actual description is of no consequence where the street address was given. *Campbell v. Graham*, 144 Colo. 532, 357 P.2d 366, 94 A.L.R.2d 1165 (1960).

**Courts reluctant to set aside claim for looseness of description.** Courts are reluctant to set aside a claim of mechanic's lien for looseness of description, and it is not necessary that the description shall be either full or precise. *Cary Hdwe. Co. v. McCarty*, 10 Colo. App. 200, 50 P. 744 (1897).

**Lien should not fail because claimant described too large a tract of land**, if the land properly subject to the lien was embraced in the tract described, especially where it does not appear that any innocent party has been misled and prejudiced thereby. *Cary Hdwe. Co. v. McCarty*, 10 Colo. App. 200, 50 P. 744 (1897).

#### E. Amount of Indebtedness.

**Purpose of subsection (1)(d)** is to have the statement inform any interested party to the actual condition of the account and the amount for which a lien is claimed. *Harris v. Harris*, 9 Colo. App. 211, 47 P. 841 (1897).

**Merely stating balance due is not substantial compliance with this section.** *Cannon v. Williams*, 14 Colo. 21, 23 P. 456 (1890).

**Discrepancy by mistake in claim would not affect standing lien.** In the enforcement of a mechanics' lien a small discrepancy between the statement in the lien claim and the evidence as to the amount due, which was purely the result of mistake and did not mislead or injure anyone, would not affect the standing of the lien. *Chicago Lumber Co. v. Newcomb*, 19 Colo. App. 265, 74 P. 786 (1903).

**Contents of lien statement including numerous claims.** A lien statement which includes a number of assigned claims should set forth each separate indebtedness with credits thereon, but an omission to mention credits is equivalent to a statement that the claim is not entitled to one, and it need not show credit for amounts paid after assignment except as against the gross amount claimed. *Small v. Foley*, 8 Colo. App. 435, 47 P. 64 (1896).

A lien statement filed by one who is claiming as the assignee of numerous claims must show the balance due with respect to each separate claim; a lien statement which merely states the aggregate amount of indebtedness is defective and insufficient. *Ridge Erection Co. v. Mountain States Tel. & Tel. Co.*, 37 Colo. App. 477, 549 P.2d 408 (1976).

**Statement of claims which fails to show balance is defective.** A statement filed by one claiming to be the assignee of numerous demands which sets forth the aggregate amount of indebtedness, but does not show the balance due with respect to each separate claim, was held defective and insufficient. *Hanna v. Colo. Sav. Bank*, 3 Colo. App. 28, 31 P. 1020 (1892).

A lien statement filed by assignees which contained only the aggregate amount claimed as due and owing to the assignees was inadequate and ineffectual to assert a lien. *Ridge Erection Co. v. Mountain States Tel. & Tel. Co.*, 37 Colo. App. 477, 549 P.2d 408 (1976).

#### F. Verification.

**Filing of an unverified statement is void and of no effect.** *Rice v. Carmichael*, 4 Colo. App. 84, 34 P. 1010 (1893).

**Absence of statement in verification deemed not fatal.** The fact that in a verification there is no statement that the affidavit was made in behalf of the claimant is not fatal to its validity. *Consumers' Lumber & Inv. Co. v. Hayutin*, 75 Colo. 483, 226 P. 860 (1924).

**Verification held in substantial compliance with subsection (2).** The verification of a claimant to his lien statement that "he has read the same and is familiar with the contents thereof, and that the same is true, as he verily believes, and that the amount therein stated as due is due", and one to the effect that the statement "is true and that the amount of indebtedness therein stated as due is due and unpaid", are in substantial compliance with the requirement of subsection (2). *Gutshall v. Kornaley*, 38 Colo. 195, 88 P. 158 (1906).

#### G. Service of Notice.

**Statutory notice required to perfect valid lien.** The 1975 amendment to subsection (3) demonstrates a clear legislative intent to require statutory notice in order to perfect a valid lien. *Daniel v. M.J. Dev., Inc.*, 43 Colo. App. 92, 603 P.2d 947 (1979); *Moore Elec. Co. v. Ambassador Bldr. Corp.*, 653 P.2d 90 (Colo. App. 1982).

**Service of notice under this section is effected** when the notice is delivered in person or, in the alternative, when notice is properly addressed, registered, and mailed. No requirement exists that a mailed notice must be received in order to be effective. *6S Corp. v. Martinez*, 831 P.2d 509 (Colo. App. 1992).

#### Service of notice essential for jurisdiction.

The service of the statutory notice is essential to give the court jurisdiction to charge the property. *Sayre-Newton Lumber Co. v. Park*, 4 Colo. App. 482, 36 P. 445 (1894).

**Party improving leased premises not required to make service.** Party improving leased premises for the tenant was not a subcontractor, and was not required to serve a copy of the statement. *Fisher v. McPhee & McGinnity Co.*, 24 Colo. App. 420, 135 P. 132 (1913).

#### Averment of service and filing in complaint with separate causes of actions unnecessary.

Where several causes of action are declared upon in one complaint in favor of one and the same plaintiff, whether the liens are possessed by him as assignee, or in his own right, and where, after the assignment, he has served the written notice and filed the statement required by this section, and whether he has included therein all of said claims owned by him, and for which he has brought suit, it is not necessary to aver in each separate cause of action arising out of said liens that he served the written notice and filed the statement; but it is sufficient if, either at the beginning or the end of the complaint relating to said causes of action, there is a general statement or averment of the service of the notice and filing of the statement. *Rialto Mining & Milling Co. v. Lowell*, 23 Colo. 253, 47 P. 263 (1896).

**Notice served upon purchaser deemed notice to vendor.** Under a contract of sale of real estate that requires the purchaser to make certain improvements, the purchaser is the agent of the vendor for the purpose of making the improvements, so that a notice of an intention to file a mechanic's lien for labor and materials furnished in making the improvements, served upon the purchaser, was notice to the vendor. *Colo. Iron Works v. Taylor*, 12 Colo. App. 451, 55 P. 942 (1899), appeal dismissed, 27 Colo. 310, 61 P. 233 (1900).

**Service of corporation upon cashier and bookkeeper held sufficient.** The defendant being a foreign corporation, service of the statement of the lien required by this section upon its cashier and bookkeeper, at the factory in the town where the building was erected, was held sufficient. *Great W. Sugar Co. v. Gilcrest Lumber Co.*, 25 Colo. App. 24, 136 P. 562 (1913).

**Service upon agent's owner sufficient.** Service upon the agent of the owner of the premises in charge of the erection of the building held sufficient. *Curtis v. McCarthy*, 53 Colo. 284, 125 P. 109 (1912).

**Service upon clerk of superintendent of company insufficient.** Service upon a clerk of the superintendent of the defendant company, the owner, was not such service as this section prescribes. *Union Pac. Ry. v. Davidson*, 21 Colo. 93, 39 P. 1095 (1895).



**Lien claimant has burden of proving his right to lien** under this section and this burden includes the requirement of giving statutory notice. *Daniel v. M.J. Dev., Inc.*, 43 Colo. App. 92, 603 P.2d 947 (1979).

**Defense of lack of notice.** The owners' failure to raise in their pleadings the defense of lack of notice is not material, and they need not establish prejudice resulting from a lack of notice. *Daniel v. M.J. Dev., Inc.*, 43 Colo. App. 92, 603 P.2d 947 (1979).

**Failure to record an affidavit of service of notice of intent upon the principal contractor invalidates the lien.** *Everitt Lumber Co. v. Prudential Ins. Co. of Am.*, 660 P.2d 925 (Colo. App. 1983).

#### H. Time of Filing.

**Claimants not required to wait for property's completion.** This section does not require that the lien claimants wait until the property is completed, because that time might never arrive. *State Bank v. Plummer*, 54 Colo. 144, 129 P. 819 (1912).

**Lien filed from time changes in work completed.** Where after a building is turned over to the owner by the contractor it is insisted by the owner that certain parts of the work are not according to contract and changes are made to make the work comply with the contract, the changes are a part of the construction and the time within which a mechanic's lien must be filed would date from the time the changes were completed. *Stidger v. McPhee*, 15 Colo. App. 252, 62 P. 332 (1900).

**Unnecessary addition to smelter does not extend filing period.** The addition to a smelter, after it is put in operation, of conveniences which are not a necessary part of the plant, and without which it can be operated, e.g., trackage facilities for handling ore, buckets and screw conveyors, or a refinery, does not extend the period within which the lien statement must be filed. *Mine & Smelter Supply Co. v. Kuenzel Process Smelter Co.*, 56 Colo. 326, 138 P. 31 (1914).

**It is necessary that seasonable filing of lien statements be shown** and, unless the evidence shows that the liens were filed within the time required, they are too late. *John F. Rice Lumber Co. v. Chipeta Mining, Milling & Smelting Co.*, 77 Colo. 133, 234 P. 1066 (1925).

**Plaintiff must prove statement filed within statutory period.** The burden is on the plaintiff to prove that he filed his lien statement within the prescribed statutory period. *Stiger v. McPhee*, 15 Colo. App. 252, 62 P. 332 (1900); *Foley v. Coon*, 41 Colo. 432, 93 P. 13 (1907); *First Nat'l Bank v. Sam McClure & Son*, 163 Colo. 473, 431 P.2d 460 (1967).

**"Blanket lien" subject to filing within time limits.** *Hill Development Corp. v. Cordova*, 714 P.2d 927 (Colo. App. 1986).

**Time for filing statements commences upon laborers' completion of work.** As to laborers working directly for the owner of the property, time for filing lien statements does not commence to run until the completion of the work on which they are engaged. *Tiger Placers Co. v. Fisher*, 98 Colo. 221, 54 P.2d 891 (1936).

**Principal contractor has four months to file lien statement.** One who furnishes materials to the owner is a principal contractor, and has three (now four) months after completion of the building within which to file his lien statement. *Park Lane Props. v. Fisher*, 89 Colo. 591, 5 P.2d 577 (1931); *Mortgage Brokerage Co. v. Barr Lumber Co.*, 91 Colo. 445, 16 P.2d 32 (1932).

Where the contract to furnish material for the construction of a house is between the lien claimant and the owner, the claimant is, in virtue of section 38-22-108 (1)(b), a principal contractor and has three (now four) months after the completion of the building in which to file his lien statement. *Platte Valley Lumber Co. v. Courtright*, 70 Colo. 57, 197 P. 235 (1921).

**A mechanics' lien secures in rem recovery against property,** and generally, a party claiming for labor and materials must perfect its lien by filing within four months "after the day on which the last labor was performed or the last material furnished by such lien claimant". *Richter Plumbing and Heating v. Rademacher*, 729 P.2d 1009 (Colo. App. 1986).

**Subcontractor deemed principal contractor for filing time of statement.** A subcontractor under a building contract which is not filed for record, is a principal contractor with respect to the time for filing a lien statement. *Western Elaterite Roofing Co. v. Fisher*, 85 Colo. 5, 273 P. 19 (1928).

**Prematurely filed claim.** Since there would be no debt until the materials had been furnished or labor performed, the fact that the materials were later furnished and labor was later performed would not validate a lien claim that had been prematurely filed when no debt existed. *Sperry & Mock, Inc. v. Security Sav. & Loan Ass'n*, 37 Colo. App. 357, 549 P.2d 412 (1976).

**Liens held partially valid.** Although mechanics' lien claims for the entire cost of a job were filed more than three months after some of the work had been performed, where there was a time lag of over three months during which plaintiff furnished neither material nor labor and plaintiff subsequently furnished labor and material, the statutorily designated period had not commenced at the time of the filing of the lien claim statements, and the liens were valid and enforceable to the extent of the value of the material furnished and labor performed prior to the filing thereof. *Sperry & Mock, Inc. v. Security Sav. & Loan Ass'n*, 37 Colo. App. 357, 549 P.2d 412 (1976).

**It is the date of mailing of the notice,** not of its receipt, which establishes the commence-

ment of the 10-day waiting period under subsection (3) before the lien statement itself may be recorded. *Weyerhaeuser Co. v. Colo. Quality Research, Inc.*, 778 P.2d 290 (Colo. App. 1989).

**Notice of intent and related affidavit of service** must be served upon the owner not less than ten days before the lien statement is filed with the county clerk and recorder, but a copy of the lien may be served on the owner at the same time as the notice of intent without affecting the perfection of the lien. *Manguso v. Am. Sav. and Loan Ass'n*, 782 P.2d 866 (Colo. App. 1989); *United Floor Co. v. Eigel*, 807 P.2d 1209 (Colo. App. 1990).

**A mechanics' lien statement with accompanying affidavit of service is perfected** if it has actually been filed not less than 10 days following proper service of notice of intent to file that lien statement. *United Floor Co. v. Eigel*, 807 P.2d 1209 (Colo. App. 1990).

### III. COMPLETION OF WORK OR CONTRACT.

#### A. In General.

**"Completion" construed.** In the absence of any statutory qualifications or definition of the term "completion", it should be construed to mean actual completion, dating from the time when the last work was done. *Lichty v. Houston Lumber Co.*, 39 Colo. 53, 88 P. 846 (1907).

**Work completed when essential parts of job completed.** Where in a mechanic's lien case involving repairs to a roof, labor of laying the roofing material was completed May 6, but mopping of the seams, which was an essential part of the work, was not done until July 5, following, it was held, under the attending circumstances, that for the purposes of a mechanic's lien, the work was completed on the latter date. *Western Elaterite Roofing Co. v. Fisher*, 85 Colo. 5, 273 P. 19 (1928).

#### B. Abandonment of Work.

**Section creates a conclusive presumption of completion** on proof of 30 days (now 90 days) cessation (now abandonment) from labor. *First Nat'l Bank v. Sam McClure & Son*, 163 Colo. 473, 431 P.2d 460 (1967).

**Labor performed in furtherance of completion not abandonment from labor.** Whenever any labor, whatever its character, is performed on a building (or improvement) in furtherance of its completion, there is no cessation (now abandonment) from labor. *First Nat'l Bank v. Sam McClure & Son*, 163 Colo. 473, 431 P.2d 460 (1967).

**Affirmative showing of no abandonment not required.** Cases do not require an affirmative showing on the part of the lien claimant that there was no cessation (now abandonment) from

labor of 30 days (now 90 days) or more. *First Nat'l Bank v. Sam McClure & Son*, 163 Colo. 473, 431 P.2d 460 (1967).

**Abandonment provisions in subsection (7) are applicable in situations where: (1) Work is abandoned pursuant to an unfinished contract for work on a building, improvement, or structure; or (2) the entire project is abandoned and the building, improvement, or structure goes unfinished.** Abandonment occurs at the end of the three-month period, not at the beginning. *Merrick & Co. v. Estate of Verzuh*, 987 P.2d 950 (Colo. App. 1999).

**Burden is upon owner to take advantage of statutory presumption.** If the owner wishes to take advantage of this statutory presumption in order to be relieved of liability, the burden is upon him to come forward with sufficient evidence to justify raising the presumption. *First Nat'l Bank v. Sam McClure & Son*, 163 Colo. 473, 431 P.2d 460 (1967).

**Trial court determines abandonment of work.** In an action to foreclose a mechanic's lien, whether or not certain work was done during a period when it was alleged there was a cessation (now abandonment) of work for 30 days (now 90 days), is a question to be determined by the trial court. *Farmers' Life Ins. Co. v. Connor*, 82 Colo. 81, 257 P. 260 (1927).

**Engineering services contract constituted work on a building or improvement and, consequently, subsection (7) would extend the filing period if the engineering firm had abandoned work on the project before its completion.** Because the trial court found a genuine issue of material fact as to whether the firm had abandoned its contract before completion, summary judgment should not have been entered. *Merrick & Co. v. Estate of Verzuh*, 987 P.2d 950 (Colo. App. 1999).

#### C. Trivial Imperfections or Omissions.

**Subsection (7) applies to all lien claimants.** *Kehn v. Spring Creek Vill. I*, 38 Colo. App. 550, 563 P.2d 969 (1977).

**Subsection (7) applies when project completed.** It only comes into play when a project is deemed completed. *Kehn v. Spring Creek Vill. I*, 38 Colo. App. 550, 563 P.2d 969 (1977).

**Extension of filing time by trivial alterations prohibited.** It is not competent for mechanics by trivial work and trivial alterations to extend the time within which the lien may be filed. *Burleigh Bldg. Co. v. Merchant Brick & Bldg. Co.*, 13 Colo. App. 455, 59 P. 83 (1899).

**A lien claimant may not extend the filing period by doing work related to a trivial imperfection in or omission from work or construction performed on a project deemed completed.** *Richter Plumbing and Heating v. Rademacher*, 729 P.2d 1009 (Colo. 1986).



However, all repairs and shakedown work following the construction of a house need not precede completion. *Richter Plumbing and Heating v. Rademacher*, 729 P.2d 1009 (Colo. 1986).

Determination of completion date is within the province of the trier of fact and will not be overturned on appeal where the evidence supports its finding. *Richter Plumbing and Heating v. Rademacher*, 729 P.2d 1009 (Colo. 1986).

**All repairs need not precede completion.** All repairs and "fixing of bugs" following the construction of a house need not precede "completion". *Kaibab Lumber Co. v. Osburne*, 171 Colo. 49, 464 P.2d 294 (1970).

**Incomplete mantel and fireplace not trivial imperfection.** The lack of completion of a man-

tel and fireplace is not a trivial imperfection or omission from the work. *Lichty v. Houston Lumber Co.*, 39 Colo. 53, 88 P. 846 (1907).

**Insignificant plumber's labor months after completion of plumbing trivial.** Labor performed by a plumber, of the value of \$6.75, months after he had practically completed the plumbing in a building, is "trivial" under this subsection (7). *Boise-Payette Lumber Co. v. Longwedel*, 88 Colo. 233, 295 P. 791 (1930).

**Where the contract was not completed and the architect was performing tasks at the request of the owner pursuant to a contract which had not been terminated, the concept of "triviality" of the work has no applicability.** *Sheldon v. Platte Valley Sav.*, 794 P.2d 1083 (Colo. App. 1990).

**38-22-110. Action commenced within six months.** No lien claimed by virtue of this article, as against the owner of the property or as against one primarily liable for the debt upon which the lien is based or as against anyone who is neither the owner of the property nor one primarily liable for such debt, shall hold the property longer than six months after the last work or labor is performed, or laborers or materials are furnished, or after the completion of the building, structure, or other improvement, or the completion of the alteration, addition to, or repair thereof, as prescribed in section 38-22-109, unless an action has been commenced within that time to enforce the same, and unless also a notice stating that such action has been commenced is filed for record within that time in the office of the county clerk and recorder of the county in which said property is situate. Where two or more liens are claimed of record against the same property, the commencement of any action and the filing of the notice of the commencement of such action within that time by any one or more of such lien claimants in which action all the lien claimants as appear of record are made parties, either plaintiff or defendant shall be sufficient.

**Source:** L. 1899: p. 271, § 10. R.S. 08: § 4034. L. 15: p. 333, § 2. C.L. § 6451. CSA: C. 101, § 24. L. 37: p. 481, § 4. CRS 53: § 86-3-10. C.R.S. 1963: § 86-3-10. L. 2000: Entire section amended, p. 210, § 9, effective August 2.

**Cross references:** For filing notice of lis pendens, see C.R.C.P. 105(f).

## ANNOTATION

- I. General Consideration.
- II. Six Months Limitation.
- III. Notice of Lis Pendens.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 16 *Dicta* 71 (1940). For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 *Dicta* 321 (1949).

**No presumption of performance necessary to lien's acquisition.** No act necessary to the acquisition of a lien can be presumed to have been performed in the absence of proof that it was performed. *Kalamath Inv. Co. v. Asphalt Paving Co.*, 153 Colo. 109, 384 P.2d 938 (1963).

**Lien claimant has burden of proving its right to a lien on property.** *Kalamath Inv. Co. v. Asphalt Paving Co.*, 153 Colo. 109, 384 P.2d 938 (1963).

**This section and § 38-22-109 must be construed together.** *Pacific Lumber Co. v. Lieberman*, 76 Colo. 332, 231 P. 673 (1924).

**Applied in** *Weiner v. Rumble*, 11 Colo. 607, 19 P. 760 (1888); *Small v. Foley*, 8 Colo. App. 435, 47 P. 64 (1896); *Bitter v. Mouat Lumber & Inv. Co.*, 10 Colo. App. 307, 51 P. 519 (1897); *Burleigh Bldg. Co. v. Merchant Brick & Bldg. Co.*, 13 Colo. App. 455, 59 P. 83 (1899); *Ferguson v. Christensen*, 59 Colo. 42, 147 P. 352 (1915); *Hawkins v. Grisham*, 69 Colo. 156, 170 P. 187 (1918); *Laverents v. Craig*, 74 Colo. 297, 225 P. 250 (1923); *Campbell v. Graham*, 144

Colo. 532, 357 P.2d 366 (1960); Nat'l Union Fire Ins. Co. v. Denver Brick & Pipe Co., 162 Colo. 519, 427 P.2d 861 (1967); First Com. Corp. v. First Nat'l Bancorporation, Inc., 572 F. Supp. 1430 (D. Colo. 1983).

## II. SIX MONTHS LIMITATION.

**Time when suit should be brought procedural matter.** The time when a suit should be brought is a matter of procedure and within the control of the general assembly so long as reasonable time was provided. Chicago Lumber Co. v. Dillon, 13 Colo. App. 196, 56 P. 989 (1899); Orman v. Crystal River Ry., 5 Colo. App. 493, 39 P. 434 (1895).

**Applicability of section.** This statute of limitations applies to the joinder of additional parties by amendment. McIntire & Quiros of Colo., Inc. v. Westinghouse Credit Corp., 40 Colo. App. 398, 576 P.2d 1026 (1978); Trustees of Mtg. Trust of Am. v. District Court, 621 P.2d 310 (Colo. 1980).

**Materialman may begin his suit at any time within six months** after the last material furnished by him or within six months after the completion of the building. Pacific Lumber Co. v. Lieberman, 76 Colo. 332, 231 P. 673 (1924); Meurer, Serafini & Meurer, Inc. v. Skiland Corp., 38 Colo. App. 61, 551 P.2d 1089 (1976).

**Right to enforce lien is lost by the failure to commence suit** within the time limited. Orman v. Crystal River Ry., 5 Colo. App. 493, 39 P. 434 (1895); Johnston v. Bennett, 6 Colo. App. 362, 40 P. 847 (1895).

A mechanics' lien is extinguished upon the claimant's failure to initiate an action within the statutory six-month period. Where there is no notice of commencement of the action filed, there can be no cloud upon the plaintiffs' title. Schlosky v. Mobile Premix Concrete, Inc., 656 P.2d 1321 (Colo. App. 1982).

**Strict limitation makes titles more safe and marketable.** Strictly limiting the time during which property is encumbered renders titles to real property and to interests and estates therein more safe, secure and marketable. King v. W.R. Hall Transp. & Storage Co., 641 P.2d 916 (Colo. 1982).

**Only one claimant required to begin action within limitation period.** This section and § 38-22-111 read together require only that one of the lien claimants begins the action within six months of the completion of the work, and that the filing of such action by one lien claimant is sufficient to meet the six-month time limitation as to all lien claimants, as appear of record, who are made parties either plaintiff or defendant within the six-month limitation period. Bulow v. Ward Terry & Co., 155 Colo. 560, 396 P.2d 232 (1964).

**Intervention order relates back to filing date of motion.** Order of intervention properly

relates back to date of filing of motion to intervene in a mechanic's lien foreclosure action. Franklin Contract Sales Co. v. First Nat'l Bank, 200 Colo. 370, 615 P.2d 684 (1980).

**Trial court lacks jurisdiction over intervention granted after limitation expired.** Intervention by a mechanic's lien claimant in a pending foreclosure action sought and granted after expiration of the six-month period prescribed by this section does not vest the trial court with jurisdiction to decree foreclosure of that lien and to assign it priority over a deed of trust recorded after the work for which such lien was asserted, had commenced. Cox v. Bankers Trust Co., 39 Colo. App. 303, 570 P.2d 6 (1977).

**Late joinder not allowed.** Joinder of one lien claimant after the statutory period in an action initiated by another claimant within the time limit is not allowed under this section, nor is tardy joinder of an additional defendant allowed in an action timely brought. King v. W.R. Hall Transp. & Storage Co., 641 P.2d 916 (Colo. 1982).

**Six-month period may not be tolled.** The mechanics' lien statute contains no specific provisions allowing the six-month period to be tolled. King v. W.R. Hall Transp. & Storage Co., 641 P.2d 916 (Colo. 1982).

Strict application of the six-month limit is based on the principle that extending the lifetime of a perfected lien would vest a lien creditor with greater rights than were granted by the statutory provision creating the right. King v. W.R. Hall Transp. & Storage Co., 641 P.2d 916 (Colo. 1982).

**Six-month period may be tolled.** 11 U.S.C. § 108 in the federal bankruptcy code tolls the running of the period until 30 days after relief from stay is granted or the underlying bankruptcy case is terminated. In re Cantrup, 38 Bankr. 148 (Bankr. D. Colo. 1984); In re Nash Phillips/Copus, Inc., 78 Bankr. 798 (Bankr. W.D. Tex. 1987).

**Where complaint amended after statutory period.** Complaint against the owner and principal contractor within the statutory six-month period, followed by an amendment joining a mortgage company and a plumbing and heating company after the expiration of the statutory period, is not sufficient to satisfy the requirements of this section and preserve the enforceability of the claims of both the original plaintiff company and the plumbing and heating company against the mortgage company. Rogers Concrete, Inc. v. Jude Contractors, 38 Colo. App. 26, 550 P.2d 892 (1976).

## III. NOTICE OF LIS PENDENS.

**Purpose of lis pendens** is to give notice to those interested in the property in question that a suit to foreclose a mechanic's lien is on file. Only one such notice is necessary. Bulow v.



Ward Terry & Co., 155 Colo. 560, 396 P.2d 232 (1964).

The purpose of recording the lis pendens notice is to give notice of the pendency of an action to persons who may subsequently acquire or seek to acquire rights in the property. *King v. W.R. Hall Transp. & Storage Co.*, 641 P.2d 916 (Colo. 1982).

**Filing of one lis pendens is sufficient notice** to subsequent purchasers of pending litigation against property. *Abrams v. Colo. Seal and Stripe, Inc.*, 702 P.2d 765 (Colo. App. 1985).

**Notice of lis pendens prerequisite to establishment of lien right.** A notice of lis pendens is a prerequisite to the establishment of a lien right as against the owner of property or one primarily liable for the debt upon which the lien is based and, where no such lis pendens is filed, it is error to hold that no such notice is necessary as against the owner of the property involved. *Kalamath Inv. Co. v. Asphalt Paving Co.*, 153 Colo. 109, 384 P.2d 938 (1963).

**Bonding pursuant to § 38-22-131 does not excuse failure to record a notice of lis pendens.** *Weize Co., LLC v. Colo. Reg'l Constr.*, 251 P.3d 489 (Colo. App. 2010).

**Failure to file notice not fatal to claimant's lien.** Failure to file notice of lis pendens by one of several lien claimants is not fatal to the lien of the nonfiling claimant when the notice that has been filed discloses the existence and nature of the claim of the nonfiling claimant. *Amco Elec. Co. v. First Nat'l Bank*, 622 P.2d 608 (Colo. App. 1981).

**Notice sufficient even though proprietorship incorrectly identified.** Where a proprietorship is incorrectly identified as a corporation in the caption of the lis pendens, but the error is remedied by amendment and the defendants are not prejudiced thereby, the notice is sufficient under this section. *Fasso v. Straten*, 640 P.2d 272 (Colo. App. 1982).

**38-22-111. Joinder of parties - consolidation of actions.** (1) Any number of persons claiming liens against the same property and not contesting the claims of each other may join as plaintiffs in the same action, and when separate actions are commenced, the court may consolidate them upon motion of any party in interest or upon its own motion.

(2) Upon such procedure for consolidation, one case shall be selected with which the other cases shall be incorporated, and all the parties to such other cases shall be made parties plaintiff or defendant as the court may designate in said case so selected. All persons having claims for liens, the statements of which have been filed as provided in this article, shall be made parties to the action.

(3) Those claiming liens who fail or refuse to become parties plaintiff, or for any reason have not been made such parties, shall be made parties defendant. Any party claiming a lien, not made a party to such action, at any time within the period provided in section 38-22-109, may be allowed to intervene by motion, upon cause shown, and may be made a party defendant on the order of the court, which shall fix by such order the time for such intervenor to plead or otherwise proceed. The pleadings and other proceedings of such intervenor thus made a party shall be the same as though he had been an original party. Any defendant who claims a lien, in answering, shall set forth by cross complaint his claim and lien. Likewise such defendant may set forth in said answer defensive matter to any claim or lien of any plaintiff or codefendant or otherwise deny such claim or lien. The owner of the property to which such lien has attached, and all other parties claiming of record any right, title, interest, or equity therein, whose title or interests are to be charged with or affected by such lien, shall be made parties to the action.

**Source:** L. 1899: p. 272, § 11. R.S. 08: § 4035. C.L. § 6452. CSA: C. 101, § 25. CRS 53: § 86-3-11. C.R.S. 1963: § 86-3-11.

## ANNOTATION

- I. General Consideration.
- II. Necessary Parties.

### I. GENERAL CONSIDERATION.

**Court's jurisdiction to consolidate actions resolved in Rule 21, C.A.R. proceeding.** Contention that district court had no power under subsection (1) to consolidate one action which

was pending with another action which had been dismissed with prejudice, and thus, was proceeding without in personam jurisdiction, is a proper matter to be resolved in a Rule 21, C.A.R. proceeding for a writ of mandamus. *Columbia Sav. & Loan Ass'n v. District Court*, 186 Colo. 212, 526 P.2d 661 (1974).

**Applied** in *Orman v. Crystal River Ry.*, 5 Colo. App. 493, 39 P. 434 (1895); *Clark Hdwe.*

Co. v. Centennial Tunnel Mining Co., 22 Colo. App. 174, 123 P. 322 (1912); McClung v. Griffith, 127 Colo. 315, 255 P.2d 973 (1953); Nat'l Union Fire Ins. Co. v. Denver Brick & Pipe Co., 162 Colo. 519, 427 P.2d 861 (1967); Rogers Concrete, Inc. v. Jude Contractors, 38 Colo. App. 26, 550 P.2d 892 (1976); Trustees of Mtg. Trust of Am. v. District Court, 621 P.2d 310 (Colo. 1980).

## II. NECESSARY PARTIES.

**Action must be against all persons against whom priority of lien is claimed.** Johnston v. Bennett, 6 Colo. App. 362, 40 P. 847 (1895).

**Contractor and lien claimants are parties to action.** The mechanics' lien act clearly contemplates that the contractor and all claimants of liens shall be made parties to an action brought to enforce a lien, and that all shall have their rights adjudicated in one action and protected and enforced in one judgment. Union Pac. Ry. v. Davidson, 21 Colo. 93, 39 P. 1095 (1895); Nat'l Union Fire Ins. Co. v. Denver Brick & Pipe Co., 162 Colo. 519, 427 P.2d 861 (1967).

In an action by a materialman or subcontractor to foreclose his lien, the original contractor must be made a party. State Bank v. Plummer, 54 Colo. 144, 129 P. 819 (1912).

The mechanics' lien law contemplates that all lien claimants be made parties to an action to foreclose. Franklin Contract Sales Co. v. First Nat'l Bank, 200 Colo. 370, 615 P.2d 684 (1980).

**"Owner" defined.** The "owner", referred to in subsection (3), is the person upon whose interest in the property the lien is claimed and sought to be established. Horn v. Clark Hdwe. Co., 54 Colo. 522, 131 P. 405 (1913).

**Owner made party if mortgagee joined.** If a mortgagee is joined, the owner must also be made a party. State Bank v. Plummer, 54 Colo. 144, 129 P. 819 (1912).

**Section places other claimants in category with owner.** This section places other claimants of record in the same category as the owner. Hawkins v. Grisham, 69 Colo. 156, 170 P. 187 (1918); San Juan Hdwe. Co. v. Carrothers, 7 Colo. App. 413, 43 P. 1053 (1896).

**Lessee as "owner".** Where the liens asserted and sought to be established by claimants are limited to the interest of the lessee, he is the "owner" of the property, as contemplated by subsection (3). Horn v. Clark Hdwe. Co., 54 Colo. 522, 131 P. 405 (1913).

**Holder of note secured by deed of trust not "owner".** The holder of a promissory note secured by a deed of trust is not the "owner" of the land within the meaning of subsection (3). Cornell v. Conine-Eaton Lumber Co., 9 Colo. App. 225, 47 P. 912 (1897).

**Subsequent or junior encumbrances deemed indispensable parties.** Subsequent or junior encumbrancers, of record at the time an action is brought to enforce a mechanic's lien, are indispensable parties in order to establish the validity of the lien against the property. Hawkins v. Grisham, 69 Colo. 156, 170 P. 187 (1918).

A mortgagee of record, whose lien is junior to that of mechanics, being interested in objecting to invalid lien claims, is a necessary party to a suit to foreclose mechanic's liens on the property. Howard v. Fisher, 86 Colo. 493, 283 P. 1042 (1929).

**Purchaser pendente lite is proper party.** A purchaser pendente lite of property involved in a mechanic's lien suit is a proper party. Howard v. Fisher, 86 Colo. 493, 283 P. 1042 (1929).

**Only one claimant required to begin action within limitation period.** Section 38-22-110 and this section, read together, require only that one of the lien claimants begins the action within six months of the completion of the work, and that the filing of such action by one lien claimant is sufficient to meet the six-month time limitation as to all lien claimants, as appear of record, who are made parties either plaintiff or defendant within the six-month limitation period. Bulow v. Ward Terry & Co., 155 Colo. 560, 396 P.2d 232 (1964).

**Parties other than owner and claimants not required for lien's enforcement.** This section requires no parties to a suit for the enforcement to a mechanic's lien, except the owner and persons having claims for liens; any number of lien claimants may join as plaintiffs, and those who are not made parties plaintiff may be made parties defendant, but persons claiming interests of some other kind in the property involved need not be made defendants. Branham v. Nye, 9 Colo. App. 19, 47 P. 402 (1896).

**Holder of note not indispensable party to an action to foreclose a mechanic's lien against the property.** Cornell v. Conine-Eaton Lumber Co., 9 Colo. App. 225, 47 P. 912 (1897).

**Beneficiary in deed of trust not necessary party.** The beneficiary in a deed of trust is not a necessary party to the foreclosure of a mechanic's lien on the premises conveyed by the deed of trust, but where such foreclosure is had without making such beneficiary a party, his interest is not bound thereby, and he may attack the validity of such lien and foreclosure in a subsequent action. Fleming v. Prudential Ins. Co., 19 Colo. App. 126, 73 P. 752 (1903).

**Mortgagee not obligated to intervene.** The holder of a mortgage or trust deed on property is under no obligation to intervene in an action to foreclose a mechanic's lien involving the mortgaged premises. Stark Lumber Co. v. Keystone Inv. Co., 92 Colo. 259, 20 P.2d 306 (1933).

**38-22-112. Allegations of complaint.** It is sufficient to allege in the complaint in relation to any party claiming a lien whom it is desired to make a defendant, that such party



claims a lien under this article upon the property described; and in case of the intervention of parties, or of the making of new parties, or of the consolidation of actions, so that the issues are in any manner changed or increased, any party to the action shall be allowed to amend his pleadings, or file new pleadings, as the nature of the case may require.

**Source:** L. 1899: p. 273, § 12. R.S. 08: § 4036. C.L. § 6453. CSA: C. 101, § 26. CRS 53: § 86-3-12. C.R.S. 1963: § 86-3-12.

#### ANNOTATION

**Complaint must contain every fact necessary in the creation of a lien.** *Mouat Lumber & Inv. Co. v. Freeman*, 7 Colo. App. 152, 42 P. 1040 (1895); *Arkansas River Land, Reservoir & Canal Co. v. Nelson*, 4 Colo. App. 438, 36 P. 307 (1894).

In order to entitle a plaintiff to maintain a suit in the nature of a bill in equity to foreclose a mechanic's lien, he must in his complaint allege everything essential to the existence and establishment of his claim, and by allegations — both specific and general — bring himself literally within the terms of this article. *Arkansas River, Land, Reservoir & Canal Co. v. Flinn*, 3 Colo. App. 381, 33 P. 1006 (1893).

**Allegations put in issue must be proved at the trial**, whether appearing in the lien statement or not. *Mouat Lumber & Inv. Co. v. Freeman*, 7 Colo. App. 152, 42 P. 1040 (1895).

In an action to enforce a mechanic's lien against the vendor for labor and materials furnished in making improvements under a contract of sale that required the purchaser to make improvements to a certain value, it was not necessary to allege or prove that the purchaser had not exceeded that amount in making the improvements; if the owner of the property sought to escape liability on the ground that his agent had exceeded the limits of his powers in making the contract for the improvements, it was his duty to aver and prove it. *Colo. Iron Works v. Taylor*, 12 Colo. App. 451, 55 P. 942 (1899), appeal dismissed, 27 Colo. 310, 61 P. 233 (1900).

**Applied in** *Hall v. Cudahy*, 46 Colo. 324, 104 P. 415 (1909); *Clark Hdwe. Co. v. Centennial Tunnel Mining Co.*, 22 Colo. App. 174, 123 P. 322 (1912).

**38-22-113. Hearing - judgment - summons - defense.** (1) The court, whenever the issues in such case are made up, shall advance such cause to the head of the docket for trial and may proceed to hear and determine said liens and claims or may refer the same to a magistrate to ascertain and report upon said liens and claims and the amounts justly due thereon.

(2) Judgments shall be rendered according to the rights of the parties. The various rights of all the lien claimants and other parties to any such action shall be determined and incorporated in one judgment or decree. Each party who establishes his claim under this article shall have judgment against the party personally liable to him for the full amount of his claim so established, and shall have a lien established and determined in said decree upon the property to which his lien has attached to the extent stated in this section.

(3) Proceedings to foreclose and enforce mechanics' liens under this article are actions in rem, and service by publication may be obtained against any defendant therein in a manner as provided by law, and personal judgment against the principal contractor or other person personally liable for the debt for which the lien is claimed shall not be requisite to a decree of foreclosure in favor of a subcontractor or materialman.

(4) In such proceedings, it shall be an affirmative defense that the owner or some person acting on the owner's behalf has paid an amount sufficient to satisfy the contractual and legal obligations of the owner, including the initial purchase price or contract amount plus any additions or change orders, to the principal contractor or any subcontractor for the purpose of payment to the subcontractors or suppliers of laborers or materials or services to the job, when:

(a) The property is an existing single-family dwelling unit;

(b) The property is a residence constructed by the owner or under a contract entered into by the owner prior to its occupancy as his primary residence; or

(c) The property is a single-family, owner-occupied dwelling unit, including a residence constructed and sold for occupancy as a primary residence. This paragraph (c) shall not apply to a developer or builder of multiple residences except for the residence that is occupied as the primary residence of the developer or builder.

**Source:** L. 1899: p. 273, § 13. R.S. 08: § 4037. C.L. § 6454. CSA: C. 101, § 27. CRS 53: § 86-3-13. C.R.S. 1963: § 86-3-13. L. 87: (4) added, p. 1336, § 2, effective May 25. L. 91: (1) amended, p. 366, § 42, effective April 9. L. 2000: IP(4) amended, p. 210, § 10, effective August 2.

**Cross references:** For service of summons by publication, see C.R.C.P. 4(g) and 4(h).

## ANNOTATION

- I. General Consideration.
- II. Judgments.

### I. GENERAL CONSIDERATION.

**Foreclosure action addresses equity.** An action to foreclose a mechanic's lien is addressed to the equity side of a court. *Am. Irrigation Co. v. Fadenrecht*, 30 Colo. App. 28, 489 P.2d 1060 (1971).

**Right to a materialman's lien is based upon considerations of natural justice**, and it is predicated upon the equitable considerations that one who has enhanced the value of property by attaching thereto or having incorporated therein his material shall have a lien therefor. *Jackson v. A.B.Z. Lumber Co.*, 155 Colo. 33, 392 P.2d 288 (1964).

**Article contemplates speedy determination of claims**, to the end that mechanics' lienors will not have to wait indefinitely for their money, or for experiments in legal procedure. *Howard v. Fisher*, 86 Colo. 493, 283 P. 1042 (1929); *Tiger Placers Co. v. Fisher*, 98 Colo. 221, 54 P.2d 891 (1936).

**No prejudice resulted from claimant's failure to serve copy of answer.** In a mechanic's lien foreclosure action where a defendant lien claimant failed to serve a copy of its answer and counterclaim on defendant owners, and ample time existed before trial for responsive pleadings thereto, no prejudice to the substantial

rights of any litigant to the action, including the right to a speedy disposition of causes of this nature, can occur by permitting service of such answer and counterclaim on the owner defendants. *Gould & Preisner, Inc. v. District Court*, 149 Colo. 484, 369 P.2d 554 (1962).

**Applied** in *Bradbury & Co. v. Butler & Son*, 1 Colo. App. 430, 29 P. 463 (1892); *Davis v. John Mouat Lumber Co.*, 2 Colo. App. 381, 31 P. 187 (1892); *Barnes v. Colo. Springs & C.C.D. Ry.*, 42 Colo. 461, 94 P. 570 (1908); *Pike v. Empfield*, 21 Colo. App. 161, 120 P. 1054 (1912).

### II. JUDGMENTS.

**Personal judgment rendered for amount due.** In an action to foreclose a mechanic's lien, a personal judgment may be rendered for the amount due, notwithstanding no right to a lien exists. *Finch v. Turner*, 21 Colo. 287, 40 P. 565 (1895); *Cannon v. Williams*, 14 Colo. 21, 23 P. 456 (1890).

**Saving clause in decree held valid.** Saving clause in a decree providing that certain trust deed holders should not be affected by its terms, is valid. *Stark Lumber Co. v. Keystone Inv. Co.*, 92 Colo. 259, 20 P.2d 306 (1933).

**Decree awarding lien fails in part.** A decree awarding a lien, in part for things not the subject of a lien, fails only to the extent to which the allowance is improper. *Horn v. Clark Hdwe. Co.*, 54 Colo. 522, 131 P. 405 (1913).

**38-22-114. Disposition of proceeds - execution.** (1) The court shall cause said property to be sold in satisfaction of said liens and costs of suit as in case of foreclosure of mortgages; and any party in whose favor a judgment for a lien is rendered, may cause the property to be sold within the time and in the manner provided for sales of real estate on executions issued out of any court of record, and there shall be the same rights of redemption as are provided for in the case of sales of real estate on executions. And if the proceeds of such sale, after the payment of costs, are not sufficient to satisfy the whole amount of such liens included in the decree of sale, then such proceeds shall be apportioned according to the rights of the several parties. In case the proceeds of sale amount to more than the sum of said liens and all costs, then the remainder shall be paid over to the owner of said property; and each party whose claim is not fully satisfied in the manner provided in this section shall have execution for the balance unsatisfied against the party personally liable, as in other cases.

(2) In the first instance without a previous sale of said property to which such liens have attached, an execution may issue in behalf of any such lien claimant for the full amount of his claim against the party personally liable, and he may thereafter enforce such lien for any balance of such judgment remaining unsatisfied. A transcript of the docket of said judgment and decree may be filed with the county clerk and recorder of the county where such



property is situated or in any other county, and thereupon said judgment and decree shall become a lien upon the real property in such county of each party so personally liable in favor of any such lien claimant holding any such judgment against any such party so personally liable, as in other cases of recording transcripts of judgment.

**Source:** L. 1899: p. 274, § 14. R.S. 08: § 4038. C.L. § 6455. CSA: C. 101, § 28. CRS 53: § 86-3-14. C.R.S. 1963: § 86-3-14.

**Cross references:** For foreclosure of mortgages, see § 38-36-162; for sale of real estate on execution, see § 13-56-201.

#### ANNOTATION

**Assignee of lien claimant has redemption right.** Where the proceeds from the sale of land were sufficient to satisfy only a part of a lien claimant's judgment, and thereafter claimant filed with the clerk and recorder a transcript of his judgment, his assignee was a senior lienor and such assignee had the right to redeem. *Twogood v. Ocsay*, 97 Colo. 300, 49 P.2d 437 (1935).

**When allocation of proceeds of foreclosure sale proper.** The allocation of the proceeds of a foreclosure sale is proper where the mortgage of the bank provides for the appointment of the receiver and the payment of his costs and expenses lies within the sound discretion of the trial court. *Plateau Supply Co. v. Bison Meadows Corp.*, 31 Colo. App. 205, 500 P.2d 162 (1972).

**Applicability of exception to time period under § 38-39-102.** The "agricultural real estate" exception to the otherwise applicable 75-day period under § 38-39-102 applies only to

foreclosures under mortgages and deeds of trust and is not applicable to sales upon foreclosure of mechanics' liens or upon sale under execution. *Kimtruss Corp. v. Westland Manor Nursing Home N., Inc.*, 39 Colo. App. 542, 568 P.2d 105 (1977).

**How execution sale may be set aside.** An execution sale may be set aside either on motion in the court which issued the process or in an independent action in a court possessing equitable jurisdiction. *Tekai Corp. v. Transamerica Title Ins. Co.*, 39 Colo. App. 528, 571 P.2d 321 (1977).

**Inadequacy of price alone is not a sufficient ground** upon which to set aside a judicial sale. *Tekai Corp. v. Transamerica Title Ins. Co.*, 39 Colo. App. 528, 571 P.2d 321 (1977).

**Applied** in *Bassick Mining Co. v. Schoolfield*, 10 Colo. 46, 14 P. 65 (1887); *Fitch v. Stallings*, 5 Colo. App. 106, 38 P. 393 (1894); *Howard v. Fisher*, 86 Colo. 493, 283 P. 1042 (1929).

**38-22-115. Parties to action.** Principal contractors and all other persons personally liable for the debt for which the lien is claimed shall be made parties to actions to enforce liens under this article, and service of summons shall be made either personally or by publication in the same manner and with like effect as is provided by law in cases of attachment and other proceedings in rem.

**Source:** L. 1899: p. 274, § 15. R.S. 08: § 4039. C.L. § 6456. CSA: C. 101, § 29. CRS 53: § 86-3-15. C.R.S. 1963: § 86-3-15.

**Cross references:** For service of summons in attachment or other in rem proceedings, see C.R.C.P. 4(e) to 4(g).

#### ANNOTATION

**Principal contractor is a necessary and indispensable party** to an action for the foreclosure of mechanics' liens. *Estey v. Hallack & Howard Lumber Co.*, 4 Colo. App. 165, 34 P. 1113 (1893); *Union Pac. Ry. v. Davidson*, 21 Colo. 93, 39 P. 1095 (1895).

**When principal contractor deemed unnecessary party.** When the contract amount is greater than \$500 and the contract is not re-

corded, the principal contractor is a proper, but not a necessary party, and the action is sufficient without him. *Bulow v. Ward Terry & Co.*, 155 Colo. 560, 396 P.2d 232 (1964).

**Where several original contractors exist, only one necessary as defendant.** In an action to foreclose a mechanic's lien for material furnished a subcontractor, where there are several original contractors, it is not necessary to make

more than one of them a defendant; but, if the owners of the property wish the other joint contractors to be made defendant the court may, in its discretion, have them brought in, if they are within its jurisdiction. *Barnes v. Colo. Springs & C.C.D. Ry.*, 42 Colo. 461, 94 P. 570 (1908).

**Applied** in *Decker v. Myles*, 4 Colo. 558 (1879); *Nat'l Union Fire Ins. Co. v. Denver Brick & Pipe Co.*, 162 Colo. 519, 427 P.2d 861 (1967).

**38-22-116. Costs.** The court shall divide the costs between the parties liable therefor, according to the justice of the case.

**Source:** L. 1899: p. 275, § 16. R.S. 08: § 4040. C.L. § 6457. CSA: C. 101, § 30. CRS 53: § 86-3-16. C.R.S. 1963: § 86-3-16.

#### ANNOTATION

**Applied** in *Los Angeles Gold Mine Co. v. Campbell*, 13 Colo. App. 1, 56 P. 246 (1899); *Burleigh Bldg. Co. v. Merchant Brick & Bldg. Co.*, 13 Colo. App. 455, 59 P. 83 (1899); *Davison v. Jennings*, 27 Colo. 187, 60 P. 354 (1900); *Campbell v. Los Angeles Gold Mine Co.*, 28 Colo. 256, 64 P. 194 (1901); *Perkins v.*

*Boyd*, 16 Colo. App. 266, 65 P. 350 (1901); *Antlers Park Regent Mining Co. v. Cunningham*, 29 Colo. 284, 68 P. 226 (1902); *Sickman v. Wollett*, 31 Colo. 58, 71 P. 1107 (1903); *Nat'l Union Fire Ins. Co. v. Denver Brick & Pipe Co.*, 162 Colo. 519, 427 P.2d 861 (1967).

**38-22-117. Assignment of lien - failure to support lien.** Any party claiming a lien may assign in writing his claim and lien to any other claimant or other person who shall thereupon have all the rights and remedies of the assignor for the purpose of filing and for the enforcement of any such lien by action under this article, and the assignment shall be a sufficient consideration as to all other parties for the purpose of such action. Such assignment may be made before or after the filing of the statement of lien. Any such claimant, whether as assignee or otherwise, may include all the liens he may possess against the same property in any such statement, and when more than one such claim is included in one such statement, one verification thereto shall be sufficient. Any person may file separate statements of two or more claims. If, on the trial of a cause under the provisions of this article, the proceedings will not support a lien, the plaintiff and all lien claimants entitled thereto may proceed to judgment as in an action on contract, and executions may issue as provided in such cases, and said judgment shall have all the rights of a judgment in a personal action.

**Source:** L. 1899: p. 275, § 17. R.S. 08: § 4041. C.L. § 6458. CSA: C. 101, § 31. CRS 53: § 86-3-17. C.R.S. 1963: § 86-3-17.

#### ANNOTATION

- I. General Consideration.
- II. Assignment.
- III. Right to Personal Judgment.

#### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "One Year Review of Contracts", see 36 *Dicta* 19 (1959).

**Section construed.** The only legitimate construction to be given this section is one which will permit the enforcement of the evident legislative intent, which is to enable a plaintiff to recover whenever he is entitled to maintain his action against a defendant, but when there is no

privity whatever between a plaintiff and defendant, and no contract established between them, a plaintiff cannot recover. *Brannan Sand & Gravel Co. v. Santa Fe Land & Imp. Co.*, 138 Colo. 314, 332 P.2d 892 (1958).

**Applied** in *Hart, etc., Corp. v. Mullen*, 4 Colo. 512 (1878); *Small v. Foley*, 8 Colo. App. 435, 47 P. 64 (1896); *Sprague Inv. Co. v. Mouat Lumber & Inv. Co.*, 14 Colo. App. 107, 60 P. 179 (1899); *Trustees of Carpenters & Millwrights Health Benefit Trust Fund v. Angel-Haus Condominium, Ltd.*, 36 Colo. App. 133, 535 P.2d 259 (1975); *Jordan v. Lone Pines, Ltd.*, 41 Colo. App. 152, 580 P.2d 1273 (1978).



## II. ASSIGNMENT.

**Assignment vests enforcement right in assignee.** An assignment carries with it the lien and vests in the assignee the right to enforce it. *Perkins v. Boyd*, 16 Colo. App. 266, 65 P. 350 (1901); *Howard v. Fisher*, 86 Colo. 493, 283 P. 1042 (1929).

**Contract prohibits assignee's enforcement of claim.** Where, on default of the principal contractor, the surety on his bond took assignments of lien claims, it could not enforce such claims against the property, the contract providing that the building should be turned over to the owner free from liens. *Howard v. Fisher*, 86 Colo. 493, 283 P. 1042 (1929).

**Assignee deemed real party in interest.** The assignee in an action to foreclose is the real party in interest. *Howard v. Fisher*, 86 Colo. 493, 283 P. 1042 (1929).

**Burden of pleading and proving valid assignment is upon those who assert it.** *Howard v. Fisher*, 86 Colo. 493, 283 P. 1042 (1929).

## III. RIGHT TO PERSONAL JUDGMENT.

**Intent of article.** This article does not purport to create personal liability of a landowner for

obligations incurred by a contractor in the performance of his contract, but only authorizes the creation of a lien for improvements upon the land of the owner. *Brannan Sand & Gravel Co. v. Santa Fe Land & Imp. Co.*, 138 Colo. 314, 332 P.2d 892 (1958).

**Privity of contract required.** In absence of privity of contract, lien claimants may not secure personal judgment against the owners. *Daniel v. M.J. Dev., Inc.*, 43 Colo. App. 92, 603 P.2d 947 (1979).

**Right to personal judgment for sum due uncontroverted.** This section places the right to a personal judgment for the sum due beyond possible controversy, though the lien itself fails. *Cannon v. Williams*, 14 Colo. 21, 23 P. 456 (1890); *Saint Kevin Mining Co. v. Isaacs*, 18 Colo. 400, 32 P. 822 (1893).

**Even where no lien is allowed, the plaintiff is entitled to personal judgment** for the value of materials furnished at request of the defendant. *Clark Hdwe. Co. v. Centennial Tunnel Mining Co.*, 22 Colo. App. 174, 123 P. 322 (1912).

A personal judgment for the amount found to be due may be rendered in an action to foreclose a mechanic's lien, notwithstanding an abandonment of the claim for a lien. *Saint Kevin Mining Co. v. Isaacs*, 18 Colo. 400, 32 P. 822 (1893).

**38-22-118. Satisfaction of lien - failure to release.** The claimant of any such lien, the statement of which has been filed, on the payment of the amount thereof, together with the costs of filing and recording such lien, and the acknowledgment of satisfaction, and accrued costs of suit in case a suit has been brought thereon, at the request of any person interested in the property charged therewith, shall enter or cause to be entered an acknowledgment of satisfaction of the same of record, and if he neglects or refuses to do so within ten days after the written request of any person so interested, he shall forfeit and pay to such person the sum of ten dollars per day for every day of such neglect or refusal, to be recovered in the same manner as other debts. A valid tender of payment, refused by any such claimant, shall be equivalent to a payment for the purpose of this section. Any such statement may be satisfied of record in the same manner as mortgages.

**Source:** L. 1899: p. 275, § 18. R.S. 08: § 4042. C.L. § 6459. CSA: C. 101, § 32. CRS 53: § 86-3-18. C.R.S. 1963: § 86-3-18.

## ANNOTATION

**Law reviews.** For article, "Discharge of Security Transactions", see 26 Rocky Mt. L. Rev. 115 (1954).

**38-22-119. Agreement to waive - effect.** (1) No agreement to waive, abandon, or refrain from enforcing any lien provided for by this article shall be binding except as between the parties to such contract. The provisions of this article shall receive a liberal construction in all cases.

(2) An agreement to waive lien rights shall contain a statement, by the person waiving lien rights, providing in substance that all debts owed to any third party by the person waiving the lien rights and relating to the goods or services covered by the waiver of lien rights have been paid or will be timely paid.

**Source:** L. 1899: p. 276, § 19. R.S. 08: § 4043. C.L. § 6460. CSA: C. 101, § 33. CRS 53: § 86-3-19. C.R.S. 1963: § 86-3-19. L. 2009: Entire section amended, (SB 09-137), ch. 145, p. 610, § 2, effective July 1.

#### ANNOTATION

**Law reviews.** For article, "Assemblage, Design and Construction for Real Estate Developments", see 11 Colo. Law. 2297 (1982).

**That this article shall be liberally construed** means that it is to be construed according to equitable principles. Buerger Inv. Co. v. Salzer Lumber Co., 77 Colo. 401, 237 P. 162 (1925).

**Mechanic's lien may be waived by the express agreement of a party** in whose favor it exists. Bishop v. Moore, 137 Colo. 263, 323 P.2d 897 (1958).

**A waiver of any lien established pursuant to this article** is effective only if the party in whose favor the lien exists expressly agrees to such a waiver. General Growth Development v. A & P Steel, Inc., 678 F. Supp. 243 (D. Colo. 1988).

**Doubt in language resolved against waiver.** Where the terms of a contract, or the evidence offered in support of an alleged waiver of the right to claim a lien are ambiguous, the doubt must be resolved against the waiver. Bishop v. Moore, 137 Colo. 263, 323 P.2d 897 (1958).

Clauses of contracts, purporting to prohibit the contractor from asserting a statutory right of lien, should be strictly construed; if language used is of doubtful import, it should be construed in favor of the lien. Aste v. Wilson, 14 Colo. App. 323, 59 P. 846 (1900).

**Lien waiver enforceable if consideration or estoppel is shown.** The right to a mechanic's lien can be waived in this state; however, if the

waiver is to be enforceable, consideration for lien waivers or an estoppel is required. Woodcrest Homes, Inc. v. First Nat'l Bank, 11 B.R. 342, aff'd in part and rev'd on other grounds, 15 B.R. 886 (D. Colo. 1981).

**Consideration sufficient to support waiver.** The voluntary agreement of a lender to continue financing a financially troubled joint venture is adequate consideration to support lien waivers executed by a joint venturer who had supplied materials. Woodcrest Homes, Inc. v. First Nat'l Bank, 11 B.R. 342, aff'd in part and rev'd on other grounds, 15 B.R. 886 (D. Colo. 1981).

**Estoppel sufficient to support waiver.** Where a subcontractor advised an owner in writing that he had been paid in full and the owner proceeded to disburse funds to the contractor in reliance upon the representation, the waiver is enforceable without finding specific consideration. Woodcrest Homes, Inc. v. First Nat'l Bank, 11 B.R. 342, aff'd in part and rev'd on other grounds, 15 B.R. 886 (D. Colo. 1981).

**When owner unable to assert invalidity of waiver provision.** Where there is an entire failure to file with the county recorder such a contract as is provided for in § 38-22-101, the owner is not in a position to assert the invalidity of the waiver provision of this section. Armour & Co. v. McPhee & McGinnity Co., 85 Colo. 262, 275 P. 12 (1929).

**Applied** in Gutshall v. Kornaley, 38 Colo. 195, 88 P. 158 (1906); Miller v. Davis, 26 Colo. App. 483, 145 P. 714 (1914).

**38-22-120. Rules of civil procedure apply.** The provisions of the Colorado rules of civil procedure, insofar as the same are applicable and not in conflict with the provisions of this article, shall be observed in proceedings to establish and enforce mechanics' liens.

**Source:** L. 1899: p. 276, § 20. R.S. 08: § 4044. C.L. § 6461. CSA: C. 101, § 34. CRS 53: § 86-3-20. C.R.S. 1963: § 86-3-20.

#### ANNOTATION

**Applied** in Empire Constr. Co. v. Crawford, 57 Colo. 281, 141 P. 474 (1914).

**38-22-121. Liens of surveyors and engineers.** The provisions of this article shall apply to surveyors, civil and mining engineers doing any work of surveying or plotting of any mines, mining claims, lodes, or mineral deposits, and they shall have like lien and claim as other persons under the provisions of this article.

**Source:** L. 1883: p. 227, § 8. G.S. § 2138. R.S. 08: § 4045. C.L. § 6462. CSA: C. 101, § 35. CRS 53: § 86-3-21. C.R.S. 1963: § 86-3-21.



## ANNOTATION

**Law reviews.** For article, "Mechanics' Liens Relative to Oil and Gas Operations — Part II", see 34 Dicta 373 (1957).

**38-22-122. Lien under two contracts - effect.** In case the act of doing such work or of furnishing such laborers or materials is continuous, said lien shall attach as in other cases, even though such work is done or laborers or materials have been furnished under two or more contracts between the same parties.

**Source:** L. 1883: p. 230, § 17. G.S. § 2147. R.S. 08: § 4046. C.L. § 6463. CSA: C. 101, § 36. CRS 53: § 86-3-22. C.R.S. 1963: § 86-3-22. L. 2000: Entire section amended, p. 210, § 11, effective August 2.

## ANNOTATION

**Attachment of lien based upon several contracts.** Where the work done and material furnished, for which a mechanics' lien is claimed, tended to the accomplishment of one purpose, as the construction of a smelting plant, and was practically continuous, the lien will attach from the commencement of the work even though the work was done and material furnished under two or more contracts between the same parties, and it is necessary for the lien claimant to take steps for asserting his lien at the completion of each contract. Cary Hdwe. Co. v. McCarty, 10 Colo. App. 200, 50 P. 744 (1897).

**Continuity of work not destroyed by short interruptions.** Where there was no abandonment of the intention to prosecute the work, the fact that there were interruptions of short periods of time in the construction of a building does not destroy the continuity of the work and prevent the attaching of the lien from the commencement of the building. Cary Hdwe. Co. v. McCarty, 10 Colo. App. 200, 50 P. 744 (1897).

**Applied** in Smith v. Stroehle Mach. & Supply Co., 109 Colo. 460, 126 P.2d 341 (1942).

**38-22-123. Payment to avoid invalid.** No payment made by any owner to any contractor for the purpose of avoiding any anticipated lien of any subcontractor shall be valid; and if any person files either of said statements for a lien for a larger sum than is due or to become due, in fact, or in probability, as the case may be, with intent to cheat or defraud any other person, and that fact appears in any proceeding under this article, such person shall forfeit all rights to such lien under this article.

**Source:** L. 1883: p. 235, § 29. G.S. § 2159. R.S. 08: § 4047. C.L. § 6464. CSA: C. 101, § 37. CRS 53: § 86-3-23. C.R.S. 1963: § 86-3-23.

## ANNOTATION

**Trial court should invoke forfeiture on its own initiative** when the facts warrant its application whether or not it has been affirmatively pleaded. Pope Heating & Air Conditioning Co. v. Garrett-Bromfield Mtg. Co., 29 Colo. App. 169, 480 P.2d 602 (1971).

**"Cheat or defraud" standard encompasses "knowledge".** The "cheat or defraud" standard as to the lien claimant's state of mind in this section encompasses the "knowledge" standard in § 38-22-128. If a person intends to cheat or defraud someone regarding the amount of a

mechanic's lien, he would necessarily have to have had knowledge that the amount was in error. Concrete Contractors v. E.B. Roberts Constr. Co., 664 P.2d 722 (Colo. App. 1982), aff'd, 704 P.2d 859 (Colo. 1985).

**This section is facially irreconcilable with § 38-22-128,** but since § 38-22-128 was enacted later, it controls. Wigham Excavating v. Colo. Fed. S & L, 796 P.2d 23 (Colo. App. 1990).

**Applied** in Armour & Co. v. McPhee & McGinnity Co., 87 Colo. 97, 285 P. 942 (1930).

**38-22-124. Other remedies not barred.** No remedy given in this article shall be construed as preventing any person from enforcing any other remedy which he otherwise

would have had, except as otherwise provided in this article. In case of two or more owners, contractors, or subcontractors interested in the same contract, the rule of procedure shall be the same as in the case of one such.

**Source:** L. 1883: p. 236, § 31. G.S. § 2161. R.S. 08: § 4048. C.L. § 6465. CSA: C. 101, § 38. CRS 53: § 86-3-24. C.R.S. 1963: § 86-3-24.

#### ANNOTATION

**The remedy provided by article is cumulative**, as the remedy thus afforded does not prevent any person from enforcing any other remedy which he otherwise would have had, except as otherwise herein provided. *Hayutin v. Gibbons*, 139 Colo. 262, 338 P.2d 1032 (1959).

**Claimant may pursue his remedy for a money judgment**, notwithstanding he has a right to a lien. *Hayutin v. Gibbons*, 139 Colo. 262, 338 P.2d 1032 (1959); *Tighe v. Kenyon*, 681 P.2d 547 (Colo. App. 1984).

**Recovery of judgment for debt no bar to foreclosure action.** The recovery of judgment for a debt due for labor and materials furnished by a contractor does not bar an action by the creditor to foreclose a mechanic's lien to secure the payment of the same indebtedness. *Marean v. Stanley*, 5 Colo. App. 335, 38 P. 395 (1894).

**Failure to investigate information sources deprives guarantors of remedy.** Where guarantors have the same sources of information available to them as mortgagor, failure to investigate deprives them of any remedy misrepresentations might have afforded them. *Plateau Supply Co. v. Bison Meadows Corp.*, 31 Colo. App. 205, 500 P.2d 162 (1972).

**Unenforceability of mechanics' lien does not preclude assertion of claim premised on unjust enrichment.** *F.M. Hall & Co. v. Southwest Props.*, 747 P.2d 688 (Colo. App. 1987); *Redd Iron v. Int'l Sales & Serv.*, 200 P.3d 1133 (Colo. App. 2008).

**This section is the rare exception to the doctrine of claim preclusion and permits a subsequent action based upon the same claim for relief involving the same parties.** *Dave Peterson Elec., Inc. v. Beach Mountain Builders, Inc.* 167 P.3d 175 (Colo. App. 2007).

In enacting this section, the general assembly intended to abrogate the doctrine of claim preclusion by permitting a mechanic's lien claim subsequent and in addition to a claim to foreclose a judgment lien. *Dave Peterson Elec., Inc. v. Beach Mountain Builders, Inc.*, 167 P.3d 175 (Colo. App. 2007).

**Applied** in *Cornell v. Conine-Eaton Lumber Co.*, 9 Colo. App. 225, 47 P. 912 (1897); *Jordan v. Lone Pines, Ltd.*, 41 Colo. App. 152, 580 P.2d 1273 (1978).

**38-22-125. Bona fide purchaser.** No lien, excepting those claimed by laborers or mechanics as defined in section 38-22-108 (1) (a), filed for record more than two months after completion of the building, improvement, or structure shall encumber the interest of any bona fide purchaser for value of real property, the principal improvement upon which is a single- or double-family dwelling, unless said purchaser at the time of conveyance has actual knowledge that the amounts due and secured by such lien have not been paid, or unless such lien statement has been recorded prior to conveyance, or unless a notice as provided in section 38-22-109 (10) has been filed within one month subsequent to completion or prior to conveyance, whichever is later; except that nothing in this section shall extend the time for recording lien statements as provided in section 38-22-109 (4), (5), and (10). For the purposes of this section, the dwelling shall be deemed complete upon conveyance and occupancy if not completed before. The lien for items of labor, work, or material which shall thereafter be furnished shall be effective and may be claimed within the time thereafter as provided in section 38-22-109 (4), (5), and (10), and their priority shall not be affected by this section.

**Source:** L. 65: p. 854, § 5. C.R.S. 1963: § 86-3-25. L. 75: Entire section amended, p. 1424, § 4, effective October 1.

#### ANNOTATION

**All bona fide purchasers possess, prior to closing, an equitable interest in the property**

**purchased which may be subject to a mechanics' lien.** *Richter Plumbing and Heating v.*



Rademacher, 729 P.2d 1009 (Colo. App. 1986).

**Perfection of lien against bona fide purchaser.** In "deemed completed" situations such as that at issue here, a claimant may perfect a lien as against the interest of a bona fide purchaser only: (1) If a lien statement is filed either before or within two months after the date of

conveyance and occupancy; (2) if a § 38-22-109 (10) notice is filed within one month after that time; or (3) if it can be shown that the bona fide purchaser had, at the time of conveyance, actual knowledge of nonpayment. *Richter Plumbing and Heating v. Rademacher*, 729 P.2d 1009 (Colo. App. 1986).

**38-22-126. Disburser - notice - duty of owner and disburser.** (1) For the purposes of this section, the word "disburser" means any lender who has agreed to make any loan to the owner or contractor, the proceeds of which are to be disbursed from time to time as work upon a structure or other improvement progresses, or any part of which is to be withheld until all or any part of such work is completed; or, any person who receives funds from any lender, contractor, or owner to be disbursed from time to time as work upon a structure or other improvement progresses, or any part of which is to be withheld until all or any part of such work is completed; or, any owner who has agreed to pay any sum to any contractor from time to time as work upon a structure or other improvement progresses, or any part of which is to be withheld until all or any part of such work is completed.

(2) It is the duty of the disburser, prior to the first disbursement, to see that there has been recorded in the office of the county clerk and recorder of the county where the land to be improved is situated, a notice stating the name and address of the owner, the names, addresses, and telephone numbers of the principal contractor, if any, and the disburser, and the legal description of the land and its address, if any. One notice may include as many parcels as desired, providing that all the information is stated as to each parcel. Such notice shall be indexed by the county clerk and recorder under the name of the owner and each principal contractor as grantors and according to address.

(3) It is the duty of any person upon ordering or contracting for any labor, services, machinery, tools, equipment, laborers, or materials to be used as provided in section 38-22-101, upon demand of the person from whom he or she is so ordering or with whom he or she is so contracting, to furnish to such person a statement of the names, addresses, and telephone numbers of the owner or reputed owner of the land to be improved, the principal contractor, if any, and the disburser, if any, as defined in subsection (1) of this section, together with a legal description or the address, if any, of the land to be improved.

(4) Any lien claimant who is entitled to a lien under this article may give notice to the disburser stating the property by address or legal description, or by such other description as will identify the real property; the claimant's name, address, and telephone number; the person with whom he has contracted; and a general statement of his contract.

(5) Such notice shall be in writing and shall be served upon the disburser by certified mail or by delivering the same personally to such disburser, or by leaving a copy at his residence or at his place of business with some person in charge.

(6) Upon such notice being received by the disburser, it is the duty of the disburser, before disbursing any funds to the person designated in said notice with whom said claimant has contracted, to ascertain the amount due to the claimant on any disbursement date, and to pay such amount directly to the claimant out of any undisbursed funds available for and due to said person designated in said notice on such date; except that any amounts actually paid by the disburser to others for labor, services, machinery, tools, equipment, and laborers or materials performed, supplied, or furnished for such structure or improvement that are chargeable to said person designated in said notice shall not be deemed available for said person designated in said notice; and further except that if the amount claimed by said claimant is disputed by said person designated in said notice, the disburser may impound such amount until the amount due is settled by agreement or final judicial determination.

(7) If the disburser fails to comply with subsection (6) of this section and the said claimant suffers loss by reason of said failure the disburser shall be liable to said claimant for the amount which the disburser should have paid claimant to the extent of claimant's loss.

## ANNOTATION

**Law reviews.** For article, "Mechanic's Liens — The 'Intent' Provisions Explored", see 11 Colo. Law. 1492 (1982).

**Definition of "disburser" in this section** was not intended by the legislature to apply to § 38-22-127. *Flooring Design Assocs. v. Novick*, 923 P.2d 216 (Colo. App. 1995).

**Presumption of receipt.** Return receipt for certified mail raises presumption of receipt by addressee. *Johnson-Voiland-Archuleta, Inc. v. Roark & Assocs.*, 43 Colo. App. 370, 608 P.2d 818 (1979).

**Subsection (6) requires a disburser, upon appropriate notice, to pay the subcontractor directly rather than pay the contractor** in order to ensure that the subcontractor receives

payment for labor and materials. *Flooring Design Assocs. Inc. v. Novick*, 923 P.2d 216 (Colo. App. 1995); *Crissey Fowler Lumber v. FCIB*, 8 P.3d 531 (Colo. App. 2000).

**Under the rules of statutory construction, the phrase in subsection (6) "available for and due to" refers to the construction loan proceeds in full**, and not merely to those funds paid to the general contractor upon completion of a project. Subsection (6) plainly states that the disburser should pay the claimed amount directly to the claimant out of any undisbursed funds available for and due to the general contractor. *Crissey Fowler Lumber v. FCIB*, 8 P.3d 531 (Colo. App. 2000).

### 38-22-127. Moneys for lien claims made trust funds - disbursements - penalty.

(1) All funds disbursed to any contractor or subcontractor under any building, construction, or remodeling contract or on any construction project shall be held in trust for the payment of the subcontractors, laborer or material suppliers, or laborers who have furnished laborers, materials, services, or labor, who have a lien, or may have a lien, against the property, or who claim, or may claim, against a principal and surety under the provisions of this article and for which such disbursement was made.

(2) This section shall not be construed so as to require any such contractor or subcontractor to hold in trust any funds which have been disbursed to him or her for any subcontractor, laborer or material supplier, or laborer who claims a lien against the property or claims against a principal and surety who has furnished a bond under the provisions of this article if such contractor or subcontractor has a good faith belief that such lien or claim is not valid or if such contractor or subcontractor, in good faith, claims a setoff, to the extent of such setoff.

(3) If the contractor or subcontractor has furnished a performance or payment bond or if the owner of the property has executed a written release to the contractor or subcontractor, he need not furnish any such bond or hold such payments or disbursements as trust funds, and the provisions of this section shall not apply.

(4) Every contractor or subcontractor shall maintain separate records of account for each project or contract, but nothing contained in this section shall be construed as requiring a contractor or subcontractor to deposit trust funds from a single project in a separate bank account solely for that project so long as trust funds are not expended in a manner prohibited by this section.

(5) Any person who violates the provisions of subsections (1) and (2) of this section commits theft, as defined in section 18-4-401, C.R.S.

**Source: L. 75:** Entire section added, p. 1420, § 2, effective October 1. **L. 2000:** (1) and (2) amended, p. 211, § 13, effective August 2.

## ANNOTATION

**Law reviews.** For article, "The Mechanics' Lien Trust Fund Statute — Theft or Not Theft", see 16 Colo. Law. 1968 (1987). For article, "The Mechanic's Lien Trust Fund Statute: An Underused Tool in Civil Litigation and Bankruptcy Cases", see 31 Colo. Law. 55 (August 2002). For article, "Juggling Hammers: Bankruptcy Issues and the Mechanic's Lien Trust

Fund Statute", see 39 Colo. Law. 21 (December 2010).

**Prosecution not imprisonment for civil debt.** Because the intent to defraud, necessary to § 18-4-401, must be proven in order to convict an accused, a prosecution for violation of this section does not conflict with the constitutional prohibition of imprisonment for civil debt in



§ 12 of art. II, Colo. Const. *People v. Piskula*, 197 Colo. 148, 595 P.2d 219 (1979).

**General assembly intended to protect subcontractors, laborers, material suppliers, and homeowners from unscrupulous contractors.** *In re Regan*, 151 P.3d 1281 (Colo. 2007); *Syfrett v. Pullen*, 209 P.3d 1167 (Colo. App. 2008).

**The purpose of this section is to protect homeowners, laborers, and material suppliers from dishonest or profligate contractors** by requiring contractors to hold in trust their customers' advanced payments if independent laborers or material suppliers are necessary to complete a particular job. *People v. Collie*, 682 P.2d 1208 (Colo. App. 1983); *In re Regan*, 151 P.3d 1281 (Colo. 2007); *Syfrett v. Pullen*, 209 P.3d 1167 (Colo. App. 2008).

**Trade vendors are permitted to waive rights enacted for their benefit and protection.** A construction subcontract agreement that unambiguously waived all rights of trade vendors to make claims under this section is not void as against public policy nor is the waiver an unenforceable exculpatory clause. *In re Vill. Homes of Colo., Inc.*, 405 B.R. 479 (Bankr. D. Colo. 2009).

**There is no express statutory prohibition of a waiver of this section.** The fact that § 38-22-119 refers to lien waivers, and limits the effect of such waivers to the parties to the agreement, neither authorizes nor prohibits waivers of mechanics' liens. In fact, it recognizes their validity as between the contracting parties. Section 38-22-119 does not give rise to an implication that statutory authorization is required in order to waive rights under this section. *In re Vill. Homes of Colo., Inc.*, 405 B.R. 479 (Bankr. D. Colo. 2009).

**Section is not in itself criminal statute;** it merely defines conduct that will be considered theft under § 18-4-401. Any violation of this section must be charged and prosecuted as a violation of the theft statute. *People v. Brand*, 43 Colo. App. 347, 608 P.2d 817 (1979); *People v. Collie*, 682 P.2d 1208 (Colo. App. 1983).

**Each of the essential elements of theft** as set forth in § 18-4-401 must be proven beyond a reasonable doubt to support a conviction even where theft is sought to be proven by showing a violation of this section. *People v. Erickson*, 695 P.2d 804 (Colo. App. 1984); *In re Gamboa*, 400 B.R. 784 (Bankr. D. Colo. 2008).

**In the context of theft of construction project trust funds,** the "knowingly using" element of mental culpability in § 18-4-401 (1) (b) does not require a conscious objective to deprive another person of the use or benefit of the construction trust funds, but instead requires the offender to be aware that his manner of using the trust funds is practically certain to result in depriving another person of the use or benefit of the funds. *People v. Anderson*, 773 P.2d 542 (Colo. 1989); *In re Helmke*, 398 B.R. 38 (Bankr.

D. Colo. 2008); *In re Gamboa*, 400 B.R. 784 (Bankr. D. Colo. 2008).

**Owner/officer personally liable for breach of statute.** *Alexander Co. v. Packard*, 754 P.2d 780 (Colo. App. 1988); *Flooring Design Assocs. v. Novick*, 923 P.2d 216 (Colo. App. 1995); *In re Barnes*, 377 B.R. 289 (Bankr. D. Colo. 2007).

An individual in complete control of the finances and financial decisions of an entity that violates the statute is personally liable for such violation. *Flooring Design Assocs. v. Novick*, 923 P.2d at 216 (Colo. App. 1995); *Alexander Co. v. Packard*, 754 P.2d 780 (Colo. App. 1988); *In re Walker*, 325 B.R. 598 (Bankr. D. Colo. 2005); *In re Barnes*, 377 B.R. 289 (Bankr. D. Colo. 2007).

A part owner and vice-president of contractor was personally liable for damages and costs incurred by owner of property in defending materialmen liens on project where vice-president breached the statutory trust relationship by diverting trust funds received from the owner of the property intended for payment to materialmen to pay other obligations of the contractor. *Alexander Co. v. Packard*, 754 P.2d 780 (Colo. App. 1988).

**Once trust funds are identified as having been disbursed to a contractor or subcontractor on a particular project, the burden to account for proper disposition of the funds under subsection (1) rests squarely on the contractor or subcontractor.** The inability to meet that burden constitutes a breach of fiduciary duty. *Stetson Ridge Assocs., Ltd. v. Tri-C Constr.*, 315 B.R. 595 (Bankr. D. Colo. 2004), *aff'd in part and rev'd in part on other grounds*, 325 B.R. 598 (D. Colo. 2005); *In re Gamboa*, 400 B.R. 784 (Bankr. D. Colo. 2008).

**Trust fund claims are limited by the applicable statute of limitations,** just as lien claims are limited by §§ 38-22-109 and 38-22-110. *In re Regan*, 151 P.3d 1281 (Colo. 2007).

**Where contractor obtained a surety bond and is later paid by the owner,** the contractor receives those payments free of the express trust otherwise imposed by this section. *In re Western Urethanes, Inc.*, 61 Bankr. 245 (Bankr. D. Colo. 1986).

**Priority of interests under this section.** An unsecured supplier claiming an interest under this section, which imposes a trust fund for materialmen and laborers, takes priority over a prior perfected security interest in all present and future accounts receivable and proceeds of accounts. *First Com. Corp. v. First Nat'l Bancorporation, Inc.*, 572 F. Supp. 1430 (D. Colo. 1983).

**Contractor who received advances from clients but failed to retain them for payment** of subcontractors and materialman could be convicted of theft, as set forth in § 18-4-401, though contractor was allegedly ignorant of this section's requirement that such funds be held in

trust. However, the prosecution must prove all elements of § 18-4-401 to obtain conviction. *People v. Mendro*, 731 P.2d 704 (Colo. 1987).

**Definition of "disburser" in § 38-22-126** was not intended by the legislature to apply to this section. *Flooring Design Assocs. v. Novick*, 923 P.2d 216 (Colo. App. 1995).

**Merchant homebuilders are "contractors" under this section.** *Flooring Design Assocs. v. Novick*, 923 P.2d 216 (Colo. App. 1995).

**All funds disbursed to merchant homebuilder from a construction loan and all funds received by merchant homebuilder from the sale of the property constituted "funds disbursed to a contractor"** and are subject to the statute. *In re Barnes*, 377 B.R. 289 (Bankr. D. Colo. 2007).

**The failure to fully account for all disbursements from the construction loan and the use of proceeds from the sale of the property in a manner inconsistent with the statute constitute violations of the statute.** *In re Barnes*, 377 B.R. 289 (Bankr. D. Colo. 2007).

**Merchant homebuilder committed a defalcation pursuant to 11 U.S.C. § 523(a)(4) by failing to ensure that all such disbursements were held in trust for the unpaid suppliers of material and labor.** *In re Barnes*, 377 B.R. 289 (Bankr. D. Colo. 2007).

**An individual in complete control of the finances and financial decisions of an entity that violates the statute is personally liable for such violation.** *In re Barnes*, 377 B.R. 289 (Bankr. D. Colo. 2007).

**The debts owed by debtor merchant homebuilder to suppliers of material and labor that result from this defalcation are non-dischargeable under 11 U.S.C. § 523(a)(4).** *In re Barnes*, 377 B.R. 289 (Bankr. D. Colo. 2007).

**A trust fund claimant is not required to have a properly perfected lien or still be able to perfect a lien to seek access to money held in trust under this section.** By its plain language, this section allows subcontractors, laborers, and material suppliers to assert claims directly against contractors if they have a lien or may have a lien, which means they have added value to a property or may have added value to a property. *In re Regan*, 151 P.3d 1281 (Colo. 2007); *In re Regan*, 477 F.3d 1209 (10th Cir. 2007); *In re Barnes*, 377 B.R. 289 (Bankr. D. Colo. 2007); *Syfrett v. Pullen*, 209 P.3d 1167 (Colo. App. 2008).

The section protects subcontractors, laborers, and material suppliers who add value to property but are unable to recover money owed to them through the lien claim process. *In re Regan*, 151 P.3d 1281 (Colo. 2007).

The procedural requirements for perfecting a lien contained in §§ 38-22-109 and 38-22-110 do not apply to claims against money held in trust under this section. *In re Regan*, 151 P.3d

1281 (Colo. 2007); *In re Regan*, 477 F.3d 1209 (10th Cir. 2007).

**An owner of a project or a general contractor has standing to sue under subsection (1) to contest the dischargeability of a subcontractor-debtor under 11 U.S.C. § 523(a)(4).** *Stetson Ridge Assocs., Ltd. v. Tri-C Constr.*, 325 B.R. 598 (D. Colo. 2005).

**General contractor that paid subcontractor to release its lien on property** had standing to sue contractor for contractor's failure to pay subcontractor and to establish that debt was not dischargeable pursuant to 11 U.S.C. § 523(a)(4). Allowing general contractor recourse under this section merely subrogates it to the rights of the subcontractor whom it paid when the contractor failed to do so. Subcontractor is among the identified class for whom funds shall be held in trust under subsection (1)(a). *In re Brennan*, 449 B.R. 114 (Bankr. D. Colo. 2011).

**Property owner had standing to sue contractor for contractor's failure to make payments to subcontractors, laborers, and material suppliers.** Material supplier's lien on property owner's house amounted to an injury in fact, and the property owner of a construction project, as well as the subcontractors, material suppliers, and laborers, has a legally protected interest to enforce the trust created under subsection (1). *Syfrett v. Pullen*, 209 P.3d 1167 (Colo. App. 2008).

As beneficiaries, property owners are able to enforce this section against a contractor separate from the lien claim laws. *In re Regan*, 151 P.3d 1281 (Colo. 2007); *Syfrett v. Pullen*, 209 P.3d 1167 (Colo. App. 2008).

Property owner does not have the right to retain damages awarded against contractor. Instead, property owner is entitled to a judgment imposing a constructive trust on the funds that should have been paid to subcontractors, material suppliers, and laborers. *Syfrett v. Pullen*, 209 P.3d 1167 (Colo. App. 2008).

**Claims under this section are not assignable on a contingency fee basis for collection purposes.** *In re Thomas*, 387 B.R. 808 (D. Colo. 2008).

**Although a claim for breach of trust under this section is assignable**, even on a contingency payment basis, the right to the penalty of treble damages and the incorporated civil theft remedies under §§ 18-4-401 and 18-4-405 are not assignable. *People v. Adams*, 243 P.3d 256 (Colo. 2010) (disagreeing with *In re Thomas* cited above).

**A lien release bond is not equivalent to payment or performance bonds.** Because only payment or performance bonds are included in subsection (3), it must be presumed that the legislature intended to exclude lien release bonds from the exemption. Accordingly, defendant's lien release bonds did not support an



exemption from the trust fund statute. *Weize Co., LLC v. Colo. Reg'l Constr.*, 251 P.3d 489 (Colo. App. 2010).

**Trial court construed statute too narrowly in determining that loans by contractor's manager to contractor did not fall within its provisions because loans were not construction loans but rather general purpose "survival loans" for company.** Statutory language encompasses all funds disbursed on a construction project and does not limit the source of funds disbursed to construction loans. Any modifications to ameliorate statute's effect lies with the legislature. *AC Excavating, Inc. v. Yale*, \_\_\_ P.3d \_\_\_ (Colo. App. 2010).

**38-22-128. Excessive amounts claimed.** Any person who files a lien under this article for an amount greater than is due without a reasonable possibility that said amount claimed is due and with the knowledge that said amount claimed is greater than that amount then due, and that fact is shown in any proceeding under this article, shall forfeit all rights to such lien plus such person shall be liable to the person against whom the lien was filed in an amount equal to the costs and all attorney's fees.

**Source: L. 75:** Entire section added, p. 1421, § 3, effective October 1.

#### ANNOTATION

**Law reviews.** For article, "Substantial Completion as it Relates to the Colorado Mechanic's Lien Act", see 26 Colo. Law. 45 (February 1997).

**"Knowledge" standard encompassed within "cheat or defraud".** The "cheat or defraud" standard as to the lien claimant's state of mind in § 38-22-123 encompasses the "knowledge" standard in this section. If a person intends to cheat or defraud someone regarding the amount of a mechanic's lien, he would necessarily have to have had knowledge that the amount was in error. *Concrete Contractors v. E.B. Roberts Constr. Co.*, 664 P.2d 722 (Colo. App. 1982), *aff'd*, 704 P.2d 859 (Colo. 1985).

**Reasonableness of award of attorney fees.** Where lawsuits were directly attributable to the contractor's giving notice or filing a lien statement claim for an excessive amount, the trial court did not err in awarding all of the attorney fees incurred incident to the excessive claim. *Heating & Plumbing Engineers v. H.J. Wilson*, 698 P.2d 1364 (Colo. App. 1984).

**Where nonlienable items can be separated from the lienable items at trial** and no showing or allegations were made stating that the lien was knowingly and intentionally excessive, the lien will remain valid as to the lienable items. *Manguso v. Am. Sav. & Loan Ass'n*, 782 P.2d 866 (Colo. App. 1989).

**Inclusion of accrued interest in lien statement does not render the lien void as excessive.** Because lien claimants are entitled to receive interest under § 38-22-101 (5), accrued

interest can be an "amount due" under this section. *Honnen Equip. Co. v. Never Summer Backhoe Serv., Inc.*, 261 P.3d 507 (Colo. App. 2011).

**Section 38-22-123 is facially irreconcilable with this section,** but because this section was enacted later, it controls. *Wigham Excavating v. Colo. Fed. S & L*, 796 P.2d 23 (Colo. App. 1990).

**Where fraudulently inflated construction charges were included in lien statement,** forfeiture of lien rights was required as a matter of law. *Wigham Excavating v. Colo. Fed. S & L*, 796 P.2d 23 (Colo. App. 1990).

**An officer of a corporation who has signed a lien in an official capacity is not personally liable for costs and attorney fees.** The corporation has an independent legal identity and is considered to be the "person who files a lien". *JW Constr. Co. v. Elliott*, 253 P.3d 1265 (Colo. App. 2011).

**Even though the intent of this section is to punish and deter those who would abuse the lien statute, section's intent is not to be unjust.** Party entitled to attorney fees under this section is entitled only to those fees expended in bringing or defending an excessive lien claim, not the fees expended in bringing or defending against other claims unrelated to the lien claim in a multiple-claim suit. Moreover, although this section mandates an award of all attorney fees for successfully defending against an excessive lien, the amount awarded must be reasonable. *LSV, Inc. v. Pinnacle Creek, LLC*, 996 P.2d 188 (Colo. App. 1999).

**38-22-129. Principal contractor may provide bond prior to commencement of work.** (1) Except as provided in subsection (4) of this section, the provisions of section 38-22-101 (1) shall not apply if, at the commencement of any work upon any construction project for the improvement of real property as described in section 38-22-101 (1), a performance bond and a labor and materials payment bond, each in an amount equal to one hundred fifty percent of the contract price, are executed by the principal contractor and one or more corporate sureties authorized and qualified to do business in this state, for the protection of all contractors, subcontractors, materialmen, and laborers supplying labor, laborers, or material in the prosecution of the work on such construction project for the use of each contractor, subcontractor, materialman, or laborer.

(2) All subcontractors, materialmen, mechanics, and others who would otherwise be entitled to a lien under the provisions of section 38-22-101 (1) shall have a right of action directly against the principal contractor and his surety for the full amount due. Such action shall be brought within six months after completion of the last work on such project.

(3) In order to be effective, a notice of such bond shall be filed with the county clerk and recorder of the county wherein such project is situate prior to the commencement of any work on the project and shall be indexed according to both the street address and the legal description of the property to be improved. The principal contractor shall post a notice on the property that notice of such bond has been filed with the county clerk and recorder and shall make available copies of the bond to every contractor, subcontractor, materialman, mechanic, or laborer upon request.

(4) If any claimant files for record a lien statement or other notice, pursuant to section 38-22-109, such lien shall be deemed released upon the filing for record of a notice executed by both the principal and all sureties acknowledging the existence of the bond furnished for such project and that said lien claimant is entitled to claim the benefits of said bond. Such acknowledgment shall be executed by the principal and sureties upon demand of the owners or any person filing a lien statement. Said notice may be delivered personally to the surety or its agent and the principal or his agent or may be mailed by certified or registered mail. If the principal and all sureties on any such bonds fail or refuse to execute and record such acknowledgment within thirty days after written demand is made upon them, all lien claimants shall be entitled to enforce their lien claims in the same manner as if no bond had been filed as provided in subsection (1) of this section.

(5) In the event that any corporate surety on any bond filed pursuant to the provisions of subsection (1) of this section becomes subject to an order for relief under the federal bankruptcy code of 1978, title 11 of the United States Code, is the subject of any state or federal corporate reorganization proceedings, makes any assignment for the benefit of creditors, or otherwise is unable to meet its financial obligations as they become due, the provisions of this section shall not apply, and any lien claimant shall be entitled to enforce such lien claim in the same manner as if no bond had been filed as provided in subsection (1) of this section.

**Source:** **L. 75:** Entire section added, p. 1424, § 5, effective October 1. **L. 80:** (5) amended, p. 786, § 14, effective June 5. **L. 2000:** (1) amended, p. 211, § 14, effective August 2.

#### ANNOTATION

**Notice recorded pursuant to this section does not satisfy the notice requirement of** § **38-35-110.** *Weize Co., LLC v. Colo. Reg'l Constr.*, 251 P.3d 489 (Colo. App. 2010).

**38-22-130. Payment of claims by surety.** (1) Subcontractors, materialmen, mechanics, and others who have claims aggregating two thousand dollars or less each on construction projects for the improvement of real property as described in section 38-22-101 (1) for which a bond was executed pursuant to section 38-22-129 shall serve upon the principal contractor and his surety an affidavit, supported by all reasonably available documentary evidence, that a claimant has furnished labor or materials used or performed in the prosecution of the work on such project, that he has been unpaid therefor, and the



amount of such claim. If after forty-five days such affidavit remains uncontroverted, such surety shall pay to such claimant forthwith the full value of his claim.

(2) Service of such affidavit may be accomplished by certified or registered mail, by personal delivery to such person, or by leaving a copy at his residence or at his place of business with some person in charge.

**Source:** L. 75: Entire section added, p. 1425, § 5, effective October 1.

**38-22-131. Substitution of bond allowed.** (1) Whenever a mechanic's lien has been filed in accordance with this article, the owner, whether legal or beneficial, of any interest in the property subject to the lien may, at any time, file with the clerk of the district court of the county wherein the property is situated a corporate surety bond or any other undertaking which has been approved by a judge of said district court.

(2) Such bond or undertaking plus costs allowed to date shall be in an amount equal to one and one-half times the amount of the lien plus costs allowed to date and shall be approved by a judge of the district court with which such bond or undertaking is filed.

(3) The bond or undertaking shall be conditioned that, if the lien claimant shall be finally adjudged to be entitled to recover upon the claim upon which his lien is based, the principal or his sureties shall pay to such claimant the amount of his judgment, together with any interest, costs, and other sums which such claimant would be entitled to recover upon the foreclosure of the lien.

**Source:** L. 75: Entire section added, p. 1425, § 5, effective October 1.

#### ANNOTATION

**Bonding pursuant to this section does not excuse failure to record a notice of lis pendens** pursuant to § 38-22-110. *Weize Co., LLC v.*

*Colo. Reg'l Constr.*, 251 P.3d 489 (Colo. App. 2010).

**38-22-132. Lien to be discharged.** Notwithstanding any other provision of this article or section 38-35-110, upon court approval of a bond or undertaking as provided in section 38-22-131, and upon the issuance and recording of a certificate of release as specified in this section, the lien against the property, and any notice of lis pendens or notice of the commencement of any action relating to such lien, shall be immediately discharged and released in full; the real property described in such bond or undertaking shall be forever released from the lien, from any notice of lis pendens or notice of the commencement of any action relating to such lien, and from any action brought to foreclose such lien; the bond or undertaking shall be substituted; and no notice of lis pendens or notice of the commencement of any action relating to such lien or any action for the enforcement or foreclosure thereof shall thereafter be recorded against the property. The clerk of the district court with which such bond or undertaking has been filed shall issue a certificate of release which shall be recorded in the office of the clerk and recorder of the county wherein the original mechanic's lien was filed, and the certificate of release shall show that the property has been forever released from the lien, from any notice of lis pendens or notice of the commencement of any action relating to such lien, and from any action brought to foreclose such lien.

**Source:** L. 75: Entire section added, p. 1426, § 5, effective October 1. L. 2011: Entire section amended, (SB 11-264), ch. 279, p. 1250, § 2, effective July 1.

**Cross references:** For the legislative declaration in the 2011 act amending this section, see section 1 of chapter 279, Session Laws of Colorado 2011.

**38-22-133. Action to be brought on bond or undertaking.** When a bond or undertaking is filed as provided in section 38-22-131, the person filing the original mechanic's lien may bring an action upon the said bond or undertaking. Such action shall be

commenced within the time allowed for the commencement of an action upon foreclosure of the lien, and the statute of limitations applicable to a lien foreclosure shall apply to the action upon the bond or undertaking as it would had no bond or undertaking been filed.

**Source:** L. 75: Entire section added, p. 1426, § 5, effective October 1.

## ARTICLE 22.5

### Commercial Real Estate Brokers Commission Security Act

38-22.5-101.	Short title.	38-22.5-107.	Conditions on validity of lien
38-22.5-102.	Definitions.		- subsequent service of notice to owner - action commenced within six months.
38-22.5-103.	Brokers' lien for compensation for services - requirements.	38-22.5-108.	Priority of liens.
38-22.5-104.	Notice of intent - lien notice - service - contents - filing.	38-22.5-109.	Satisfaction or release of brokers' lien - written demand by owner - obligation to record.
38-22.5-105.	Mediation period.	38-22.5-110.	Spurious liens.
38-22.5-106.	When lien attaches - effect of payment by installments - affirmative defense.	38-22.5-111.	Substitution of bond allowed - lien to be discharged.

**38-22.5-101. Short title.** This article shall be known and may be cited as the "Commercial Real Estate Brokers Commission Security Act".

**Source:** L. 2010: Entire article added, (HB 10-1288), ch. 179, p. 642, § 1, effective August 11.

**38-22.5-102. Definitions.** As used in this article, unless the context otherwise requires:

(1) "Agreement" means a written listing agreement, written compensation agreement, or other written agreement between a real estate broker and an owner that grants the real estate broker a right to compensation for professional services in connection with leasing or attempting to lease commercial real estate.

(2) "Commercial real estate" means any real property other than real property containing one to four residential units. "Commercial real estate" does not include single-family or multi-family residential units including condominiums, townhouses, or homes in a subdivision when such real estate is sold, leased, or otherwise conveyed on a unit-by-unit basis even though the units may be part of a larger building or parcel of real property containing more than four residential units.

(3) "Owner" means the owner of record of real estate and includes an agent of such owner.

(4) "Real estate broker" has the meaning set forth in section 12-61-101, C.R.S.

(5) "Renewal commission" means an additional commission that may become payable to a real estate broker if a lease is later renewed or modified to expand the leased premises or extend the lease term.

**Source:** L. 2010: Entire article added, (HB 10-1288), ch. 179, p. 642, § 1, effective August 11.

**38-22.5-103. Brokers' lien for compensation for services - requirements.** (1) A real estate broker shall have a lien on commercial real estate, in the amount of the compensation as set forth in the agreement, if:

(a) Such real estate is listed with the real estate broker under terms of an agreement or is the subject of an agreement; and

(b) The real estate broker has provided licensed services that resulted in the procuring



of a person or entity who has leased any interest in the commercial real estate in accordance with the agreement.

(2) The general assembly intends that nothing in this section is subject to a prospective waiver by either party without consideration acceptable to the parties to the waiver.

(3) Notwithstanding subsection (1) of this section, commercial real estate is not subject to a real estate brokers' lien to enforce the payment of a renewal commission if the property is conveyed to a bona fide purchaser before the recording of a notice of lien pursuant to section 38-22.5-104.

**Source: L. 2010:** Entire article added, (HB 10-1288), ch. 179, p. 643, § 1, effective August 11.

**38-22.5-104. Notice of intent - lien notice - service - contents - filing.** (1) The real estate broker shall serve a notice of intent to record a notice of lien upon the owner at least thirty days before recording the notice of lien with the county clerk and recorder of the county in which the commercial real estate is located. Such notice of intent shall be served by personal service or by registered or certified mail, return receipt requested, addressed to the last-known address of the owner or the owner's agent, at least thirty days before recording of the notice of lien with the county clerk and recorder. If the notice of intent is served upon the owner's agent, a copy of the notice shall also be served upon the owner of record by personal service or by registered or certified mail, return receipt requested, addressed to the owner's last-known address, at least thirty days before recording of the notice of lien with the county clerk and recorder.

(2) The notice of lien shall state the name of the real estate broker, the name of the owner, a legal description of the property upon which the lien is being claimed, the amount for which the lien is claimed, and the real estate license number of the real estate broker. The real estate broker shall sign the notice of lien and attest that the information contained in the notice is true and accurate as to his or her knowledge and belief.

**Source: L. 2010:** Entire article added, (HB 10-1288), ch. 179, p. 643, § 1, effective August 11.

**38-22.5-105. Mediation period.** The real estate broker shall make a good faith effort to attempt to resolve the nonpayment of the commission through mediation. The mediator's recommended resolution is not binding unless the parties so agree in writing. The parties shall jointly appoint an acceptable mediator and shall share equally in the cost of the mediation. Mediation shall commence when a written notice requesting mediation is delivered by one party to the other at the party's last-known address, and, unless otherwise agreed, the mediation shall terminate if the entire dispute is not resolved within thirty days thereafter. This section does not impair the ability of a real estate broker to record a notice of lien if a resolution is not agreed upon by both parties.

**Source: L. 2010:** Entire article added, (HB 10-1288), ch. 179, p. 644, § 1, effective August 11.

**38-22.5-106. When lien attaches - effect of payment by installments - affirmative defense.** (1) The lien created by section 38-22.5-103 attaches to an interest in commercial real estate when all of the following conditions are met:

(a) The real estate broker either:

(I) Procures a person or entity who leases the property in accordance with the agreement; or

(II) Has otherwise earned a fee or commission in accordance with the agreement;

(b) The real estate broker serves a notice of intent to record a notice of lien upon the owner or owner's agent as provided in section 38-22.5-104;

(c) The real estate broker makes a good faith attempt to obtain settlement through mediation as provided in section 38-22.5-105; and

(d) At least thirty days after serving the owner with notice of intent to record a notice of lien, but not more than ninety days after the tenant takes possession of the leased property or ninety days after the compensation is due under the agreement, whichever is later, the real estate broker records a notice of the lien in the office of the clerk and recorder of the county in which the commercial real estate is located.

(2) Notwithstanding paragraph (d) of subsection (1) of this section:

(a) If payment is due in installments and a portion of the payment is due after the leasing of any interest in commercial real estate, a claim for a lien for only that portion may be recorded within ninety days after the tenant takes possession of the leased property or ninety days after the compensation is due under the agreement, whichever is later; and

(b) The lien shall be effective as a lien against the commercial real estate only to the extent moneys are still owed to the real estate broker by the owner. Any claims for a lien for future installment payments shall only be recorded within ninety days after those installment payments become due in accordance with the agreement.

(3) The lien attaches for purposes of this section when the claim for lien is recorded, and shall not relate back to the date of the agreement.

(4) Notwithstanding any provision of this article to the contrary, it shall be an affirmative defense in an action to foreclose a lien pursuant to this article that the owner has paid any compensation owed to the listing broker in an amount sufficient to satisfy the contractual and legal obligations of the owner, including compensation to the tenant's broker.

**Source: L. 2010:** Entire article added, (HB 10-1288), ch. 179, p. 644, § 1, effective August 11.

**38-22.5-107. Conditions on validity of lien - subsequent service of notice to owner - action commenced within six months.** (1) No lien claimed by virtue of this article shall hold the property longer than ten days after the recording of the notice of lien under section 38-22.5-104 unless the real estate broker provides a copy of the notice of lien to the owner or owner's agent by personal service or by registered or certified mail, return receipt requested, addressed to the last-known address of such person, within ten days after recording the notice of lien.

(2) No lien claimed by virtue of this article shall hold the property longer than six months after the recording of the notice of lien under section 38-22.5-104 unless an action to foreclose the lien has been commenced within that time and unless also a notice stating that such action has been commenced is filed for record within that time in the office of the county clerk and recorder of the county in which the property is situated. Where two or more liens under this article are claimed of record against the same property, the commencement of any action and the filing of the notice of the commencement of such action within that time by any one or more of such lien claimants in which action all the lien claimants as appear of record are made parties, either plaintiff or defendant, shall be sufficient.

**Source: L. 2010:** Entire article added, (HB 10-1288), ch. 179, p. 645, § 1, effective August 11.

**38-22.5-108. Priority of liens.** The priority of a lien created under this article in relation to other interests in the subject property shall be determined in accordance with section 38-35-109.

**Source: L. 2010:** Entire article added, (HB 10-1288), ch. 179, p. 645, § 1, effective August 11.

**38-22.5-109. Satisfaction or release of brokers' lien - written demand by owner - obligation to record.** If a real estate brokers' lien has been recorded pursuant to section 38-22.5-106 and the indebtedness has been paid in full or the lien is not valid and



enforceable in accordance with this article and other applicable law, the real estate broker shall acknowledge satisfaction or release of such lien in writing within ten days after receiving written demand from the owner and shall record a written release or satisfaction of the lien in the office of the clerk and recorder of the county in which the property is located.

**Source: L. 2010:** Entire article added, (HB 10-1288), ch. 179, p. 645, § 1, effective August 11.

**38-22.5-110. Spurious liens.** Section 38-35-204 applies to liens asserted pursuant to this article.

**Source: L. 2010:** Entire article added, (HB 10-1288), ch. 179, p. 646, § 1, effective August 11.

**38-22.5-111. Substitution of bond allowed - lien to be discharged.** (1) Whenever a brokers' lien has been recorded in accordance with this article, the owner of any interest in the property subject to the lien may, at any time, file with the clerk of the district court of the county wherein the property is situated a corporate surety bond or similar financial assurance. Such bond or assurance shall be in an amount equal to one and one-half times the amount of the lien plus costs allowed to date and is subject to approval by a judge of the district court with which such bond or assurance is filed.

(2) The bond or assurance shall be conditioned that, if the lien claimant is finally adjudged to be entitled to recover on the claim upon which the lien is based, the principal or surety shall pay to such claimant the amount of the judgment, including any interest, costs, or other sums to which the claimant would be entitled upon foreclosure of the lien.

(3) Notwithstanding any other provision of this article or section 38-35-110, upon the filing of a bond or undertaking as provided in this section, the lien against the property, and any notice of lis pendens relating to such lien or notice of the commencement of any action relating to such lien, shall be immediately discharged and released in full; the real property described in such bond or undertaking shall be forever released from the lien, from any notice of lis pendens or notice of the commencement of any action relating to such lien, and from any action brought to foreclose the lien; the bond or undertaking shall be substituted; and no notice of lis pendens or notice of the commencement of any action relating to such lien or any action for the enforcement or foreclosure thereof shall thereafter be recorded against the property. The clerk of the district court with which the bond or undertaking has been filed shall issue a certificate of release, which shall be recorded in the office of the clerk and recorder of the county in which the original real estate brokers' lien was filed, and the certificate of release shall show that the property has been forever released from the lien, from any notice of lis pendens relating to such lien, from any notice of the commencement of any action relating to such lien, and from any action brought to foreclose such lien.

**Source: L. 2010:** Entire article added, (HB 10-1288), ch. 179, p. 646, § 1, effective August 11. **L. 2011:** (3) amended, (SB 11-264), ch. 279, p. 1250, § 3, effective July 1.

**Cross references:** For the legislative declaration in the 2011 act amending subsection (3), see section 1 of chapter 279, Session Laws of Colorado 2011.

## ARTICLE 23

### Lien on Ditches

38-23-101.	Liability of co-owners.		ment.
38-23-102.	Request to clean ditch.	38-23-105.	Lien may be assigned - effect.
38-23-103.	Lien of co-owner against delinquent.	38-23-106.	Lien duration - action pro-
			longs.
38-23-104.	Claimant to file verified state-	38-23-107.	Judgment - execution.

38-23-108.	Sale - right of redemption.	38-23-110.	Releasing lien - penalty for
38-23-109.	Costs.		delay.

**38-23-101. Liability of co-owners.** All co-owners of unincorporated irrigating ditches shall pay for the necessary cleaning and repairing of such ditches in the proportion that their respective interests bear to the total expenses incurred in said cleaning and repairing. Any such co-owner may perform labor in cleaning and repairing such ditch equivalent in value to his share of such expenses. No co-owner shall be held liable for cleaning or repairing any ditch below the point from which he takes his portion of the water.

**Source:** L. 1893: p. 312, § 1. R.S. 08: § 4051. C.L. § 6468. CSA: C. 101, § 41. CRS 53: § 86-4-1. C.R.S. 1963: § 86-4-1.

#### ANNOTATION

**Section is inapplicable to ditches owned by incorporated companies.** Johnston v. Wanamaker Ditch Co., 95 Colo. 551, 38 P.2d 907 (1934).

entitled to contribution from his cotenants. Compton v. Knuth, 117 Colo. 523, 190 P.2d 117 (1948).

**Tenant entitled to contribution from cotenants.** One tenant maintaining a ditch is

**38-23-102. Request to clean ditch.** Upon the failure of any one or more of several coowners, upon written request of the owners of one-third of the carrying capacity or board of directors, to assist in cleaning and repairing such ditch, the other coowners shall proceed to clean and repair the same and shall keep an accurate account of the cost and expenses incurred and upon the completion of such work shall deliver to each of such delinquent coowners or his agent, lessee, or legal representative an itemized statement of such costs and expenses.

**Source:** L. 1893: p. 312, § 2. R.S. 08: § 4052. C.L. § 6469. CSA: C. 101, § 42. CRS 53: § 86-4-2. C.R.S. 1963: § 86-4-2.

#### ANNOTATION

**Section is inapplicable to ditches owned by incorporated companies.** Johnston v. Wanamaker Ditch Co., 95 Colo. 551, 38 P.2d 907 (1934).

**38-23-103. Lien of co-owner against delinquent.** The co-owners of any such ditch who clean and repair the same, as specified in section 38-23-102, shall have a lien upon the interest in such ditch owned by such delinquent co-owner for his proportion of such cost and expenses.

**Source:** L. 1893: p. 312, § 3. R.S. 08: § 4053. C.L. § 6470. CSA: C. 101, § 43. CRS 53: § 86-4-3. C.R.S. 1963: § 86-4-3.

**38-23-104. Claimant to file verified statement.** Any person wishing to avail himself of the provisions of this article shall file for record in the office of the county clerk and recorder of the county wherein the ditch to be affected by the lien is situated, within thirty days after the completion of such work, a statement addressed to the owner of the interest upon which such lien is claimed, specifying the name of the ditch and the extent of the interest in the same upon which such lien is claimed; the date upon which the work was commenced and the date it was completed; the total amount expended on such ditch and the amount due from such delinquent coowners. Said statement shall be signed and verified upon oath by a claimant.



**Source:** L. 1893: p. 313, § 4. R.S. 08: § 4054. C.L. § 6471. CSA: C. 101, § 44. CRS 53: § 86-4-4. C.R.S. 1963: § 86-4-4.

**38-23-105. Lien may be assigned - effect.** Any party claiming a lien under the provisions of this article may assign in writing his claim and lien to any person, who shall thereafter have all the rights and remedies of the assignor.

**Source:** L. 1893: p. 313, § 5. R.S. 08: § 4055. C.L. § 6472. CSA: C. 101, § 45. CRS 53: § 86-4-5. C.R.S. 1963: § 86-4-5.

**38-23-106. Lien duration - action prolongs.** No lien claimant by virtue of this article shall hold the property longer than six months after filing the statement described in section 38-23-104 unless an action is commenced within that time to enforce the same.

**Source:** L. 1893: p. 313, § 6. R.S. 08: § 4056. C.L. § 6473. CSA: C. 101, § 46. CRS 53: § 86-4-6. C.R.S. 1963: § 86-4-6.

**38-23-107. Judgment - execution.** Actions to enforce liens claimed by virtue of this article shall be commenced and prosecuted in accordance with the procedure in other civil actions in the state of Colorado. Each party who establishes his claim under this article shall have a judgment against the party personally liable to him for the full amount of his claim so established and shall have a lien decreed and determined upon the ditch interest to which his lien has attached to the extent of his said claims; but no judgment shall exceed the interest of the party in such ditch, nor shall execution issue against other than his interest in said ditch.

**Source:** L. 1893: p. 313, § 7. R.S. 08: § 4057. C.L. § 6474. CSA: C. 101, § 47. CRS 53: § 86-4-7. C.R.S. 1963: § 86-4-7.

**38-23-108. Sale - right of redemption.** The court shall cause such ditch interest to be sold in satisfaction of said lien and costs, as in the case of foreclosure of mortgages and in the manner and form provided for sales on executions issued out of courts of record, and the owner and creditors shall have a right to redeem, as is provided for in cases of sales of real estate on execution.

**Source:** L. 1893: p. 313, § 8. R.S. 08: § 4058. C.L. § 6475. CSA: C. 101, § 48. CRS 53: § 86-4-8. C.R.S. 1963: § 86-4-8.

**38-23-109. Costs.** The plaintiff if successful shall also recover all other costs and expenses incurred in claiming and enforcing his lien.

**Source:** L. 1893: p. 314, § 9. R.S. 08: § 4059. C.L. § 6476. CSA: C. 101, § 49. CRS 53: § 86-4-9. C.R.S. 1963: § 86-4-9.

**38-23-110. Releasing lien - penalty for delay.** The claimant of any such lien, the statement of which has been recorded, on the payment of the amount claimed together with costs of making and recording such statement and costs of satisfaction, at the request of any person interested in the ditch interest charged therewith, shall enter of record satisfaction of the same, and if he neglects or refuses to do so within ten days after such request, he shall forfeit and pay to the person making such request the sum of ten dollars for every day of such neglect or refusal, to be recovered in the same manner as other debts. Any such statement may be canceled on the margin of the record by an acknowledgment of satisfaction over the signature of the claimant or an agent authorized in writing.

**Source:** L. 1893: p. 314, § 10. R.S. 08: § 4060. C.L. § 6477. CSA: C. 101, § 50. CRS 53: § 86-4-10. C.R.S. 1963: § 86-4-10.

## ARTICLE 24

## Lien on Wells and Equipment

**Law reviews:** For article, "Oil and Gas Mechanics' Liens Revisited", see 15 Colo. Law. 1822 (1986); for article, "Acquiring Producing Oil and Gas Properties from a Financially Distressed Seller", see 58 U. Colo. L. Rev. 631 (1988).

38-24-101.	Property subject to lien.	38-24-107.	Lienholder's consent in removal or sale.
38-24-102.	Other property subject to lien.	38-24-108.	Penalty for removing property.
38-24-103.	Security interest invalid - when.	38-24-109.	Assignment of lien.
38-24-104.	Lien statement - when filed.	38-24-110.	Provisions of article cumulative.
38-24-105.	Action commenced within six months.	38-24-111.	Liability against owner of land.
38-24-106.	Perfecting of lien on removed property - when.		

**38-24-101. Property subject to lien.** Every person, firm, or corporation, whether as contractor, subcontractor, materialman, or laborer, who performs labor upon or furnishes machinery, material, fuel, explosives, power, or supplies for sinking, repairing, altering, or operating any gas well, oil well, or other well or for constructing, repairing, or operating any oil derrick, oil tank, oil pipeline or water pipeline, pump or pumping station, transportation or communication line, or gasoline plant and refinery by virtue of a contract, express or implied, with the owner or lessee of any interest in real estate or with the trustee, agent, or receiver of any such owner, part owner, or lessee shall have a lien to secure the payment thereof upon the properties mentioned belonging to the party contracting with the lien claimants, and upon the machinery, materials, and supplies so furnished, and upon any well upon and in which such machinery, materials, and supplies have been placed and used, and upon all other wells, buildings, and appurtenances, and the interest, leasehold, or otherwise, of such owner, part owner, or lessee in the lot or land upon which said improvements are located, or to which they may be removed, to the extent of the right, title, and interest of the owner, part owner, or lessee, at the time the work was commenced or machinery, materials, and supplies were begun to be furnished by the lien claimant or by the contractor under the original contract; and such lien shall extend to any subsequently acquired interest of any such owner, part owner, or lessee.

**Source:** L. 29: p. 435, § 1. CSA: C. 101, § 51. CRS 53: § 86-5-1. C.R.S. 1963: § 86-5-1.

## ANNOTATION

**Law reviews.** For article, "Mechanics' Liens Relative to Oil and Gas Operations", see 34 Dicta 207 (1957). For article, "Mechanics' Liens Relative to Oil and Gas Operations—Part II", see 34 Dicta 373 (1957). For article, "Oil and Gas Financing Under the Uniform Commercial Code as Enacted in Colorado", see 43 Den. L.J. 129 (1966).

**Section is constitutional.** See Terminal Drilling Co. v. Jones, 84 Colo. 279, 269 P. 894 (1928).

**Section severely restricts classes of personalty which may be impressed with lien** it confers, and the restriction lies not only against the types of personalty, but also against the classes of persons who may assert their liens against personal property. *Nation v. Chambers*,

29 Colo. App. 413, 486 P.2d 460 (1971), *aff'd*, 178 Colo. 124, 497 P.2d 5 (1972).

**"Properties" construed.** The statutory term "properties", as used in this section, does not include additional unspecified items acquired by the debtor from third parties, which items have not become integral parts of the well. *Gearhart-Owen Indus., Inc. v. Panhandle Prod. Co.*, 624 P.2d 355 (Colo. App. 1980).

**Prior lien subordinate to property encumbered with purchase money lien.** If the property comes into the hands of the purchaser already encumbered with a purchase money lien, a prior mechanic's lien remains subordinate to the purchase money mortgage, and it cannot displace the security interest which is the subject matter of the purchase money agreement.



Chambers v. Nation, 178 Colo. 124, 497 P.2d 5 (1972).

**Laborer not entitled to lien upon machinery and equipment.** One who only performed labor is not entitled to a lien upon machinery and equipment treated as personal property and as segregated from the oil well itself. *Poudre River Oil Corp. v. Carey*, 83 Colo. 419, 266 P. 201 (1928).

**Under this section, those who provide consulting or engineering services relating to an oil or gas well are not necessarily entitled to a mechanic's lien superior to all other liens on the subject property.** *AEC Indus., LLC v. Survivor Oil, Inc.*, 7 P.2d 1052 (Colo. App. 1999).

**Structural equipment essential to oil well within section.** In view of the fact that a derrick and drilling rig with their stationary parts, were

essential to the sinking of the well, and would also have been useful in its operation should it have proven productive, such equipment is a portion of the structure or improvement and of the oil well itself, for the purposes of this section. *Terminal Drilling Co. v. Jones*, 84 Colo. 279, 269 P. 894 (1928).

**Lien does not attach to detached personality not supplied by the lien claimant.** *Gearhart-Owen Indus., Inc. v. Panhandle Prod. Co.*, 624 P.2d 355 (Colo. App. 1980).

**Proceeds of oil and gas sales not lienable.** Since the proceeds of the sale of oil and gas are not listed in this section as property within the scope of the lien, they cannot be attached under a mechanic's lien on oil and gas wells. *Chambers v. Nation*, 178 Colo. 124, 497 P.2d 5 (1972).

**38-24-102. Other property subject to lien.** Every person, firm, or corporation who performs labor or furnishes machinery, material, fuel, explosives, or supplies to a contractor or subcontractor shall have a lien upon the properties and premises mentioned in section 38-24-101 to the same extent and in the same manner as the original contractor for the amount due for such machinery, material, fuel, explosives, or supplies furnished or labor performed. All liens created by virtue of this article in any particular case shall be of equal rank and validity, except liens for labor which shall be preferred.

**Source:** L. 29: p. 436, § 2. CSA: C. 101, § 52. CRS 53: § 86-5-2. C.R.S. 1963: § 86-5-2.

**38-24-103. Security interest invalid - when.** No chattel mortgage or security interest shall be valid as against any person, firm, or corporation entitled to a lien under the provisions of this article; but no mortgage, lien, or other encumbrance existing and recorded as provided by law at the time of the inception of the lien provided for in this article shall be affected thereby.

**Source:** L. 29: p. 436, § 3. CSA: C. 101, § 53. CRS 53: § 86-5-3. C.R.S. 1963: § 86-5-3.

#### ANNOTATION

**Law reviews.** For article, "Mechanics' Liens Relative to Oil and Gas Operations — Part II", see 34 Dicta 373 (1957). For article, "Oil and Gas Financing Under the Uniform Commercial Code as Enacted in Colorado", see 43 Den. L. J. 129 (1966).

**Purpose of section.** This section is intended to invalidate only those chattel mortgages which were in existence, but which were unrecorded at the time of the inception of the mechanic's lien, and where a purchase money security interest on personalty comes into existence after the inception of the mechanic's lien, the recording or lack of recording of the purchase money security document is immaterial as to a mechanic's lien

claimant whose rights were created and defined at a previous time. *Nation v. Chambers*, 29 Colo. App. 413, 486 P.2d 460 (1971), aff'd, 178 Colo. 124, 497 P.2d 5 (1972).

**This section and § 38-24-101 must be construed together.** This section must be read and construed together with the provisions of § 38-24-101, and since, under § 38-24-101 a lien claimant is not entitled to a prior lien on property which is the subject of a purchase money security interest, a chattel mortgage on such property is not rendered invalid by the operation of this section. *Chambers v. Nation*, 178 Colo. 124, 497 P.2d 5 (1972).

**38-24-104. Lien statement - when filed.** (1) Every person wishing to avail himself of the benefits of this article must file with the county clerk and recorder of the county in

which the property or premises mentioned in this article are situated, and within six months after the machinery, materials, fuel, explosives, or supplies have been furnished or the labor performed, a statement containing:

- (a) A just and true account of the amount due him after allowing all credits;
- (b) A description of the property to be charged with such lien sufficient for its proper identification; and
- (c) A verification by affidavit.

(2) No error in the account shall effect the validity of the lien by the inclusion of items erroneously taken in, if such items can be identified. An open running account shall constitute a single contract, and in such case the lien shall relate back to the first item of material furnished or labor performed, as the case may be, and the six-month filing period shall begin to run for the whole account from the date of the last item.

**Source:** L. 29: p. 437, § 4. CSA: C. 101, § 54. CRS 53: § 86-5-4. C.R.S. 1963: § 86-5-4.

#### ANNOTATION

**Law reviews.** For article, "Mechanics' Liens Relative to Oil and Gas Operations — Part II", see 34 Dicta 373 (1957). For article, "Oil and

Gas Financing Under the Uniform Commercial Code as Enacted in Colorado", see Den. L.J. 129 (1966).

**38-24-105. Action commenced within six months.** Every person, firm, or corporation filing a statement as provided in section 38-24-104 and claiming a lien under this article shall commence suit thereon in the district court of the county in which the statement is filed not later than six months after the date of such filing, and the lien shall remain in force until the final determination of such suit. Costs shall be divided according to the justice of the case.

**Source:** L. 29: p. 437, § 5. CSA: C. 101, § 55. CRS 53: § 86-5-5. C.R.S. 1963: § 86-5-5.

#### ANNOTATION

**Law reviews.** For article, "Mechanics' Liens Relative to Oil and Gas Operations — Part II", see 34 Dicta 373 (1957). For article, "Oil and

Gas Financing Under the Uniform Commercial Code as Enacted in Colorado", see 43 Den. L.J. 129 (1966).

**38-24-106. Perfecting of lien on removed property - when.** Whenever any person removes any property subject to a lien under this article out of the county in which the statement has been filed, the lien claimant may file, within thirty days after receiving notice of such removal, with the county clerk and recorder of the county to which such property has been removed, an inventory of said property so removed, showing the amount due and unpaid thereon, which inventory shall be filed in the lien records of such county. Such filing shall operate as a notice of the existence of the lien, and it shall thereupon attach to and extend to the leasehold and other premises, properties, and appurtenances with which said property so removed has been put in use or to which it has attached if it is of the kind and character enumerated in section 38-24-101. If said leasehold, premises, properties, and appurtenances belong to some party other than the party originally contracting with the lien claimant, the lien shall be limited to the property and chattels so removed. The benefits of this section as regards removal shall apply even though such removal is to another locality in the same county.

**Source:** L. 29: p. 437, § 6. CSA: C. 101, § 56. CRS 53: § 86-5-6. C.R.S. 1963: § 86-5-6.



## ANNOTATION

**Law reviews.** For article, "Mechanics' Liens Relative to Oil and Gas Operations — Part II", see 34 Dicta 373 (1957).

**38-24-107. Lienholder's consent in removal or sale.** When the lien provided in this article attaches to the property covered thereby in the manner indicated in this article, no one shall sell or remove the property subject to said lien, or cause the same to be removed from such lands or premises, or otherwise sell or dispose of the same without the written consent of the lien claimant under this article. In the event of any violation of the provisions of this section, the lien claimant shall be entitled to the possession of the property to which said lien has attached, wherever the same may be found, and shall hold the same pending the disposition of the action provided for in this article.

**Source:** L. 29: p. 438, § 7. CSA: C. 101, § 57. CRS 53: § 86-5-7. C.R.S. 1963: § 86-5-7.

## ANNOTATION

**Applied** in *Chambers v. Nation*, 178 Colo. 124, 497 P.2d 5 (1972).

**38-24-108. Penalty for removing property.** Any person who removes or causes to be removed any property covered by the lien provided for in this article from the place where such property was located when such lien was filed, without the written consent of the lien claimant, is guilty of theft of such property and, upon conviction thereof, shall be punished accordingly.

**Source:** L. 29: p. 439, § 8. CSA: C. 101, § 58. CRS 53: § 86-5-8. C.R.S. 1963: § 86-5-8.

**Cross references:** For theft, see part 4 of article 4 of title 18.

**38-24-109. Assignment of lien.** Any person, firm, or corporation entitled to a lien under this article may assign his claim before or after filing the lien statement provided for in section 38-24-104, and in such event the assignee shall be clothed with all the rights inherent by virtue of this article in the assignor.

**Source:** L. 29: p. 439, § 9. CSA: C. 101, § 59. CRS 53: § 86-5-9. C.R.S. 1963: § 86-5-9.

**38-24-110. Provisions of article cumulative.** The provisions of this article are cumulative and in addition to all lien rights and remedies already provided by the laws of this state.

**Source:** L. 29: p. 439, § 10. CSA: C. 101, § 60. CRS 53: § 86-5-10. C.R.S. 1963: § 86-5-10.

**38-24-111. Liability against owner of land.** Nothing in this article shall fix a liability against the owner of the land, except when such owner is a party to the contract with the lien claimant.

**Source:** L. 29: p. 439, § 11. CSA: C. 101, § 61. CRS 53: § 86-5-11. C.R.S. 1963: § 86-5-11.

## ANNOTATION

**Law reviews.** For article, "Mechanics' Liens Relative to Oil and Gas Operations — Part II", see 34 Dicta 373 (1957).

## ARTICLE 24.5

## Harvesters' Liens

38-24.5-101.	Definitions.	38-24.5-105.	Priority.
38-24.5-102.	Who may have lien - amount.	38-24.5-106.	Parties.
38-24.5-103.	How lien obtained - lien statement.	38-24.5-107.	Limitations of actions.
38-24.5-104.	Filing with county clerk and recorder.	38-24.5-108.	Acknowledgment of satisfaction of lien - penalty.

**38-24.5-101. Definitions.** As used in this article, unless the context otherwise requires:

(1) "Harvester" means any person who gathers in grain or other crops by manual or mechanical threshing, swathing, or picking but shall not include an owner.

(2) "Harvesting" means the manual or mechanical threshing, swathing, cutting, or picking of grain or other crops, including any services rendered and labor performed in connection therewith.

(3) "Owner" means any person, including any guardian or minor, married person, company, firm, association, or corporation, for whose use or benefit the grain or other crops are harvested.

**Source:** L. 89: Entire article added, p. 1442, § 1, effective July 1.

## ANNOTATION

**A water well more properly fits within article 24 of title 38 than article 22 of title 38,** as article 24 specifically addresses sinking a hole into the earth to obtain a natural resource below

it. Article 24 controls, because it has more specific provisions that supplement the general provisions of article 22. *Aspen Drilling Co., Inc. v. Hayes*, 876 P.2d 86 (Colo. App. 1994).

**38-24.5-102. Who may have lien - amount.** (1) Every harvester shall have a lien upon the grain and other crops harvested for and on account of harvesting. A lien on grain or other crops shall be charged for at the prevailing price for a particular locality in which such grain or other crop is harvested after notice has been given and a lien has been filed within the time provided under section 38-24.5-103.

(2) If the prevailing price for harvesting is disputed by the harvester or the owner, the matter may be submitted to arbitration under the provisions of rule 109 of the Colorado rules of civil procedure.

**Source:** L. 89: Entire article added, p. 1442, § 1, effective July 1.

**Editor's note:** Rule 109, C.R.C.P., referenced in subsection (2), was repealed March 17, 1994.

**38-24.5-103. How lien obtained - lien statement.** (1) Every person intending to avail himself or herself of the benefits of this article shall serve on the owner by certified or registered mail, return receipt requested, or by personal service, within ten days after completing the harvesting, a notice that, within twenty days, a lien, as specified in section 38-24.5-102, shall be claimed, and, within said twenty days, such person shall file in the same locations for farm products and crops as provided in section 4-9-501, C.R.S., a statement containing a just and true account of the amount due him or her for such harvesting, after allowing all just credits and offsets, and containing a correct description of



the grain or other crops to be charged with such lien, the price agreed upon for such harvesting, the name of the person, firm, or corporation for whom such harvesting was performed, a legal description of the lands upon which said grain or other crops were raised, a description of the legal subdivision of land upon which said grain or other crops are stored and, if said grain or other crops are stored in a storage facility, the locality of the storage facility, which statement of facts shall be verified by affidavit of the person claiming such lien or his or her duly authorized agent or attorney having knowledge of the facts, and a copy of the notice of intent to file a lien and an affidavit of service or mailing thereof. Any immaterial error or mistake in the account or description of the grain or other crops or of the property upon which it was raised shall not invalidate such lien.

(2) If the grain or other crops so harvested will be hauled directly to the storage facility or to a purchaser, the person claiming the lien pursuant to subsection (1) of this section shall also serve written notice upon the owner of such storage facility or other private purchaser of his intent to claim and file a lien upon said grain or other crops for harvesting pursuant to section 38-24.5-102 within the time frames set forth in this section.

**Source:** L. 89: Entire article added, p. 1443, § 1, effective July 1. L. 2001: (1) amended, p. 1447, § 44, effective July 1.

**38-24.5-104. Filing with county clerk and recorder.** The county clerk and recorder shall endorse upon a lien the day of its filing and make an abstract thereof in a book kept and indexed by him for that purpose containing the date of the filing, the name of the person claiming the lien, the amount thereof, the name of any other person against whose property the lien is filed, and a description of the property to be charged with the same.

**Source:** L. 89: Entire article added, p. 1443, § 1, effective July 1.

**38-24.5-105. Priority.** (1) The lien for harvesting specified in section 38-24.5-102 shall not be prior to nor have precedence over any mortgage, encumbrance, security interest, or other valid lien upon the grain or other crops if such other mortgage, encumbrance, security interest, or valid lien attached or was filed prior to the filing of a lien under this article.

(2) A person seeking to perfect a lien under this article shall comply with article 9.5 of title 4, C.R.S., and section 1324 of the federal "Food Security Act of 1985", in order to perfect a lien under this article.

**Source:** L. 89: Entire article added, p. 1443, § 1, effective July 1.

**Cross references:** For the federal "Food Security Act of 1985", see Pub.L. 99-198.

**38-24.5-106. Parties.** Any person interested in the matter in controversy or the property to be charged with the lien or having a lien thereon may be made a party to an action for the foreclosure thereof.

**Source:** L. 89: Entire article added, p. 1443, § 1, effective July 1.

**38-24.5-107. Limitations of actions.** Any action for the foreclosure and enforcement of a lien authorized in section 38-24.5-102 shall be commenced, and a notice of commencement of action filed in the same locations as the lien statements, within three months from the filing of the lien and shall be filed in the district court for the county in which the lien authorized in section 38-24.5-103 is filed. The failure to file such an action and notice on a timely basis shall render the lien null and void.

**Source:** L. 89: Entire article added, p. 1443, § 1, effective July 1.

**38-24.5-108. Acknowledgment of satisfaction of lien - penalty.** Whenever the indebtedness which is a lien upon any such grain or other crops is paid and satisfied, it is the duty of the lienor to acknowledge satisfaction thereof and to discharge the lien of record; and, if any lienor fails to acknowledge satisfaction and discharge said lien within thirty days after being requested to do so by a person having a property interest in such grain or other crops, he is liable to any person injured thereby in the amount of such injury and the costs of the action.

**Source:** L. 89: Entire article added, p. 1444, § 1, effective July 1.

## ARTICLE 25

### Uniform Federal Lien Registration Act

**Editor's note:** This article was numbered as article 6 of chapter 86 in C.R.S. 1963. The provisions of this article were repealed and reenacted in 1969, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this article prior to 1969, consult the Colorado statutory research explanatory note beginning on page vii in the front of this volume.

38-25-101.	Short title.	38-25-104.	Duties of filing officer.
38-25-101.5.	Scope.	38-25-105.	Fees.
38-25-102.	Federal liens - places of filing.	38-25-106.	Lien not valid until notice filed.
38-25-103.	Execution of notices and certificates.	38-25-107.	Uniformity of interpretation.

**38-25-101. Short title.** This article shall be known and may be cited as the "Uniform Federal Lien Registration Act".

**Source:** L. 69: R&RE, p. 694, § 1. C.R.S. 1963: § 86-6-1. L. 88: Entire section amended, p. 1255, § 1, effective July 1.

**38-25-101.5. Scope.** This article applies only to federal tax liens and to other federal liens notices of which under any act of congress or any regulation adopted pursuant thereto are required or permitted to be filed in the same manner as notices of federal tax liens.

**Source:** L. 88: Entire section added, p. 1255, § 2, effective July 1.

**38-25-102. Federal liens - places of filing.** (1) (a) Notices of liens, certificates, and other notices affecting federal tax liens or other federal liens must be filed in accordance with this article.

(b) Notices of liens upon real property for obligations payable to the United States and certificates and notices affecting the liens shall be recorded in the office of the county clerk and recorder of the county in which the real property subject to the liens is situated.

(2) Notices of federal liens upon personal property, whether tangible or intangible, for obligations payable to the United States and certificates and notices affecting the liens shall be filed as follows:

(a) If the person against whose interest the lien applies is a corporation, partnership, or limited liability company whose chief executive office is in this state, as these entities are defined in the internal revenue laws of the United States, in the office of the secretary of state;

(b) If the person against whose interest the lien applies is a trust that is not covered by paragraph (a) of this subsection (2), in the office of the secretary of state;

(c) If the person against whose interest the lien applies is the estate of a decedent, in the office of the secretary of state;

(d) In all other cases, where the person against whose interest the lien applies has his, her, or its principal residence in this state at the time of recording of the notice of lien, the notice of lien shall be recorded in the office of the secretary of state.



(2.5) (Deleted by amendment, L. 2001, p. 1431, § 11, effective July 1, 2001.)

**Source:** L. 69: R&RE, p. 694, § 1. C.R.S. 1963: § 86-6-2. L. 88: Entire section amended, p. 1255, § 3, effective July 1. L. 99: (2) amended and (2.5) added, p. 752, § 23, effective January 1, 2000. L. 2001: (2) and (2.5) amended, p. 1431, § 11, effective July 1.

**38-25-103. Execution of notices and certificates.** Certification of notices of liens, certificates, or other notices affecting federal liens by the secretary of the treasury of the United States or his delegate, or by any official or entity of the United States responsible for the filing or certifying of notice of any other lien, entitles them to be filed, and no other attestation, certification, or acknowledgment is necessary.

**Source:** L. 69: R&RE, p. 694, § 1. C.R.S. 1963: § 86-6-3. L. 88: Entire section amended, p. 1256, § 4, effective July 1.

**38-25-104. Duties of filing officer.** (1) If a notice of federal lien, a refiling of a notice of federal lien, or a notice of revocation of any certificate described in subsection (2) of this section is presented to a filing officer who is:

(a) The secretary of state, then the secretary of state shall cause the notice to be marked, held, and indexed in accordance with the provisions of section 4-9-519, C.R.S., as if the notice were a financing statement within the meaning of such section; or

(b) The county clerk and recorder, then the county clerk and recorder shall endorse thereon the county clerk and recorder's identification and the date and time of receipt and forthwith record and index in the real estate records in accordance with the provisions of sections 30-10-408 and 30-10-409, C.R.S., showing the name and address of the person named in the notice, the date and time of receipt, the title and address of the official or entity certifying the lien, and the total amount appearing on the notice of lien.

(2) If a certificate of release, nonattachment, discharge, or subordination of any lien is presented to the secretary of state for filing, the secretary of state shall:

(a) Cause a certificate of release or nonattachment to be marked, held, and indexed as if the certificate were a termination statement within the meaning of the "Uniform Commercial Code", but the notice of lien to which the certificate relates may not be removed from the files; and

(b) Cause a certificate of discharge or subordination to be marked, held, and indexed as if the certificate were a release of collateral within the meaning of the "Uniform Commercial Code".

(3) If a refiled notice of federal lien referred to in subsection (1) of this section or any of the certificates or notices referred to in subsection (2) of this section is presented for recording to any county clerk and recorder, such clerk and recorder shall enter the refiled notice or the certificate with the date of recording in the index in accordance with the provisions of sections 30-10-408 and 30-10-409, C.R.S.

(4) Upon request of any person, the filing officer shall issue a certificate showing whether there is on file, or recorded on the date and hour stated therein, any notice of lien or certificate or notice affecting any lien filed under this article, naming a particular person and, if a notice or certificate is on file, giving the date and hour of filing of each notice or certificate. The fee for the issuance of a certificate by the secretary of state shall be determined and collected pursuant to section 24-21-104 (3), C.R.S., and the fee for the issuance of a certificate by a county clerk and recorder shall be five dollars. Upon request, the filing officer shall furnish a copy of any notice of federal lien or notice or certificate affecting a federal lien. The fee for furnishing and for certifying such copy and affixing the seal thereto shall be determined and collected pursuant to section 24-21-104 (3), C.R.S., if furnished by the secretary of state, and the said fee shall be five dollars, if furnished by a county clerk and recorder.

**Source:** L. 69: R&RE, p. 694, § 1. C.R.S. 1963: § 86-6-4. L. 83: (4) amended, p. 1229, § 17, effective July 1; (4) amended, p. 880, § 50, effective July 1; (4) R&RE, p.

2056, § 37, effective October 14. **L. 88:** Entire section amended, p. 1256, § 5, effective July 1. **L. 93:** (1), IP(2), (3), and (4) amended, p. 438, § 5, effective July 1. **L. 99:** (1)(a), IP(2), and (4) amended, p. 753, § 24, effective January 1, 2000. **L. 2001:** (1)(a), IP(2), and (4) amended, p. 1432, § 12, effective July 1.

**Cross references:** For the provisions of the “Uniform Commercial Code”, see title 4; for termination statement, see § 4-9-513.

**38-25-105. Fees.** (1) (a) A fee shall be charged for filing or recording and indexing each notice of lien or certificate or notice affecting the lien:

(I) For a lien on real estate;

(II) For a lien on tangible and intangible personal property;

(III) For a certificate of discharge or subordination;

(IV) For all other notices, including a certificate of release or nonattachment.

(b) The fee charged by a county clerk and recorder for filing and indexing each notice of lien or certificate or notice affecting the lien shall be five dollars.

(c) When the filing officer is the secretary of state, the fees required by this subsection (1) shall be determined and collected pursuant to section 24-21-104 (3), C.R.S.

(2) The filing officer shall bill the district directors of internal revenue or other appropriate federal officials on a monthly basis for fees for documents filed by them.

**Source:** **L. 69:** R&RE, p. 695, § 1. **C.R.S. 1963:** § 86-6-5. **L. 83:** (1) R&RE, p. 1230, § 18, effective July 1; (1) amended, p. 880, § 18, effective July 1. **L. 88:** IP(1)(a), (1)(a)(I), (1)(a)(II), and (2) amended, p. 1257, § 6, effective July 1. **L. 91:** (1)(b) amended, p. 709, § 6, effective July 1. **L. 93:** (1)(b) amended, p. 439, § 6, effective July 1. **L. 99:** (1)(c) amended, p. 754, § 25, effective January 1, 2000. **L. 2001:** (1)(c) and (2) amended, p. 1432, § 13, effective July 1.

**38-25-106. Lien not valid until notice filed.** Prior to the time of the filing of a notice of lien in the office of the secretary of state or the county clerk and recorder, as the case may be, the lien shall not be valid as against any mortgagee, purchaser, or judgment creditor.

**Source:** **L. 69:** R&RE, p. 695, § 1. **C.R.S. 1963:** § 86-6-6. **L. 99:** Entire section amended, p. 754, § 26, effective January 1, 2000. **L. 2001:** Entire section amended, p. 1432, § 14, effective July 1.

**38-25-107. Uniformity of interpretation.** This article shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this article among states enacting it.

**Source:** **L. 69:** R&RE, p. 695, § 1. **C.R.S. 1963:** § 86-6-7. **L. 88:** Entire section amended, p. 1258, § 7, effective July 1.

## ARTICLE 25.5

### State and Local Tax Liens

38-25.5-101.	Definitions.	tax delinquency notification
38-25.5-102.	Certificate of taxes due.	fund - creation - immunity.
38-25.5-103.	Copies of returns and filings - summary statement - fees.	38-25.5-104. Civil liability.
38-25.5-103.5.	Notification requirements -	38-25.5-105. Department of revenue fees.

**38-25.5-101. Definitions.** As used in this article, unless the context otherwise requires:

(1) “Authorized person” means:

(a) A person who has obtained a written authorization signed and notarized by a



taxpayer to receive a certificate of taxes due for the taxpayer, to receive copies of tax returns and filings by the taxpayer with a public entity, to receive a summary statement of tax payments made to any public entity by the taxpayer, or all of the above, to the degree set forth in the authorization. The authorization may be a signed original or a copy thereof and may be a separate document or part of a more general document; or

(b) A lending institution that has obtained written authorization from a borrower to receive notification from the department of revenue when the borrower is delinquent in the payment of sales and use taxes, special fuel taxes, withholding taxes, gas taxes, or aviation fuel taxes. The authorization may be a signed and dated original or a copy thereof and may be a separate document or part of a more general document.

(2) "Lender" means a person who has made a loan of value to a taxpayer in good faith and not for the purposes of evading this article.

(3) "Public entity" means the state and every county, city and county, city, town, school district, special improvement district, special district, and every other kind of district, agency, instrumentality, political subdivision, or taxing authority of the state organized pursuant to state law, whether or not it is subject to home rule.

(4) "Statement of intent" means a declaration by a lender or transferor that he intends to foreclose or transfer assets. A statement of intent need not specify a date certain for such foreclosure or transfer.

(5) "Tax" means a tax and assessment collected by a public entity which is secured by a first and prior lien, including any interest, additional amount, additions to tax, penalties, and costs that are due.

(6) "Tax liability" means the liability of a taxpayer for a tax.

(7) "Tax lien" means a lien imposed by state or local law to secure the payment of a tax liability.

(8) "Transferee" means a person to whom assets are transferred, as provided in section 38-25.5-102 (3).

(9) "Transferor" means a person who transfers assets, as provided in section 38-25.5-102 (3).

(10) "Treasurer" means the treasurer, director of the department of revenue, sales and use tax administrator, or the chief tax collection officer of a public entity.

**Source:** L. 90: Entire article added, p. 1640, § 1, effective January 1, 1991. L. 97: (1) amended, p. 986, § 1, effective July 1.

**38-25.5-102. Certificate of taxes due.** (1) (a) As soon as practical but in no event later than thirty days after receipt of a written request from a taxpayer or authorized person, the treasurer of a public entity shall certify in writing as of the date of the certificate the full amount of the taxes identified in the request known to be due from the taxpayer. If there is a delinquency in the payment of taxes of an unknown amount, the public entity shall, if practical, provide a good faith estimate of the amount of the taxes due and indicate on the certificate that the figure provided is an estimate. A fee of ten dollars shall be collected for each specifically identified tax included in a certificate issued by a public entity in response to a request.

(b) Notwithstanding the amount of the fee specified in paragraph (a) of this subsection (1), if the public entity collecting the fee is a state agency, the executive director of the state agency, by rule or as otherwise provided by law, may reduce the amount of the fee if necessary pursuant to section 24-75-402 (3), C.R.S., to reduce the uncommitted reserves of the fund to which all or any portion of the fee is credited. After the uncommitted reserves of the fund are sufficiently reduced, the executive director of the state agency, by rule or as otherwise provided by law, may increase the amount of the fee as provided in section 24-75-402 (4), C.R.S.

(2) Except as provided in subsection (3) of this section and notwithstanding any other provision of law to the contrary:

(a) When signed by the treasurer of a public entity, a certificate of taxes due shall be conclusive evidence for all purposes and against all persons, including the public entity, that, at the time of certification, the property of the taxpayer was free and clear of all such

identified taxes due and any tax liens arising therefrom or was subject to each such identified tax due and any tax lien arising therefrom in a stated or estimated amount; and

(b) If more than one certificate of taxes due is issued by the treasurer of the same public entity with respect to the same taxpayer and the later certificate sets forth an amount of taxes due for a particular tax which is:

(I) In excess of the amount set forth in the earlier certificate, the earlier certificate shall be conclusive evidence of the amount of taxes due and any tax liens arising therefrom as of the date of that earlier certificate. The later certificate shall be evidence of the amount of taxes due and any tax liens arising therefrom as of the date of the later certificate, but any tax lien arising therefrom shall only be effective for the amount of taxes which became due after the date of the earlier certificate.

(II) Less than the amount set forth in the earlier certificate, the later certificate shall be conclusive evidence of the amount of taxes due and any tax liens arising therefrom as of the date of the later certificate;

(c) Any tax lien arising from taxes becoming due after the date of the latest certificate of taxes due shall not be affected by this section.

(3) (a) This subsection (3) shall apply only to taxes identified in and due as of the date of a certificate of taxes due. Notwithstanding any other provision of law to the contrary, if a public entity completes an audit or investigation subsequent to the date of such certificate which reveals a tax liability for the identified taxes due as of the date of a certificate previously issued in excess of the amount certified in the certificate, then the public entity shall retain whatever rights and remedies for collection of such tax liability as otherwise provided by state or local law; except that:

(I) In the event of a foreclosure initiated by a lender which results in a sale of assets subject to any tax lien to a purchaser other than the lender, such tax lien shall remain a lien on such assets but not on the proceeds to the lender of the foreclosure sale, and neither the lender nor the purchaser shall have any personal liability for the tax liability underlying the tax lien;

(II) In the event of a foreclosure initiated by a lender which results in a sale of assets subject to any tax lien to the lender or in the event of a transfer of assets subject to any tax lien to a lender in lieu of foreclosure, such tax lien shall remain a lien on such assets, but the lender shall not have any personal liability for the tax liability underlying the tax lien;

(III) In the event the circumstances described in subparagraph (II) of this paragraph (a) occur and the lender subsequently sells such assets to a purchaser, such tax lien shall remain a lien on such assets but not on the proceeds to the lender of the sale, and neither the lender nor the purchaser shall have any personal liability for the tax liability underlying the tax lien; and

(IV) In the event the circumstances described in subparagraph (I) or subparagraph (III) of this paragraph (a) occur and the purchaser transfers such assets to a subsequent purchaser, such tax lien shall remain a lien on such assets but not on the proceeds of sale, and neither the subsequent purchaser nor any subsequent purchaser thereafter shall have any personal liability for the tax liability underlying the tax lien.

(b) In order to qualify for the protections provided by this subsection (3), a lender or transferor shall comply with the following requirements:

(I) Upon receipt of a written request from a public entity, the lender or transferor shall promptly provide to the public entity a description of any assets of the taxpayer subject to a tax lien which have been transferred and the name and address of the transferee of such assets. The lender or transferor shall maintain records relating to such asset transfers for a minimum of four years; and

(II) Prior to a foreclosure sale or transfer of taxpayer assets which may be subject to a tax lien, the lender or transferor shall request or cause to be requested from the appropriate public entity a certificate of taxes due. Such request shall be accompanied by or shall include a statement of intent. Such certificate of taxes due shall have been issued no more than six months prior to the date of the foreclosure sale or transfer of assets.

(4) This section shall not apply to general taxes for real property as governed by articles 1 to 14 of title 39, C.R.S.



**Source:** L. 90: Entire article added, p. 1641, § 1, effective January, 1, 1991. L. 2001: (1) amended, p. 556, § 1, effective May 23.

**38-25.5-103. Copies of returns and filings - summary statement - fees.** (1) As soon as practical but in no event later than thirty days after receipt of a written request from a taxpayer or authorized person, the treasurer of a public entity shall provide, as to taxes of the public entity which are specifically identified in the request, either copies of returns and filings by the taxpayer which are in the possession or custody of the public entity or a summary statement of tax payments made by the taxpayer to the public entity. A request made under the provisions of this section shall be limited to the current year and the previous three years. A request made by an authorized person shall be limited to the extent set forth in the written authorization of the authorized person.

(2) A request made pursuant to this section may be either in the form of a request for copies of tax returns and filings or in the form of a request for a summary statement but may not contain both types of requests. If the specified form of the request cannot be readily complied with by the treasurer, the treasurer shall so notify the requesting party and may comply with the request by furnishing the information in the alternative form.

(3) (a) A fee of ten dollars shall be collected for each specifically identified tax included in such summary statement issued by a public entity. A fee of one dollar and twenty-five cents shall be collected for each page of tax returns and filings of a taxpayer copied and delivered by a public entity.

(b) Notwithstanding the amount of any fee specified in paragraph (a) of this subsection (3), if the public entity collecting the fee is a state agency, the executive director of the state agency by rule or as otherwise provided by law may reduce the amount of one or more of the fees if necessary pursuant to section 24-75-402 (3), C.R.S., to reduce the uncommitted reserves of the fund to which all or any portion of one or more of the fees is credited. After the uncommitted reserves of the fund are sufficiently reduced, the executive director of the state agency by rule or as otherwise provided by law may increase the amount of one or more of the fees as provided in section 24-75-402 (4), C.R.S.

(4) This section shall not apply to general taxes for real property as governed by articles 1 to 14 of title 39, C.R.S.

**Source:** L. 90: Entire article added, p. 1643, § 1, effective January 1, 1991. L. 98: (3) amended, p. 1346, § 80, effective June 1.

**38-25.5-103.5. Notification requirements - tax delinquency notification fund - creation - immunity.** (1) The department of revenue shall provide information to any lending institution that is an authorized person regarding the delinquent payment of sales and use tax, withholding tax, special fuels tax, gas tax, or aviation fuel tax by a borrower of funds from such institution provided such delinquency is in distraint warrant stage. The department shall honor any request made by a lending institution that is an authorized person to the extent set forth in the written authorization. Such provision of information shall be made in accordance with rules promulgated by the department, which shall include the following:

(a) The procedures pursuant to which lending institutions may request notification under this section, when such notification will be provided by the department, and the manner in which such information shall be provided;

(b) The amount of the filing fee needed to cover programming and other administrative costs, which may be adjusted periodically by the department and not necessarily at the beginning of the year;

(c) The level, type, or degree of delinquency subject to the disclosure provided by this section;

(d) Any other information needed for the implementation of this section.

(2) The level, type, or degree of delinquency subject to the disclosure provided by this section shall be set by the department of revenue.

(3) The department shall transmit any filing fees collected pursuant to this section to the state treasurer, who shall deposit such fees in the state treasury in the tax delinquency notification fund, which fund is hereby created. Moneys so deposited and all interest earned on such moneys shall be retained in the fund.

**Source: L. 97:** Entire section added, p. 987, § 2, effective July 1.

**38-25.5-104. Civil liability.** Notwithstanding any other provision of law to the contrary, no public entity, lender, authorized person, or transferor or any director, officer, employee, or agent thereof shall be liable in any civil action for damages to a taxpayer, authorized person, transferee, or any other person for any act done or omitted in accordance with the provisions of this article.

**Source: L. 90:** Entire article added, p. 1643, § 1, effective January 1, 1991.

**38-25.5-105. Department of revenue fees.** Except as provided in section 38-25.5-103.5, fees collected by the department of revenue pursuant to this article shall be deposited in the state treasury in the tax lien certification fund which is hereby created. Moneys so deposited and all interest earned on such moneys shall be used by the department of revenue for the purposes of this article in accordance with the annual appropriation by the general assembly and shall not be deposited in or transferred to the general fund; except that moneys in excess of the target reserve, as defined in section 24-75-402 (2) (g), C.R.S., that remain in the fund at the end of any state fiscal year commencing on or after July 1, 2000, shall be transferred to the general fund.

**Source: L. 90:** Entire article added, p. 1643, § 1, effective January 1, 1991. **L. 97:** Entire section amended, p. 987, § 3, effective July 1. **L. 2001:** Entire section amended, p. 556, § 2, effective May 23.

## ARTICLE 26

### Contractor's Bonds and Lien on Funds

38-26-101.	Contractor defined.		bond - conditions.
38-26-102.	Railroad and irrigation contractor's bond - action - limitation.	38-26-106.	Contractor executes bond.
		38-26-107.	Supplier may file statement - notice - withholding funds.
38-26-103.	Verified account to company - withhold payments.	38-26-108.	Substitution of bond allowed.
38-26-104.	Contractor furnished copy - undisputed accounts - condition.	38-26-109.	Moneys for verified claims made - trust funds - disbursements - penalty.
38-26-105.	Public works contractor's	38-26-110.	Excessive amounts claimed.

**38-26-101. Contractor defined.** The word "contractor", as used in sections 38-26-101, 38-26-106, and 38-26-107, means any person, copartnership, association of persons, company, or corporation to whom is awarded any contract for the construction, erection, repair, maintenance, or improvement of any building, road, bridge, viaduct, tunnel, excavation, or other public work of this state or for any county, city and county, municipality, school district, or other political subdivision of the state.

**Source: L. 23:** p. 480, § 1. **CSA:** C. 39, § 5. **CRS 53:** § 86-7-5. **C.R.S. 1963:** § 86-7-5.



## ANNOTATION

**Applied** in *Lovell Clay Prods. Co. v. State-wide Supply Co.*, 41 Colo. App. 166, 580 P.2d 1278 (1978).

**38-26-102. Railroad and irrigation contractor's bond - action - limitation.**

(1) Whenever any railroad, reservoir, or irrigating canal company contracts with any person or corporation for the construction of its railroad, reservoir, or irrigating canal, or any part thereof, such company shall take from the person or corporation with whom such contract is made a good and sufficient bond, conditioned that such contractor shall pay or cause to be paid to all laborers, mechanics, materialmen, ranchmen, farmers, merchants, and other persons who supply such contractor, or any of his or her subcontractors, with labor, work, laborers, materials, ranch or farm products, provisions, goods, or supplies of any kind all just debts incurred therefor in carrying on such work, which bond shall be filed by such company in the office of the county clerk and recorder in the county where the principal work of such contractor is carried on. If any such railroad, reservoir, or irrigation canal company fails to take such bond, such company shall be liable to the persons mentioned to the full extent of all such debts so contracted by such contractor or any of his or her subcontractors. Any such contractor may take a similar bond from each of his or her subcontractors to secure the payment of all debts of the kind mentioned incurred by such contractor and file the same.

(2) All such persons mentioned in this section to whom any debt of the kind mentioned is due from any such contractor or subcontractor shall severally have a right of action upon any such bond covering such debt taken as provided for the recovery of the full amount of such debt. A certified copy of the bond shall be received as evidence in any such action. In order that the right of action upon such bonds may exist, such person or parties granted such right shall comply with either of the following conditions:

(a) An action in a court of competent jurisdiction in the county where such bond is filed shall be commenced within ninety days after the last item of indebtedness has accrued; or

(b) An itemized statement of the indebtedness duly verified shall be filed within ninety days after the last item of such indebtedness has accrued in the office of the county clerk and recorder of the proper county, and an action shall be brought in any court of competent jurisdiction of such county within three months after the filing of such statement.

(3) In case an action is commenced upon the bond of a contractor, such contractor may give notice thereof to the subcontractor liable for the claim. In such case the result of such action shall be binding upon the subcontractor and his sureties. In any case when a contractor has paid a claim for which a subcontractor is liable, such contractor shall bring action against the subcontractor and his sureties within sixty days after the payment of such claim.

**Source:** L. 11: p. 490, § 1. C.L. § 6481. CSA: C. 39, § 1. CRS 53: § 86-7-1. C.R.S. 1963: § 86-7-1. L. 2000: (1) amended, p. 212, § 15, effective August 2.

## ANNOTATION

**Law reviews.** For article, "Contractual Rights of Persons Not Parties to the Contract in Colorado", see 3 Rocky Mt. L. Rev. 175 (1931).

**38-26-103. Verified account to company - withhold payments.** Every laborer, mechanic, ranchman, farmer, merchant, or other person performing any work or labor or furnishing any laborers, materials, ranch or farm products, provisions, goods, or supplies to any contractor or subcontractor in the construction of any railroad, reservoir, or irrigation canal, or any part thereof, used by such contractor or subcontractor in carrying on said work of construction whose demand for work, labor, laborers, material, ranch or farm products, provisions, goods, or supplies so furnished has not been paid may deliver to the company

owning such railroad, reservoir, or irrigation canal, or to its agent, a verified account of the amount and value of the work and labor so performed or the laborers, material, ranch or farm products, provisions, goods, or supplies so furnished. Thereupon such company, or its agent, shall retain out of the subsequent payments to the contractor the amount of such unpaid account for the benefit of the person to whom the same is due.

**Source:** L. 11: p. 491, § 2. C.L. § 6482. CSA: C. 39, § 2. CRS 53: § 86-7-2. C.R.S. 1963: § 86-7-2. L. 2000: Entire section amended, p. 212, § 16, effective August 2.

#### ANNOTATION

**Claimant needs only to state right in fund.** It is only necessary for a claimant to state his right or interest in the fund. *Olson v. Model Land & Irrigation Co.*, 75 Colo. 221, 225 P. 259 (1924).

**Groceries and supplies lienable.** Groceries and supplies furnished subcontractor, who also conducted a boarding house which was necessary for his men, is a proper charge under the provisions of this section, but a lien will not lie

for such provisions as are consumed by men not employed on the contract work. *Olson v. Model Land & Irrigation Co.*, 75 Colo. 221, 225 P. 259 (1924).

**Proof required of lien claimant.** It is the duty of a lien claimant to show what proportion of supplies furnished a subcontractor are used on the contract work. *Olson v. Model Land & Irrigation Co.*, 75 Colo. 221, 225 P. 259 (1924).

**38-26-104. Contractor furnished copy - undisputed accounts - condition.** Whenever any verified account mentioned in section 38-26-103 is placed in the hands of any railroad, reservoir, or irrigating canal company, or its agent, it is the duty of such company to furnish the contractor with a copy of such verified account so that if there is any disagreement between the debtor and creditor as to the amount due the same may be amicably adjusted. If the contractor or subcontractor, if he is the debtor, does not give, within ten days after the receipt of such amount, the same railroad, reservoir, or irrigating canal company, or its agent, written notice that the claim is disputed, he shall be considered as assenting to its payment and the railroad, reservoir, or irrigating canal company, or its agent, shall be justified in paying the same when due and charging the same to the contractor. The person to whom any such debt is due and who delivers a verified account thereof as provided may recover the amount thereof in an action at law to the extent of any balance due by the railroad, reservoir, or irrigating canal company to the contractor at or after the time of delivering the verified account. Nothing in this section or in section 38-26-103 shall interfere with the right of action upon bonds provided for in section 38-26-102 or against the railroad, reservoir, or irrigating canal company for the full amount of any such debt in case of a failure of the company to take a bond.

**Source:** L. 11: p. 492, § 3. C.L. § 6483. CSA: C. 39, § 3. CRS 53: § 86-7-3. C.R.S. 1963: § 86-7-3.

**38-26-105. Public works contractor's bond - conditions.** (1) Subject to the provisions of subsection (2) of this section, any person, company, firm, or corporation entering into a contract for more than fifty thousand dollars with any county, municipality, or school district for the construction of any public building or the prosecution or completion of any public works or for repairs upon any public building or public works shall be required before commencing work to execute, in addition to all bonds that may be required of it, a penal bond with good and sufficient surety to be approved by the board or boards of county commissioners of the county or counties, the governing body or bodies of the municipality or municipalities, or the district school board or boards, conditioned that such contractor shall at all times promptly make payments of all amounts lawfully due to all persons supplying or furnishing such person or such person's subcontractors with labor, laborers, materials, rental machinery, tools, or equipment used or performed in the prosecution of the work provided for in such contract and that such contractor will indemnify and save



harmless the county, municipality, or school district to the extent of any payments in connection with the carrying out of any such contract which the county or counties, municipality or municipalities, and school district or school districts may be required to make under the law. Subcontractors, materialmen, mechanics, suppliers of rental equipment, and others may have a right of action for amounts lawfully due them from the contractor or subcontractor directly against the principal and surety of such bond. Such action for laborers, materials, rental machinery, tools, or equipment furnished or labor rendered shall be brought within six months after the completion of the work and not afterwards.

(2) Notwithstanding the monetary qualification provided in subsection (1) of this section, the state, or the governing body of any county, municipality, school district, or other political subdivision determining it to be in the best interest of this state, or any county, municipality, school district, or other political subdivision may require the execution of a penal bond for any contract of fifty thousand dollars or less.

**Source:** L. 15: p. 395, § 1. C.L. § 9514. CSA: C. 39, § 4. CRS 53: § 86-7-4. C.R.S. 1963: § 86-7-4. L. 75: Entire section amended, p. 821, § 17, effective July 18. L. 79: Entire section amended, p. 1392, § 1, effective May 25; entire section amended, p. 888, § 13, effective July 1. L. 81: Entire section amended, p. 1824, § 1, effective May 28. L. 85: (1) amended, p. 1201, § 1, effective May 10. L. 2000: (1) amended, p. 212, § 17, effective August 2.

**Editor's note:** Amendments to this section by House Bill 79-1146 and Senate Bill 79-306 were harmonized.

## ANNOTATION

- I. General Consideration.
- II. Six-month Limitation for Commencement of Suit.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "Contractual Rights of Persons Not Parties to the Contract in Colorado", see 3 Rocky Mt. L. Rev. 175 (1931). For article, "Labor and Material Claims on State Public Works Projects", see 24 Colo. Law. 2165 (1995).

**Statutory remedy is in lieu of mechanic's lien statute.** *Flaugh v. Empire Clay Prods., Inc.*, 157 Colo. 409, 402 P.2d 932 (1965).

**Remedy is designed to protect** those who supply labor and materials for public buildings. *Flaugh v. Empire Clay Prods., Inc.*, 157 Colo. 409, 402 P.2d 932 (1965).

**Effect of section.** For purposes of giving effect to this section, the actions of subcontractors in purchasing materials and labor are imputed to the principal contractor; however, no such relationship can be extended beyond the statutory remedy. *Flaugh v. Empire Clay Prods., Inc.*, 157 Colo. 409, 402 P.2d 932 (1965).

**Both principal and surety not required parties.** Although this section allows both the principal and surety to be sued, it would be too narrow a construction to say it requires both to be made parties. *Fountain Sand & Gravel Co. v. Chilton Constr. Co.*, 40 Colo. App. 363, 578 P.2d 664 (1978).

**Test for recovery.** Under this section requiring contractors with cities to give bond to secure the payment of bills for labor and materials, recovery may be had for hay and auto truck repairs under a bond covering a grading and paving contract, the test being not whether the labor and materials entered into the work, but whether they were necessary for doing what the contractor had to do. *Stryker v. Tolliver & Kinney Mercantile Co.*, 77 Colo. 347, 236 P. 993 (1925).

**Fringe benefits recoverable under section.** Fringe benefits, including vacation benefits, retirement pension benefits, health insurance payments, unemployment insurance payments, and apprenticeship and industry advancement funds, are recoverable as "amounts lawfully due" under subsection (1). *Trustees of Colo. Carpenters & Millwrights Health Benefit Trust Fund v. Pinkard Constr. Co.*, 604 P.2d 683 (Colo. 1979).

**Attorney's fees.** Section 38-26-106 and this section, which require execution of a payment and performance bond, do not expressly allow for the attorney's fees, and the general rule is that, absent express statutory authority or an enforceable contract provision, attorney's fees are not recoverable. *Cement Asbestos Prods. Co. v. Hartford Accident & Indem. Co.*, 592 F.2d 1144 (10th Cir. 1979).

**Trustees and union negotiating trust have standing.** Trustees of a fringe benefit trust and a union which negotiated a collective bargaining agreement which included a fringe benefit trust

on behalf of its members both have standing to bring actions to recover payments due the respective trust funds. Trustees of Colo. Carpenters & Millwrights Health Benefit Trust Fund v. Pinkard Constr. Co., 604 P.2d 683 (Colo. 1979).

**Section does not apply to equipment.** Neither this section nor § 38-26-106 covers equipment, whether rented or purchased. CPS Distrib., Inc. v. Federal Ins. Co., 685 P.2d 783 (Colo. App. 1984).

**Subsection (1) does not apply to breach of contract damages.** As a general rule, such damages, including lost profits, are not recoverable under public works bond statutes. Lenon v. St. Paul Mercury Ins. Co., 136 F.3d 1365 (10th Cir. 1998).

**A subdivision agreement calling for the construction of certain public improvements prior to the annexation of a subdivision or the issuance of certificates of occupancy for structures built in the subdivision does not constitute a contract for the construction of public improvements pursuant to this section.** Brannan Sand & Gravel v. F.D.I.C., 928 P.2d 1337 (Colo. App. 1996), rev'd on other grounds, 940 P.2d 393 (Colo. 1997).

**Applied in** Newt Olson Lumber Co. v. Sch. Dist. No. 8, 83 Colo. 272, 263 P. 723 (1928); Sch. Dist. No. 28 v. Denver Pressed Brick Co., 91 Colo. 288, 144 P.2d 487 (1932); Cont'l Cas. Co. v. Rio Grande Fuel Co., 108 Colo. 472, 119 P.2d 618 (1941); Lovell Clay Prods. Co. v. Statewide Supply Co., 41 Colo. App. 166, 580 P.2d 1278 (1978).

## II. SIX-MONTH LIMITATION FOR COMMENCEMENT OF SUIT.

**Legislative intent.** The legislative intent is to provide for prompt and speedy settlement of disputes involving laborers and materialmen on public buildings. Gen. Elec. Co. v. Webco Constr. Co., 164 Colo. 232, 433 P.2d 760 (1967).

**"Completion" construed.** "Completion", as used in subsection (1), means substantial completion. Hensel Phelps Constr. Co. v. Gen. Signal Corp., 460 F.2d 109 (10th Cir. 1972).

**What constitutes substantial completion** must, of course, ultimately rest on the facts of each case, but as a general proposition, work which is an integral part of a continuing effort to finish a project in conformance with contract

specifications, especially when performed reasonably soon after actual construction ceases, is not insubstantial. Hensel Phelps Constr. Co. v. Gen. Signal Corp., 460 F.2d 109 (10th Cir. 1972).

**Applicability of six-month limitation.** The six-month limitation for commencement of suit contained in subsection (1) is applicable to actions against surety bonds posted by public works contractors under the provisions of § 38-26-106; and the limitation is not restricted to the types of public bodies specifically mentioned in this section but includes hospital districts. United States Fid. & Guar. Co. v. Empire Clay Prods., Inc., 28 Colo. App. 26, 470 P.2d 878 (1970); Hensel Phelps Constr. Co. v. Gen. Signal Corp., 460 F.2d 109 (10th Cir. 1972).

**Limitation period does not begin at time of abandonment.** Under this section the six-month period, within which an action may be brought by a subcontractor for a balance due, begins at the time of the completion of the work, and not at the time of the abandonment of work by the principal contractor. Allen v. Well, 75 Colo. 608, 227 P. 833 (1924).

**Failure to meet statutory requirements does not deprive subcontractor of common-law claims.** Failure of a subcontractor or materialman to meet the statutory requirements of this section and §§ 38-26-106 and 38-26-107, e.g., time limitations within which a claim must be filed, does not deprive it of its common-law claims against the principal contractor and the principal contractor's surety. Montezuma Plumbing & Heating, Inc. v. Hous. Auth., 651 P.2d 426 (Colo. App. 1982).

**The specific statute of limitations provision in this section controls over the general civil action provision in § 13-80-101.** The provisions in this section specifically apply to the construction project that is the subject of the plaintiff's action while the provision in § 13-80-101 is a general and broad provision that encompasses all common law actions. Pat's Constr. Serv., Inc. v. Ins. Co. of the W., 141 P.3d 885 (Colo. App. 2005).

**Longer period of limitation permitted.** Although this section prescribes a six-month limitation on actions on a labor and material bond, neither this section nor § 38-26-106 prohibit the parties from establishing a longer period of limitation in the bond. Montezuma Plumbing & Heating, Inc. v. Hous. Auth., 651 P.2d 426 (Colo. App. 1982).

**38-26-106. Contractor executes bond.** (1) A contractor who is awarded a contract for more than fifty thousand dollars for the construction, erection, repair, maintenance, or improvement of any building, road, bridge, viaduct, tunnel, excavation, or other public works for any county, city and county, municipality, school district, or other political subdivision of the state, and a contractor who is awarded a contract for more than one hundred thousand dollars for the construction, erection, repair, maintenance, or improvement of any building, road, bridge, viaduct, tunnel, excavation, or other public works for this state, before entering upon the performance of any such work included in the contract,



shall duly execute, deliver to, and file with the board, officer, body, or person by whom the contract was awarded a good and sufficient bond or other acceptable surety approved by the contracting board, officer, body, or person, in a penal sum not less than one-half of the total amount payable under the terms of the contract; except that, for a public works contract having a total value of five hundred million dollars or more, a bond or other acceptable surety, including but not limited to a letter of credit, may be issued in a penal sum not less than one-half of the maximum amount payable under the terms of the contract in any calendar year in which the contract is performed. The contracting board, office, body, or person shall ensure that the contract requires that a bond or other acceptable surety, including but not limited to a letter of credit, be filed and current for the duration of the contract.

(2) A bond or other acceptable surety shall be duly executed by a qualified corporate surety or other qualified financial institution, conditioned upon the faithful performance of the contract, and, in addition, shall provide that, if the contractor or his or her subcontractor fails to duly pay for any labor, materials, team hire, sustenance, provisions, provender, or other supplies used or consumed by such contractor or his or her subcontractor in performance of the work contracted to be done or fails to pay any person who supplies laborers, rental machinery, tools, or equipment, all amounts due as the result of the use of such laborers, machinery, tools, or equipment, in the prosecution of the work, the surety or other qualified financial institution will pay the same in an amount not exceeding the sum specified in the bond or other acceptable surety together with interest at the rate of eight percent per annum. Unless a bond or other acceptable surety is executed, delivered, and filed, no claim in favor of the contractor arising under the contract shall be audited, allowed, or paid. A certified or cashier's check or a bank money order made payable to the treasurer of the state of Colorado or to the treasurer or other officer designated by the governing body of the contracting local government may be accepted in lieu of a bond or other acceptable surety.

**Source:** L. 23: p. 480, § 2. CSA: C. 39, § 6. CRS 53: § 86-7-6. C.R.S. 1963: § 86-7-6. L. 75: (1) amended, p. 1427, § 1, effective June 13. L. 77: Entire section amended, p. 1712, § 1, effective June 3. L. 81: (1) amended, p. 1825, § 2, effective May 28. L. 85: (2) amended, p. 1202, § 2, effective May 10. L. 2000: (2) amended, p. 213, § 18, effective August 2. L. 2004: (1) amended p. 228, § 4, effective August 4. L. 2009: Entire section amended, (SB 09-248), ch. 270, p. 1225, § 1, effective August 5.

#### ANNOTATION

**Law reviews.** For article, "Labor and Material Claims on State Public Works Projects", see 24 Colo. Law. 2165 (1995).

**Section is to be liberally construed.** CPS Distrib., Inc. v. Federal Ins. Co., 685 P.2d 783 (Colo. App. 1984).

**Indifference in ascertaining existence of bond equivalent to negligence.** Under this section the bond required of contractors on public works is in the interest of those furnishing material and labor therefor, and where a materialman, furnishing material for a public school building, fails to ascertain that no contractor's bond has been given, his indifference is equivalent to negligence, and precludes a recovery from the school district. Sch. Dist. No. 28 v. Denver Pressed Brick Co., 91 Colo. 288, 14 P.2d 487 (1932).

**Advancement or loan connected with work not payment.** An advancement or loan by a principal contractor to a subcontractor, which is used in connection with the work, is not a

payment which will affect the liability of, or relieve the surety on the subcontractor's bond, and this is equally true if sums advanced are payments rather than advancements or loans. Federal Sur. Co. v. White, 88 Colo. 238, 295 P. 281 (1930).

**Where a subcontractor "steps into the shoes" of a principal contractor,** so far as the work to be performed under the original contract is concerned, the surety on the subcontractor's bond is bound by the terms and conditions of the original contract where he is fully apprised thereof and of the relations and obligations of the parties thereunder. Federal Sur. Co. v. White, 88 Colo. 238, 295 P. 281 (1930).

**Judgment against surety may include interest.** Judgment against the surety on a contractor's bond may include interest from the time of default, even though this may make the judgment exceed the penalty named in the bond. Federal Sur. Co. v. White, 88 Colo. 238, 295 P. 281 (1930).

**To release compensated surety from liability,** by an alteration or departure from the contract, it must have been prejudiced thereby. *Empire State Sur. Co. v. Lindenmeier*, 54 Colo. 497, 131 P. 437(1913); *Nat'l Sur. Co. v. Queen City Land Mtg. Co.*, 63 Colo. 105, 164 P. 722 (1917); *Federal Sur. Co. v. White*, 88 Colo. 238, 295 P. 281 (1930).

**Surety company not required party.** The surety company which wrote the bond to the contracting agency was not required to be made a party since it had no contingent liability on the materialman's withholding claim because the contracting body had enough withheld funds to pay the claim sued upon. *South-Way Constr. Co. v. Adams City Serv.*, 169 Colo. 513, 458 P.2d 250 (1969).

**Six-month statute of limitation applicable.** Although this section does not contain a statute of limitations, the six-month statute of limitations contained in § 38-26-105 is applicable to actions on a bond posted pursuant to this section. *Hensel Phelps Constr. Co. v. Gen. Signal Corp.*, 460 F. 2d 109 (10th Cir. 1972); *Fountain Sand & Gravel Co. v. Chilton Constr. Co.*, 40 Colo. App. 363, 578 P.2d 664 (1978).

**Action filed pursuant to § 38-26-107.** Section 38-26-107 (3) permits qualified claimants, within 90 days of the date for final settlement of claims, regardless of the date of completion, to file actions against sureties who have posted performance bonds pursuant to this section. *Rocky Mt. Ass'n of Credit Mgt. v. Marshall*, 44 Colo. App. 467, 615 P.2d 68 (1980).

While the six-month limitations provision of § 38-26-105 is applicable to actions on a performance bond, § 38-26-107 (3) contains no bonding provisions and establishes a new remedy for suppliers. *Rocky Mt. Ass'n of Credit Mgt. v. Marshall*, 44 Colo. App. 467, 615 P.2d 68 (1980).

**Longer period of limitation permitted for actions on bond.** Although § 38-26-105 prescribes a six-month limitation on actions on a labor and material bond, neither § 38-26-105 nor this section prohibit the parties from establishing a longer period of limitation in the bond. *Montezuma Plumbing & Heating, Inc. v. Hous. Auth.*, 651 P.2d 426 (Colo. App. 1982).

**Failure to meet statutory requirements does not deprive subcontractor of common-law claims.** Failure of a subcontractor or materialman to meet the statutory requirements of this section and §§ 38-26-105 and 38-26-107, e.g., time limitations within which a claim must be filed, does not deprive it of its common-law claims against the principal contractor and the principal contractor's surety. *Montezuma Plumbing & Heating, Inc. v. Hous. Auth.*, 651 P.2d 426 (Colo. App. 1982).

**Attorney's fees not recoverable.** Section 38-26-105 and this section, which require execution of a payment and performance bond, do not

expressly allow for the attorney's fees, and the general rule is that, absent express statutory authority or an enforceable contract provision, attorney's fees are not recoverable. *Cement Asbestos Prods. Co. v. Hartford Accident & Indem. Co.*, 592 F.2d 1144 (10th Cir. 1979).

**Prior to amendment in 1985,** the costs of rental equipment were not covered by a payment and performance bond issued on a public works contract and even though the bonding statute has been amended to allow claims for the use of rented equipment, the extent of a surety's obligation on a public works bond is determined according to the terms of the statutes in effect at the time the bond was written. *Colo. Crane & Hauling v. McKee, Inc.*, 761 P. 2d 792 (Colo. App. 1988) (decided under law in effect prior to 1985 amendment).

**Interest award under this section was not error** since although subcontractor requested contract rate of interest in its complaint, its memorandum brief in support of a motion for summary judgment did request the interest rate under this section and presentation of the issue in this manner, in effect, constituted an amendment to the complaint. *SaBell's, Inc. v. City of Golden*, 832 P.2d 974 (Colo. App. 1991), cert. denied, 846 P.2d 189 (Colo. 1993).

**Right to the interest rate set forth in the statute is not waived if the contract rate is requested in the complaint,** when the statutory interest rate is requested in the memorandum brief in support of a motion for summary judgment, constituting an amendment to the complaint. *SaBell's, Inc. v. City of Golden*, 832 P.2d 974 (Colo. App. 1991), cert. denied, 846 P.2d 189 (Colo. 1993).

**Where city's retainage was sufficient to pay all claims, the surety for a public project is not even a necessary party to litigation over a subcontractor's claim.** Instead, the city serves as a stakeholder and pays out the funds in conformity with the court's order, and it necessarily follows that the surety is not liable for interest on the retainage. *SaBell's, Inc. v. City of Golden*, 832 P.2d 974 (Colo. App. 1991), cert. denied, 846 P.2d 189 (Colo. 1993).

**Surety not liable for interest on retainage** when the municipality has not withheld sufficient funds to pay all claims. *SaBell's, Inc. v. City of Golden*, 832 P.2d 974 (Colo. App. 1991), cert. denied, 846 P.2d 189 (Colo. 1993).

**A subdivision agreement calling for the construction of certain public improvements prior to the annexation of a subdivision or the issuance of certificates of occupancy for structures built in the subdivision does not constitute a contract for the construction of public improvements pursuant to this section.** *Brannan Sand & Gravel v. F.D.I.C.*, 928 P.2d 1337 (Colo. App. 1996), rev'd on other grounds, 940 P.2d 393 (Colo. 1997).



**Surety's obligation to pay interest to subcontractor was governed by this section and not the contract rate between surety and contractor** where subcontractor was not party to that contract. *SaBell's, Inc. v. City of Golden*, 832 P.2d 974 (Colo. App. 1991), cert. denied, 846 P.2d 189 (Colo. 1993).

**Applied** in *General Elec. Co. v. Webco Constr. Co.*, 164 Colo. 232, 433 P.2d 760 (1967); *Fulton v. Coppco, Inc.*, 407 F.2d 611 (10th Cir. 1969); *Trustees of Colo. Carpenters & Millwrights Health Benefit Trust Fund v. Pinkard Constr. Co.*, 39 Colo. App. 564, 574 P.2d 506 (1977).

**38-26-107. Supplier may file statement - notice - withholding funds.** (1) Any person, as defined in section 2-4-401 (8), C.R.S., that has furnished labor, materials, sustenance, or other supplies used or consumed by a contractor or his or her subcontractor in or about the performance of the work contracted to be done or that supplies laborers, rental machinery, tools, or equipment to the extent used in the prosecution of the work whose claim therefor has not been paid by the contractor or the subcontractor may, at any time up to and including the time of final settlement for the work contracted to be done, file with the board, officer, person, or other contracting body by whom the contract was awarded a verified statement of the amount due and unpaid on account of the claim. If the amount of the contract awarded to the contractor exceeds fifty thousand dollars, the board, officer, person, or other contracting body by whom the contract was awarded shall, no later than ten days before the final settlement is made, publish a notice of the final settlement at least twice in a newspaper of general circulation in any county where the work was contracted for or performed or in an electronic medium approved by the executive director of the department of personnel. It is unlawful for any person to divide a public works contract into two or more separate contracts for the sole purpose of evading or attempting to evade the requirements of this subsection (1).

(2) Upon the filing of any such claim, such board, officer, person, or other body awarding the contract shall withhold from all payments to said contractor sufficient funds to insure the payment of said claims until the same have been paid or such claims as filed have been withdrawn, such payment or withdrawal to be evidenced by filing with the person or contracting body by whom the contract was awarded a receipt in full or an order for withdrawal in writing and signed by the person filing such claim or his duly authorized agents or assigns. Such funds shall not be withheld longer than ninety days following the date fixed for final settlement as published unless an action is commenced within that time to enforce such unpaid claim and a notice of *lis pendens* is filed with the person or contracting body by whom the contract was awarded.

(3) At the expiration of the ninety-day period, the person or other body awarding the contract shall pay to the contractor such moneys and funds as are not the subject of suit and *lis pendens* notices and shall retain thereafter, subject to the final outcome thereof, only sufficient funds to insure the payment of judgments that may result from the suit. Failure on the part of a claimant to comply with the provisions of sections 38-26-101, 38-26-106, and this section shall relieve the board, officer, body, or person by whom such contract was awarded from any liability for making payment to the contractor. At any time within ninety days following the date fixed for final settlement as published, any person, copartnership, association of persons, company, or corporation, or its assigns, whose claims have not been paid by any such contractor or subcontractor may commence an action to recover the same, individually or collectively, against the surety or other qualified financial institution on the bond or other acceptable surety specified and required in section 38-26-106.

**Source:** L. 23: p. 481, § 3. L. 29: p. 525, § 1. CSA: C. 39, § 7. CRS 53: § 86-7-7. C.R.S. 1963: § 86-7-7. L. 85: (1) amended, p. 1202, § 3, effective May 10. L. 2000: (1) amended, p. 213, § 19, effective August 2. L. 2003: (1) amended, p. 1690, § 1, effective September 1. L. 2007: (1) amended, p. 420, § 1, effective August 3. L. 2009: (1) amended, (SB 09-290), ch. 374, p. 2042, § 8, effective August 5; (3) amended, (SB 09-248), ch. 270, p. 1226, § 2, effective August 5.

## ANNOTATION

**Law reviews.** For article, "Contractual Rights of Persons Not Parties to the Contract in Colorado", see 3 Rocky Mt. L. Rev. 175 (1931). For article, "Labor and Material Claims on State Public Works Projects", see 24 Colo. Law. 2165 (1995).

**Constitutional.** Limiting the lien rights created by this section to one in privity of contract with the owner or general contractor acting on behalf of the owner does not violate the equal protection clause of the Colorado Constitution. Such a limitation protects the public entity, its contractor, and the surety on the public works project from unforeseeable claims. *Western Metal v. Acoustical and Const.*, 851 P.2d 875 (Colo. 1993).

**Policy.** The clear policy underlying Colorado law is that laborers and suppliers of materials in construction projects are to be paid. *First Com. Corp. v. First Nat'l Bancorporation, Inc.*, 572 F. Supp. 1430 (D. Colo. 1983).

This article is designed to protect all persons who supply labor or material for public works projects and is the public works counterpart of the mechanic's lien statute. *Heinrichsdorff v. Raat*, 655 P.2d 860 (Colo. App. 1982).

**Section stands in lieu of the mechanic's lien statute**, and is designed to protect those who supply labor and materials for public works. *South-Way Constr. Co. v. Adams City Serv.*, 169 Colo. 513, 458 P.2d 250 (1969); *Weld Colo. Bank v. E & E Constr., Inc.*, 653 P.2d 758 (Colo. App. 1982). See also *Flaugh v. Empire Clay Prods., Inc.*, 157 Colo. 409, 402 P.2d 932 (1965).

**Section applies only to what the public entity must do** and to its liability if it fails to comply; it does not provide defense to contractor who is otherwise liable. *White Const. Co., Inc. v. Sauter Const. Co.*, 731 P.2d 784 (Colo. App. 1986).

**Effect of section.** For purposes of giving effect to this section, the actions of the subcontractors in purchasing materials and labor are imputed to the principal contractor; however, no such relationship can be extended beyond the statutory remedy. *Flaugh v. Empire Clay Prods., Inc.*, 157 Colo. 409, 402 P.2d 932 (1965).

**This section provides suppliers to public works projects with a remedy** independent of the remedies afforded under §§ 38-26-105 and 38-26-106. *Crane & Hauling v. McKee, Inc.*, 761 P.2d 792 (Colo. App. 1988).

**Section provides alternate methods of relief**, and specifically requires the governmental agency to withhold funds to insure payment of claims by materialmen provided proper and timely notice is given. *South-Way Constr. Co. v. Adams City Serv.*, 169 Colo. 513, 458 P.2d 250 (1969).

**Section permits actions against § 38-26-106 sureties.** Subsection (3) permits qualified claimants, within 90 days of the date for final settlement of claims, regardless of the date of completion, to file actions against sureties who have posted performance bonds pursuant to section 38-26-106. *Rocky Mt. Ass'n of Credit Mgt. v. Marshall*, 44 Colo. App. 467, 615 P.2d 68 (1980).

**Without regard to six-month limitation.** This section contains no requirement that the date for final settlement must be within a six-month period subsequent to the completion of the work as is the case under § 38-26-105. The final settlement date, whenever it might occur, is the critical date for purposes of subsection (3). *Rocky Mt. Ass'n of Credit Mgt. v. Marshall*, 44 Colo. App. 467, 615 P.2d 68 (1980).

To the extent that §§ 38-26-105 and 38-26-107 (3) are irreconcilable, § 38-26-107 (3), adopted subsequent to § 38-26-105 and containing specific time requirements, must control. *Rocky Mt. Ass'n of Credit Mgt. v. Marshall*, 44 Colo. App. 467, 615 P.2d 68 (1980).

**Section provides additional remedy.** While the six-month limitations provision of § 38-26-105 is applicable to actions on a performance bond, subsection (3) of this section contains no bonding provisions and establishes a new remedy for suppliers. *Rocky Mt. Ass'n of Credit Mgt. v. Marshall*, 44 Colo. App. 467, 615 P.2d 68 (1980).

**Surety company not required party.** The surety company which wrote the bond to the contracting agency was not required to be made a party since it had no contingent liability on the materialman's withholding claim because the contracting body had enough withheld funds to pay the claim sued upon. *South-Way Constr. Co. v. Adams City Serv.*, 169 Colo. 513, 458 P.2d 250 (1969).

**Claimant may recover only for such work and materials as were specifically necessary** for the doing of what the contractor had to do in the construction of the public work. *South-Way Constr. Co. v. Adams City Serv.*, 169 Colo. 513, 458 P.2d 250 (1969).

**Provision is permissive.** The provision of subsection (3) that persons having claims against contractors may commence an action to recover the same against the surety on the contractor's bond within the specified time is, in this respect, permissive, and not mandatory. *Continental Cas. Co. v. Rio Grande Fuel Co.*, 108 Colo. 472, 119 P.2d 618 (1941).

**Filing of claims by laborers and materialmen not mandatory.** The filing of claims by laborers and materialmen for services and material furnished is not mandatory, the only penalty for failure to file such claims being to release the body awarding the contract from all



liability; also, such failure does not operate to discharge the surety on the bond of the contractor, given to secure performance of the contract, from liability thereunder. *Continental Cas. Co. v. Rio Grande Fuel Co.*, 108 Colo. 472, 119 P.2d 618 (1941).

**Failure to meet statutory requirements does not deprive contractor of common-law claims.** Failure of a subcontractor or materialman to meet the statutory requirements of this section and §§ 38-26-105 and 38-26-106, e.g., time limitations within which a claim must be filed, does not deprive it of its common-law claims against the principal contractor and the principal contractor's surety. *Montezuma Plumbing & Heating, Inc. v. Hous. Auth.*, 651 P.2d 426 (Colo. App. 1982).

**Protected claimants are those who have a direct relationship with the contractor** or one whose acts in purchasing labor and materials are imputed to him. Although subcontractors are not in privity of contract with the owner of the property they are in privity with the general contractor. *Western Metal v. Acoustical and Const.*, 851 P.2d 875 (Colo. 1993).

**Applied** in *Kaiser Steel Corp. v. Fulton*, 261 F. Supp. 997 (D. Colo. 1966); *General Elec. Co. v. Webco Constr. Co.*, 164 Colo. 232, 433 P.2d 760 (1967); *Lovell Clay Prods. Co. v. Statewide Supply Co.*, 41 Colo. App. 166, 580 P.2d 1278 (1978); *Columbine Valley Constr. Co. v. Bd. of Dirs.*, 626 P.2d 686 (Colo. 1981).

**38-26-108. Substitution of bond allowed.** (1) Whenever a verified statement of a claim has been filed in accordance with section 38-26-107, the contractor holding the contract against which such statement has been filed, or other person who has an interest in the payments being withheld, by the contracting body that awarded the contract may, at any time, file with the clerk of the district court of the county where the contract is being performed or of the county where the office in which the verified statement of claim is located an ex parte motion for approval of a substitute corporate surety bond or any other undertaking that may be acceptable to a judge of such district court.

(2) A corporate surety bond or undertaking filed pursuant to subsection (1) of this section shall be in an amount equal to one and one-half times the amount of the claim plus costs allowed by the court up to the date of such filing and shall have been approved by an order of a judge of the district court in which such bond or undertaking is filed. The order shall state that:

- (a) The corporate surety bond or undertaking is approved;
- (b) The verified statement of claim is discharged;
- (c) The corporate surety bond or undertaking shall be substituted for the moneys withheld pursuant to the verified statement of claim; and
- (d) The contracting body that awarded the contract shall release the moneys being withheld pursuant to the verified statement of claim on the same terms and conditions as if the verified statement of claim had been released by the claimant.

(3) A corporate surety bond or undertaking filed pursuant to subsection (1) of this section shall be conditioned that, if the claimant is finally adjudged to be entitled to recover upon the claim upon which the claimant's verified statement of a claim is based, the surety issuing the bond or undertaking or the principal thereunder, shall pay to such claimant the amount of the judgment issued upon such claim, together with any interest, costs, and other amounts awarded by the judgment.

(4) Notwithstanding the provisions of section 38-26-107, upon the issuance of an order from a judge of the district court approving a bond or undertaking filed pursuant to subsection (1) of this section, the clerk of such district court shall issue a certificate of release, which shall be served on the board, officer, person, or other contracting body by whom the contract was awarded by certified mail, return receipt requested, or by personal delivery. The certificate of release shall show that such claim against the contract has been discharged and released in full and the corporate surety bond or undertaking has been substituted. After the certificate of release is filed, payments to the contractor by the contracting body by whom the contract was awarded shall resume in accordance with the terms of the contract, and any funds previously withheld as a result of the filing of the verified statement shall be released to the contractor pursuant to the terms of the contract or, if not specified in the contract, within thirty days after the receipt of the certificate of release by the board, officer, person, or other contracting body by whom the contract was awarded.

(5) When a corporate surety bond or undertaking is substituted for a claim as provided in this section, the claimant who filed the verified statement of a claim pursuant to section 38-26-107 (1) may bring an action against such bond or undertaking. Such action shall be commenced within the time allowed for the commencement of an action set forth in section 38-26-107 (3).

(6) In the event that no action is commenced upon the corporate surety bond or undertaking within the time period called for by section 38-26-107, the corporate surety bond or undertaking shall be discharged and shall be returned to the contractor.

**Source: L. 2000:** Entire section added, p. 68, § 1, effective March 10.

**38-26-109. Moneys for verified claims made - trust funds - disbursements - penalty.** (1) All funds disbursed to any contractor or subcontractor under any contract or project subject to the provisions of this article shall be held in trust for the payment of any person that has furnished labor, materials, sustenance, or other supplies used or consumed by the contractor in or about the performance of the work contracted to be done or that supplies laborers, rental machinery, tools, or equipment to the extent used in the prosecution of the work where the person has:

- (a) Filed or may file a verified statement of a claim arising from the project; or
- (b) Asserted or may assert a claim against a principal or surety under the provisions of this article and for whom or which such disbursement was made.

(2) The requirements of this section shall not be construed so as to require a contractor or subcontractor to hold in trust any funds that have been disbursed to him or her for any person that has furnished labor, materials, sustenance, or other supplies used or consumed by the contractor or his or her subcontractor in the performance of the work contracted to be done; supplied laborers, rental machinery, tools, or equipment to the extent used in the prosecution of the work; filed or may file a verified statement of a claim arising from the project; or asserted or may assert a claim against a principal or surety that has furnished a bond under the provisions of this article if:

(a) The contractor or subcontractor has a good faith belief that the verified statement of a claim or bond claim is not valid; or

(b) The contractor or subcontractor, in good faith, claims a setoff, to the extent of such setoff.

(3) Each contractor or subcontractor shall maintain separate records of account of each project or account; except that nothing in this section shall be construed to require a contractor or subcontractor to deposit trust funds from a single project in a separate bank account solely for that project as long as the trust funds are not disbursed in a manner that conflicts with the requirements of this section.

(4) Any person who violates the provisions of subsections (1) and (2) of this section commits theft within the meaning of section 18-4-401, C.R.S.

**Source: L. 2003:** Entire section added, p. 1690, § 2, effective September 1.

#### ANNOTATION

**Person who controlled the financial decisions of subcontractor is personally liable for violation of the statute.** In re Dorland, 374 B.R. 765 (Bankr. D. Colo. 2007).

**When a matter is pursued as a civil matter, the requisite burden of proof under this statute is the preponderance of the evidence standard, rather than the higher criminal burden of proof.** In re Dorland, 374 B.R. 765 (Bankr. D. Colo. 2007).

**Plaintiff met its burden of proof demonstrating that defendant failed to pay three of the material and equipment suppliers in a**

**sum certain.** Thus, defendant failed to (1) account for the trust funds and (2) demonstrate that the funds were properly applied on the project. In re Dorland, 374 B.R. 765 (Bankr. D. Colo. 2007).

**Defendant violated this statute,** a technical trust imposed under the law. Consequently, a fiduciary relationship was demonstrated for purposes of 11 U.S.C. § 523(a)(4). Moreover, the testimony and evidence at trial demonstrated that a defalcation was committed by defendant in the course of the fiduciary relationship. In re Dorland, 374 B.R. 765 (Bankr. D. Colo. 2007).



**Plaintiff did not prove all the components of “theft” by a preponderance of the evidence.** Although there was a violation of this statute resulting in an award of actual damages, there was no proof, evidence, or finding of conduct necessary to show criminal conduct or criminal liability under applicable Colorado case law. Thus, there was no justification for

assessing the criminal penalty of treble damages, attorney fees, and costs. In re Dorland, 374 B.R. 765 (Bankr. D. Colo. 2007).

**The judgment owed by defendant is non-dischargeable** under 11 U.S.C. § 523(a)(4). In re Dorland, 374 B.R. 765 (Bankr. D. Colo. 2007).

**38-26-110. Excessive amounts claimed.** (1) Any person who files a verified statement of a claim or asserts a claim against a principal or surety that has furnished a bond under this article for an amount greater than the amount due without a reasonable possibility that the amount claimed is due and with the knowledge that the amount claimed is greater than the amount due, and that fact is demonstrated in any proceedings under this article, shall forfeit all rights to the amount claimed and shall be liable to the following in an amount equal to all costs and all attorney fees reasonably incurred in bonding over, contesting, or otherwise responding in any way to the excessive verified statement of claim or excessive bond claim:

- (a) The person to whom or which a disbursement would be made but for the verified statement of a claim or bond claim; or
- (b) The principal and surety on the bond.

**Source: L. 2003:** Entire section added, p. 1690, § 2, effective September 1.

ARTICLE 27

Hospital Liens

38-27-101.	Lien for hospital care.	38-27-104.	Hospital to furnish itemized statement.
38-27-102.	Notice of lien.	38-27-105.	Assignment of lien.
38-27-103.	Enforcement of lien and limitation of action.	38-27-106.	Applicability.

**38-27-101. Lien for hospital care.** Every hospital duly licensed by the department of public health and environment, pursuant to part 1 of article 3 of title 25, C.R.S., which furnishes services to any person injured as the result of the negligence or other wrongful acts of another person and not covered by the provisions of the “Workers’ Compensation Act of Colorado” shall, subject to the provisions of this article, have a lien for all reasonable and necessary charges for hospital care upon the net amount payable to such injured person, his heirs, assigns, or legal representatives out of the total amount of any recovery or sum had or collected, or to be collected, whether by judgment, settlement, or compromise, by such person, his heirs, or legal representatives as damages on account of such injuries. The lien of attorneys and counselors at law created by section 12-5-119, C.R.S., shall have precedence over and be senior to the lien created under this section. The provisions of this article shall not apply to any hospital charges incurred subsequent to any such judgment, settlement, or compromise.

**Source: L. 67:** p. 880, § 1. **C.R.S. 1963:** § 86-8-1. **L. 90:** Entire section amended, p. 574, § 72, effective July 1. **L. 94:** Entire section amended, p. 2805, § 577, effective July 1.

ANNOTATION

**Law reviews.** For article, “The Emerging Law of the Statutory Hospital Lien in Colorado,” see 25 Colo. Law. 61 (July 1996).  
**Statute does not prohibit an assignment of a hospital’s right to file a lien** nor does it state

that only a duly licensed hospital may create the lien. Trevino v. HHL Fin. Servs., Inc., 928 P.2d 766 (Colo. App. 1996), aff’d on other grounds, 945 P.2d 1345 (Colo. 1997).  
**Valid assignment of hospital’s claim to a**

lien to a collection agency did not render the lien invalid. *Trevino v. HHL Fin. Servs., Inc.*, 928 P.2d 766 (Colo. App. 1996), *aff'd* on other grounds, 945 P.2d 1345 (Colo. 1997).

**This section does not require a hospital enforcing its statutory lien for medical services upon the proceeds of a personal injury**

**settlement to contribute a proportionate share of the attorney fees incurred in obtaining the settlement.** *Trevino v. HHL Fin. Servs., Inc.*, 945 P.2d 1345 (Colo. 1997).

**Applied in** *Fleet Leasing, Inc. v. District Court*, 649 P.2d 1074 (Colo. 1982).

**38-27-102. Notice of lien.** Such lien shall take effect if, prior to any such judgment, settlement, or compromise, a written notice of lien containing the name and address of the injured person, the date of the accident, the name and location of the hospital, and the name of the person alleged to be liable to the injured person for the injuries received is filed by the hospital in the office of the secretary of state. Hospital liens properly recorded with the division of insurance prior to July 1, 1994, shall be valid and enforceable without filing with the office of the secretary of state. Within ten days after such filing, the hospital shall mail by certified mail, return receipt requested, a copy of said notice to such injured person at the last address provided to the hospital by such person, to his or her attorney, if known, to the persons alleged to be liable to such injured person for the injuries sustained, if known, and to the insurance carriers, if known, which have insured such persons alleged to be liable against such liability. If an action for damages on account of such injuries or death is pending, the requirements of notice contained in this section shall be satisfied by the filing of the said notice of lien in the pending action, with copies thereof to the attorneys of record for the parties thereto.

**Source:** L. 67: p. 880, § 1. C.R.S. 1963: § 86-8-2. L. 94: Entire section amended, p. 1555, § 11, effective July 1. L. 99: Entire section amended, p. 754, § 27, effective January 1, 2000. L. 2001: Entire section amended, p. 1433, § 15, effective July 1.

#### ANNOTATION

**Making a hospital lien that was perfected by filing in personal injury litigation applicable to PIP benefits provided by the same carrier is not a denial of due process.** *Rose Medical Center v. State Farm*, 903 P.2d 15 (Colo. App. 1994) (decided under version of statute in effect prior to 1994 amendment).

**This section establishes two separate and distinct but equal methods by which a hospital may perfect a lien against proceeds payable to an injured party.** *Rose Medical Center v. State Farm*, 903 P.2d 15 (Colo. App. 1994) (decided under version of statute in effect prior to 1994 amendment).

**Where liability coverage and PIP coverage is provided by same carrier, presumably under the same policy, notice given in compliance with this section for the liability coverage was also effective for PIP coverage.** When an insurance carrier receives adequate notice of a claim under one policy or coverage, it has notice as to all coverages when the information contained in the notice is sufficient for both. *Rose Medical Center v. State Farm*, 903 P.2d 15 (Colo. App. 1994) (decided under version of statute in effect prior to 1994 amendment).

**38-27-103. Enforcement of lien and limitation of action.** Any person, private or corporate, who pays over any money to any such injured person, his attorney, heirs, assigns, or legal representatives against whom there is a lien as provided in this article of which he has received notice as provided in this article is liable to the hospital having such lien for the amount thereof not exceeding the net amount paid to such injured person, his heirs, assigns, or legal representatives. Any action under this section shall be commenced within one year after the date of such payment, and the court shall allow a reasonable attorney's fee for the collection and enforcement of such lien.

**Source:** L. 67: p. 881, § 1. C.R.S. 1963: § 86-8-3.



ANNOTATION

Where liability coverage and PIP coverage is provided by same carrier, presumably under the same policy, notice given in compliance with § 38-27-102 to perfect lien for the

liability coverage was effective to reach benefits under PIP coverage. *Rose Medical Center v. State Farm*, 903 P.2d 15 (Colo. App. 1994).

**38-27-104. Hospital to furnish itemized statement.** Upon receipt of a written request mailed by certified mail, return receipt requested, from any person notified of such lien in accordance with the provisions of section 38-27-102, such hospital shall, within ten days after receipt of such request, furnish such person with an itemized statement of all charges for which the lien is claimed. If such injured person has not been discharged from said hospital at the time such request is received, then the hospital shall recite that hospitalization or medical treatments are continuing and shall furnish the said itemized statement within ten days after such person has been discharged from said hospital. In addition to being furnished the said itemized statement, the person, private or corporate, against whom the lien is asserted shall also be permitted to examine the financial records of the said hospital in reference to the services furnished for which the hospital is asserting a lien.

Source: L. 67: p. 881, § 1. C.R.S. 1963: § 86-8-4.

**38-27-105. Assignment of lien.** Any party claiming a lien under the provisions of this article may assign, in writing, his claim and lien to any other party, who shall thereafter have all the rights and remedies of the assignor.

Source: L. 67: p. 881, § 1. C.R.S. 1963: § 86-8-5.

**38-27-106. Applicability.** This article shall apply only to liens for hospital services and care rendered on or after June 12, 1967.

Source: L. 67: p. 881, § 2. C.R.S. 1963: § 86-8-6.

PARTITION

ARTICLE 28

Partition

38-28-101.	Action - who may maintain.		land.
38-28-102.	Parties.	38-28-107.	Sale of property - notice.
38-28-103.	Complete adjudication.	38-28-108.	Report - confirmation - distribution.
38-28-104.	Process, practice, procedure.		
38-28-105.	Commissioners - oath - partition - objections.	38-28-109.	Compensation of commissioners - fees and costs.
38-28-106.	Commissioners may divide	38-28-110.	Powers of court.

**38-28-101. Action - who may maintain.** Actions for the division and partition of real or personal property or interest therein may be maintained by any person having an interest in such property.

Source: L. 49: p. 544, § 1. CSA: C. 122, § 24. CRS 53: § 103-1-1. C.R.S. 1963: § 103-1-1.

## ANNOTATION

**Law reviews.** For article, "Joint Tenancy in Colorado", see 26 Dicta 313 (1949).

**There is nothing inalienable about the right of partition;** and a tenant in common may contract it away. *Twin Lakes Reservoir & Canal Co. v. Bond*, 157 Colo. 10, 401 P.2d 586, cert. denied, 382 U.S. 901, 86 S. Ct. 236, 15 L. Ed.2d 155 (1965). See also *McIntire v. Midwest Theatres Co.*, 88 Colo. 559, 298 P. 959 (1931).

**Partition by tenants in common and joint tenants same.** There is no difference in a partition action as to property held by tenants in common and property held by joint tenants. *Merth v. Hobart*, 129 Colo. 546, 272 P.2d 273 (1954).

**Partition not imposable by marriage partner following divorce.** Partition action may not be imposed by one of the marriage partners upon the other following divorce. *Harrod v. Harrod*, 34 Colo. App. 172, 526 P.2d 666 (1974).

**Partition of marital property after the entry of the final dissolution decree is permissible,** but the partition order must not conflict with explicit provisions of the decree. In such cases, the trial court is not required to treat the partition as a disposition of marital property but instead may consider the parties' equitable arguments and enter orders to partition the leaseholds equ-

itably to promote the ends of justice. *Wilson v. Prentiss*, 140 P.3d 288 (Colo. App. 2006).

**The court's function in a partition action** is not to create new interests in property owned by tenants in common, but is merely to sever their unity of possession. *Keith v. El-Kareh*, 729 P.2d 377 (Colo. App. 1986).

**Court cannot issue order directing sale of property** under partition statute on grounds of "waste" or through its equitable powers where the two parties hold separate concurrent estates and have no interest in common. *Federal Deposit Ins. Corp. v. Mars*, 821 P.2d 826 (Colo. App. 1991).

**This section does not abrogate the common law rule** that a life estate interest cannot be partitioned from a successive, non-concurrent remainder interest in the same property. Therefore, as a matter of law, a mother could not partition her life estate in a three-room addition to her daughter's property from the daughter's remainder interest in the addition. *Beach v. Beach*, 74 P.3d 1 (Colo. 2003).

**Applied** in *First Nat'l Bank v. Energy Fuels Corp.*, 200 Colo. 540, 618 P.2d 1115 (1980); *Martinez v. Martinez*, 638 P.2d 834 (Colo. App. 1981); *Fry & Co. v. District Court*, 653 P.2d 1135 (Colo. 1982).

**38-28-102. Parties.** All persons having any interest, direct, beneficial, contingent, or otherwise, in such property shall be made parties.

**Source:** L. 49: p. 544, § 2. CSA: C. 122, § 25. CRS 53: § 103-1-2. C.R.S. 1963: § 103-1-2.

## ANNOTATION

**Law reviews.** For article, "Joint Tenancy in Colorado", see 26 Dicta 313 (1949). For article, "Partition: A Little-Known Remedy", see 17 Colo. Law. 1063.

**Obvious intent of the joinder requirement** in this section is that all persons having interests in the real property be represented in the partition action so that they may protect their interests and be bound by the results. *Fry & Co. v. District Court*, 653 P.2d 1135 (Colo. 1982).

**When estate beneficiaries are not indispensable parties.** Estate beneficiaries are not

indispensable parties to a partition action commenced by the personal representative, where the personal representative is acting on behalf of all the estate beneficiaries to segregate their collective interests in the real property to be partitioned, so that he can perform his statutory duty to settle and distribute the estate expeditiously and efficiently. *Fry & Co. v. District Court*, 653 P.2d 1135 (Colo. 1982).

**Applied** in *Beardshear v. Beardshear*, 143 Colo. 293, 352 P.2d 969 (1960).

**38-28-103. Complete adjudication.** The court shall make a complete adjudication of the rights of all parties to such property.

**Source:** L. 49: p. 544, § 3. CSA: C. 122, § 26. CRS 53: § 103-1-3. C.R.S. 1963: § 103-1-3.



## ANNOTATION

**Agreement not to partition implied.** If it appears the tenants in common of a tract of land have formulated plans and entered into agreements in reference to the management of the common property and the plans and agreements are of such a character that to grant partition would be to destroy the mutual agreement of the parties, then an agreement not to partition will be implied. *Twin Lakes Reservoir & Canal Co. v. Bond*, 157 Colo. 10, 401 P.2d 586, cert. denied, 382 U.S. 901, 86 S. Ct. 236, 15 L. Ed. 2d 155 (1965).

**Court may offset contribution to reach equitable result.** Once the property has been divided, the court may then, to reach an equitable result, compute the contribution of each tenant and offset any amount owing against the one-half share held by each tenant. *Martinez v. Martinez*, 638 P.2d 834 (Colo. App. 1981); *Keith v. El-Kareh*, 729 P.2d 377 (Colo. App. 1986).

**Applied** in *Harrod v. Harrod*, 34 Colo. App. 172, 526 P.2d 666 (1974).

**38-28-104. Process, practice, procedure.** The process, practice, and procedure shall be in compliance with the Colorado rules of civil procedure then in effect.

**Source:** L. 49: p. 544, § 4. CSA: C. 122, § 27. CRS 53: § 103-1-4. C.R.S. 1963: § 103-1-4.

## ANNOTATION

**Law reviews.** For article, "Partition: A Little-Known Remedy", see 17 Colo. Law. 1063 (1988).

**38-28-105. Commissioners - oath - partition - objections.** Upon the entry of any order for partition, the court shall appoint one or more disinterested commissioners who shall take oath to fairly and impartially make partition of the property in accordance with the decree of court. Such commissioners shall view the property and make partition thereof in writing, assigning to each party his share, and shall submit the same to the court for confirmation. Objections may be filed by any party within the time fixed by the court.

**Source:** L. 49: p. 544, § 5. CSA: C. 122, § 28. CRS 53: § 103-1-5. C.R.S. 1963: § 103-1-5.

## ANNOTATION

**Law reviews.** For article, "Partition: A Little-Known Remedy", see 17 Colo. Law. 1063 (1988).

**Substitution of commissioner for refusal to serve.** Where a commissioner appointed by the court under the provisions of this section to make partition declines to serve, the court may substitute another person in his place without giving notice to the parties, and, if the appointee is objectionable by reason of coming within any of the exceptions enumerated in this section, the

objection may be raised after the appointment, or it may be interposed as an objection to the report before its confirmation. *Jordan v. McNulty*, 14 Colo. 280, 23 P. 460 (1890).

**Effect of commissioner's failure to sign report.** A commissioner's neglecting to sign and acknowledge the report does not do away with the presumption that he did meet and act with the other commissioners in making the partition. *Jordan v. McNulty*, 14 Colo. 280, 23 P. 460 (1890).

**38-28-106. Commissioners may divide land.** The commissioners appointed by the court, with the approval of the court, may divide any lands involved in such action into lots or parcels, streets, and alleys and file a map or plat thereof in compliance with law and applicable ordinances.

**Source:** L. 49: p. 544, § 6. CSA: C. 122, § 29. CRS 53: § 103-1-6. C.R.S. 1963: § 103-1-6.

**38-28-107. Sale of property - notice.** If the commissioners report and the court finds that partition of the property cannot be made without manifest prejudice to the rights of any interested party, the court may direct the sale of such property at public sale upon such terms as the court may fix. Notice of such sale shall be given in the same manner as may be required by law for sales of real estate upon execution.

**Source:** L. 49: p. 545, § 7. CSA: C. 122, § 30. CRS 53: § 103-1-7. C.R.S. 1963: § 103-1-7.

**Cross references:** For sale of real estate upon execution, see § 13-56-201.

#### ANNOTATION

**Court cannot issue order directing sale of property** under partition statute on grounds of "waste" or through its equitable powers where the two parties hold separate concurrent estates and have no interest in common. Federal Deposit Ins. Corp. v. Mars, 821 P.2d 826 (Colo. App. 1991).

**Trial court abused its discretion in ordering a sale of the subject property without a finding that partition in kind would result in manifest prejudice.** Trial court did not find that

partition in kind would result in economic prejudice or would be impractical. To the contrary, the trial court ordered an equitable in kind division of the property and specified the extent of necessary easements in the event plaintiffs did not exercise their option to buy defendant's interest. Young Props. v. Wolflick, 87 P.3d 235 (Colo. App. 2003).

**Applied** in First Nat'l Bank v. Energy Fuels Corp., 200 Colo. 540, 618 P.2d 1115 (1980).

**38-28-108. Report - confirmation - distribution.** The person making such sale shall make report thereof to the court for confirmation, and upon confirmation, the court shall direct the execution of a proper instrument of conveyance to the purchaser. The court shall direct the distribution of the net proceeds of such sale and any undistributed income from such property among the persons entitled thereto.

**Source:** L. 49: p. 545, § 8. CSA: C. 122, § 31. CRS 53: § 103-1-8. C.R.S. 1963: § 103-1-8.

**38-28-109. Compensation of commissioners - fees and costs.** The court shall fix the compensation of the commissioners and the person making the sale and may order the payment thereof, with costs, expenses, and attorney's fees, out of the proceeds of such sale or make any other order which it deems best for the payment of such compensation, fees, and costs.

**Source:** L. 49: p. 545, § 9. CSA: C. 122, § 32. CRS 53: § 103-1-9. C.R.S. 1963: § 103-1-9.

**38-28-110. Powers of court.** The court at any time may make such orders as it may deem necessary to promote the ends of justice to completely adjudicate every question and controversy concerning the title, rights, and interest of all persons whether in being or not, known or unknown, and may direct the payment and discharge of liens and have the property sold free from any lien or may apportion any lien among the persons to whom the partition is made.

**Source:** L. 49: p. 545, § 10. CSA: C. 122, § 33. CRS 53: § 103-1-10. C.R.S. 1963: § 103-1-10.



ANNOTATION

**Court's function is to sever unity of possession.** A court's function when deciding a partition action is not to create new interests in property held by tenants in common, but is merely to sever the unity of possession owned by the tenants. *Martinez v. Martinez*, 638 P.2d 834 (Colo. App. 1981); *McNamara v. Mossman*, 230 P.3d 1286 (Colo. App. 2010).

**Court to assign equal shares to cotenants.** In order to allocate to each cotenant his share of the property's enhanced value, the court should begin by assigning each cotenant one-half of the property's stipulated value, and then make adjustments as required by the accounting. *Martinez v. Martinez*, 638 P.2d 834 (Colo. App. 1981).

When partitioning property held by tenants in common, the court should assign one-half of interest in the property to each tenant, and not grant a greater share of the property to either. *Keith v. El-Kareh*, 729 P.2d 377 (Colo. App. 1986).

**Then offset amounts for contribution.** Once the property has been divided, the court may then, to reach an equitable result, compute the contribution of each tenant and offset any amount owing against the one-half share held by each tenant. *Martinez v. Martinez*, 638 P.2d 834

(Colo. App. 1981); *Keith v. El-Kareh*, 729 P.2d 377 (Colo. App. 1986).

Where expenditures have been made by a cotenant improving jointly owned realty, that cotenant will be allowed the amount by which the improvements enhance the value of the property but not the cost thereof or the original amount expended in making the improvement. *Martinez v. Martinez*, 638 P.2d 834 (Colo. App. 1981).

**Trial court abused its discretion in granting plaintiffs an option to purchase defendant's interest in the subject property.** This section does not grant a trial court carte blanche to provide partition remedies, particularly where that remedy would contravene the provisions of § 38-28-107. Here, the court found that the parcel could be divided equitably. Neither party occupied the parcel as a primary residence. Furthermore, the trial court granted the plaintiffs, who originally sought to sell their interest in the parcel, an option to buy defendant's interest, while defendant sought to retain his interest in the property in kind. Thus, the trial court abused its discretion in granting the option to the plaintiffs. *Young Props. v. Wolflick*, 87 P.3d 235 (Colo. App. 2003).

**Applied** in *Harrod v. Harrod*, 34 Colo. App. 172, 526 P.2d 666 (1974).

MANUFACTURED HOMES

ARTICLE 29

Titles to Manufactured Homes

**Editor's note:** The substantive provisions of this article were located in part 1 of article 6 of title 42 prior to 1983.

**Cross references:** For certificates of title to motor vehicles, see the "Certificate of Title Act", part 1 of article 6 of title 42.

PART 1

TITLES TO MANUFACTURED HOMES

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## PART 1

## TITLES TO MANUFACTURED HOMES

**38-29-101. Short title.** This part 1 shall be known and may be cited as the "Titles to Manufactured Homes Act".

**Source: L. 83:** Entire article added, p. 1448, § 1, effective June 15. **L. 2008:** Entire section amended, p. 442, § 1, effective July 1.

**38-29-102. Definitions.** As used in this article, unless the context otherwise requires:

(1) "Authorized agent" means the county clerk and recorder in each of the counties of the state, except in the city and county of Denver, and therein the manager of revenue, or such other official of the city and county of Denver as may be appointed by the mayor to perform functions related to the registration of manufactured homes, is the authorized agent.

(1.5) "Clerk and recorder" means the clerk and recorder of any county or city and county in the state of Colorado.

(2) "Dealer" means any person, firm, partnership, corporation, or association licensed under the laws of this state to engage in the business of buying, selling, exchanging, or otherwise trading in manufactured homes.

(3) "Department" means the department of revenue.

(4) "Director" means the executive director of the department of revenue.

(5) "Home" means any manufactured home as defined in subsection (6) of this section.

(6) "Manufactured home" means a preconstructed building unit or combination of preconstructed building units that is constructed in compliance with the federal manufactured home construction safety standard, as defined in section 24-32-3302 (13), C.R.S.



"Manufactured home" shall also include a mobile home, as defined in section 24-32-3302 (24), C.R.S.

(7) "Manufacturer" means a person, firm, partnership, corporation, or association engaged in the manufacture of new manufactured homes.

(8) Repealed.

(9) "Mortgages" or "mortgage" or "chattel mortgage" means chattel mortgages, conditional sales contracts, or any other like instrument intended to operate as a mortgage or to create a lien on a manufactured home as security for an undertaking of the owner thereof or some other person; except that, as used in part 2 of this article, "mortgage" also includes mortgages, deeds of trust, and other liens on real property.

(10) "Owner" means any person, association of persons, firm, or corporation in whose name the title to a manufactured home is registered.

(11) "Person" means a natural person, association of persons, firm, partnership, or corporation.

(12) "State" includes the territories and the federal districts of the United States.

(13) "Verification of application form" means the form generated by an authorized agent upon receipt of a properly completed application for title submitted in accordance with section 38-29-107.

**Source:** L. 83: Entire article added, p. 1448, § 1, effective June 15. L. 89: (6) amended and (8) repealed, pp. 729, 731, §§ 35, 40, effective July 1. L. 2003: (1) amended, p. 562, § 1, effective July 1. L. 2008: (1.5) and (13) added and (6) and (9) amended, p. 442, § 2, effective July 1.

**38-29-103. Application.** The provisions of this article shall apply to manufactured homes as defined in section 38-29-102 (6).

**Source:** L. 83: Entire article added, p. 1449, § 1, effective June 15.

**38-29-104. Administration.** The director is charged with the duty of administering this part 1. For that purpose he or she is vested with the power to make such reasonable rules, prepare, prescribe, and require the use of such forms, and provide such procedures as may be reasonably necessary or essential to the efficient administration of this part 1.

**Source:** L. 83: Entire article added, p. 1449, § 1, effective June 15. L. 2008: Entire section amended, p. 443, § 3, effective July 1.

**38-29-105. Authorized agents.** The county clerk and recorder in each of the counties of the state, except in the city and county of Denver the manager of revenue or such other official of the city and county of Denver as may be appointed by the mayor to perform functions related to the registration of manufactured homes, is designated to be the authorized agent of the director and, under the direction of the director, is charged with the administration of the terms and provisions of this article and the rules that may from time to time be adopted for the administration thereof in the county in which such authorized agent holds office.

**Source:** L. 83: Entire article added, p. 1449, § 1, effective June 15. L. 2003: Entire section amended, p. 562, § 2, effective July 1.

**38-29-106. Sale or transfer of manufactured home.** Except as provided in section 38-29-114, no person shall sell or otherwise transfer a manufactured home to a purchaser or transferee thereof without delivering to such purchaser or transferee the certificate of title to such home, duly transferred in the manner prescribed in section 38-29-112, and no purchaser or transferee shall acquire any right, title, or interest in and to a manufactured home purchased by him unless and until he obtains from the transferor the certificate of title thereto, duly transferred to him in accordance with the provisions of this article.

**Source:** L. 83: Entire article added, p. 1449, § 1, effective June 15.

**38-29-107. Applications for certificates of title.** (1) In any case under the provisions of this article wherein a person who is entitled to a certificate of title to a manufactured home is required to make formal application to the director therefor, such applicant shall make application upon a form provided by the director in which appears a description of the manufactured home, including the manufacturer and model thereof, the manufacturer's number, the date on which said manufactured home was first sold by the dealer or manufacturer thereof to the initial user thereof, and a description of any other distinguishing mark, number, or symbol placed on said home by the manufacturer thereof for identification purposes, as may by rule be required by the director. Such application shall also show the applicant's source of title and the new or resale price of said manufactured home, whichever is applicable, paid by such applicant and shall include a description of all known mortgages and liens upon said manufactured home, each including the name of the legal holder thereof, the amount originally secured, the amount outstanding on the obligation secured at the time such application is made, the name of the county or city and county and state in which such mortgage or lien instrument is recorded or filed, and proof of the fact that no property taxes for previous years are due on such manufactured home. Such proof shall be a certificate of taxes, or an authentication of paid ad valorem taxes, issued by the county treasurer of the county in which the manufactured home is located. Such application shall be affirmed by a statement signed by the applicant and shall contain or be accompanied by a written declaration that it is made under the penalties of perjury in the second degree, as defined in section 18-8-503, C.R.S.

(2) In any case in which the manufactured home was affixed to the ground prior to July 1, 2008, and a certificate of permanent location was not filed and recorded, a person who is entitled to a certificate of title to a manufactured home shall make formal application to the director upon a form provided by the director. As part of the application, in addition to any information required pursuant to subsection (1) of this section, the applicant shall provide an affidavit of real property, a statement that the identification number has been verified pursuant to section 38-29-122 (3) (a), a certificate of removal, and a copy of all deeds recorded since the home was affixed to the ground. The director shall accept these documents as sufficient evidence of the applicant's proof of ownership of the manufactured home.

(3) (a) In any case in which the manufactured home was affixed to the ground after July 1, 2008, and a certificate of permanent location was filed and recorded, a person who is entitled to a certificate of title to a manufactured home shall make formal application to the director upon a form provided by the director. As part of the application, in addition to any information required pursuant to subsection (1) of this section, the applicant shall provide a copy of the recorded certificate of permanent location, a certificate of removal, a statement that the identification number has been verified pursuant to section 38-29-122 (3) (a), and a copy of all deeds recorded since the home was affixed to the ground. The director shall accept these documents as sufficient evidence of the applicant's proof of ownership of the manufactured home.

(b) In any case in which a manufactured home occupies real property subject to a long-term lease that has an express term of at least ten years, the manufactured home was affixed to the ground after July 1, 2008, and a certificate of permanent location was filed and recorded, a person who is entitled to a certificate of title to a manufactured home shall make formal application to the director upon a form provided by the director. As part of the application, in addition to any information required pursuant to subsection (1) of this section, the applicant shall provide a copy of the recorded certificate of permanent location, a statement that the identification number has been verified pursuant to section 38-29-122 (3) (a), and a copy of the recorded long-term lease. The director shall accept these documents as sufficient evidence of the applicant's proof of ownership of the manufactured home.

**Source:** L. 83: Entire article added, p. 1449, § 1, effective June 15. L. 89: Entire section amended, p. 1570, § 2, effective January 1, 1990. L. 90: Entire section amended, p. 1687, § 1, effective May 31. L. 91: Entire section amended, p. 1696, § 4, effective July 1. L. 2009: Entire section amended, (SB 09-040), ch. 9, p. 63, § 3, effective July 1.



**38-29-108. Where application for certificates of title made - procedure.** (1) An application for a certificate of title upon the sale, transfer, or movement into the state of any manufactured home that does not become real property pursuant to section 38-29-114 (2) or section 38-29-117 (6) shall be directed to the director and filed with the authorized agent of the county or city or city and county in which such manufactured home is to be located. Upon sale or transfer, an application for a certificate of title on a manufactured home shall be made within forty-five days of the receipt of a manufacturer's certificate or statement of origin or its equivalent. The authorized agents shall forward copies of all such applications to the county assessor. Any person, other than an individual selling a manufactured home used as his residence, who receives a commission or other valuable consideration for the transfer or sale of a manufactured home shall fulfill the application and notice requirements of this subsection (1).

(2) Repealed.

**Source:** L. 83: Entire article added, p. 1450, § 1, effective June 15. L. 84: (2) repealed, p. 978, § 1, effective March 29. L. 89: (1) amended, p. 729, § 36, effective July 1.

**38-29-109. Director may refuse certificate, when.** The director shall use reasonable diligence in ascertaining whether the facts stated in any application and facts contained in other documents submitted to him with said application are true and, in appropriate cases, may require the applicant to furnish other and additional information regarding his ownership of the manufactured home and his right to have issued to him a certificate of title therefor. He may refuse to issue a certificate of title to such home if from his investigation he determines that the applicant is not entitled thereto.

**Source:** L. 83: Entire article added, p. 1450, § 1, effective June 15.

**38-29-110. Certificates of title - contents.** (1) All certificates of title to manufactured homes issued under the provisions of this article shall be subscribed by the director, or by some duly authorized officer or employee in the department in the name, place, and stead of the director, to which shall be affixed the seal of the department. Such certificate shall be mailed to the applicant, except as provided in section 38-29-111, and information of the facts therein appearing and concerning the issuance thereof shall be retained by the director and appropriately indexed and filed in his office. The certificate shall be in such form as the director may prescribe and shall contain, in addition to other information which he may by rule from time to time require, the manufacturer and model of the manufactured home for which said certificate is issued, the date on which said home therein described was first sold by the manufacturer or dealer to the initial user thereof, where such information is available, together with the serial number thereof, if any, and a description of such other marks or symbols as may be placed upon the home by the manufacturer thereof for identification purposes.

(2) Beginning January 1, 1983, there shall be issued a distinctive certificate of title identifying the home as a manufactured home. Any person in whose name a certificate of title to a mobile home, as defined in section 38-29-102 (8), was issued prior to January 1, 1983, and which title is free and clear of all encumbrances, may apply to the director or one of his authorized agents for a distinctive manufactured home certificate of title, accompanied by the fee required in section 38-29-138 to be paid for the issuance of a duplicate certificate of title; whereupon, a distinctive certificate of title shall be issued and disposition thereof made as required in this article.

**Source:** L. 83: Entire article added, p. 1450, § 1, effective June 15.

**Editor's note:** Section 38-29-102 (8), which is referenced in subsection (2), was repealed by L. 89, p. 731, § 40, effective July 1, 1989.

**38-29-111. Disposition of certificates of title.** (1) All certificates of title issued by the director shall be disposed of by him in the following manner:

(a) If it appears from the records in the director's office and from an examination of the certificate of title that the manufactured home therein described is not subject to a mortgage filed subsequent to August 1, 1949, or if such home is encumbered by a mortgage filed in any county of a state other than the state of Colorado, the certificate of title shall be delivered to the person who therein appears to be the owner of the home described, or such certificate shall be mailed to the owner thereof at his address as the same may appear in the application, the certificate of title, or other records in the director's office.

(b) If it appears from the records in the office of the director and from the certificate of title that the manufactured home therein described is subject to one or more mortgages filed subsequent to August 1, 1949, the director shall deliver the certificate of title issued by him to the mortgagee named therein or the holder thereof whose mortgage was first filed in the office of an authorized agent or shall mail the same to such mortgagee or holder at his address as the same appears in the certificate of title to said manufactured home.

**Source: L. 83:** Entire article added, p. 1451, § 1, effective June 15.

**38-29-112. Certificate of title - transfer.** (1) Upon the sale or transfer of a manufactured home for which a certificate of title has been issued, the person in whose name said certificate of title is registered, if he is other than a dealer, shall, in his own person or by his duly authorized agent or attorney, execute a formal transfer of the home described in the certificate, which transfer shall be affirmed by a statement signed by the person in whose name said certificate of title is registered or by his duly authorized agent or attorney and shall contain or be accompanied by a written declaration that it is made under the penalties of perjury in the second degree, as defined in section 18-8-503, C.R.S. The purchaser or transferee, within thirty days thereafter, shall present such certificate, duly transferred, together with his application for a new certificate of title to the director or one of his authorized agents, accompanied by the fee required in section 38-29-138 to be paid for the issuance of a new certificate of title; whereupon, a new certificate of title shall be issued and disposition thereof made as required in this article.

(1.3) Prior to the sale or transfer of a manufactured home for which a certificate of title has been issued, a holder of a mortgage that is the legal holder of certificate of title shall provide a copy of the certificate of title to any title insurance agent, title insurance company, or financial institution requesting information related to the payoff of the mortgage within fourteen days of the request.

(1.5) The purchaser or transferee of a manufactured home that becomes permanently affixed at an existing site or is transported to a site and is permanently affixed to the ground so that it is no longer capable of being drawn over the public highways shall present a certificate of transfer as required in subsection (1) of this section, together with his or her application for purging a manufactured home title and a certificate of permanent location, to the authorized agent of the county or city or city and county in which such manufactured home is located. The manufactured home shall become real property upon the filing and recording of the certificate of permanent location in accordance with section 38-29-202. The provisions of articles 30 to 44 of this title and of any other law of this state shall be applicable to manufactured homes that have become real property pursuant to this subsection (1.5) and to instruments creating, disposing of, or otherwise affecting such real property wherever such provisions would be applicable to estates, rights, and interests in land or to instruments creating, disposing of, or otherwise affecting estates, rights, and interest in land. The manufactured home for which a Colorado certificate of title has been issued shall continue to be valued and taxed separately from the land on which it sits until such time that the manufactured home becomes real property pursuant to this subsection (1.5).

(1.7) (a) If the conditions set forth in paragraph (b) of this subsection (1.7) are met, the legal holder of the certificate of title, within forty-five days, shall deliver to the title insurance agent who is the settlement agent related to the sale of the manufactured home the certificate of title or evidence that the holder has lost the certificate of title and requested a duplicate from the department. The holder shall mail or otherwise deliver the duplicate certificate of title to the title insurance agent within five business days of receipt from the department. Upon receipt from the holder, the title insurance agent shall present the



certificate of title to the person in whose name the certificate of title is issued or his or her authorized agent or attorney to allow such person to execute a formal transfer as required by subsection (1) of this section.

(b) The provisions of paragraph (a) of this subsection (1.7) shall apply if:

(I) A title insurance agent acts as a settlement agent related to the sale of a manufactured home;

(II) The manufactured home that is sold is the subject of one or more mortgages that have been filed pursuant to section 38-29-128; and

(III) All holders of a mortgage on the manufactured home that have been filed pursuant to section 38-29-128 have been paid in full from the proceeds of the sale.

(2) Any person who violates any of the provisions of subsection (1) of this section is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than two hundred fifty dollars nor more than one thousand dollars, or by imprisonment in the county jail for not less than ten days nor more than six months, or by both such fine and imprisonment.

(3) Any person who violates the provisions of subsection (1.3) or (1.7) of this section shall be liable to an injured person for any actual economic damages caused by the violation, to be recovered in a civil action in a court of competent jurisdiction.

**Source:** L. 83: Entire article added, p. 1451, § 1, effective June 15. L. 89: (1.5) added, p. 729, § 37, effective July 1; (1) amended, p. 1571, § 3, effective January 1, 1990. L. 91: (2) amended, p. 1696, § 5, effective July 1. L. 2004: (1.3), (1.7), and (3) added and (1.5) amended, p. 866, § 1, effective August 4. L. 2008: (1.5) amended, p. 443, § 4, effective July 1.

#### ANNOTATION

**Subsection (1.5) did not preclude the court from determining in this specific situation that the home was de facto part of the property.** In re Harris, 166 Bankr. 163 (Bankr. D. Colo. 1994), overruled in Leader Fed. Bank for Sav. v. Saunders, 929 P.2d 1343 (Colo. 1997).

**The Titles to Manufactured Homes Act abrogates the common law of fixtures and provides the exclusive means by which a mobile home titled in Colorado can be converted**

**from personal property to real property.** Leader Fed. Bank for Sav. v. Saunders, 929 P.2d 1343 (Colo. 1997), (overruling In re Harris, 166 Bankr. 163 (Bankr. D. Colo. 1994)).

**Transferee of mobile home permanently affixed to real property required to purge title and cannot avoid foreclosure of deed of trust due to transferee's own failure.** Leader Fed. Bank for Sav. v. Saunders, 929 P.2d 1343 (Colo. 1997).

**38-29-113. Lost certificates of title.** (1) Upon the loss in the mails of any certificate of title to a manufactured home and accompanying papers which may be sent by an authorized agent to the director and upon an appropriate application of the owner or other person entitled to such certificate of title directed to the authorized agent therefor, such certificate of title may be reissued bearing such notations respecting existing mortgages on the home therein described as the records of the authorized agent and of the director may indicate are unreleased and constitute an encumbrance upon the home, which certificate of title shall be issued without charge.

(2) If the holder of any certificate of title loses, misplaces, or accidentally destroys any certificate of title to a manufactured home which he holds whether as the holder of a mortgage or as the owner of the home therein described, upon application therefor to the director, the director may issue a duplicate certificate of title as in other cases.

(3) Upon the issuance of any duplicate certificate of title as provided in this section, the director shall note thereon every mortgage shown to be unreleased and the lien of which is in force and effect as may be disclosed by the records in his office and shall dispose of such certificate as in other cases.

**Source:** L. 83: Entire article added, p. 1452, § 1, effective June 15.

**38-29-114. New manufactured homes - bill of sale - certificate of title.** (1) Upon the sale or transfer by a dealer of a new manufactured home, such dealer shall, upon the delivery thereof, make, execute, and deliver to the purchaser or transferee a good and sufficient bill of sale therefor, together with the manufacturer's certificate or statement of origin or the filing of a mortgage by the holder of such mortgage pursuant to section 38-29-128. Said bill of sale shall be affirmed by a statement signed by such dealer and shall contain or be accompanied by a written declaration that it is made under the penalties of perjury in the second degree, as defined in section 18-8-503, C.R.S., and the manufacturer's certificate or statement of origin shall be notarized. Both the bill of sale and the manufacturer's certificate or statement of origin shall be in such form as the director may prescribe, and shall contain, in addition to other information which he may by rule from time to time require, the manufacturer and model of the manufactured home so sold or transferred, the identification number placed upon the home by the manufacturer for identification purposes, the manufacturer's suggested retail price or the retail delivered price, and the date of the sale or transfer thereof, together with a description of any mortgage thereon given to secure the purchase price or any part thereof. Upon presentation of such a bill of sale to the director or one of his authorized agents, a new certificate of title for the home therein described shall be issued and disposition thereof made as in other cases. The transfer of a manufactured home which has been used by a dealer for the purpose of demonstration to prospective customers shall be made in accordance with the provisions of this section.

(2) Any purchaser of a new manufactured home that is transported to a site and permanently affixed to the ground so that it is no longer capable of being drawn over the public highways shall not be required to procure a certificate of title thereto as is otherwise required by this article. The purchaser shall file a certificate of permanent location along with the manufacturer's certificate or statement of origin or its equivalent with the clerk and recorder for the county or city and county in which the new manufactured home is permanently affixed to the ground. The manufactured home shall become real property upon the filing and recording of such documents in accordance with section 38-29-202. The provisions of articles 30 to 44 of this title and of any other law of this state shall be applicable to manufactured homes that have become real property pursuant to this subsection (2) and to instruments creating, disposing of, or otherwise affecting such real property wherever such provisions would be applicable to estates, rights, and interests in land or to instruments creating, disposing of, or otherwise affecting estates, rights, and interests in land.

**Source:** L. 83: Entire article added, p. 1452, § 1, effective June 15. L. 89: Entire section amended, p. 730, § 38, effective July 1; (1) amended, p. 1571, § 4, effective January 1, 1990. L. 2008: (2) amended, p. 443, § 5, effective July 1.

**38-29-115. Sale to dealers - certificate need not issue.** Upon the sale or transfer to a dealer of a manufactured home for which a Colorado certificate of title has been issued, formal transfer and delivery of the certificate of title thereto shall be made as in other cases; except that, so long as the home so sold or transferred remains in the dealer's inventory for sale and for no other purpose, such dealer shall not be required to procure the issuance of a new certificate of title thereto as is otherwise required in this article.

**Source:** L. 83: Entire article added, p. 1452, § 1, effective June 15.

**38-29-116. Transfers by bequest, descent, law.** Upon the transfer of ownership of a manufactured home by a bequest contained in the will of the person in whose name the certificate of title is registered, or upon the descent and distribution upon the death intestate of the owner of such home, or upon the transfer by operation of law, as in proceedings in bankruptcy, insolvency, replevin, attachment, execution, or other judicial sale, or whenever such manufactured home is sold to satisfy storage or repair charges or repossession is had upon default in the performance of the terms of any mortgage, the director or an authorized agent, upon the surrender of the certificate of title, if the same is available, or upon



presentation of such proof of ownership of such home as the director may reasonably require and upon presentation of an application for a certificate of title, as required in section 38-29-107, a new certificate of title may thereupon issue to the person shown by such evidence to be entitled thereto, and disposition shall be made as in other cases.

**Source: L. 83:** Entire article added, p. 1453, § 1, effective June 15.

**38-29-117. Certificates for manufactured homes registered in other states.**

(1) Whenever any resident of the state acquires the ownership of a manufactured home, located or to be located in the state of Colorado, by purchase, gift, or otherwise, for which a certificate of title has been issued under the laws of a state other than the state of Colorado, the person so acquiring such home upon acquiring the same shall make application to the director or his authorized agent for a certificate of title as in other cases.

(2) If any dealer acquires the ownership by any lawful means whatsoever of a manufactured home, the title to which is registered under the laws of and in a state other than the state of Colorado, such dealer shall not be required to procure a Colorado certificate of title therefor so long as such home remains in the dealer's inventory for sale and for no other purpose.

(3) Upon the sale by a dealer of a manufactured home, the certificate of title to which was issued in a state other than Colorado, the dealer shall immediately deliver to the purchaser or transferee such certificate of title from a state other than Colorado duly and properly endorsed or assigned to the purchaser or transferee, together with the dealer's statement, which shall contain or be accompanied by a written declaration that it is made under the penalties of perjury in the second degree, as defined in section 18-8-503, C.R.S., and which shall set forth the following:

(a) That such dealer has warranted and, by the execution of such affidavit, does warrant to the purchaser or transferee and all persons claiming or who shall claim under, by, or through the named purchaser or transferee that, at the time of the sale, transfer, and delivery thereof by the dealer, the manufactured home therein described was free and clear of all liens and mortgages, except those which might otherwise appear therein;

(b) That the home therein described is not stolen; and

(c) That such dealer had good, sure, and adequate title thereto and full right and authority to sell and transfer the same.

(4) If the purchaser or transferee of the said manufactured home accompanies his application for a Colorado certificate of title to such home with the affidavit required by subsection (3) of this section and the duly endorsed or assigned certificate of title from a state other than Colorado, a Colorado certificate of title therefor may issue in the same manner as upon the sale or transfer of a manufactured home for which a Colorado certificate of title has been issued. Upon the issuance by the director of such certificate of title, he shall dispose of the same as provided in section 38-29-111.

(5) Each dealer, on or before the fifteenth day of each month, on a form to be provided therefor, shall prepare, subscribe, and send to the auto theft division of the Colorado state patrol a complete description of each manufactured home held by such dealer during the preceding calendar month, or any part thereof, the certificate of title to which was issued by a state other than the state of Colorado or which home was registered under the laws of a state other than the state of Colorado and for which no application for a Colorado certificate of title has been made as provided in this section.

(6) If any person acquires the ownership in a manufactured home for which a certificate of title has been issued under the laws of a state other than the state of Colorado and such home is transported to a site where it is permanently affixed to the ground so that it is no longer capable of being drawn over the public highways, such person shall not be required to procure a new certificate of title as is otherwise required by this article. The owner shall file a certificate of permanent location along with the certificate of title or the manufacturer's certificate or statement of origin or its equivalent with the clerk and recorder for the county or city and county in which the manufactured home is permanently affixed to the ground. The manufactured home shall become real property upon the filing and recording of such documents in accordance with section 38-29-202. The provisions of articles 30 to

44 of this title and of any other law of this state shall be applicable to manufactured homes that have become real property pursuant to this subsection (6) and to instruments creating, disposing of, or otherwise affecting such real property wherever such provisions would be applicable to estates, rights, and interests in land or to instruments creating, disposing of, or otherwise affecting estates, rights, and interests in land.

**Source:** L. 83: Entire article added, p. 1453, § 1, effective June 15. L. 89: (6) added, p. 730, § 39, effective July 1; IP(3) amended, p. 1572, § 5, effective January 1, 1990. L. 2008: (6) amended, p. 444, § 6, effective July 1.

**38-29-118. Surrender and cancellation of certificate - purge of certificate - penalty for violation.** (1) The owner of any manufactured home for which a Colorado certificate of title has been issued, upon the destruction or dismantling of said manufactured home or upon its being sold or otherwise disposed of as salvage, shall surrender his or her certificate of title thereto to the director with the request that such certificate of title be cancelled and shall submit a certificate of destruction as set forth in section 38-29-204, and such certificate of title may thereupon be cancelled. Any person who violates any of the provisions of this subsection (1) commits a class 1 petty offense and, upon conviction thereof, shall be punished as provided in section 18-1.3-503, C.R.S.

(2) The owner of any manufactured home for which a Colorado certificate of title has been issued, upon its being permanently affixed to the ground so that it is no longer capable of being drawn over the public highways, shall surrender his or her certificate of title thereto and file with the authorized agent of the county or city and county in which such manufactured home is located a request for purging of the manufactured home title and a certificate of permanent location. The manufactured home shall become real property upon the filing and recording of the certificate of permanent location in accordance with section 38-29-202. The provisions of articles 30 to 44 of this title and of any other law of this state shall be applicable to manufactured homes that have become real property pursuant to this subsection (2) and to instruments creating, disposing of, or otherwise affecting such real property wherever such provisions would be applicable to estates, rights, and interests in land or to instruments creating, disposing of, or otherwise affecting estates, rights, and interests in land. The manufactured home for which a Colorado certificate of title has been issued shall continue to be valued and taxed separately from the land on which it sits until such time that the manufactured home becomes real property pursuant to this subsection (2).

**Source:** L. 83: Entire article added, p. 1454, § 1, effective June 15. L. 2002: (1) amended, p. 1554, § 339, effective October 1. L. 2004: (2) amended, p. 867, § 2, effective August 4. L. 2008: Entire section amended, p. 444, § 7, effective July 1.

**Cross references:** For the legislative declaration in the 2002 act amending subsection (1), see section 1 of chapter 318, Session Laws of Colorado 2002.

#### ANNOTATION

The Titles to Manufactured Homes Act abrogates the common law of fixtures and provides the exclusive means by which a mobile home titled in Colorado can be converted

from personal property to real property. Leader Fed. Bank for Sav. v. Saunders, 929 P.2d 1343 (Colo. 1997).

**38-29-119. Furnishing bond for certificates.** (1) In cases where the applicant for a certificate of title to a manufactured home is unable to provide the director or the director's authorized agent with a certificate of title thereto, duly transferred to such applicant, a bill of sale therefor, or other evidence of the ownership thereof that satisfies the director of the right of the applicant to have a certificate of title issued to him or her, as provided in section 38-29-110, a certificate of title for such home may, nevertheless, be issued by the director upon the applicant therefor furnishing the director with his or her statement, in such form as the director may prescribe. There shall appear a recital of the facts and circumstances by



which the applicant acquired the ownership and possession of such home, the source of the title thereto, and such other information as the director may require to enable him or her to determine what liens and encumbrances are outstanding against such manufactured home, if any, the date thereof, the amount secured thereby, where said liens or encumbrances are of public record, if they are of public record, and the right of the applicant to have a certificate of title issued to him or her. In situations involving an abandoned manufactured home located on an applicant's real property, a copy of an order or judgment for possession obtained through a civil eviction proceeding, along with proof of efforts to notify, via certified mail, regular mail, and posting as otherwise required by law, the prior owner of the potential removal or transfer of title of the home, as well as proof of ownership of the real property on which the home is located, shall constitute sufficient evidence of the applicant's right to a certificate of title for the home. The statement shall contain or be accompanied by a written declaration that it is made under the penalties of perjury in the second degree, as defined in section 18-8-503, C.R.S., and shall accompany the formal application for the certificate as required in section 38-29-107.

(2) (a) If, from the affidavit of the applicant and such other evidence as may be submitted to him or her, the director finds that the applicant is the same person to whom a certificate of title for said home has previously been issued or that a certificate of title should be issued to the applicant, such certificate may be issued, in which event disposition thereof shall be made as in other cases. Except as provided by paragraph (b) of this subsection (2), no certificate of title shall be issued as provided in this section unless and until the applicant furnishes evidence of a savings account, deposit, or certificate of deposit meeting the requirements of section 11-35-101, C.R.S., or a good and sufficient bond with a corporate surety, to the people of the state of Colorado, in an amount equal to twice the actual value of the manufactured home according to the assessor's records, as of the time application for the certificate is made, conditioned that the applicant and his or her surety shall hold harmless any person who suffers any loss or damage by reason of the issuance thereof.

(b) An applicant shall not be required to furnish surety pursuant to this subsection (2) for a manufactured home that is twenty-five years old or older, if the applicant:

(I) Provides proof that no property taxes for previous years are due for the manufactured home;

(II) Has had a manufactured home identification inspection performed on the manufactured home; and

(III) Presents the information required in subsection (1) of this section with the title application, accompanied by the written declaration set forth therein.

(c) If any person suffers any loss or damage by reason of the issuance of the certificate of title as provided in this section, such person shall have a right of action against the applicant and, if applicable, the surety on his or her bond. The person who has suffered a loss or damage may proceed against the applicant, the surety, or against both the applicant and the surety.

**Source:** L. 83: Entire article added, p. 1454, § 1, effective June 15. L. 89: (1) amended, p. 1572, § 6, effective January 1, 1990. L. 90: (1) amended, p. 1840, § 18, effective May 31. L. 2008: (2) amended, p. 445, § 8, effective July 1. L. 2009: Entire section amended, (SB 09-040), ch. 9, p. 64, § 4, effective July 1.

**38-29-120. Where to apply for certificate of title.** Except as may be otherwise provided by rule of the director, it is unlawful for any person who is a resident of the state to procure a certificate of title to a manufactured home in any county of this state other than the county in which such home is to be used as a residence. Any person who violates any of the provisions of this section or any rule of the director relating thereto, made pursuant to the authority conferred upon him in this article, is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than fifty dollars nor more than one hundred dollars, or by imprisonment in the county jail for not less than ten days nor more than six months, or by both such fine and imprisonment.

**Source:** L. 83: Entire article added, p. 1455, § 1, effective June 15.

**38-29-121. Altering or using altered certificate.** Any person who alters or forges or causes to be altered or forged any certificate of title issued by the director pursuant to the provisions of this article, or any written transfer thereof, or any other notation placed thereon by the director or under his or her authority respecting the mortgaging of the manufactured home therein described or who uses or attempts to use any such certificate for the transfer thereof, knowing the same to have been altered or forged, commits a class 6 felony and shall be punished as provided in section 18-1.3-401, C.R.S.

**Source:** L. 83: Entire article added, p. 1455, § 1, effective June 15. L. 89: Entire section amended, p. 851, § 139, effective July 1. L. 2002: Entire section amended, p. 1554, § 340, effective October 1.

**Cross references:** For the legislative declaration in the 2002 act amending this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

**38-29-122. Substitute manufactured home identification numbers - inspection.**  
(1) Any person required to make an application for a certificate of title to a manufactured home shall use the identification number placed upon the home by the manufacturer thereof or an identification number assigned to the home by the department. The certificate of title issued by the department shall use the identification number assigned to the manufactured home.

(2) On and after February 25, 1954, the identification number provided for in this section shall be accepted in lieu of any serial number provided for by law prior to said date.

(3) (a) The department may designate a manufactured home identification inspector to physically inspect a manufactured home in order to verify the following information: The identification number, the make of the manufactured home, the year of manufacture of the manufactured home, and such other information as may be required by the department. A manufactured home identification inspector may charge a fee for the inspection; except that such fee shall not exceed the reasonable costs related to the inspection. A manufactured home identification inspector shall notify the owner of the amount of the fee before commencing any verification activities. If the manufactured home identification inspector determines that the manufactured home identification number has been removed, changed, altered, or obliterated, the owner shall request that the department assign a distinguishing number to the manufactured home pursuant to section 38-29-123.

(b) The department may designate one or more of the following persons to be a manufactured home identification inspector charged with the functions set forth in paragraph (a) of this subsection (3):

(I) An authorized agent as defined in section 38-29-102 (1) or a person designated by such agent;

(II) A Colorado law enforcement officer;

(III) A person registered to sell manufactured homes pursuant to section 24-32-3323, C.R.S.; or

(IV) A county assessor.

**Source:** L. 83: Entire article added, p. 1455, § 1, effective June 15. L. 2009: (3) added, (SB 09-040), ch. 9, p. 65, § 5, effective July 1.

**38-29-123. Assignment of a special manufactured home identification number by the department of revenue.** The department is authorized to assign a distinguishing number to any manufactured home whenever there is no identifying number thereon or such number has been destroyed, obliterated, or mutilated. In such cases, the department shall provide a form on which the distinguishing number has been assigned to the manufactured home. The distinguishing number shall be affixed to the manufactured home in the door frame or fuse box or as determined by the department. The distinguishing number shall then be the manufactured home identification number. Such manufactured home shall be titled under such distinguishing number in lieu of the former number or absence thereof, or in the



event that the manufactured home is affixed to the ground so that it is no longer capable of being drawn over the public highways, the owner shall file the form provided by the department on which the distinguishing number has been assigned with the clerk and recorder for the county or city and county in which the manufactured home is located. The clerk and recorder shall file and record such form in his or her office.

**Source:** L. 83: Entire article added, p. 1456, § 1, effective June 15. L. 2009: Entire section amended, (SB 09-040), ch. 9, p. 66, § 6, effective July 1.

**38-29-124. Amended certificate to issue, when.** If the owner of any manufactured home for which a Colorado certificate of title has been issued replaces any part of said home on which appears the identification number or symbol described in the certificate of title and by which said home is known and identified, by reason whereof such identification number or symbol no longer appears thereon, or incorporates the part containing the identification number or symbol into a manufactured home other than the one for which the original certificate of title was issued, immediately thereafter, such owner shall make application to the director or one of his authorized agents for an assigned identification number and an amended certificate of title to such manufactured home.

**Source:** L. 83: Entire article added, p. 1456, § 1, effective June 15.

**38-29-125. Security interests upon manufactured homes.** (1) Except as provided in this section, the provisions of the "Uniform Commercial Code", title 4, C.R.S., relating to the filing, recording, releasing, renewal, and extension of mortgages, as the term is defined in section 38-29-102 (9), shall not be applicable to manufactured homes. Any mortgage intended by the parties thereto to encumber or create a lien on a manufactured home, to be effective as a valid lien against the rights of third persons, purchasers for value without notice, mortgagees, or creditors of the owner, shall be filed for public record and the fact thereof noted on the owner's certificate of title or bill of sale substantially in the manner provided in section 38-29-128; and the filing of such mortgage with the authorized agent and the notation by him of that fact on the certificate of title or bill of sale substantially in the manner provided in section 38-29-128 shall constitute notice to the world of each and every right of the person secured by such mortgage.

(2) The provisions of this section and section 38-29-128 shall not apply to any mortgage or security interest upon any manufactured home held for sale or lease which constitutes inventory as defined in section 4-9-102, C.R.S. As to such mortgages or security interests, the provisions of article 9 of title 4, C.R.S., shall apply, and perfection of such mortgages or security interests shall be made pursuant thereto, and the rights of the parties shall be governed and determined thereby.

**Source:** L. 83: Entire article added, p. 1456, § 1, effective June 15. L. 2001: (2) amended, p. 1447, § 45, effective July 1.

#### ANNOTATION

**Compliance with this section makes UCC "fixture filing" unnecessary.** Where creditor noted its lien on certificate of title pursuant to this section, and home was not held as inventory, creditor's interest was superior to that of

holder of trust deed to real estate on which home had been affixed although creditor had not made a "fixture filing" under § 4-9-313. *ENT Federal Credit Union v. Chrysler First Financial Serv. Corp.*, 826 P.2d 430 (Colo. App. 1992).

**38-29-126. Existing mortgages not affected.** Nothing in this article shall be construed to impair the rights of the holder of any lien on a manufactured home created by mortgage or otherwise prior to August 1, 1949, which remains unreleased and the undertaking which the lien thereof secures remains undischarged. Nothing in this article shall be construed to

relieve the holders of such liens of the duty to file such instruments respecting the undertakings secured thereby as may be required by law to preserve the liens of such mortgages unimpaired.

**Source: L. 83:** Entire article added, p. 1456, § 1, effective June 15.

**38-29-127. Foreign mortgages.** No mortgage on a manufactured home, filed for record in any state other than the state of Colorado, shall be valid and enforceable against the rights of subsequent purchasers for value, creditors, or mortgagees having no actual notice of the existence thereof. If the certificate of title for such home, whether issued under the laws of this state or any other state, bears thereon any notation adequate to apprise a purchaser, creditor, or mortgagee of the existence of such mortgage at the time any third party acquires a right in the manufactured home covered thereby, such mortgage and the rights of the holder thereof shall be enforceable in this state the same and with like effect as though such mortgage were filed in the state of Colorado and noted on the certificate of title in the manner prescribed in section 38-29-128.

**Source: L. 83:** Entire article added, p. 1457, § 1, effective June 15.

**38-29-128. Filing of mortgage.** The holder of any mortgage on a manufactured home desiring to secure to himself the rights provided for in this article and to have the existence of the mortgage and the fact of the filing thereof for public record noted on the certificate of title to the manufactured home thereby encumbered shall present said mortgage or a duly executed copy or certified copy thereof and the certificate of title to the manufactured home encumbered to the authorized agent of the director in the county or city and county in which the manufactured home is located. Upon the receipt of said mortgage or executed copy or certified copy thereof and certificate of title, the authorized agent, if he is satisfied that the manufactured home described in the mortgage is the same as that described in the certificate of title, shall make and subscribe a certificate to be attached or stamped on the mortgage and on the certificate of title, in which shall appear the day and hour on which said mortgage was received for filing, the name and address of the mortgagee therein named and the name and address of the holder of such mortgage, if such person is other than the mortgagee named, the amount secured thereby, the date thereof, the day and year on which said mortgage was filed for public record, and such other information regarding the filing thereof in the office of the authorized agent as may be required by the director by rule, to which certificate the authorized agent shall affix his signature and the seal of his office.

**Source: L. 83:** Entire article added, p. 1457, § 1, effective June 15.

**38-29-129. Disposition of mortgages by agent.** (1) The authorized agent upon receipt of the mortgage shall file the same in his office separately and apart from records affecting real property and personal property, other than manufactured homes, which he may by law be required to keep. Such mortgage shall be appropriately indexed and cross-indexed:

(a) Under one or more of the following headings in accordance with such rules and regulations relating thereto as may be adopted by the director:

(I) Manufacturer, manufacturer's number, or serial number of manufactured homes mortgaged;

(II) The numbers of the certificates of title for manufactured homes mortgaged;

(b) Under the name of the mortgagee, the holder of such mortgage, or the owner of such mortgaged home; or

(c) Under such other system as the director may devise and determine to be necessary for the efficient administration of this article.

(2) All records of mortgages affecting manufactured homes shall be public and may be inspected and copies thereof made, as is provided by law respecting public records affecting real property.

**Source: L. 83:** Entire article added, p. 1457, § 1, effective June 15.



**38-29-130. Disposition after mortgaging.** Within forty-eight hours after a mortgage on a manufactured home has been filed in his office, the authorized agent shall mail to the director the certificate of title or bill of sale on which he has affixed his certificate respecting the filing of such mortgage. Upon the receipt thereof, the director shall note, on records to be kept and maintained by him in his office, the fact of the existence of the mortgage on such manufactured home and other information respecting the date thereof, the date of filing, the amount secured by the lien thereof, the name and address of the mortgagee and of the holder of the mortgage, if such person is other than the mortgagee, and such other information relating thereto as appears in the certificate of the authorized agent affixed to the certificate of title or bill of sale. The director shall thereupon issue a new certificate of title containing, in addition to the other matters and things required to be set forth in certificates of title, a description of the mortgage and all information respecting said mortgage and the filing thereof as may appear in the certificate of the authorized agent, and he shall thereafter dispose of said new certificate of title containing said notation as provided in section 38-29-111.

**Source:** L. 83: Entire article added, p. 1458, § 1, effective June 15.

**38-29-131. Release of mortgages.** (1) Upon the payment or discharge of the undertaking secured by any mortgage on a manufactured home that has been filed for record and noted on the certificate of title in the manner prescribed in section 38-29-128, the legal holder of the certificate of title, in a place to be provided therefor, shall make and execute such notation of the discharge of the obligation and release of the mortgage securing the same and set forth therein such facts concerning the right of the holder to so release said mortgage as the director may require by appropriate rule, which satisfaction and release shall be affirmed by a statement signed by the legal holder of the certificate of title and shall contain or be accompanied by a written declaration that it is made under the penalties of perjury in the second degree, as defined in section 18-8-503, C.R.S. Thereupon, except as otherwise provided in section 38-29-112 (1.7), the holder of the mortgage so released shall dispose of the certificate of title as follows:

(a) If it appears from an examination of the certificate of title that the manufactured home therein described is subject to an outstanding junior mortgage or mortgages filed for record subsequent to August 1, 1949, the holder shall deliver the certificate of title to the person so shown to be the holder of the mortgage which was filed earliest in point of time after the filing of the mortgage released or to the person or agent of the person shown to be the assignee or other legal holder of the undertaking secured thereby or shall mail the same to such mortgagee or holder thereof at his address as the same thereon appears. If such certificate is returned unclaimed, it shall thereupon be mailed to the director.

(b) If it appears from an examination of the certificate of title that there are no other outstanding mortgages against the manufactured home therein described, filed for record subsequent to August 1, 1949, upon the release of such mortgage as provided in this section, the holder thereof shall deliver the certificate of title to the owner of the home therein described or shall mail the same to him at his address as the same may therein appear. If for any reason said certificate of title is not delivered to the owner of the home therein described or is returned unclaimed upon the mailing thereof, it shall thereupon be mailed to the director.

**Source:** L. 83: Entire article added, p. 1458, § 1, effective June 15. L. 89: IP(1) amended, p. 1573, § 7, effective January 1, 1990. L. 2004: IP(1) amended, p. 868, § 3, effective August 4.

**38-29-132. New certificate upon release of mortgage.** Upon the release of any mortgage on a manufactured home, filed for record in the manner prescribed in section 38-29-128, the owner of the home encumbered by such mortgage, the purchaser from or transferee of the owner thereof as appears on the certificate of title, or the holder of any mortgage the lien of which was junior to the lien of the mortgage released, whichever the

case may be, upon the receipt of the certificate of title, as provided in section 38-29-131, shall deliver the same to the authorized agent who shall transmit the same to the director as in other cases. Upon the receipt by the director of the certificate of title bearing thereon the release and satisfaction of mortgage referred to in section 38-29-131, he shall make such notation on the records in his office as shall show the release of the lien of such mortgage, shall issue a new certificate of title to the manufactured home therein described, omitting therefrom all reference to the mortgage so released, and shall dispose of the new certificate of title in the manner prescribed in other cases.

**Source:** L. 83: Entire article added, p. 1459, § 1, effective June 15.

**38-29-133. Duration of lien of mortgage - extensions.** (1) The duration of the lien of any mortgage on a manufactured home shall be for the full term of the mortgage, but the lien of the mortgage may be extended beyond the original term thereof for successive three-year periods during the term of the mortgage or any extension thereof upon the holder thereof presenting the certificate of title, on which the existence of the mortgage has been noted, to the authorized agent of the county wherein said mortgage is filed, together with a notarized written request for an extension of the mortgage or a written request that is made under the penalties of perjury in the second degree, as defined in section 18-8-503, C.R.S., in which shall appear a description of the undertaking secured, to what extent it has been discharged or remains unperformed, and such other and further information respecting the same as may be required by appropriate rule of the director to enable him or her to properly record such extension upon the director's records.

(2) Upon receipt of a mortgage extension, the authorized agent shall make and complete a record of the extension and shall issue a new certificate of title on which the extension of the mortgage is noted. Thereafter the newly issued certificate of title shall be returned to the person shown thereon to be entitled thereto, the same as in other cases. If a mortgage noted on the certificate of title has not been released or extended after its maturity date, the owner of the manufactured home described in the certificate of title may request that any references to the mortgages shown on the records of the authorized agent be removed, and upon the request, the authorized agent shall remove such references.

**Source:** L. 83: Entire article added, p. 1459, § 1, effective June 15. L. 2009: Entire section amended, (SB 09-040), ch. 9, p. 66, § 7, effective July 1.

**38-29-134. Priority of mortgages.** The liens of mortgages filed for record and noted on a certificate of title to a manufactured home, as provided in sections 38-29-128 and 38-29-135, shall take priority in the same order that the mortgages creating such liens were filed in the office of the authorized agent.

**Source:** L. 83: Entire article added, p. 1459, § 1, effective June 15.

**38-29-135. Second or other junior mortgages.** (1) On and after July 1, 1977, any person who takes a second or other junior mortgage on a manufactured home for which a Colorado certificate of title has been issued may file said mortgage for public record and have the existence thereof noted on the certificate of title with like effect as in other cases, in the manner prescribed in this section.

(2) Such second or junior mortgagee or the holder thereof shall file said mortgage with the authorized agent of the county wherein the manufactured home is located and shall accompany said mortgage with a written request to have the existence thereof noted on the certificate of title to the manufactured home covered thereby, subscribed by such mortgagee or holder, in which shall appear the names and addresses of the holders of all outstanding mortgages against the home described in said second or junior mortgage and the name and address of the person in possession of the certificate of title thereto. Upon the filing of such mortgage, the authorized agent shall note thereon the day and hour on which such mortgage



was received by him and shall make and deliver a receipt therefor to the person filing the same.

(3) The authorized agent, by registered mail, return receipt requested, shall make a written demand on the holder of the certificate of title, addressed to such person at his address as the same may appear in said written request, that such certificate be delivered to the authorized agent for the purpose of having noted thereon such second or junior mortgage. Within fifteen days after the receipt of such demand, the person holding such certificate shall either mail or deliver the same to such authorized agent or, if he no longer has possession thereof, shall so notify the agent and, if he knows, shall likewise inform him where and from whom such certificate may be procured. Upon the receipt of such certificate, the authorized agent shall complete his application for a new title and record the number thereof on the mortgage, as in the case of a first mortgage, and shall thereafter transmit the current certificate of title and application for a new certificate of title to the director. Upon the receipt thereof, the director, as in the case of a first mortgage, shall thereupon issue a new certificate of title on which the existence of all mortgages on the manufactured home, including such second or junior mortgage, have been noted, which certificate he shall dispose of as in other cases.

(4) If any person lawfully in possession of a certificate of title to any manufactured home upon whom demand is made for the delivery thereof to the authorized agent omits, for any reason whatsoever, to deliver or mail the same to the authorized agent, such person shall be liable to the holder of such second or junior mortgage for all damage sustained by reason of such omission.

**Source: L. 83:** Entire article added, p. 1459, § 1, effective June 15.

**38-29-136. Validity of mortgage between parties.** Nothing in this article shall be construed to impair the validity of a mortgage on a manufactured home between the parties thereto as long as no purchaser for value, mortgagee, or creditor without actual notice of the existence thereof has acquired an interest in the manufactured home described therein, notwithstanding that the parties to said mortgage have failed to comply with the provisions of this article.

**Source: L. 83:** Entire article added, p. 1460, § 1, effective June 15.

**38-29-137. Mechanics', warehouse, and other liens.** Nothing in this article shall be construed to impair the rights of lien claimants arising under any mechanics' lien law in force and effect in this state or the lien of any warehouseman or any other person claimed for repairs on or storage of any manufactured home, when a mechanic's lien or storage lien has originated prior to the time any mortgage on said manufactured home has been filed for record, as provided in section 38-29-125, and such manufactured home has remained continuously in the possession of the person claiming such mechanic's lien or lien for storage, notwithstanding that no notation of such lien is made upon the certificate of title to the home in respect of which it is claimed.

**Source: L. 83:** Entire article added, p. 1460, § 1, effective June 15.

**38-29-138. Fees.** (1) (a) Upon filing with the authorized agent any application for a certificate of title, the applicant shall pay to the agent a fee of seven dollars and twenty cents, which shall be disposed pursuant to section 42-6-138, C.R.S.

(b) Repealed.

(2) Upon the receipt by the authorized agent of any mortgage for filing under the provisions of section 38-29-128, the agent shall be paid such fees as are prescribed by law for the filing of like instruments in the office of the county clerk and recorder in the county or city and county in which such mortgage is filed and shall receive, in addition, a fee of seven dollars and twenty cents for the issuance or recording of the certificate of title and the notation of the existence of said mortgage.

(3) Upon application to the authorized agent to have noted on a certificate of title the extension of any mortgage therein described and noted thereon, such authorized agent shall receive a fee of one dollar and fifty cents.

(4) Upon the release and satisfaction of any mortgage and upon application to the authorized agent for the notation thereof on the certificate of title in the manner prescribed in section 38-29-131, such authorized agent shall be paid a fee of seven dollars and twenty cents, which shall be disposed pursuant to section 42-6-138, C.R.S.

(5) For the issuance of any duplicate certificate of title, except as may be otherwise provided in this article, the agent shall be paid a fee of eight dollars and twenty cents, and, in all cases in which the department assigns a new identifying number to any manufactured home, the fee charged for such assignment shall be three dollars and fifty cents.

(6) The fees provided for in subsections (1) and (2) of this section shall not apply to the issuance of a certificate of title for a tax-deferred mobile home pursuant to the provisions of section 39-3.5-105 (1) (b) (II), C.R.S.

**Source:** L. 83: Entire article added, p. 1461, § 1, effective June 15. L. 88: (6) added, p. 1285, § 16, effective May 23. L. 2003: (1), (2), (4), and (5) amended, p. 1977, § 1, effective May 22.

**Editor's note:** Subsection (1)(b)(III) provided for the repeal of subsection (1)(b), effective September 1, 2006. (See L. 2003, p. 1977.)

**38-29-139. Disposition of fees.** (1) All fees received by the authorized agent under the provisions of section 38-29-138 (1) and (2), upon application being made for a certificate of title, shall be disposed of pursuant to section 42-6-138 (1), C.R.S.

(2) All fees collected by the authorized agent under the provisions of section 38-29-138 (5) shall be disposed of pursuant to section 42-6-138 (2), C.R.S.

(3) All fees paid to the authorized agent under section 38-29-138 (3) for the filing or extension of any mortgage on a manufactured home filed in his or her office shall be kept and retained by said agent to defray the cost thereof and shall be disposed of by him or her as provided by law; except that fees for this service that may be paid to the authorized agent in the city and county of Denver shall, by such agent, be disposed of in the same manner as fees retained by him or her that were paid upon application being made for a certificate of title.

**Source:** L. 83: Entire article added, p. 1461, § 1, effective June 15. L. 94: (1) and (2) amended, p. 2567, § 84, effective January 1, 1995. L. 2003: (3) amended, p. 1980, § 7, effective May 22.

**38-29-140. Director's records to be public.** All records in the director's office pertaining to the title to any manufactured home shall be public records and shall be subject to the provisions of section 42-1-206, C.R.S. This shall include any records regarding ownership of and mortgages on any manufactured home for which a Colorado certificate of title has been issued.

**Source:** L. 83: Entire article added, p. 1461, § 1, effective June 15.

**38-29-141. Penalties.** (1) No person may:

(a) Sell, transfer, or in any manner dispose of a manufactured home in this state without complying with the requirements of this article.

(b) (Deleted by amendment, L. 89, p. 1573, § 8, effective January 1, 1990.)

(2) Any person who violates any of the provisions of subsection (1) of this section for which no other penalty is expressly provided is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail for not less than ten days nor more than six months, or by both such fine and imprisonment.



**Source:** L. 83: Entire article added, p. 1462, § 1, effective June 15. L. 89: Entire section amended, p. 1573, § 8, effective January 1, 1990.

**38-29-141.5. False oath.** Any person who makes any application for a certificate of title, written transfer thereof, satisfaction and release, oath, affirmation, affidavit, statement, report, or deposition required to be made or taken under any of the provisions of this article and who, upon such application, transfer, satisfaction and release, oath, affirmation, affidavit, statement, report, or deposition, swears or affirms willfully and falsely in a matter material to any issue, point, or subject matter in question, in addition to any other penalties provided in this article, is guilty of perjury in the second degree, as defined in section 18-8-503, C.R.S.

**Source:** L. 89: Entire section added, p. 1573, § 9, effective January 1, 1990.

**38-29-142. Repossession of manufactured home - owner must notify law enforcement agency - penalty.** (1) If any mortgagee or his assignee or the agent of either repossesses a manufactured home because of default in the terms of a mortgage, the mortgagee or his assignee shall notify, either verbally or in writing, a law enforcement agency, as provided in this section, of the fact of such repossession, the name of the owner, and the name of the mortgagee or assignee. Such notification shall be made not later than twelve hours after the repossession occurs. If such repossession takes place in an incorporated city or town, the notification shall be made to the police department, town marshal, or other local law enforcement agency of such city or town, and, if such repossession takes place in the unincorporated area of a county, the notification shall be made to the county sheriff.

(2) Any mortgagee of a manufactured home or his assignee who violates the provisions of this section is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than fifty dollars nor more than one hundred dollars.

**Source:** L. 83: Entire article added, p. 1462, § 1, effective June 15.

**38-29-143. Change of location - penalty.** (1) The owner shall file notice of any change of location within the county with the county assessor and the county treasurer or change of location from one county to another county with the county assessor and the county treasurer of each county within twenty days after such change of location occurs. For the purposes of this subsection (1), "owner" shall mean the owner at the time of the change of location.

(2) Any person who fails to file notice of any change of location as required by subsection (1) of this section is guilty of a misdemeanor traffic offense and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars. This shall be a strict liability offense.

**Source:** L. 83: Entire article added, p. 1462, § 1, effective June 15. L. 91: (2) amended, p. 1696, § 6, effective July 1.

## PART 2

### FILING AND RECORDING OF DOCUMENTS RELATED TO A MANUFACTURED HOME

**38-29-201. Verification of application form - supporting materials.** (1) In all instances under part 1 of this article in which an application for a certificate of title is filed with an authorized agent pursuant to section 38-29-107, the authorized agent, in his or her capacity as the clerk and recorder, shall file and record the documents set forth in subsection (2) of this section in his or her office.

(2) (a) For an application for a certificate of title for a new manufactured home, the following documents shall be filed and recorded:

(I) The manufacturer's certificate or statement of origin or its equivalent; and

(II) (Deleted by amendment, L. 2009, (SB 09-040), ch. 9, p. 67, § 8, effective July 1, 2009.)

(III) The verification of application form.

(b) For an application for a certificate of title for which a bond is furnished pursuant to section 38-29-119 (2), the following documents shall be filed and recorded:

(I) A copy of the written declaration required pursuant to section 38-29-119 (1);

(II) A copy of the bond that was furnished; and

(III) The verification of application form.

(c) For all other applications for a certificate of title, the following documents shall be filed and recorded:

(I) A copy of the certificate of title presented to the authorized agent, if any; and

(II) The verification of application form.

(3) A verification of application form shall comply with the federal "Driver's Privacy Protection Act of 1994", 18 U.S.C. sec. 2721 et seq.

**Source:** L. 2008: Entire part added, p. 445, § 9, effective July 1. L. 2009: (2)(a) amended and (3) added, (SB 09-040), ch. 9, p. 67, § 8, effective July 1.

**38-29-202. Certificate of permanent location.** (1) (a) If a manufactured home is permanently affixed to the ground so that it is no longer capable of being drawn over the public highways on or after July 1, 2008, the owner of the manufactured home shall file a certificate of permanent location.

(b) If the certificate of permanent location accompanies an application for purging a manufactured home title pursuant to section 38-29-112 (1.5) or 38-29-118 (2), the certificate shall be filed with the authorized agent for the county or city and county in which the manufactured home is located. For a manufactured home that occupies real property subject to a long-term lease that has an express term of at least ten years, a copy of the lease shall be filed along with the certificate. The authorized agent, in his or her capacity as the clerk and recorder, shall file and record the certificate of permanent location and, if applicable, the copy of the long-term lease in his or her office.

(c) If the certificate of permanent location is received in accordance with section 38-29-114 (2) or 38-29-117 (6), the certificate shall be filed with the clerk and recorder for the county or city and county in which the manufactured home is located. For a manufactured home that occupies real property subject to a long-term lease that has an express term of at least ten years, a copy of the lease shall be filed along with the certificate. The clerk and recorder shall file and record the certificate of permanent location, a copy of the bill of sale, a copy of the manufacturer's certificate or statement of origin or its equivalent, and, if applicable, the copy of the long-term lease in his or her office and destroy the original manufacturer's certificate or statement of origin or its equivalent.

(d) At least one of the owners of the manufactured home, as reflected on the certificate of title, the bill of sale, or the manufacturer's certificate or statement of origin or its equivalent, must be an owner of record of the real property to which the manufactured home is to be affixed or permanently located; except that this paragraph (d) shall not apply to any manufactured home that occupies real property subject to a long-term lease that has an express term of at least ten years.

(2) The property tax administrator shall establish the form of the certificate of permanent location. In addition to any other information that the administrator may require, the certificate shall include the following:

(a) The name and mailing address of the owner of the manufactured home;

(b) The name and mailing address of any holder of a mortgage on the manufactured home or on the real property to which the home has been affixed;

(c) The identification number of the manufactured home and the certificate of title number, if applicable;

(d) The manufacturer or make and year of the manufactured home;



(e) Attached to the certificate of permanent location, a certificate of taxes due, or an authentication of paid ad valorem taxes, issued by the county treasurer of the county in which the manufactured home is located;

(f) The legal description of the real property to which the manufactured home has been permanently affixed;

(g) The name of the legal owner or owners of the land upon which the home is affixed;

(h) The county or city and county in which the certificate of permanent location is filed;

(i) Verification that the manufactured home is permanently affixed to the ground so that it is no longer capable of being drawn over the public highways in accordance with any applicable county or city and county codes or requirements;

(j) Consent to the permanent location of the manufactured home by all holders of a security interest in the manufactured home;

(k) An affirmative statement of relinquishment and release of all rights in the manufactured home by all holders of a security interest in the manufactured home;

(l) An affirmative statement of relinquishment of all rights in the manufactured home by any owner on the certificate of title of the manufactured home who is not also an owner of the real property to which the manufactured home is to be affixed or permanently located. The provisions of this paragraph (l) shall not apply to any manufactured home that occupies real property subject to a long-term lease that has an express term of at least ten years.

(1.5) For any manufactured home that occupies real property subject to a long-term lease that has an express term of at least ten years, an affirmative statement that all owners of the real property and the manufactured home consent to the affixation of the manufactured home to the real property and an acknowledgment that, upon such affixation and upon the filing and recording of the certificate of permanent location, the manufactured home will become a part of the real property, subject to the reversion of the manufactured home to the owners of the home upon termination of the long-term lease; and

(m) An affirmative statement that all owners of the real property and the manufactured home consent to the affixation of the manufactured home to the real property and an acknowledgment that upon such affixation and upon the filing and recording of the certificate of permanent location the manufactured home will become a part of the real property and ownership shall be vested only in the title owners of the real property. Ownership in the manufactured home shall vest in the same parties and be subject to the same tenancies, encumbrances, liens, limitations, restrictions, and estates as the real property to which the manufactured home is affixed or permanently located. The provisions of this paragraph (m) shall not apply to any manufactured home that occupies real property subject to a long-term lease that has an express term of at least ten years.

(3) The certificate of permanent location shall be acknowledged and shall contain or be accompanied by a written declaration that the statements made therein are made under the penalties of perjury in the second degree, as defined in section 18-8-503, C.R.S.

**Source: L. 2008:** Entire part added, p. 446, § 9, effective July 1. **L. 2009:** (1)(b), (1)(c), (2)(i), and (2)(l) amended and (2)(1.5) added, (SB 09- 040), ch. 9, p. 67, § 9, effective July 1.

**38-29-203. Certificate of removal.** (1) (a) On or after July 1, 2008, a manufactured home shall not be removed from its permanent location unless the owner of the manufactured home files a certificate of removal. If a certificate of permanent location has not been previously filed and recorded for the manufactured home, the owner shall also file an affidavit of real property, described in section 38-29-208, along with the certificate of removal.

(b) The certificate of removal and the affidavit of real property, if any, along with the application for a new certificate of title required in part 1 of this article, shall be filed with the authorized agent for the county or city and county in which the manufactured home is located. The authorized agent, in his or her capacity as the clerk and recorder, shall file and record the certificate of removal and the affidavit of real property in his or her office.

(2) The property tax administrator shall establish the form of the certificate of removal. In addition to any other information that the administrator may require, the certificate shall include the following:

- (a) The name and mailing address of the owner of the manufactured home;
- (b) The name and mailing address of any holder of a mortgage on or lien against the real property on which the manufactured home was affixed or permanently located;
- (c) The identification number of the manufactured home;
- (d) The manufacturer or make and year of the manufactured home;
- (e) Attached to the certificate of removal, a certificate of taxes due, or an authentication of paid ad valorem taxes, issued by the county treasurer of the county in which the manufactured home is located;
- (f) The legal description of the real property from which the manufactured home was removed; and

(g) Consent of all lienholders and a release by all holders of a mortgage, only to the extent that the mortgage or lien applies to the manufactured home, to allow the removal of the manufactured home from its permanent location.

(2.5) (a) The provisions of this section shall apply to a manufactured home that occupies real property subject to a long-term lease that has an express term of at least ten years, except as set forth in paragraph (b) of this subsection (2.5).

(b) A landlord evicting a tenant who owns a manufactured home that occupies real property subject to a long-term lease that has an express term of at least ten years may cause the home to be removed from its permanent location without the owner first filing a certificate of removal if, within twenty days after such removal, the landlord files a certificate of removal accompanied by a copy of the notice of judgment or order for possession allowing the eviction of the home and the address of the location to which the home has been moved. Such certificate of removal shall comply with subsection (5) of this section and include the information required in subsection (2) of this section; except that paragraphs (e) and (g) of said subsection (2) shall not apply. The landlord shall file the certificate of removal and the additional information with the authorized agent for the county or city and county from which the manufactured home was removed.

(3) The consent of a mortgage or other lien holder on the certificate of removal shall serve as a full release of any interest against the manufactured home once the manufactured home is removed from the real property. The consent on the certificate of removal shall not release any interest of the mortgage or lien holder against the remaining real property.

(4) If consent of any mortgagee or lien holder is not given, the owner may file a corporate surety bond or any other undertaking with the clerk of the district court of the county in which the real property to which the manufactured home was affixed is situated. The bond or undertaking shall be in an amount equal to one and one-half times the amount of the mortgage or lien and shall be approved by a judge of the district court with which the bond or undertaking is filed. The bond or undertaking shall be conditioned that, if the mortgagee or lien holder shall be finally adjudged to be entitled to recover upon the mortgage or lien, the principal or his sureties shall pay to the mortgagee or lien holder the amount of the indebtedness together with any interest, costs, and other sums which the mortgagee or lien holder would be entitled to recover upon foreclosure of the mortgage or lien. Upon the filing of a bond or undertaking, the mortgage or lien against the property shall be forthwith discharged and released in full, and the real property described in the bond or undertaking shall be released from the mortgage or lien and from any action brought to foreclose the mortgage or lien, and the bond or undertaking shall be substituted. The clerk of the district court with which the bond or undertaking has been filed shall issue a certificate of release that shall be recorded in the office of the clerk and recorder of the county in which the real property to which the manufactured home was affixed is situated, and the certificate of release shall show that the property has been released from the mortgage or lien and from any action brought to foreclose the mortgage or lien.

(5) The certificate of removal shall be acknowledged and shall contain or be accompanied by a written declaration that the statements made therein are made under the penalties of perjury in the second degree, as defined in section 18-8-503, C.R.S.



**Source: L. 2008:** Entire part added, p. 448, § 9, effective July 1. **L. 2009:** (2.5) added, (SB 09-040), ch. 9, p. 69, § 10, effective July 1.

**38-29-204. Certificate of destruction.** (1) (a) If a manufactured home is destroyed, dismantled, or sold or otherwise disposed of as salvage on or after July 1, 2008, the owner of the manufactured home or the person on whose real property the manufactured home is situated shall file a certificate of destruction.

(b) If the certificate of destruction accompanies an application to cancel a certificate of title pursuant to section 38-29-118 (1), the certificate shall be filed with the authorized agent for the county or city and county in which the manufactured home is or was located. The authorized agent, in his or her capacity as the clerk and recorder, shall file and record the certificate of destruction in his or her office.

(c) If an application to cancel a certificate of title is not required pursuant to section 38-29-118 (1) because no certificate of title was ever issued or because the title has been purged, the certificate of destruction shall be filed with the county clerk and recorder for the county or city and county in which the manufactured home is or was located. The clerk and recorder shall file and record the certificate of destruction in his or her office.

(d) (I) Notwithstanding any other provision of law, if a manufactured home has been deemed materially dangerous or materially hazardous, pursuant to local building or health codes by a governmental entity, the person on whose real property the manufactured home is situated may file and record a certificate of destruction without attaching a certificate of taxes due or an authentication of paid ad valorem taxes and without surrendering a certificate of title or filing an application to cancel a certificate of title. Any certificate of destruction filed and recorded pursuant to this paragraph (d) shall be accompanied by the evidence of violation.

(II) The certificate of destruction and the evidence of violation shall be filed and recorded with the clerk and recorder for the county or city and county in which the manufactured home is or was located. The clerk and recorder shall file and record the certificate of destruction and the evidence of violation in his or her office.

(III) For purposes of this paragraph (d):

(A) "Evidence of violation" means a notice and order from a governmental entity that a manufactured home has been deemed materially dangerous or materially hazardous pursuant to local building or health codes and that all applicable cure periods have expired.

(B) "Governmental entity" means any federal agency, the state, or any county, town, city, or city and county.

(2) The property tax administrator shall establish the form of the certificate of destruction. In addition to any other information that the administrator may require, the certificate shall include the following:

(a) The name and mailing address of the owner of the manufactured home;

(b) The name and mailing address of each holder of a security interest in the manufactured home and all holders of a lien against the real property on which the manufactured home was affixed or permanently located;

(c) The identification number of the manufactured home;

(d) The manufacturer or make and year of the manufactured home;

(e) Attached to the certificate of destruction, a certificate of taxes due, or an authentication of paid ad valorem taxes, issued by the county treasurer of the county in which the manufactured home is located;

(f) The legal description of the real property on which the manufactured home was affixed or permanently located prior to destruction;

(g) A book and page or reception number reference for a certificate of permanent location that was previously filed related to the manufactured home, if any;

(h) Consent of all lienholders to the destruction of the manufactured home, or proof that a request for such consent was sent by certified mail to such lienholders, along with proof that a copy of the request for such consent was mailed to the owner if the certificate of destruction is filed by the person on whose real property the manufactured home is situated, at their last-known address and a notarized declaration, signed under penalty of perjury, that

no response was received from any such lienholders within thirty days of the date of the mailing of the notice;

(i) Release of all holders of a mortgage to the extent that the mortgage applies to the manufactured home, or proof that a request for such consent was sent by certified mail to such mortgage holders at their last-known address and a notarized declaration, signed under penalty of perjury, that no response was received within thirty days of the date of the mailing of the notice; and

(j) Verification that the manufactured home has been destroyed, dismantled, or sold or otherwise disposed of as salvage.

(3) The certificate of destruction shall be acknowledged and shall contain or be accompanied by a written declaration that the statements made therein are made under the penalties of perjury in the second degree, as defined in section 18-8-503, C.R.S.

(4) Any owner or person on whose real property the manufactured home is situated who fails to file a properly completed certificate of destruction when required pursuant to this section shall be responsible for all actual damages sustained by any affected party related to the manufactured home being destroyed, dismantled, or sold or otherwise disposed of as salvage.

**Source:** L. 2008: Entire part added, p. 450, § 9, effective July 1. L. 2011: (1)(a), (2)(h), and (4) amended and (1)(d) added, (HB 11-1174), ch. 91, p. 269, § 1, effective August 10.

**38-29-205. Authorized agent - forward to the clerk and recorder.** If an authorized agent who receives a document for filing and recording pursuant to this part 2 is not the clerk and recorder for the county or city and county, the authorized agent shall forward such document to the clerk and recorder, for the clerk and recorder to file and record the document in his or her office.

**Source:** L. 2008: Entire part added, p. 451, § 9, effective July 1.

**38-29-206. Recorded documents - index.** Any document filed and recorded by a clerk and recorder pursuant to this part 2 shall be indexed in both the grantor and grantee indexes under the name of the owner or owners of the manufactured home and the owners of the land to which the manufactured home was affixed or permanently located at the time the document is required to be filed and recorded.

**Source:** L. 2008: Entire part added, p. 451, § 9, effective July 1.

**38-29-207. Copy of certificates to assessor.** The clerk and recorder shall forward a copy of a certificate of permanent location, certificate of removal, and certificate of destruction to the assessor for the county or city and county.

**Source:** L. 2008: Entire part added, p. 451, § 9, effective July 1.

**38-29-208. Affidavit of real property.** (1) Any person can prove that a manufactured home and the land upon which it has been permanently affixed is real property by filing an affidavit of real property with the clerk and recorder for the county or city and county in which the manufactured home is located. The clerk and recorder shall file and record the affidavit of real property in his or her office. Except as otherwise set forth in subsection (2) of this section, the affidavit of real property shall include the following:

(a) An acknowledged statement by all owners that the manufactured home and real property to which the manufactured home is permanently affixed became real property pursuant to this article;

(b) A statement from the county assessor that the manufactured home has been valued together with the land upon which it is affixed;



- (c) A statement from the county treasurer that taxes have been paid on the manufactured home and the land upon which it is affixed in the same manner as other real property, as that term is defined in section 39-1-102 (14), C.R.S.;
- (d) Proof that a search of the director's records pursuant to section 42-1-206, C.R.S., was conducted and that no certificate of title was found for the manufactured home; and
- (e) Verification that the manufactured home is permanently affixed to the ground in accordance with any applicable county or city and county codes or requirements so that it is no longer capable of being drawn over the public highways.
- (2) If a manufactured home occupies real property subject to a long-term lease that has an express term of at least ten years, then the affidavit of real property shall include the following:
- (a) A copy of the applicable long-term lease;
  - (b) A statement from the county treasurer that taxes have been paid separately on the manufactured home and the land upon which it is affixed; and
  - (c) The items set forth in paragraphs (a), (d), and (e) of subsection (1) of this section.

**Source:** **L. 2008:** Entire part added, p. 451, § 9, effective July 1. **L. 2009:** IP(1) and (1)(e) amended and (2) added, (SB 09-040), ch. 9, p. 69, § 11, effective July 1.

- 38-29-209. Fees - disposition.** (1) In all instances in which a document is to be filed and recorded pursuant to this part 2, the authorized agent or clerk and recorder, as the case may be, shall be paid such fees for each document so filed and recorded as are prescribed by law for the filing of like instruments in the office of the county clerk and recorder.
- (2) The recording fees authorized by this section are in addition to any fees that are required pursuant to section 38-29-138.
- (3) All fees paid pursuant to this section shall be kept and retained by the authorized agent or the clerk and recorder to defray the cost thereof and shall be disposed of by him or her as provided by law.

**Source:** **L. 2008:** Entire part added, p. 452, § 9, effective July 1.

REAL PROPERTY

Interests in Land

ARTICLE 30

Titles and Interests

**Cross references:** For right of an alien to take real property as an heir, see § 15-11-111; for provisions regarding subdivisions, see part 4 of article 61 of title 12; for unlawful activity concerning the sale of land, see § 18-5-302; for powers of appointment affecting realty, see article 2 of title 15; for power of attorney affecting realty, see part 5 of article 14 of title 15; for the effect of corporate resolutions, records, and reports and recordation thereof insofar as they pertain to real estate, see § 13-25-120; for effect and authenticity of reports of death by United States authorities as they may affect real estate, see § 13-25-121.

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38-30-103.	Livery of seisin, not necessary.	38-30-107.	Estate granted deemed fee simple unless limited.
38-30-104.	Vendor's after-acquired title deemed in trust for vendee.	38-30-107.5.	Royalty interests - minerals or geothermal resources.
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38-30-108.5.	Conveyances to trusts - ownership and transfer of property.	38-30-138.	Filing and recording fee.
38-30-109.	Existing conveyances not notice of beneficiary unless statement filed in five years. (Repealed)	38-30-139.	Photographic copies deemed recording. (Repealed)
38-30-110.	Rule against perpetuities inapplicable to cemetery trusts.	38-30-140.	Foreign deeds - translation - proof - not recorded without.
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38-30-113.	Deeds - short form - acknowledgment - effect.	38-30-143.	Prior deeds and conveyances by council validated.
38-30-113.5.	Beneficiary deeds.	38-30-144.	Conveyance by corporation.
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38-30-118.	Seal not necessary.	38-30-149.	Change of presiding officer not to affect suit.
38-30-119.	Posthumous children take as others.	38-30-150.	Definitions.
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38-30-136.	Subsequent proof of execution - proof or acknowledgment of copy.		
38-30-137.	Recording of leases based on crop rentals.		



38-30-164.	Sections to be liberally construed.		forceable restrictive covenants which are based upon race or religion.
38-30-165.	Unreasonable restraints on the alienation of property - prohibited practices.	38-30-170.	Private restrictive covenants - modification - exception - procedures.
38-30-166.	Joint ventures - ownership and transfer of property.	38-30-171.	Survival of remedies and title to corporate property after dissolution.
38-30-167.	Right of purchaser to obtain partial specific performance.	38-30-172.	Evidence of existence and authority - definitions.
38-30-168.	Unreasonable restrictions on renewable energy generation devices - definitions.	38-30-173.	Survival of remedies and title to corporate property after dissolution - nonprofit corporations.
38-30-169.	Instruments of conveyance - removal of void and unen-		

**38-30-101. Parties entitled to hold lands may convey.** Any person, association of persons, or body politic or corporate which is entitled to hold real estate, or any interest in real estate whatever, shall be authorized to convey the same to another or a body corporate or politic by deed.

**Source:** R.S. p. 106, § 1. G.L. § 160. G.S. § 198. R.S. 08: § 668. C.L. § 4869. CSA: C. 40, § 1. CRS 53: § 118-1-1. C.R.S. 1963: § 118-1-1.

#### ANNOTATION

**Law reviews.** For article, "An Introduction to Security", see 16 Rocky Mt. L. Rev. 27 (1943). For article, "Future Interests in Colorado", Part I, see 21 Rocky Mt. L. Rev. 227 (1948); Part II, 21 Rocky Mt. L. Rev. 1 (1948); Part III, 21 Rocky Mt. L. Rev. 123 (1949). For article, "Transmissibility of Future Interests in Colorado", see 27 Rocky Mt. L. Rev. 1 (1954). For note, "The Effect of Tax Titles Upon Easements and Restrictions Upon the Use of Land in Colorado", see 33 Dicta 228 (1956). For article, "One Year Review of Property", see 37 Dicta 89 (1960). For article, "Converting a Duplex: Party Wall Declaration and Other Considerations", see 11 Colo. Law. 1201 (1982). For

article, "Representing a Purchaser of a Time Share", see 11 Colo. Law. 1543 (1982). For article, "Some Rules of Future Interests Can Be Used to Clear Titles", see 12 Colo. Law. 1229 (1983).

**Quitclaim deed within exercise of power to sell.** Where a testator devised to his wife a life estate in land, remainder to his children, with power to her to "sell the place" during her lifetime, a quitclaim deed by her to the children was in exercise of the power to sell. *Moore v. Barnard*, 75 Colo. 395, 226 P. 134 (1924).

**Applied** in *Reinhardt v. Meyer*, 153 Colo. 296, 385 P.2d 597 (1963).

**38-30-102. Water rights conveyed as real estate - well permit transfers - legislative declaration - definitions.** (1) The general assembly:

(a) Finds that the division of water resources in the department of natural resources needs timely and accurate data regarding well ownership in order to efficiently and accurately account for wells and to ensure that wells are properly constructed and maintained;

(b) Determines that current data concerning well ownership is inadequate and that a substantial number of residential real estate transactions that transfer ownership of a well are not reported to the division;

(c) Determines that current and accurate data is necessary for the state to notify well owners of any health, safety, water right, or stewardship issues pertaining to their groundwater well; and

(d) Declares that this section is intended to provide the division with the information it needs to properly carry out its statutory duties.

(2) In the conveyance of water rights in all cases, except where the ownership of stock in ditch companies or other companies constitutes the ownership of a water right, the same formalities shall be observed and complied with as in the conveyance of real estate.

(3) (a) As used in this subsection (3):

(I) "Closing service" means closing and settlement services, as defined in section 10-11-102, C.R.S.

(II) "Division" means the division of water resources in the department of natural resources.

(III) "Person" means any individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, limited liability company, partnership, association, or other legal entity.

(b) (I) On and after January 1, 2009, when a buyer of residential real estate enters into a transaction that results in the transfer of ownership of a small capacity well listed in section 37-90-105 (1) (a) or (1) (b), C.R.S., or a domestic exempt water well used for ordinary household purposes that is listed in section 37-92-602 (1) (b) or (1) (e), C.R.S., the buyer shall, prior to or at closing of the transaction, complete a change in ownership form for the well in compliance with section 37-90-143, C.R.S.; except that, if an existing well has not yet been registered with the division, the buyer shall complete a registration of existing well form for the well.

(II) The residential real estate contract approved by the real estate commission created in section 12-61-105, C.R.S., shall require the buyer to complete the appropriate form for the well and, if no person will be providing a closing service in connection with the transaction, to file the form with the division within sixty days after closing.

(c) (I) If a person provides a closing service in connection with a residential real estate transaction subject to this subsection (3), that person shall:

(A) Within sixty days after closing, submit the appropriate form to the division with as much information as is available, and the division shall be responsible for obtaining the necessary well registration information directly from the buyer; and

(B) Not be liable for delaying the closing of the transaction in order to ensure that the buyer completes the form required by subparagraph (I) of paragraph (b) of this subsection (3). If the closing is delayed pursuant to this sub-subparagraph (B), neither the buyer nor the seller shall have any claim under this section for relief against the buyer, the seller, the person who provided closing services, a title insurance company regulated pursuant to article 11 of title 10, C.R.S., or any person licensed pursuant to article 61 of title 12, C.R.S.

(II) If no person provides such closing service, the buyer shall submit the appropriate form within the deadline specified in sub-subparagraph (A) of subparagraph (I) of this paragraph (c) and pay the applicable fee.

**Source:** L. 1893: p. 298, § 1. R.S. 08: § 669. C.L. § 4870. CSA: C. 40, § 2. CRS 53: § 118-1-2. C.R.S. 1963: § 118-1-2. L. 2008: Entire section amended, p. 192, § 1, effective January 1, 2009.

#### ANNOTATION

**Law reviews.** For note, "Water Title Examinations", see 34 Rocky Mt. L. Rev. 509 (1962). For article, "Transaction Costs As Determinants of Water Transfers", see 61 U. Colo. L. Rev. 393 (1990).

**Deed determines extent of water rights.** Where a deed clearly describes a water right intended to be conveyed there is no room for the application of the doctrine of implied grant, because the matter is one of conveyance and not of implication, and the extent of plaintiff's water rights is to be determined by the express terms of his deed. *Wanamaker Ditch Co. v. Crane*, 132 Colo. 366, 288 P.2d 339 (1955).

**If deed is silent, intention of parties determinative.** It is recognized in this state that water may or may not be appurtenant to land, and the provisions of the deed control. If the deed is silent on the subject, then the intention of the

parties is to be determined from all the circumstances of the case, including the fact as to the use of the water and whether it is necessary and essential to the beneficial use and enjoyment of the land. *Kinoshita v. North Denver Bank*, 31 Colo. App. 227, 501 P.2d 1337 (1972), *aff'd*, 181 Colo. 183, 508 P.2d 1264 (1973).

**Presumption of intent of convey all water rights.** Where a deed to land conveyed all water rights in any way appertaining or belonging to said land, and the grantee and his successors in title claimed a water right thereunder, in the absence of some fact or circumstance disclosing a patent inconsistency with the right claimed, a presumption arises that the grantor intended to and did convey any and all water rights incident to and necessary to the beneficial enjoyment of the land. *Means v. Pratt*, 138 Colo. 214, 331 P.2d 805 (1958).



**Prima facie title to water rights established.** Where a claim to water rights has been consistently asserted for nearly 50 years without challenge or interference and the water so claimed has been used upon the lands of a petitioner and his predecessors in title for that period of time, a prima facie title to such right has been established. *Means v. Pratt*, 138 Colo. 214, 331 P.2d 805 (1958).

**As to whether water right used to irrigate land passes as appurtenance to land.** See *Kinoshita v. North Denver Bank*, 31 Colo. App. 277, 501 P.2d 1337 (1972).

**Water rights may be conveyed and warranted.** Water rights can be conveyed and the

quality of the title may be warranted much like with real property. *Navajo Dev. Co. v. Sanderson*, 655 P.2d 1374 (Colo. 1982).

**Without regard to property over which water flows.** Whatever the exact nature of the property interest, water rights may be bought and sold without regard to the real property over which the water flows. *Navajo Dev. Co. v. Sanderson*, 655 P.2d 1374 (Colo. 1982).

**Applied** in *Davis v. Hurt*, 81 Colo. 10, 253 P. 394 (1927); *Franzen v. Zimmerman*, 127 Colo. 381, 256 P.2d 897 (1953); *Sherwood Irrigation Co. v. Vandewark*, 138 Colo. 261, 331 P.2d 810 (1958).

**38-30-103. Livery of seisin, not necessary.** Livery of seisin is in no case necessary for the conveyance of any lands, tenements, or hereditaments.

**Source:** R.S. p. 106, § 2. G.L. § 161. G.S. § 199. R.S. 08: § 670. C.L. § 4871. CSA: C. 40, § 3. CRS 53: § 118-1-3. C.R.S. 1963: § 118-1-3.

#### ANNOTATION

**Law reviews.** For note, "The Effect of Tax Titles Upon Easements and Restrictions Upon the Use of Land in Colorado", see 33 *Dicta* 228 (1956).

**Delivery of possession is no longer necessary.** *Moore v. Barnard*, 75 Colo. 395, 226 P. 134 (1924).

**Livery of seisin effective as notice of owner.** While livery of seisin is no longer necessary to

effect a conveyance of land in this state, it can be effective as a means of putting a vendee in possession and giving notice to the world that he is the lawful owner. *Western Motor Rebuilders, Inc. v. Carlson*, 138 Colo. 404, 335 P.2d 272 (1959).

**38-30-104. Vendor's after-acquired title deemed in trust for vendee.** If any person sells and conveys to another by deed or conveyance, purporting to convey an estate in fee simple absolute, any tract of land or real estate lying and being in this state, not being possessed of the legal estate or interest therein at the time of the sale and conveyance and, after such sale and conveyance, the vendor becomes possessed of and confirmed in the legal estate of the land or real estate so sold and conveyed, it shall be taken and held to be in trust and for the use of the grantee or vendee, and said conveyance shall be held and taken, and shall be as valid as if the grantor or vendor had the legal estate or interest at the time of said sale or conveyance.

**Source:** R.S. p. 106, § 4. G.L. § 163. G.S. § 201. R.S. 08: § 672. C.L. § 4873. CSA: C. 40, § 5. CRS 53: § 118-1-4. C.R.S. 1963: § 118-1-4.

#### ANNOTATION

**Law reviews.** For article, "The Perennial Problem of Security Priority and Recordation", see 24 *Rocky Mt. L. Rev.* 180 (1952). For article, "Transmissibility of Future Interests in Colorado", see 27 *Rocky Mt. L. Rev.* 1 (1954).

**This section is merely a codification of the general rule,** and is in harmony with the same. *Colo. Trout Fisheries, Inc. v. Welfenberg*, 84 Colo. 592, 273 P. 17 (1928).

**Purpose of section.** This section's obvious purpose is to confirm in the grantee any legal

estate or interest subsequently acquired by the grantor which was intended to be conveyed. *Van Wagenen v. Carpenter*, 27 Colo. 444, 61 P. 698 (1900).

**Applicability of section limited.** This section has no application except in cases where the deed purports to convey an estate in fee simple absolute. *Rittmaster v. Brisbane*, 19 Colo. 371, 35 P. 736 (1894).

**Section applicable only when the original transfer consists of a transfer of title to real**

**property by sale or conveyance.** Conveyance is the transfer of title from one person to another by delivery and acceptance of a deed. The deed of trust could not have purported to transfer title to the property from husband to the bank but rather secured payment of indebtedness by transfer to the public trustee. As such, the transaction was not a conveyance. *Premier Bank v. Bd. of County Comm'rs of County of Bent*, 214 P.3d 574 (Colo. App. 2009).

**Section applies only to purported conveyances of land or estates in fee.** Conveyance of a fee simple interest is generally accomplished by describing the grant as consisting of "the following real property" or some other description of the land. Such a conveyance carries with it covenants and warranties on the part of the grantor. Quitclaim language, however, only purports to convey the grantors' present interest; it makes no title warranty of any kind. It necessarily follows, therefore, that this section does not apply to such conveyances. *Premier Bank v. Bd. of County Comm'rs of County of Bent*, 214 P.3d 574 (Colo. App. 2009).

Granting clause of the deed only conveyed a quitclaim interest. Such language does not purport or promise to convey land or an estate in fee but only that which husband actually owned at the time. It is the granting clause, not the warranty clause in a deed that describes the nature

of the interest conveyed. To the extent there is any conflict between the warranty clause and the granting clause, the latter controls. *Premier Bank v. Bd. of County Comm'rs of County of Bent*, 214 P.3d 574 (Colo. App. 2009).

**Section does not affect lien priorities, and trial court erred in relying upon it to reverse priorities otherwise established under race-notice.** Race-notice is the linchpin of Colorado real estate law. By its plain terms, statute applies only to enforce a guarantor's warranty to a grantee, and its intent is to remedy the possibility that, in the grant of an estate in fee simple absolute, the grantor could still claim, as against the grantee, title to property that the grantor purported to convey but only acquired title to after the conveyance. Thus, statute merely serves to "bind" a grantor to the terms of the original purported conveyance, and, contrary to bank's argument, it contains no language pertaining to or overriding establishment of lien priorities under race-notice. Accordingly, although the bank had valid lien on husband's after-acquired interest, lien is junior to county's lien on one-half undivided interest in property held by wife. *Premier Bank v. Bd. of County Comm'rs of County of Bent*, 214 P.3d 574 (Colo. App. 2009).

**Applied in** *Phillipp v. Leet*, 19 Colo. 246, 35 P. 540 (1893).

**38-30-105. Lands not in possession may be conveyed.** Any person claiming right or title to lands, tenements, or hereditaments, although he may be out of possession, and notwithstanding there may be an adverse possession thereof, may sell, convey, and transfer his interest in and to the same in as full and complete a manner as if he were in the actual possession of the lands and premises intended to be conveyed.

**Source:** R.S. p. 107, § 5. G.L. § 164. G.S. § 202. R.S. 08: § 673. C.L. § 4874. CSA: C. 40, § 6. CRS 53: § 118-1-5. C.R.S. 1963: § 118-1-5.

**38-30-106. Tenant in fee tail takes in fee simple.** In cases where, by the common law, any person may be or become seized in fee tail of any lands, tenements, or hereditaments by virtue of any devise or conveyance, or by any other means whatsoever, such person, instead of becoming seized in fee tail thereof, shall be deemed and adjudged to be seized of such lands, tenements, and hereditaments in fee simple.

**Source:** R.S. p. 107, § 6. G.L. § 165. G.S. § 203. R.S. 08: § 674. C.L. § 4875. CSA: C. 40, § 7. CRS 53: § 118-1-6. C.R.S. 1963: § 118-1-6. L. 83: Entire section amended, p. 1467, § 1, effective May 25.

## ANNOTATION

**Law reviews.** For comment on *Sconce v. Neece*, 129 Colo. 267, 268 P.2d 1102 (1954), appearing below, see 31 *Dicta* 239 (1954), and 27 *Rocky Mt. L. Rev.* 121 (1954). For article, "Some Rules of Future Interests Can be Used to Clear Titles", see 12 *Colo. Law.* 1229 (1983).

**Legislative intent.** The manifest intention of the general assembly was to get rid of estates tail

and not to revive conditional fees and to substitute for the fee tail a life estate in the grantee, with remainder in fee simple to those who would take such remainder by the terms of the grant. *Sconce v. Neece*, 129 Colo. 267, 268 P.2d 1102 (1954).

**Fee simple conditional and estate tail distinguished.** The major difference between the



fee simple conditional and the estate tail is that the former is freely alienable after birth of the required issue while the latter lacks this charac-

teristic and its alienability is extremely limited. *Sconce v. Neece*, 129 Colo. 267, 268 P.2d 1102 (1954).

**38-30-107. Estate granted deemed fee simple unless limited.** Every estate in land which is granted, conveyed, or devised to one, although other words necessary to transfer an estate of inheritance are not added, shall be deemed a fee simple estate of inheritance if a lesser estate is not limited by express words or does not appear to be granted, devised, or conveyed by operation of law.

**Source:** R.S. p. 107, § 7. G.L. § 166. G.S. § 204. R.S. 08: § 675. C.L. § 4876. CSA: C. 40, § 8. CRS 53: § 118-1-7. C.R.S. 1963: § 118-1-7.

### ANNOTATION

**Law reviews.** For article, "Some Rules of Future Interests Can be Used to Clear Titles", see 12 Colo. Law. 1229 (1983).

**Words of inheritance still give rise to fee simple estate.** The use of words of inheritance, even though not required under this section, still gives rise to an estate in fee simple; the meaning or effect has not been changed, only the necessity for their use has been removed. In re Newby's Estate, 146 Colo. 296, 361 P.2d 622 (1961).

**Rebuttable presumption of fee simple estate.** The use of the word "deemed" in this section shows that only a rebuttable presumption is intended. *Bd. of County Comm'rs v. Morris*, 147 Colo. 1, 362 P.2d 202 (1961); *Farmers Reservoir & Irr. v. Sun Prod.*, 721 P.2d 1198 (Colo. App. 1986).

**Estate in fee created by will.** Where an estate in lands is created by will, it will be deemed to be in fee simple, unless the language of the will clearly shows that a lesser or different estate was intended to be established. *Tarr v. Newby*, 146 Colo. 296, 361 P.2d 622 (1961).

**Title passes by use of word "convey".** The word "convey" is the equivalent of the word "grant"; and by the use of the word "convey" in a deed, the title passes. *City of Leadville v. Coronado Mining Co.*, 29 Colo. 17, 67 P. 289 (1901).

**Use of the word "heirs" is not necessary to create a fee.** *Haymaker v. Windsor Reservoir & Canal Co.*, 81 Colo. 168, 254 P. 768 (1927); *Tarr v. Newby*, 146 Colo. 296, 361 P.2d 622 (1961).

**Ambiguity construed in favor of grantee.** Where ambiguity exists in the terms of an instrument creating an interest in real estate, the construction thereof must favor the grantee. *Clevenger v. Continental Oil Co.*, 149 Colo. 417, 369 P.2d 550 (1962); *Farmers Reservoir & Irr. v. Sun Prod.*, 721 P.2d 1198 (Colo. App. 1986).

Where the deed contains no language expressly limiting the fee interest, but language creating an interest in real property is ambiguous, it is to be construed in favor of the grantee.

*Kanarado Mining & Dev. Co. v. Sutton*, 36 Colo. App. 375, 539 P.2d 1325 (1975).

**Interpretation of parties' intent allowed only when ambiguous.** The intention of the parties to a conveyance is open to interpretation only when the words used are ambiguous. *Radke v. Union P. R. R.*, 138 Colo. 189, 334 P.2d 1077 (1958).

**Reservation construed to retain fee simple in grantor.** A reservation will be construed as an exception where that is the plain intent and a grantor will retain in himself a fee simple estate in the portion reserved. *Radke v. Union P. R. R.*, 138 Colo. 189, 334 P.2d 1077 (1958).

**Right to prospect for minerals is license, not reservation.** A right to prospect for and to remove minerals if found, is not a reservation of an estate in real property, but a mere license, subject to revocation before its exercise by the owner of the fee simple estate. *Radke v. Union P. R. R.*, 138 Colo. 189, 334 P.2d 1077 (1958).

**Grant of privilege to take coal is easement.** If an owner grants to another the right or privilege of taking coal from his lands, this grant, if not an exclusive one, is not the grant of an interest in land, but of an easement or incorporeal right, which leaves the title to the coal in place remaining in the grantor. *Radke v. Union P. R. R.*, 138 Colo. 189, 334 P.2d 1077 (1958).

**Fee simple determinable conveyed.** Where a block of ground within the limits of a city was conveyed to the county, with the proviso that if any part thereof should be used otherwise than for a courthouse, the premises should revert to the city, the conveyance conveyed a fee simple, determinable upon the condition expressed. *Bd. of Comm'rs v. City of Colo. Springs*, 66 Colo. 111, 180 P. 301 (1919).

**Grant of all coal on land is sale.** Grant of all the coal on the grantor's land, or of the exclusive right to mine the coal, is a sale of the coal in place. *Radke v. Union P. R. R.*, 138 Colo. 189, 334 P.2d 1077 (1958).

**Applied in** *Teller v. Hill*, 18 Colo. App. 509, 72 P. 811 (1903); *Huston v. Gaffner*, 67 Colo. 377, 176 P. 952 (1919); *Simson v. Langholf*, 133 Colo. 208, 293 P.2d 302 (1956).

**38-30-107.5. Royalty interests - minerals or geothermal resources.** (1) Any conveyance, reservation, or devise of a royalty interest in minerals or geothermal resources, whether of a perpetual or limited duration, contained in any instrument executed on or after July 1, 1991, creates a real property interest which vests in the holder or holders of such interest the right to receive the designated royalty share of the specified minerals or geothermal resources or the proceeds therefrom in accordance with the terms of the instrument. Unless otherwise provided in the conveyance, reservation, or devise, the holder of such interest shall not have the right to:

- (a) Explore for or develop the minerals or geothermal resources;
- (b) Grant a mineral development lease; or
- (c) Receive any share of rentals, bonus payments, surface damage payments, or similar sums that might be payable under the terms of any mineral development lease.

**Source: L. 91:** Entire section added, p. 1677, § 1, effective July 1.

#### ANNOTATION

**Rule against perpetuities inapplicable to option contract for mineral rights of stockholder.** Although the option contract clearly identified a specific property interest as the subject matter of the option, the terms were insuf-

ficient to create an interest in the property described since mineral interests were yet to be distributed. *Temple Hoyne Buell v. Holland & Hart*, 851 P.2d 192 (Colo. App. 1992).

**38-30-108. Conveyances to grantee in a representative capacity.** (1) An instrument conveying an interest in real property, in which the grantee is described as trustee, agent, conservator, executor, administrator, attorney-in-fact, personal representative, nominee, custodian, or a person acting in any other representative capacity, shall also describe the representative capacity of such grantee by one or more of the following means:

- (a) Naming the person so represented;
- (b) Identifying the statute, the trust or other agreement, or the court appointment under which the grantee is acting; or
- (c) Referring, by proper description to book, page, document number, or file to an instrument, order, decree, or other writing containing any such description of the representative capacity of the grantee that is recorded with the county clerk and recorder in the county where the real property is located.

(2) If the representative capacity of the grantee is not described as provided in subsection (1) of this section, the description of a grantee in any such representative capacity in such instrument of conveyance shall be presumed to be a description of the person only and shall not be notice of the representative capacity of such grantee.

(3) After the recording of an instrument conveying an interest in real property in which the grantee is described as acting in a representative capacity, but in which the description of the grantee does not comply with subsection (1) of this section, and regardless of whether such instrument of conveyance was recorded prior to or after August 8, 2001, an affidavit that has been executed by or on behalf of such grantee, which refers by proper description by book, page, document number, or file to the recording information of such instrument of conveyance and that contains one of the descriptions of the representative capacity of such grantee described in subsection (1) of this section, may be recorded with the county clerk and recorder of the county where the real property is located. Upon the recording of such affidavit, all persons shall thereafter have notice of the representative capacity of such grantee with respect to the interest in real property so conveyed.

**Source: L. 21:** p. 187, § 1. **C.L.** § 4877. **CSA:** C. 40, § 9. **CRS 53:** § 118-1-8. **C.R.S. 1963:** § 118-1-8. **L. 2001:** Entire section amended, p. 398, § 1, effective August 8.

**Cross references:** For succession of title to property held in trust for church or religious society, see § 7-52-105.



## ANNOTATION

**Law reviews.** For article, "Some Observations on Living Trusts", see 7 Dicta 3 (March 1930). For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 16 Dicta 71 (1940). For article, "How the Statute of Uses Became Operative in Colorado with a 'Telling Effect'", see 26 Dicta 310 (1949). For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 Dicta 321 (1949). For article, "The Care and Feeding of Individual Trustees", see 39 U. Colo. L. Rev. 205 (1966). For article, "Marketability Issues of Titles Held by Trusts and Trustees", see 29 Colo. Law. 73 (August 2000). For article "Entity and Trade Name Registration: 2001 Update", see 30 Colo. Law. 81 (October 2001). For article, "Title to Colorado Real Property Held in Trust", see 31 Colo. Law. 85 (May 2002).

**Word "trustee" deemed purely descriptive.** The addition of the word "trustee" to the name of the grantee in a conveyance signifies nothing in view of this section; the word is purely descriptive of the person. *Beatty v. Fellows*, 101 Colo. 466, 74 P.2d 677 (1937).

Description of grantees as "trustees" in a deed is considered a description of the person only, and the presence of word in the deed does not give rise to an express trust. *Coriell v. Hudson*, 563 F.2d 978 (10th Cir. 1977).

**The failure of a personal representative's deed to list the beneficiaries of a trust or reference a document of record providing such information**, pursuant to this section, does not render trust property available to satisfy personal judgments against a trustee when the creditors placed no reliance on the non-conforming personal representative's deed in extending the credit. *Lagae v. Lackner*, 996 P.2d 1281 (Colo. 2000).

The intent and purpose of the general assembly in enacting this section did not include allowing personal judgment creditors to seize trust assets to satisfy a trustee's personal obligations when those creditors did not rely on the non-conforming in extending the credit. To determine otherwise would produce an absurd result. In enacting this statute, the general assembly responded to the problems faced by bona fide purchasers, lessees, mortgagees, or assignees that relied on the apparent authority of trustees. It did not intend to make trust property available to the unsecured creditors of a person who serves as a trustee for another, when those creditors placed no reliance on the non-conforming instrument in making their loans. *Lagae v. Lackner*, 996 P.2d 1281 (Colo. 2000).

**Section protects devisees** in addition to bona fide purchasers and similar parties. Deed transferring property did not satisfy the requirements of this section, and, therefore, the property was transferred to the grantees in their individual capacities not in a representative capacity. In re Estate of Kiser, 72 P.3d 425 (Colo. App. 2003).

In light of the legislative intent to protect alienability and title, the supreme court's interpretation of this section in *Lagae v. Lackner* is limited to circumstances in which the party claiming an interest adverse to the trust is not a transferee. In re Estate of Kiser, 72 P.3d 425 (Colo. App. 2003).

**Subsection (3) applies retroactively to deeds** filed before the effective date of such subsection. However, affidavit filed did not meet the statutory requirements. In re Estate of Kiser, 72 P.3d 425 (Colo. App. 2003).

**Applied** in *Bd. of County Comm'rs v. Blanning*, 29 Colo. App. 61, 479 P.2d 404 (1970).

**38-30-108.5. Conveyances to trusts - ownership and transfer of property.** (1) A trust may acquire, convey, encumber, lease, or otherwise deal with any interest in real or personal property in the name of the trust.

(2) In order to evidence the existence of a trust and the authority of one or more trustees to act on behalf of the trust with respect to an interest in real property held in the name of the trust, any trustee of the trust may execute and record with the county clerk and recorder of the county in which the real property is located, a statement of authority pursuant to section 38-30-172 (2).

(3) The provisions of subsection (1) of this section shall also apply to any interest in real or personal property that is already in the name of the trust as of August 8, 2001. Nothing in this section shall be construed to be the exclusive manner in which title to an interest in real or personal property may be held by or on behalf of a trust, and title to an interest in real or personal property may be held by or on behalf of a trust in any other manner permitted by law.

**Source: L. 2001:** Entire section added, p. 399, § 2, effective August 8.

## ANNOTATION

**Law reviews.** For article "Entity and Trade Name Registration: 2001 Update", see 30 Colo. Law. 81 (October 2001). For article, "Title to

Colorado Real Property Held in Trust", see 31 Colo. Law. 85 (May 2002).

**38-30-109. Existing conveyances not notice of beneficiary unless statement filed in five years. (Repealed)**

**Source:** L. 21: p. 188, § 2. C.L. § 4878. CSA: C. 40, § 10. CRS 53: § 118-1-9. C.R.S. 1963: § 118-1-9. L. 99: Entire section amended, p. 628, § 37, effective August 4. L. 2001: Entire section repealed, p. 399, § 3, effective August 8.

**38-30-110. Rule against perpetuities inapplicable to cemetery trusts.** (1) Any gifts, bequests, transfers, grants, or conveyances of real or personal property by any one person in trust amounting to not more than twenty-five thousand dollars in value in the aggregate at the time of the creation of such trusts, the income of which is to be used exclusively for the purpose of creating, maintaining, or caring for any graves, tombs, mausoleums, grave markers or monuments, burial places, grave sites, cemetery plots, or graveyards and payment of reasonable compensation to the trustee, shall be good, valid, and enforceable regardless of the time such trusts continue. The rule or law against perpetuities shall have no application to any such part of any such trusts as are not more than twenty-five thousand dollars in value at the time of the creation of such trusts.

(2) Nothing in this section shall be deemed to detract from the validity of any payment, gift, or bequest in consideration of an agreement of a cemetery relating to care and maintenance, or any trust or other agreement entered into by a cemetery in aid or furtherance of any promise of such cemetery relative to the maintenance thereof, or of any grave, tomb, mausoleum, grave marker or monument, burial place, grave site, or cemetery plot therein.

**Source:** L. 43: p. 222, §§ 1, 2. CSA: C. 40, § 9(1). CRS 53: § 118-1-10. C.R.S. 1963: § 118-1-10.

## ANNOTATION

**Law reviews.** For article, "The Rule Against Perpetuities in Colorado", see 12 Colo. Law. 1625 (1983).

**38-30-111. Rule against perpetuities inapplicable to employees' pension trusts.** No trust created by an employer as a part of a pension, stock bonus, disability, death benefit, or profit-sharing plan for the exclusive benefit of some or all of his employees or their beneficiaries, to which contributions are made by such employer or employees, or by both employer and employees, for the purpose of distributing to such employees or their beneficiaries the earnings or principal, or both earnings and principal, of such trust, is invalid by reason of any existing law or rule against perpetuities or accumulations or suspension of the power of alienation; but such trust may continue for such time as may be necessary to accomplish the purposes for which it may be created.

**Source:** L. 51: p. 805, § 1. CSA: C. 40, § 9(2). CRS 53: § 118-1-11. C.R.S. 1963: § 118-1-11.



ANNOTATION

**Law reviews.** For note, “Adverse Possession in Colorado”, see 27 Rocky Mt. L. Rev. 88 (1954). For article, “The Rule Against Perpetuities in Colorado”, see 12 Colo. Law. 1625 (1983).

**38-30-112. Rule against perpetuities inapplicable to existing trusts.** No suit or other proceeding affecting a pension, stock bonus, disability, death benefit, or profit-sharing plan existing on September 29, 1951, wherein relief is sought on the ground that such plan is in violation of any existing law or rule against perpetuities or accumulations or suspension of the power of alienation, shall be instituted.

**Source:** L. 51: p. 805, § 2. CSA: C. 40, § 9(3). CRS 53: § 118-1-12. C.R.S. 1963: § 118-1-12.

ANNOTATION

**Law reviews.** For article, “The Rule Against Perpetuities in Colorado”, see 12 Colo. Law. 1625 (1983).

**38-30-113. Deeds - short form - acknowledgment - effect.** (1) (a) A deed for the conveyance of real property may be substantially in the following form:

....., whose street address is ....., City or Town of ....., County of ..... and State of ....., for the consideration of ..... dollars, in hand paid, hereby sell(s) and convey(s) to ..... whose street address is ....., City or Town of ....., County of ..... and State of ....., the following real property in the County of ..... and State of Colorado, to wit: ..... with all its appurtenances and warrant(s) the title to the same, subject to .....

Signed this ..... day of ....., 20....

(b) Such deed may be acknowledged in accordance with section 38-35-101. Failure to state the address or the county or state of residence of the grantor or grantee shall not affect the validity of such deed.

(c) Every deed in substance in the above form, when properly executed, shall be a conveyance in fee simple to the grantee, with covenants on the part of the grantor as set forth in subsection (2) of this section.

(d) Every deed in substance in the above form, when properly executed, shall be a conveyance of the grantor’s interest, if any, in any vacated street, alley, or other right-of-way that adjoins the real property unless the transfer of such interest is expressly excluded in the deed.

(2) The words “warrant(s) the title” in a warranty deed as described in subsection (1) (a) of this section or in a mortgage as described in section 38-30-117 mean that the grantor covenants:

(a) That at the time of the making of such instrument he was lawfully seized of an indefeasible estate in fee simple in and to the property therein described and has good right and full power to convey the same;

(b) That the same was free and clear from all encumbrances, except as stated in the instrument; and

(c) That he warrants to the grantee and his heirs and assigns the quiet and peaceable possession of such property and will defend the title thereto against all persons who may lawfully claim the same.

(3) Such covenants shall be binding upon any grantor and his heirs and personal representatives as fully as if written at length in said instrument.

**Source:** L. 17: p. 158, § 1. C.L. § 4879. CSA: C. 40, § 11. CRS 53: § 118-1-13. L. 55: p. 717, § 1. L. 61: p. 638, § 1. C.R.S. 1963: § 118-1-13. L. 73: p. 1152, § 1. L. 2005: (1)(d) added, p. 404, § 1, effective April 27.

### ANNOTATION

**Law reviews.** For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 Dicta 281 (1949). For article, "Highlights of the 1955 Colorado Legislative Session—Real Property", see 28 Rocky Mt. L. Rev. 58 (1955). For comment, "Implied Warranties in the Sale of Real Estate in Colorado: Rational Boundaries of the Doctrine", see 53 U. Colo. L. Rev. 137 (1981). For article, "Signatures on Documents Affecting Title to Colorado Real Property — Part I", see 12 Colo. Law. 61 (1983).

**Adoption of statutory form deed is clearly within domain of public policy.** People ex rel. Attorney Gen. v. Jersin, 101 Colo. 406, 74 P.2d 668 (1937).

**Ambiguity construed in favor of grantee.** Where the deed contains no language expressly limiting the fee interest, but language creating an interest in real property is ambiguous, it is to be construed in favor of the grantee. Kanarado Mining & Dev. Co. v. Sutton, 36 Colo. App. 375, 539 P.2d 1325 (1975).

**Construction of deeds with reconveyance clauses.** Deeds with reconveyance clauses have generally been construed as creating a fee simple subject to a covenant to reconvey or a fee simple on a condition subsequent. Kanarado Mining & Dev. Co. v. Sutton, 36 Colo. App. 375, 539 P.2d 1325 (1975).

**Warranty deed held unambiguous as conveying, rather than reserving, mineral rights.** First Nat'l Bank v. Allard, 182 Colo. 297, 513 P.2d 455 (1973).

**Covenant of general warranty is a guarantee** that the grantor is vested of an estate in fee simple with full power to convey, that the property is free of all encumbrances except as listed in the deed, that the grantor will guarantee title and peaceful possession, and will defend the grantee's title to the property. O'Brien v. Vill. Land Co., 794 P.2d 246 (Colo. 1990); Ford v. Summertree Lane Ltd. Liability Co., 56 P.3d 1206 (Colo. App. 2002).

**Conveyance by warranty deed is promise from grantor** that, at time of execution, grantor was lawfully seized of estate conveyed, that estate was free and clear of all encumbrances except as stated in deed, and the grantee is warranting the quiet possession of the property and that the grantor will defend the title against all persons lawfully claiming title. Upton v. Griffiths, 831 P.2d 504 (Colo. App. 1992).

**Three-year statute of limitations for action in breach of warranty** did not start to run until plaintiffs knew, or should have known, of the government's adverse possession of the property. Upton v. Griffiths, 831 P.2d 504 (Colo. App. 1992).

**Court properly awarded attorney fees** as damages for breach of deed warranties in action to establish rights to use road, but improperly awarded attorney fees for plaintiffs' efforts to establish that road was public and that the county was obligated to maintain it or for claims concerning indemnity issues. Davis v. Gourdin, 831 P.2d 497 (Colo. App. 1992).

**As to when covenant against disturbance of possession is broken.** See Andrus v. Saint Louis Smelting Co., 130 U.S. 643, 9 S. Ct. 645, 32 L. Ed. 1054 (1889).

**Vendee's knowledge of encumbrance.** While, as a general rule, in an action of covenant for breach of warranty against encumbrances, the knowledge of an encumbrance upon the part of the vendee does not constitute a defense, yet when it appears that the vendee has assumed the removal of such encumbrance, the rule does not apply. McClellan v. Morris, 71 Colo. 304, 206 P. 575 (1922).

**The sale of property with structures in violation of a building code** is not a breach of the covenant against encumbrances because building requirements are difficult to discover once a structure has been built. In the case of a violation of zoning laws, however, which exist at the time of conveyance and are cited as conditions to the issuance of the certificate of occupancy, there is a breach of the covenant against encumbrances. Feit v. Donahue, 826 P.2d 407 (Colo. App. 1992).

**An order for the alteration of a structure** already built in violation of a law or ordinance, or for penalties imposed for such violations, constitutes an encumbrance. Feit v. Donahue, 826 P.2d 407 (Colo. App. 1992).

**When a buyer agrees to buy "subject to building and zoning regulations",** the possibility of a breach of the covenant against encumbrances is not forever foreclosed because the buyer is not obligated to take the property subject to existing zoning violations. Feit v. Donahue, 826 P.2d 407 (Colo. App. 1992).

**Language in a sales contract** that the buyer agrees to buy "subject to building and zoning regulations" merges at closing into the deed, by



the doctrine of merger, which deed thereafter contains the rights of the parties. *Feit v. Donahue*, 826 P.2d 407 (Colo. App. 1992).

**Applied in** *Thomas v. Dunnean*, 75 Colo. 216, 225 P. 253 (1924); *Veatch v. Philip J.*

*Lasky, Inc.*, 29 Colo. App. 31, 477 P.2d 468 (1970); *Doty v. Chalk*, 632 P.2d 644 (Colo. App. 1981).

**38-30-113.5. Beneficiary deeds.** Deeds intended to take effect at the death of the grantor may be executed and recorded pursuant to the provisions of part 4 of article 15 of title 15, C.R.S.

**Source: L. 2004:** Entire section added, p. 734, § 4, effective August 4.

**38-30-114. Validation of acknowledgments.** Any deed or other conveyance of real property executed pursuant to section 38-30-113, if acknowledged in conformity with the provisions of section 38-35-101, shall be considered for all purposes as having been properly acknowledged. Such acknowledgment shall carry with it the presumption provided for by said section 38-35-101.

**Source: L. 47:** p. 354, § 2. **CSA:** C. 40, § 11(1). **CRS 53:** § 118-1-14. **C.R.S. 1963:** § 118-1-14.

#### ANNOTATION

**Law reviews.** For article, "Signatures on Documents Affecting Title to Colorado Real

Property — Part I", see 12 Colo. Law. 61 (1983).

**38-30-115. Deeds - bargain and sale - special warranty.** A deed executed according to the form in section 38-30-113 with the words "and warrant the title to the same" omitted therefrom shall have the same force and effect as a bargain and sale deed, without covenants of warranty, at common law and will pass the after-acquired title of the grantor; and the words "and warrant the title against all persons claiming under me" when included in such deed shall be a covenant that the grantor will warrant and defend the title to the grantee and his heirs and assigns against all persons claiming to hold title by, through, or under the grantor.

**Source: L. 17:** p. 160, § 2. **C.L.** § 4880. **CSA:** C. 40, § 12. **CRS 53:** § 118-1-15. **C.R.S. 1963:** § 118-1-15.

#### ANNOTATION

**Law reviews.** For article, "Transmissibility of Future Interests in Colorado", see 27 Rocky Mt. L. Rev. 1 (1954).

**A special warranty deed covenants against defects in title** which arise by, through, or under the actions of the grantor. Grantor is not liable

for defects based on events which occurred while the property was in the hands of a prior title holder. *Colo. Land & Res., Inc. v. Creditthrift of Am., Inc.*, 778 P.2d 320 (Colo. App. 1989).

**38-30-116. Deeds - quitclaim.** A deed executed according to the form in section 38-30-113 with the word "quitclaim" substituted for "convey" and the words "and warrant the title to the same" omitted therefrom shall be a deed of quitclaim and shall have the same effect as a conveyance as quitclaim deeds now in use.

**Source: L. 17:** p. 160, § 3. **C.L.** § 4881. **CSA:** C. 40, § 13. **CRS 53:** § 118-1-16. **C.R.S. 1963:** § 118-1-16.

## ANNOTATION

**A quitclaim deed does not convey land, but only the grantor's present interest in the land and therefore it is ineffectual to pass to the grantee any title or right acquired by the grantor**

subsequent to execution. *Tuttle v. Burrows*, 852 P.2d 1314 (Colo. App. 1992).

**Applied** in *Doty v. Chalk*, 632 P.2d 644 (Colo. App. 1981).

**38-30-117. Mortgages - short form - acknowledgment - effect.** (1) A mortgage of real property may be substantially in the following form:

....., whose address is ....., County of ..... and State of ....., hereby mortgage(s) to ....., whose address is ....., County of ..... and State of ....., to secure the payment of ..... dollars due as follows: ..... the following described real property in the County of ..... and State of Colorado, to wit: ..... with all its appurtenances, and warrant(s) the title to the same, subject to .....

Signed this ..... day of ....., 20....

.....

(2) Such mortgage may be acknowledged in accordance with section 38-35-101. Failure to state the address or the county or state of residence of the grantor or grantee shall not affect the validity of such mortgage.

(3) Every mortgage in substance in the above form, when properly executed, shall be a mortgage to secure the payment of the money therein specified, with covenants as expressed in section 38-30-113 (2), but if the words "and warrant(s) the title to the same" are omitted, no such covenants shall be implied.

**Source:** L. 17: p. 160, § 4. C.L. § 4882. CSA: C. 40, § 14. CRS 53: § 118-1-17. L. 55: p. 718, § 2. L. 61: p. 639, § 2. C.R.S. 1963: § 118-1-17.

## ANNOTATION

**It was not a fatal flaw to fail to include the name of the county in the mortgage.** In re *Beldo*, 114 Bankr. 736 (Bankr. D. Colo. 1990).

**38-30-118. Seal not necessary.** It is not necessary to the proper execution of any conveyance affecting real property that the same be executed under the seal of the grantor, nor that any seal or scroll or other mark be set opposite the name of the grantor.

**Source:** L. 17: p. 161, § 5. C.L. § 4883. CSA: C. 40, § 15. CRS 53: § 118-1-18. C.R.S. 1963: § 118-1-18.

## ANNOTATION

**Law reviews.** For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 16 *Dicta* 71 (1940). For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 *Dicta* 321 (1949). For article, "Signatures on Documents Affecting Title to Colorado Real Property — Parts I and III," see 12 *Colo. Law*. 61 and 447 (1983).

**This section only affects private conveyances;** it makes no mention of official seals. *Sayre v. Sage*, 47 Colo. 559, 108 P. 160 (1910).

**Applied** in *Halliwill v. Weible*, 64 Colo. 295, 171 P. 372 (1918).

**38-30-119. Posthumous children take as others.** When an estate has been limited by any conveyance, in remainder to the children of any person to be begotten, such children



born after the decease of their parent shall take the estate in the same manner as if they had been born in the lifetime of the parent, though no estate has been conveyed to support the contingent remainder after his death.

**Source:** R.S. p. 107, § 8. G.L. § 167. G.S. § 205. R.S. 08: § 676. C.L. § 4884. CSA: C. 40, § 16. CRS 53: § 118-1-19. C.R.S. 1963: § 118-1-19.

**38-30-120. Conveyance carries right of possession.** All conveyances of real estate and of any interest therein, duly executed and delivered, shall be held to carry with them the right to immediate possession of the premises or interest conveyed, unless a future day for the possession is therein specified.

**Source:** R.S. p. 107, § 9. G.L. § 168. G.S. § 206. R.S. 08: § 677. C.L. § 4885. CSA: C. 40, § 17. CRS 53: § 118-1-20. C.R.S. 1963: § 118-1-20.

#### ANNOTATION

**Intent to postpone deed's operation not provable by parol evidence.** Under this section it is certainly required that the intention to postpone the operation of a deed shall be declared in the instrument, and it cannot be proved by parol. *Omaha & Grant Smelting & Ref. Co. v. Tabor*, 13 Colo. 41, 21 P. 9256 (1889).

Parol evidence of an agreement that possession should not pass until the purchase money is fully paid is inadmissible. *Drake v. Root*, 2 Colo. 685 (1875); *Omaha & Grant Smelting & Ref. Co. v. Tabor*, 13 Colo. 41, 21 P. 925 (1889).

**Right to possess both surface and minerals.** Conveyance invests grantees with ownership and the right to immediate possession of the real estate, both as to the surface and the minerals. *Lambertson v. Thomas*, 146 Colo. 539, 362 P.2d 180 (1961).

**Possession denied where deed is void.** This section does not entitle a grantee to possession if the deed of conveyance is void on its face, and occupancy of the land in controversy would then be a trespass. *Williams v. Conroy*, 35 Colo. 117, 83 P. 959 (1905); *Whitehead v. Callahan*, 44 Colo. 396, 99 P. 57 (1908).

**Application of section to leasehold.** During the term of a lease, a tenant is normally entitled to full possession of the premises, even to the exclusion of the landlord. *Rutherford v. Scarborough*, 28 Colo. App. 352, 472 P.2d 721 (1970).

**Applied** in *Thomas v. Dunnean*, 75 Colo. 216, 225 P. 253 (1924).

**38-30-121. What covenants run with the land.** Covenants of seisin, peaceable possession, freedom from encumbrances, and warranty contained in any conveyance of real estate, or any interest therein, shall run with the premises and inure to the benefit of all subsequent purchasers and encumbrancers.

**Source:** R.S. p. 107, § 10. G.L. § 169. G.S. § 207. R.S. 08: § 678. C.L. § 4886. CSA: C. 40, § 18. CRS 53: § 118-1-21. C.R.S. 1963: § 118-1-21.

#### ANNOTATION

**Law reviews.** For article, "Measure of Damages for the Breach of the Covenants of Quiet Enjoyment and Warranty", see 13 *Dicta* 278 (1936). For comment, "Implied Warranties in the Sale of Real Estate in Colorado: Rational Boundaries of the Doctrine", see 53 *U. Colo. L. Rev.* 137 (1981). For article, "Implied Covenants in Oil and Gas Leases", see 12 *Colo. Law.* 1803 (1983).

**Only last covenantee in possession can sue for breach.** Where land conveyed with real covenants has passed by subsequent conveyances through the hands of various

covenantees, only the last covenantee in whose possession the land is when the covenant is broken can sue for its breach, and his right of action extends to any or to all of the prior covenantors. *Western Dev. & Realization Corp. v. Hext*, 108 Colo. 312, 117 P.2d 313 (1941).

**Accrual of cause of action depends upon time of breach;** and the time of breach varies with the particular covenant. *Bernklau v. Stevens*, 150 Colo. 187, 371 P.2d 765 (1962).

**Covenant of seisin is broken, if at all, when it is made.** *Bernklau v. Stevens*, 150 Colo. 187, 371 P.2d 765 (1962).

**Covenant of seisin and covenant of right to convey synonymous.** The covenant of right to convey is practically synonymous with the covenant of seisin. *Bernklau v. Stevens*, 150 Colo. 187, 371 P.2d 765 (1962).

**Covenant of title.** The covenant of seisin is regarded in legal effect as a covenant of title as well as a covenant of possession. *Bernklau v. Stevens*, 150 Colo. 187, 371 P.2d 765 (1962).

**Covenant against encumbrances runs with the land** and inures to the benefit of subsequent purchasers. *Wheeler v. Roley*, 105 Colo. 116, 95 P.2d 2 (1939).

**Covenant against encumbrances is not restricted to instances where there is an adverse claim of title**, but applies when a house is sold with an existing zoning violation that eventually results in the revocation of the certificate allowing occupancy. *Feit v. Donahue*, 826 P.2d 407 (Colo. App. 1992).

**A requirement that existed at time of conveyance that a garage be built to conform to zoning laws constituted an encumbrance.** *Feit v. Donahue*, 826 P.2d 407 (Colo. App. 1992).

**Covenant of warranty is broken when covenantee suffers eviction.** *Bernklau v. Stevens*, 150 Colo. 187, 371 P.2d 765 (1962).

**What constitutes eviction.** The requirement of eviction for breach of covenant of warranty is satisfied when the covenantee is unable to obtain possession by reason of possession by a

third person having a paramount title which existed at the time of the conveyance or because of the refusal of one in actual possession to surrender the premises to the covenantee. *Bernklau v. Stevens*, 150 Colo. 187, 371 P.2d 765 (1962).

**Right of recovery unaffected by grantee's knowledge of defective title.** Even though a grantee knows at the time of conveyance that his grantor's title is defective or that the grantor had no title to part of the land, it does not generally affect the grantee's right of recovery for a breach of warranty, but this, however, does not prevent a grantee from being estopped to assert his claim. *Reinhardt v. Meyer*, 153 Colo. 296, 385 P.2d 597 (1963).

**Grantee with no loss has no action.** The grantee of real property who has not, and will not, sustain any loss or damage by the breach of grantor's covenant to pay taxes on the property conveyed, has no cause of action for recovery of the amount of taxes assessed against the property. *Western Dev. & Realization Corp. v. Hext*, 108 Colo. 312, 117 P.2d 313 (1941).

**When restrictive covenants deemed controlling.** Restrictive residential covenants are controlling where they require a more restrictive use of the land than is permitted under zoning requirements. *Lidke v. Martin*, 31 Colo. App. 40, 500 P.2d 1184 (1972).

**Applied in** *Stone v. Rozich*, 88 Colo. 399, 297 P. 999 (1931).

**38-30-122. No action against warrantor without notice and refusal to defend.** No right of action shall exist upon a covenant of warranty against a warrantor when possession of the premises warranted has been actually delivered to or taken by the warrantee, until the party menacing the possession of the grantee, his heirs, personal representatives, or assigns have commenced legal proceedings to obtain possession of the premises in question and the grantor, after notice, has refused to defend, at his own cost, the premises in such action.

**Source:** R.S. p. 108, § 11. G.L. § 170. G.S. § 208. R.S. 08: § 679. C.L. § 4887. CSA: C. 40, § 19. CRS 53: § 118-1-22. C.R.S. 1963: § 118-1-22.

## ANNOTATION

**Law reviews.** For article, "Measure of Damages for the Breach of the Covenants of Quiet Enjoyment and Warranty", see 13 *Dicta* 278 (1936).

**Section applies only to covenant of warranty.** *Seyfried v. Knoblauch*, 44 Colo. 86, 96 P. 993 (1908).

**Application of the statute is limited to grantees in possession of the property in dispute** and shall not be used to delay the running of three-year statute of limitations on a claim involving a breach of warranty by a former grantee who conveyed and voluntarily relinquished possession of the property covered by the deed. *Pagosa Springs Invs. v. Sivers*, 886 P.2d 307 (Colo. App. 1994).

**Section is inapplicable when possession is not obtained under the deed**, not when the holder of the adverse title has obtained possession of the premises since the deed was made. *Tierney v. Whiting*, 2 Colo. 620 (1875).

**"Legal proceedings" and "action" construed.** The words "legal proceedings" and "action", as used in this section, mean a suit in court for the possession of the land. *Ernst v. St. Clair*, 71 Colo. 353, 206 P. 799 (1922).

**This section does not bar action for breach of warranty deed** since grantees never took possession of the property involved and are regarded as actually being evicted from property. *Upton v. Griffiths*, 831 P.2d 504 (Colo. App. 1992).



**Accrual of cause of action for breach of warranty.** Where a covenantee is never in possession of property conveyed, he cannot be menaced in his possession within the meaning of this section, hence a cause of action for breach of warranty accrues upon delivery of the conveyance. *Bernklau v. Stevens*, 150 Colo. 187, 371 P.2d 765 (1962).

This section clearly sets forth the commencement of legal proceedings by a third party as the

date of accrual. *Bernklau v. Stevens*, 150 Colo. 187, 371 P.2d 765 (1962).

**Water rights may be warranted.** Water rights can be conveyed and the quality of the title may be warranted much like with real property. *Navajo Dev. Co. v. Sanderson*, 655 P.2d 1374 (Colo. 1982).

**Applied** in *Stone v. Rozich*, 88 Colo. 399, 297 P. 999 (1931); *Seyfried v. Knoblauch*, 44 Colo. 86, 96 P. 993 (1908).

**38-30-123. Powers of attorney must be recorded.** In order that all conveyances which are executed by any attorney-in-fact may be seen to be executed with the assent of the grantor, the power of attorney of the attorney-in-fact, duly proved or acknowledged, shall be recorded in the same office in which the conveyances themselves are required to be recorded.

**Source:** R.S. p. 108, § 12. G.L. § 171. G.S. § 209. R.S. 08: § 680. C.L. § 4888. CSA: C. 40, § 20. CRS 53: § 118-1-23. C.R.S. 1963: § 118-1-23.

#### ANNOTATION

**Law reviews.** For article, "Guess Who's Coming to Closing", see 11 Colo. Law. 689 (1982). For article, "Signatures on Documents Affecting Title to Colorado Real Property — Part III", see 12 Colo. Law. 447 (1983).

**Applied** in *Waddingham v. Dickson*, 17 Colo. 223, 29 P. 177 (1892).

**38-30-124. Powers of attorney, how acknowledged and proved.** Powers of attorney for the conveying, leasing, or releasing of any lands, tenements, or hereditaments or any interest therein may be acknowledged or proved in the same manner as deeds.

**Source:** R.S. p. 111, § 16. G.L. § 175. G.S. § 214. R.S. 08: § 681. C.L. § 4889. CSA: C. 40, § 21. CRS 53: § 118-1-24. C.R.S. 1963: § 118-1-24.

**38-30-125. Scroll sufficient.** Any instrument of writing to which the maker shall affix a scroll, by way of seal, shall be of the same effect and obligation to all intents as if the same were sealed.

**Source:** L. 1879: p. 170, § 1. G.S. § 3121. R.S. 08: § 683. C.L. § 4890. CSA: C. 40, § 22. CRS 53: § 118-1-25. C.R.S. 1963: § 118-1-25.

#### ANNOTATION

**Law reviews.** For article, "Formal Contracts in Colorado", see 7 Rocky Mt. L. Rev. 191 (1935).

**Section applies to all instruments, including tax deeds.** *Linville v. Russell*, 168 Colo. 459, 452 P.2d 18 (1969).

**Adoption of printed word and scroll as seal permissible.** Where a blank form of bond is used with the word "seal" with a scroll around

it, printed after the blank space for the signature, the maker of the bond may adopt the printed word and scroll as his seal. *Carlile v. People*, 27 Colo. 116, 59 P. 48 (1899).

**Instrument held to be sealed.** *Morgenson v. Middlesex Mining & Milling Co.*, 11 Colo. 176, 17 P. 513 (1887).

**Applied** in *Carlile v. People*, 27 Colo. 116, 59 P. 48 (1899).

**38-30-126. Acknowledgments, before whom taken.** (1) Deeds, bonds, and agreements in writing conveying lands or any interest therein, or affecting title thereto, may be acknowledged or proved before the following officers when executed within this state:

(a) Any judge of any court of record, the clerk of any such court of record, or the deputy

of any such clerk, such judge, clerk, or deputy clerk certifying such acknowledgment under the seal of such court;

(b) The clerk and recorder of any county, or his deputy, such clerk or deputy clerk certifying the same under the seal of such county;

(c) Any notary public, certifying the same under his notarial seal; or

(d) Prior to the second Tuesday in January, 1965, any justice of the peace within his county, except that if such deed, bond, or agreement is for the conveyance of lands situated beyond the county of such justice of the peace, there shall be affixed to his certificate of such acknowledgment a certificate of the county clerk and recorder of the proper county, under his hand and the seal of such county, as to the official capacity of such justice of the peace, and that the signature to such certificate of acknowledgment is the true signature of such justice.

(2) When executed out of this state, and within the United States or any territory thereof, before:

(a) The secretary of any such state or territory, certifying such acknowledgment under the seal of such state or territory;

(b) The clerk of any court of record of such state or territory, or of the United States within such state or territory, having a seal, such clerk certifying the acknowledgment under the seal of such court;

(c) Any notary public of such state or territory, certifying the same under his notarial seal;

(d) Any commissioner of deeds for any such foreign state or territory appointed under the laws of this state, certifying such acknowledgment under his hand and official seal;

(e) Any other officer authorized by the laws of any such state or territory to take and certify such acknowledgment if there is affixed to the certificate of such officer, other than those above enumerated, a certificate by the clerk of some court of record of the county, city, or district, wherein such officer resides, under the seal of such court, that the person certifying such acknowledgment is the officer he assumes to be, that he has the authority by the laws of such state or territory to take and certify such acknowledgment, and that the signature of such officer to the certificate of acknowledgment is the true signature of such officer.

(3) When executed or acknowledged out of the United States, before:

(a) Any judge, or clerk, or deputy clerk of any court of record of any foreign kingdom, empire, republic, state, principality, province, colony, island possession, or bailiwick, such judge, clerk, or deputy clerk certifying such acknowledgment under the seal of such court;

(b) The chief magistrate or other chief executive officer of any province, colony, island possession, or bailiwick or the mayor or the chief executive officer of any city, town, borough, county, or municipal corporation having a seal, of such foreign kingdom, empire, republic, state, principality, province, colony, island possession, or bailiwick, such chief magistrate or other chief executive officer or such mayor certifying such acknowledgment under such seal; or

(c) Any ambassador, minister, consul, vice-consul, consular agent, vice-consular agent, charge d'affaires, vice-charge d'affaires, commercial agent, vice-commercial agent, or diplomatic, consular, or commercial agent or representative or duly constituted deputy of any thereof of the United States or of any other government or country appointed to reside in the foreign country or place where the proof of acknowledgment is made, he certifying the same under the seal of his office.

(4) When executed or acknowledged out of the state and within any colony, island possession, or bailiwick belonging to or under the control of the United States, before:

(a) Any judge or clerk or deputy clerk of any court of record of such colony, island possession, or bailiwick, such judge, clerk, or deputy clerk certifying such acknowledgment under the seal of such court;

(b) The chief magistrate or other chief executive officer of any such colony, island possession, or bailiwick, he certifying the same under his official seal, or before the mayor or the chief executive officer of any city, town, borough, county, or municipal corporation having a seal, of such colony, island possession, or bailiwick, such mayor or other chief officer certifying such acknowledgment under his official seal; or



(c) Any notary public within such colony, island possession, or bailiwick, such notary public certifying such acknowledgment under his seal.

**Source:** R.S. p. 108, § 13. G.L. § 172. G.S. § 210. L. 1887: p. 229, § 1. L. 1889: p. 86, § 1. R.S. 08: § 684. L. 09: p. 326, § 1. C.L. § 4891. CSA: C. 40, § 23. CRS 53: § 118-1-26. C.R.S. 1963: § 118-1-26. L. 64: p. 307, § 269. L. 76: (3) R&RE, p. 314, § 69, effective May 20.

**Editor's note:** Justices of the peace were abolished pursuant to amendments to article VI of the constitution of the state of Colorado as adopted at the 1962 general election and S.B. No. 28, chapter 40, Session Laws of Colorado 1964.

#### ANNOTATION

**Law reviews.** For article, "Signatures on Documents Affecting Title to Colorado Real Property — Part I", see 12 Colo. Law. 61 (1983).

**Applied in** Waddingham v. Dickson, 17 Colo. 223, 29 P. 177 (1892); Halbouer v. Cuenin, 45

Colo. 507, 101 P. 763 (1909); Lambert v. Murray, 52 Colo. 156, 120 P. 415 (1911); McKibbin v. Paul, 25 Colo. App. 134, 136 P. 476 (1913).

**38-30-127. Acknowledgments taken pursuant to other laws.** (1) In addition to the acknowledgment of instruments as provided by articles 30 to 44 of this title, instruments may be acknowledged by:

(a) Members of the armed forces of the United States and certain other persons, as provided by section 24-12-104, C.R.S.;

(b) Any person within or outside of this state, pursuant to part 2 of article 55 of title 12, C.R.S.

(2) Any person otherwise authorized by law to take acknowledgments in this state may take and certify acknowledgments either in accordance with articles 30 to 44 of this title or in the same manner and on the same evidence as provided in part 2 of article 55 of title 12, C.R.S. Any certificate of acknowledgment that is taken pursuant to such part 2 shall be valid and have the benefits set forth in subsection (3) of this section, whether such certificate is given before or after January 1, 1999.

(3) A certificate of acknowledgment taken pursuant to part 2 of article 55 of title 12, C.R.S., or taken pursuant to such part 2 and subsection (2) of this section shall:

(a) Constitute prima facie evidence of proper execution of the instrument acknowledged;

(b) Carry with it the presumptions provided by section 38-35-101; and

(c) Be accorded the same force and effect as any acknowledgment taken and certified in accordance with articles 30 to 44 of this title.

**Source:** L. 43: p. 217, § 1. L. 47: p. 356, § 4. CSA: C. 40, § 23A. CRS 53: § 118-1-27. C.R.S. 1963: § 118-1-27. L. 98: Entire section amended, p. 744, § 7, effective January 1, 1999.

**38-30-128. Prima facie validity of prior foreign acknowledgments.** All deeds and other instruments in writing relating to real estate in this state which have been executed prior to April 23, 1909, purporting to have been acknowledged or proved out of this state before any judge, or clerk, or deputy clerk of any court of record of any foreign kingdom, empire, republic, state, principality, province, colony, island possession, or bailiwick certifying the acknowledgment under the seal of such court, or purporting to have been acknowledged or proved before the chief magistrate or other chief executive or chief officer of any province, colony, island possession, or bailiwick of such foreign kingdom, empire, republic, state, or principality, such chief magistrate or other chief officer of any such colony, island possession, or bailiwick certifying the same under the seal of such colony, island possession, or bailiwick; or purporting to have been acknowledged or proved before

a notary public having a seal, or before the mayor or other chief executive officers of any city, town, borough, county, or municipal corporation having a seal, of any such foreign kingdom, empire, republic, state, principality, province, colony, island possession, or bailiwick, such mayor or other chief officer certifying such acknowledgment under such seal; or purporting to have been acknowledged or proved out of this state and within any such kingdom, empire, republic, state, principality, province, colony, island possession, or bailiwick, before any ambassador, minister, consul, vice-consul, consular agent, vice-consular agent, charge d'affaires, commercial agent, vice-commercial agent, or any diplomatic, consular, or commercial agent or representative, or any deputy of any thereof, of the United States or of any other government or country, appointed to reside in the foreign country or place where the proof or acknowledgment is made, certifying the same under the seal of his office, shall be deemed prima facie to have been acknowledged or proved before proper officers, and such deeds or other instrument in writing, and in case of the loss of the originals, a copy of the record thereof, and of the certificate of the acknowledgment or proof appertaining to the same, shall be received as prima facie evidence of the execution and acknowledgment thereof, anything in the statutes of this state to the contrary notwithstanding.

**Source:** L. 09: p. 33, § 1. C.L. § 4892. CSA: C. 40, § 24. CRS 53: § 118-1-28. C.R.S. 1963: § 118-1-28.

**38-30-129. Clerk of U.S. courts may take acknowledgments.** Deeds, bonds, and agreements in writing conveying lands or any interest therein, or affecting title thereto, may be acknowledged or proved before any clerk of the circuit or district court of the United States, for the district of Colorado, or any deputy of such clerk, such clerk or deputy clerk certifying such acknowledgment under the seal of such court respectively.

**Source:** L. 1879: p. 5, § 1. G.S. § 211. R.S. 08: § 685. C.L. § 4893. CSA: C. 40, § 25. CRS 53: § 118-1-29. C.R.S. 1963: § 118-1-29.

**38-30-130. Governor may appoint commissioners of deeds.** The governor may appoint and commission in any other state, in the District of Columbia, in each of the territories of the United States, and in any foreign country one or more commissioners, who shall keep a seal of office and continue in office during the pleasure of the governor and shall have authority to take the acknowledgment or proof of the execution of any deed or other conveyance or lease of any lands lying in this state or of any contract, letters of attorney, or any other writing under seal, or note to be used and recorded in this state, and such commissioners appointed for any foreign country shall also have authority to certify to the official character, signature, or seal of any officer within their district who is authorized to take acknowledgments or declarations under oath.

**Source:** L. 1885: p. 147, § 1. R.S. 08: § 686. C.L. § 4894. CSA: C. 40, § 26. CRS 53: § 118-1-30. C.R.S. 1963: § 118-1-30.

#### ANNOTATION

**The appointment as commissioner carries with it all power necessary to execute the** commission. *Ford v. Rockwell*, 2 Colo. 376 (1874).

**38-30-131. Oath of commissioner of deeds.** Every such commissioner, before performing any duty or exercising any power by virtue of his appointment, shall take and subscribe an oath or affirmation, before a judge or clerk of one of the courts of record of the district, territory, state, or country in which such commissioner resides or before any ambassador, minister, consul or vice-consul, consular agent, vice-consular agent, charge d'affaires, or any diplomatic, consular, or commercial agent or representative of the United States appointed for the foreign state or country in which such commissioner resides, well



and faithfully to execute and perform all the duties of such commissioner under and by virtue of the laws of the state of Colorado, which oath, and an impression of the seal of office, together with his signature thereto, shall be filed in the office of the secretary of state of this state within six months after the date of appointment.

**Source:** L. 1885: p. 148, § 2. R.S. 08: § 687. C.L. § 4895. CSA: C. 40, § 27. L. 37: p. 470, § 1. CRS 53: § 118-1-31. C.R.S. 1963: § 118-1-31.

**38-30-132. Effect of commissioner's acknowledgment.** Such acknowledgment or proof so taken according to the laws of this state, and certified by any such commissioner under his seal of office, annexed to or endorsed on such instrument, shall have the same force and effect as if the same had been made before a judge or any other officer authorized to perform such act in this state.

**Source:** L. 1885: p. 148, § 3. R.S. 08: § 688. C.L. § 4896. CSA: C. 40, § 28. CRS 53: § 118-1-32. C.R.S. 1963: § 118-1-32. L. 64: p. 307, § 270.

**38-30-133. Commissioner has power to administer oath.** Every commissioner has the power to administer any oath, which may be lawfully required in this state, to any person willing to take it and to take and certify all depositions to be used in any of the courts of this state, in conformity with the laws thereof, either on interrogations proposed under commission from a court of this state or by consent of parties, and all such acts shall be as valid as if done and certified according to law by a magistrate of this state.

**Source:** L. 1885: p. 148, § 4. R.S. 08: § 689. C.L. § 4897. CSA: C. 40, § 29. CRS 53: § 118-1-33. C.R.S. 1963: § 118-1-33.

**38-30-134. Fees of commissioners.** Commissioners, for like services, shall be allowed the same fees as are allowed by law to notaries public of this state.

**Source:** L. 1885: p. 148, § 5. R.S. 08: § 690. C.L. § 4898. CSA: C. 40, § 30. CRS 53: § 118-1-34. C.R.S. 1963: § 118-1-34.

**Cross references:** For fees allowable to notary public, see § 12-55-121.

**38-30-135. Officer shall subscribe certificate.** Every certificate of the acknowledgment or proof of any deed, bond, agreement, power of attorney, or other writing for the conveyance of real estate, or any interest therein or affecting title thereto, shall be subscribed by the officer certifying the same with his proper hand and shall be endorsed upon or attached to such deed or other writing.

**Source:** R.S. p. 113, § 22. G.L. § 180. G.S. § 220. R.S. 08: § 692. C.L. § 4900. CSA: C. 40, § 31. CRS 53: § 118-1-35. C.R.S. 1963: § 118-1-35.

**38-30-136. Subsequent proof of execution - proof or acknowledgment of copy.** (1) When any deed or instrument of writing has been executed and not acknowledged according to law at the time of the execution thereof, such deed or instrument of writing may at any subsequent time be acknowledged by the makers thereof in the manner provided in this article, or proof may be made of the execution thereof before any officer authorized to take acknowledgments of deeds in the manner provided in this section. Such officer, when the fact is not within his own knowledge, shall ascertain from the testimony of at least one competent, credible witness, to be sworn and examined by him, that the person offering to prove the execution of such deed or writing is a subscribing witness thereto. Thereupon such officer shall examine such subscribing witness upon oath or affirmation, and shall reduce his testimony to writing and require the witness to subscribe the same, endorsed

upon or attached to such deed or other writing, and shall thereupon grant a certificate that such witness was personally known or was proved to him by the testimony of at least one witness (who shall be named in such certificate) to be a subscribing witness to the deed or instrument of writing to be proved, that such subscribing witness was lawfully sworn and examined by him, and that the testimony of the said officer was reduced to writing and by said subscribing witness subscribed in his presence.

(2) If by the testimony it appears that such witness saw the person, whose name is subscribed to such instrument of writing, sign, seal, and deliver the same or that such person afterwards acknowledged the same to the said witness to be his free and voluntary act or deed and that such witness subscribed the said deed or instrument of writing in attestation thereof, in the presence and with the consent of the person so executing the same, such proof if attested and the authority of the officer to take the same duly proved in the same manner as required in the case of acknowledgment, shall have the same force and effect as an acknowledgment of said deed or instrument of writing by the person executing the same, and duly certified.

(3) When any such deed or instrument of writing has been executed and recorded without due proof, attestation or acknowledgment as required by law, a certified copy from such record may be proved or acknowledged in the same manner and with like effect as the original thereof. No person shall be permitted to use such certified copy so proved as evidence except upon satisfactory proof that the original thereof has been lost or destroyed or is beyond his power to produce.

**Source:** R.S. p. 109, § 15. G.L. § 174. G.S. § 213. R.S. 08: § 693. C.L. § 4901. CSA: C. 40, § 32. CRS 53: § 118-1-36. C.R.S. 1963: § 118-1-36.

#### ANNOTATION

**Law reviews.** For article, "Signatures on Property — Part I", see 12 Colo. Law. 61 Documents Affecting Title to Colorado Real (1983).

**38-30-137. Recording of leases based on crop rentals.** In any case where agricultural lands are leased upon a crop rental basis and the landlord receives under the terms of the lease a share of the crop in lieu of a cash rental, such lease may be recorded in the office of the county clerk and recorder of the county where the lands leased, or the major part thereof, are situated. The filing of such lease shall be notice to all persons of the right of the landlord or lessor in and to any crops grown on said lands. Any purchaser of any such crop, or of any part thereof, shall be bound to take notice of the rights of the lessor therein and shall be accountable to such lessor for the purchase price of any such crop to the extent of the lessor's interest therein.

**Source:** L. 25: p. 177, § 1. CSA: C. 40, § 33. CRS 53: § 118-1-37. C.R.S. 1963: § 118-1-37.

#### ANNOTATION

**Applied** in *Chambers v. Nation*, 178 Colo. 124, 497 P.2d 5 (1972).

**38-30-138. Filing and recording fee.** The fee for filing and recording such lease shall be the same as that now provided by law for the recording of deeds of real estate.

**Source:** L. 25: p. 177, § 2. CSA: C. 40, § 34. CRS 53: § 118-1-38. C.R.S. 1963: § 118-1-38.

**Cross references:** For filing and recording fees chargeable by county clerk and recorders, see § 30-1-103.



**38-30-139. Photographic copies deemed recording. (Repealed)**

**Source:** L. 17: p. 400, § 1. C.L. § 4904. CSA: C. 40, § 35. CRS 53: § 118-1-39. C.R.S. 1963: § 118-1-39. L. 96: Entire section repealed, p. 1561, § 13, effective July 1.

**38-30-140. Foreign deeds - translation - proof - not recorded without.** Deeds, bonds, agreements in writing, and powers of attorney for the conveyance of lands, or any interest therein, or affecting the title thereto executed in any foreign country, and the acknowledgment or proof of execution thereof, may be executed, heard, taken, and certified in the language of such foreign country, and there shall be attached thereto a translation into the English language by any person learned in the language of such foreign country and by such person sworn to be a true and correct translation thereof before any officer or court authorized to take the acknowledgment of deeds. Such deed, bond, agreement, or power of attorney, and the certificate of acknowledgment or proof thereof, may be read in evidence and recorded with like effect as if written in the English language. Such translation shall not be conclusive upon any party desiring to question the correctness thereof. No such deed or other writing shall be entitled to record unless accompanied by such sworn translation.

**Source:** R.S. p.113, § 21. G.L. § 179. G.S. § 219. R.S. 08: § 698. C.L. § 4908. CSA: C. 40, § 37. CRS 53: § 118-1-41. C.R.S. 1963: § 118-1-40.

**ANNOTATION**

**Law reviews.** For article, "Signatures on Documents Affecting Title to Colorado Real Property — Part III", see 12 Colo. Law. 447 (1983).

**38-30-141. Conveyance by county or municipality.** The board of county commissioners of any county, or the common council of any city, or the board of trustees of any town may, by order to be entered of record among the proceedings of any such board or council, appoint a commissioner to sell and convey any real estate belonging to such county, city, or town and to affix to any conveyance thereof the seal of such county, city, or town. Any such conveyance, executed in accordance with such order, shall have the effect of transferring to the grantee named all the estate of such county, city, or town in the real estate so conveyed. Nothing in this section shall be so construed as to prevent any such board of county commissioners from selling and conveying any such real estate belonging to such county by deed or conveyance signed and acknowledged by each member of said board and attested by the signature of the county clerk and recorder and the official seal of said county. Nothing in this section shall be so construed as to prevent any such board of trustees or city council from conveying any real estate belonging to such town or city by deed or conveyance signed and acknowledged by the mayor of said town or city, attested by the signature of the town or city clerk and by the official seal of such town or city, when any such mayor and clerk are authorized to do so by ordinance or by a vote of the residents thereof, as the case may be.

**Source:** G.L. § 181. L. 1881: p. 64, § 1. G.S. § 221. R.S. 08: § 699. C.L. § 4909. CSA: C. 40, § 38. L. 47: p. 357, § 1. CRS 53: § 118-1-42. C.R.S. 1963: § 118-1-41.

**38-30-142. Prior deeds and conveyances by commissioners validated.** All deeds and conveyances of any real estate, formerly belonging to any county conveyed prior to April 4, 1947, by deed signed and acknowledged by the members of the board of county commissioners of such county and attested by the county clerk and recorder of such county, with the official seal thereof affixed, shall be deemed and held to be legal, valid, and binding conveyances of the real estate therein described in all respects and in the same manner as though said deeds or conveyances had been signed by a commissioner appointed for the purpose of selling and conveying the same on behalf of such county.

**Source:** L. 47: p. 358, § 2. CSA: C. 40, § 38(1). CRS 53: § 118-1-43. C.R.S. 1963: § 118-1-42.

**38-30-143. Prior deeds and conveyances by council validated.** All deeds and conveyances of any real estate, formerly belonging to any town or city conveyed prior to April 4, 1947, by deed signed and acknowledged by the mayor and attested by the clerk with the official seal of any such town or city affixed, shall be deemed and held to be legal, valid, and binding conveyances of the real estate therein described in all respects and in the same manner as though said deeds or conveyances had been signed by a commissioner appointed for the purpose of selling and conveying the same on behalf of such town or city.

**Source:** L. 47: p. 358, § 3. CSA: C. 40, § 38(2). CRS 53: § 118-1-44. C.R.S. 1963: § 118-1-43.

**38-30-144. Conveyance by corporation.** (1) A private corporation, authorized by law to convey, mortgage, or lease any of its real estate, may convey, mortgage, or lease the same in the manner authorized by articles 30 to 44 of this title or by instrument under its common seal, subscribed by its president, vice-president, or other head officer.

(2) Any corporate instrument affecting title to real property, executed by the president, vice-president, or other head officer of the corporation, in the form required or permitted by law, shall be deemed to have been executed with proper authority in the usual course of business, and shall be binding and conclusive upon the corporation as to any bona fide purchaser, encumbrancer, or other person relying on such instrument.

(3) There shall be filed or recorded in the office of the county clerk and recorder of each county where a corporation owns real property:

(a) A certificate of incorporation of a domestic corporation or a certified copy thereof; if the articles of incorporation limit the duration of the corporate life to less than perpetuity, or limit or impose conditions upon the exercise of the statutory powers of the corporation with respect to real property, then a certified copy of said articles;

(b) Where an amendment to the articles of incorporation changes the name or the period of duration of a domestic corporation, or limits or imposes conditions upon the exercise of the statutory powers of the corporation with respect to real property, the certificate of amendment or a certified copy thereof, and, if the certificate of amendment does not set forth such amendment, a certified copy of the articles of amendment;

(c) A certified copy of restated articles of incorporation of a domestic corporation;

(d) A certificate of merger of a domestic corporation or a certified copy thereof;

(e) A certificate of consolidation of a domestic corporation or a certified copy thereof;

(f) A certificate of dissolution of a domestic corporation or a certified copy thereof;

(g) A certified copy of a decree of involuntary dissolution of a domestic corporation;

(h) A certificate of authority of a foreign corporation or a certified copy thereof; if the articles of incorporation limit the duration of the corporate life to less than perpetuity or if they limit or impose conditions upon the exercise of any corporate power described in section 7-103-102, C.R.S., with respect to real property, then a certified copy of the articles of incorporation and amendments thereto;

(i) Where an amendment to the articles of incorporation changes the name or the period of duration of a foreign corporation or limits or imposes conditions upon the exercise of any corporate power described in section 7-103-102, C.R.S., with respect to real property, a certified copy of such amendment;

(j) Where a foreign corporation procures an amended certificate of authority evidencing a change in its corporate name, such amended certificate of authority or a certified copy thereof;

(k) A certificate of withdrawal from this state of a foreign corporation or a certified copy thereof.

(4) The failure to file any of the documents set forth in subsection (3) of this section in the office of any county clerk and recorder in this state shall not affect or impair the validity of such document; but any corporation which is required by subsection (3) of this section



to file or record documents in addition to the certificate of incorporation or the certificate of authority but which has not filed or recorded such documents at the time any person acquires any interest in or lien upon real property from said corporation shall, as against such person and those claiming under him, be conclusively deemed to be an existing corporation qualified to exercise the powers described in section 7-103-102, C.R.S.

**Source:** R.S. p. 113, § 24. G.L. § 182. G.S. § 222. R.S. 08: § 700. C.L. § 4910. CSA: C. 40, § 39. CRS 53: § 118-1-45. L. 57: p. 610, § 1. L. 59: p. 636, § 1. L. 63: p. 253, § 31. C.R.S. 1963: § 118-1-44. L. 93: (3)(h), (3)(i), and (4) amended, p. 864, § 39, effective July 1, 1994.

#### ANNOTATION

**Law reviews.** For article, “Curative Statutes of Colorado Respecting Titles to Real Estate”, see 26 Dicta 321 (1949). For article, “Guess Who’s Coming to Closing”, see 11 Colo. Law. 689 (1982). For article, “Signatures on Documents Affecting Title to Colorado Real Property — Part III”, see 12 Colo. Law. 447 (1983). For article, “Trade Name Registration Requirements and Customs in Colorado — Parts I and II”, see 16 Colo. Law. 238 and 454 (1987).

**This section does not prohibit any other mode of transfer,** nor was it so intended, and it is entirely competent for a corporation to transfer its property through such agency as it may designate. Bliss v. Harris, 38 Colo. 72, 87 P. 1076 (1906).

**This section does not require, by express language or by implication, evidence of shareholder approval to convey real estate.** It

only requires that the corporation be authorized by law to convey real estate and a corporation possesses this general legal authority unless otherwise provided in the articles of incorporation. Svanidze v. Kirkendall, 169 P.3d 262 (Colo. App. 2007).

**This section does not require proof of actual reliance in all cases.** The phrase “relying on such instrument” modifies only the last item in the series “bona fide purchaser, encumbrancer, or other person”. The phrase reflects that the three items are alike in that they all rely on the instrument and that bona fide purchasers and encumbrancers rely on the instrument by definition. Svanidze v. Kirkendall, 169 P.3d 262 (Colo. App. 2007).

**Applied** in Kuehn v. Kuehn, 642 P.2d 524 (Colo. 1981).

**38-30-145. Conveyance by sheriff.** Deeds, executed by any sheriff or other officer for real estate sold upon execution, or pursuant to the decree or order of any court, shall be acknowledged or proved and admitted to record in like manner and with like effect as other deeds. The successor in office of any sheriff or other officer shall have authority to execute deeds for real estate sold by his predecessor upon execution at law, or the judgment, order, or decree of any court of equity.

**Source:** R.S. p. 113, § 26. G.L. § 184. G.S. § 224. R.S. 08: § 702. C.L. § 4912. CSA: C. 40, § 40. CRS 53: § 118-1-46. C.R.S. 1963: § 118-1-45.

**38-30-146. Fraternal society may hold and convey real estate.** Any odd fellows or masonic lodge or other like benevolent and fraternal society duly chartered by its grand body according to the laws, constitution, and usages of such fraternity, and not wishing to become a corporate body, may take and hold real estate for its use and benefit by purchase, grant, devise, gift, or otherwise in and by the name and number of said body according to the respective registers of the grand body under which the same may be held, and the presiding officer of such body, together with the secretary thereof, may make conveyances of any real estate belonging to such body, when authorized by said body, under such regulations as the said society or its grand body may see fit to make. All such conveyances shall be attested by the seal of said subordinate body.

**Source:** L. 1893: p. 85, § 1. R.S. 08: § 703. C.L. § 4913. CSA: C. 40, § 41. CRS 53: § 118-1-47. C.R.S. 1963: § 118-1-46.

## ANNOTATION

**Effect of section** is merely to breathe into unincorporated local voluntary organizations a limited corporate life, to constitute the voluntary association a legal entity with the power of receiving title to real property by the name and number of the local body as designated by its grand body and of conveying it by its presiding

officer and secretary under its seal when authorized by the local body, "under such regulations as the said society or its grand body may see fit to make". *Loveland Camp No. 83 v. Woodmen Bldg. & Benevolent Ass'n*, 108 Colo. 297, 116 P.2d 195 (1941).

**38-30-147. Presiding officer may bring suit to protect property.** Should it become necessary at any time to protect the rights of such body in and to real estate or personal property, the presiding officer thereof may bring suit in his own name for the benefit of the lodge or society over which he presides, in any court of record of this state having original jurisdiction and may prosecute or defend the same in the supreme court of the state.

**Source:** L. 1893: p. 86, § 2. R.S. 08: § 704. C.L. § 4914. CSA: C. 40, § 42. CRS 53: § 118-1-48. C.R.S. 1963: § 118-1-47.

**38-30-148. Joint property of fraternal society.** In case any property is held jointly by two or more such bodies or lodges, the presiding officers of each of said bodies or lodges holding jointly may unite in bringing suit in their own names for the benefit of bodies or lodges over which they preside.

**Source:** L. 1893: p. 86, § 3. R.S. 08: § 705. C.L. § 4915. CSA: C. 40, § 43. CRS 53: § 118-1-49. C.R.S. 1963: § 118-1-48.

**38-30-149. Change of presiding officer not to affect suit.** No suit instituted as provided in sections 38-30-147 and 38-30-148 shall be dismissed on account of any change of the presiding officer of said lodge, but the same shall continue in the name of the party instituting the suit until otherwise disposed of.

**Source:** L. 1893: p. 86, § 4. R.S. 08: § 706. C.L. § 4916. CSA: C. 40, § 44. CRS 53: § 118-1-50. C.R.S. 1963: § 118-1-49.

**38-30-150. Definitions.** As used in articles 30 to 44 (except part 2 of article 41) of this title and part 4 of article 61 of title 12, C.R.S., unless the context otherwise requires:

(1) "Deed" includes mortgages, leases, releases, and every conveyance or encumbrance under seal.

(2) "Land" and "real estate" shall be construed as coextensive in meaning with the terms "land", "tenements", and "hereditaments" and as embracing all mining claims and other claims, and chattels real.

**Source:** R.S. p. 114, § 27. G.L. § 185. G.S. § 225. R.S. 08: § 707. C.L. § 4917. CSA: C. 40, § 45. CRS 53: § 118-1-51. C.R.S. 1963: § 118-1-50.

## ANNOTATION

**Interests in land, such as chattels real** and leases for a term of years, are regarded as real estate instead of personalty. *McKee v. Howe*, 17 Colo. 538, 31 P. 115 (1892).

**An interest acquired by occupancy of public land** is an interest in real estate, may be the subject of conveyance by deed, and carries with

it the title to any structure annexed to its soil. *Gillett v. Gaffney*, 3 Colo. 351 (1877); *Sears v. Taylor*, 4 Colo. 38 (1877); *Roseville Alta Mining Co. v. Iowa Gulch Mining Co.*, 15 Colo. 29, 24 P. 920 (1890).

**Applied** in *In re Hellman*, 474 F. Supp. 348 (D. Colo. 1979).



**38-30-151. Division of county - transcript of records - certificate.** (1) Whenever any county has been divided and a portion of the territory thereof erected into a new county, or added to some other county, the board of county commissioners of such new county or of the county to which such territory is added may, at the expense of its own county, procure to be transcribed from the records of the county to which such territory was originally attached copies of all deeds, bonds, agreements, powers of attorney, and other writings conveying or affecting title to any real estate situate within the territory so separated, and for this purpose the person whom such board may appoint shall have free access at all reasonable times to the records of the original county.

(2) Such records shall be transcribed into a suitable and well-bound book, and the person transcribing the same shall affix thereto at the end of all such transcripts his affidavit that the same were by him transcribed from the records of such original county, and are true, correct, and examined copies of such records. Such book of transcribed records shall be deposited in the office of the county clerk and recorder of the new county, or of the county to which such territory is assigned, as a part of the records thereof; and such transcribed records or copies therefrom, certified by the county clerk and recorder in whose office the same are deposited, shall have the same effect as evidence as the original records of such deeds, bonds, agreements, powers of attorney, and other writings.

**Source:** R.S. p. 114, § 28. G.L. § 186. G.S. § 226. R.S. 08: § 708. C.L. § 4918. CSA: C. 40, § 46. CRS 53: § 118-1-52. C.R.S. 1963: § 118-1-51.

**38-30-152. Not applicable to wills.** This article shall not be so construed as to embrace last wills and testaments except where expressly provided otherwise.

**Source:** R.S. p. 115, § 31. G.L. § 189. G.S. § 229. R.S. 08: § 709. C.L. § 4919. CSA: C. 40, § 47. CRS 53: § 118-1-53. C.R.S. 1963: § 118-1-52.

**38-30-153. Recording wills and decrees affecting lands - descents.** Any will in writing for the devise of real estate in this state, together with the probate thereof and the certificate mentioned in section 38-30-154, may be recorded in the office of the county clerk and recorder of every county wherein any of such real estate so devised may be situated; and all other decrees in probate determining the descent of real estate, together with the certificate mentioned in section 38-30-154, may in like manner be recorded. In case any decree or order, by certified copy or otherwise, of any appellate court is or shall be filed in any court for the government thereof in the premises, a copy of the same shall be attached to any such will and probate thereof, or to such decree, as the case may be, and certified with the other papers.

**Source:** L. 1881: p. 254, § 1. G.S. § 230. R.S. 08: § 710. C.L. § 4920. CSA: C. 40, § 48. CRS 53: § 118-1-54. C.R.S. 1963: § 118-1-53. L. 73: p. 1414, § 85.

**38-30-154. Clerk shall furnish certified copies.** The clerk of any court, upon demand, shall furnish to any party in interest copies of any such papers and records properly attached and certified by him under the seal of such court, and the same shall thereupon be admitted to record accordingly.

**Source:** L. 1881: p. 254, § 2. G.S. § 231. R.S. 08: § 711. C.L. § 4921. CSA: C. 40, § 49. CRS 53: § 118-1-55. C.R.S. 1963: § 118-1-54. L. 73: p. 1414, § 86.

**38-30-155. Certified copy of record shall be evidence of title.** Such record of any such certified will and probate thereof, and of any such decree, and of said accompanying papers and records in relation to any such will or decree shall be received in all courts of this state as evidence of the title to any real estate so devised by will or determined by decree, to the same extent as the record of deeds to real estate in such office.

**Source:** L. 1881: p. 255, § 3. G.S. § 232. R.S. 08: § 712. C.L. § 4922. CSA: C. 40, § 50. CRS 53: § 118-1-56. C.R.S. 1963: § 118-1-55.

#### ANNOTATION

**Applied** in *Chilcott v. Hart*, 23 Colo. 40, 45 P. 391, 35 L.R.A. 41 (1896).

**38-30-156. Fees for county clerk and recorder.** The county clerk and recorder shall be entitled to the same fee as in other cases of the certification of copies of records in his office, and any such county clerk and recorder shall be entitled to the same fee as in cases of deeds to real estate.

**Source:** L. 1881: p. 255, § 4. G.S. § 233. R.S. 08: § 713. C.L. § 4923. CSA: C. 40, § 51. CRS 53: § 118-1-57. C.R.S. 1963: § 118-1-56.

**Cross references:** For recording fees of county clerk and recorders, see § 30-1-103.

**38-30-157. Same use prohibition or restriction repeated in subsequent instruments taking effect on or after January 1, 1966 - exception.** (1) If any inter vivos instrument taking effect on or after January 1, 1966, or if the will of any testator dying on or after such date, or if any appointment made on or after such date, including an appointment by inter vivos instrument or will under a power created before such date, purports to convey or devise any interest in real property on a special limitation or subject to a condition subsequent which prohibits or restricts a use of such interest in real property which has been purportedly or in fact previously prohibited or restricted by an earlier conveyance or devise or appointment on a special limitation or subject to a condition subsequent, it shall be conclusively deemed and held that no new special limitation or possibility of reverter or condition subsequent or right of entry is thereby created with respect to such use, whether or not any such earlier special limitation or condition subsequent is still enforceable, unless the grantor in such inter vivos instrument or the testator in such will or the person who exercises such power of appointment expressly recites in such inter vivos instrument or such will or such appointment that he intends to create a new special limitation and possibility of reverter or a new condition subsequent and right of entry, and that he intends the same to be in addition to any other special limitation and possibility of reverter and any other condition subsequent and right of entry which may be then in existence. In the absence of such express recital, which may appear in a codicil to any will making such a devise or appointment, such language of special limitation and possibility of reverter or of condition subsequent and right of entry shall be conclusively deemed and held to be only a recognition of any prior special limitation and possibility of reverter and condition subsequent and right of entry which may be then in existence.

(2) Notwithstanding subsection (1) of this section, no presumption of intent shall be applied to any such conveyance or appointment by inter vivos instrument executed prior to April 26, 1965, but taking effect after January 1, 1966, where the person executing such inter vivos instrument, at any time between April 26, 1965, and January 1, 1966, lacks as a matter of law the capacity or power to add the express recital provided in subsection (1) of this section to such inter vivos instrument if a notice of claim, such as that required by sections 38-30-159 and 38-30-160, is filed for record in the manner set forth in said sections within one year after January 1, 1966; nor shall any presumption of intent be applied to any will making such a devise or appointment executed prior to April 26, 1965, where the testator or person making such appointment by will lacks testamentary capacity at any time between April 26, 1965, and January 1, 1966, and dies on or after January 1, 1966, if a notice of claim such as that required by sections 38-30-159 and 38-30-160 is filed for record in the manner set forth in said sections within one year after his death.

**Source:** L. 65: p. 937, § 1. C.R.S. 1963: § 118-1-57.



**38-30-158. Record notice required for same use prohibition or restriction repeated in subsequent instruments taking effect prior to January 1, 1966 - exception - affidavit as to ownership and possession.** (1) If any inter vivos instrument taking effect prior to January 1, 1966, or if the will of any testator dying prior to such date, or if any appointment made prior to such date, including an appointment by inter vivos instrument or will, purports to convey or devise any interest in real property on a special limitation or subject to a condition subsequent which prohibits or restricts a use of such interest in real property which has been purportedly or in fact previously prohibited or restricted by an earlier conveyance or devise or appointment on a special limitation or subject to a condition subsequent, it shall be conclusively deemed and held that no new special limitation or possibility of reverter or condition subsequent or right of entry was thereby created with respect to such use, unless a notice of claim to the contrary is filed for record within one year after January 1, 1966, in the manner provided by sections 38-30-159 and 38-30-160; except that if on January 1, 1966, any person is the owner of and in possession of any such interest in real property by reason of the occurrence prior to said date of the use prohibited or restricted by a special limitation or condition subsequent, such person shall not be required to file any notice in order to preserve the validity at the time of such occurrence of the special limitation and possibility of reverter or of the condition subsequent and right of entry upon which his ownership and possession are dependent.

(2) If such notice of claim to the contrary is not filed for record, except when not required as provided in subsection (1) of this section, such language of special limitation and possibility of reverter or of condition subsequent and right of entry shall be conclusively deemed and held to have been only a recognition of any prior special limitation and possibility of reverter and condition subsequent and right of entry which may have been then in existence. An affidavit may be made and filed for record in the county in which such interest in real property is located at any time on or after January 1, 1966, stating either that by January 1, 1966, no person was the owner of and in possession of such interest in real property by reason of such occurrence prior to said date of the use prohibited or restricted by a special limitation or condition subsequent, or the name of such person who was such owner in possession. Such affidavit shall further state that the affiant is of legal age and has personal knowledge of the ownership and possession of said interest in real property on January 1, 1966. Such affidavit shall not be made by anyone who then has a record interest in the real property described therein. Such recorded affidavit shall be deemed and held to be prima facie proof of the foregoing matters therein stated, and such recorded affidavit, and a copy of such record certified to be a true copy by the county clerk and recorder of the county wherein such affidavit is recorded shall be accepted in all courts of the state of Colorado as prima facie proof of the foregoing matters therein stated.

**Source: L. 65: p. 938, § 2. C.R.S. 1963: § 118-1-58.**

**38-30-159. Who may record notice of intention to claim possibility of reverter or right of entry.** (1) The notice of claim required by section 38-30-158 that a new special limitation and possibility of reverter or a new condition subsequent and right of entry were created shall be duly verified on oath and shall be filed for record in the office of the county clerk and recorder of the county in which such interest in real property is located. Such notice may be filed for record by the person claiming to be the owner of such possibility of reverter or right of entry, or by any other person acting on his behalf if the person who is said to be such owner is:

- (a) Under a legal disability; or
- (b) Unable to assert a claim on his own behalf; or
- (c) One of a class, but whose identity cannot be established or is unknown or uncertain at the time of filing such notice of claim.

**Source: L. 65: p. 939, § 3. C.R.S. 1963: § 118-1-59.**

**38-30-160. Contents of notice - recording, indexing - effect.** (1) To be effective and entitled to be filed for record, such notice shall contain all of the following matters:

(a) An accurate and full description of all real property affected by such notice, which description shall be set forth in particular terms and not by general inclusions; but if such claim is founded upon a recorded instrument, the description in such notice may be the same as that contained in the recorded instrument upon which the claim is based;

(b) The terms of the special limitation or condition subsequent from which the possibility of reverter or right of entry arises, and the name of the grantor or testator or person exercising such power of appointment who is said to have created the special limitation and possibility of reverter or condition subsequent and right of entry being claimed by such notice;

(c) The names of all claimants or owners of the possibility of reverter or right of entry on whose behalf it is filed for record, except that if a claimant or owner is one of a class whose identity cannot be established or is unknown or uncertain at the time of filing such notice, then as to such claimant or owner it shall be sufficient to identify such class, and such notice shall be wholly ineffective as to all persons who are neither named nor members of such class.

(2) The county clerk and recorder of each county shall accept every such notice presented to him which describes real property located in the county for which he serves and shall enter and record the same in the same way that deeds are recorded. In indexing such notice in his office, such county clerk and recorder shall enter such notice in the grantee indexes of deeds under the name of the person who has executed such notice and also under the names of all other persons named in said notice as claimants of or as owning such possibility of reverter or right of entry, and in the grantor indexes under the name of the grantor or testator or person exercising such power of appointment who is said to have created the special limitation and possibility of reverter or condition subsequent and right of entry being claimed by such notice.

(3) The county clerk and recorder shall be entitled to charge the same fees for recording such notice and for indexing it in the grantor and grantee indexes as are charged for the recording and indexing of deeds.

(4) If the real property affected by such notice is located in more than one county, such notice shall be recorded in each county wherein part of the real property is located, and such notice shall be wholly ineffective as to all real property located in any county in which it has not been recorded.

Source: L. 65: p. 940, § 4. C.R.S. 1963: 118-1-60.

#### ANNOTATION

**Road petition and road survey map filed with the county clerk and recorder but not recorded in the grantor-grantee index do not provide constructive notice** to a property purchaser that land has been dedicated as a public road. *Adelson v. Bd. of County Comm'rs*, 875 P.2d 1387 (Colo. App. 1993).

**Deeds that are in a purchaser's chain of title but that contain property descriptions that are vague or that are not set forth in**

**particular terms do not provide constructive notice** to a purchaser of the conveyance of an interest in such parcels. The court found that the descriptions used did not provide "clear evidence" that the interest described was part of the parcel purchased. *Adelson v. Bd. of County Comm'rs*, 875 P.2d 1387 (Colo. App. 1993).

**Applied** in *Kemp v. Empire Sav., Bldg. & Loan Ass'n*, 635 P.2d 234 (Colo. App. 1981).

**38-30-161. Use prohibition or restriction affecting less or more real property - more or fewer use prohibitions or restrictions.** For purposes of sections 38-30-157 to 38-30-164, every inter vivos instrument and every will and every appointment shall be considered as purporting to prohibit or restrict a use of an interest in real property which has been previously prohibited or restricted notwithstanding that any previous inter vivos instrument or will or appointment included more real property or less real property or more or fewer use prohibitions or restrictions.

Source: L. 65: p. 941, § 5. C.R.S. 1963: § 118-1-61.



**38-30-162. Interests and instruments to which sections 38-30-157 to 38-30-164 do not apply.** (1) Sections 38-30-157 to 38-30-164 shall not affect any special limitation or possibility of reverter or condition subsequent or right of entry contained in any conveyance, devise, or appointment for a public, charitable, religious, or educational purpose.

(2) Sections 38-30-157 to 38-30-164 shall not affect any special limitation or possibility of reverter or condition subsequent or right of entry created with respect to any:

- (a) Lease;
- (b) Mortgage, deed of trust, or other lien to secure a debt;
- (c) Communication, transmission or transportation line, or pipeline, railroad, or public road;
- (d) Easement or right-of-way; or
- (e) Reservation or lease of or conveyance, devise, or appointment of any interest in any oil, gas, or other minerals or right to take oil, gas, or other minerals, or of any interest in water or water rights.

(3) If any instrument includes any interest in real property in addition to one set forth in subsection (2) of this section, sections 38-30-157 to 38-30-164 shall apply to such other interest in real property, except as provided in subsection (1) of this section.

**Source:** L. 65: p. 941, § 6. C.R.S. 1963: § 118-1-62.

**38-30-163. Other statutes and laws remain applicable.** Sections 38-30-157 to 38-30-164 shall not be construed as establishing or maintaining or reviving the validity of any special limitation or possibility of reverter or condition subsequent or right of entry which becomes barred by any other statute or any other law, or which is for any reason unenforceable, or which for any reason has ceased to exist; nor shall it be construed as excusing, or extending the period for, the bringing of any action or the doing of any other act necessary, under any other statute or any other law, to establish or maintain the validity or enforceability of any special limitation or possibility of reverter or condition subsequent or right of entry.

**Source:** L. 65: p. 942, § 7. C.R.S. 1963: § 118-1-63.

**38-30-164. Sections to be liberally construed.** Sections 38-30-157 to 38-30-164 shall be liberally construed to effect the legislative purposes of simplifying and facilitating real property title transactions and of rendering real property titles more secure and marketable by the elimination, as provided in sections 38-30-157 to 38-30-163, of purported special limitations, and possibilities of reverter, and conditions subsequent, and rights of entry.

**Source:** L. 65: p. 942, § 8. C.R.S. 1963: § 118-1-64.

**38-30-165. Unreasonable restraints on the alienation of property - prohibited practices.** (1) Subject to the limitations and exceptions as provided in this section, any person with a security interest in real estate shall not, directly or indirectly:

(a) Accelerate or mature the indebtedness secured by such real estate on account of the sale or transfer of such real estate or on account of the assumption of such indebtedness; except that this paragraph (a) shall not apply if the person to whom the real estate would be sold or transferred is reasonably determined by the person holding the security interest to be financially incapable of retiring the indebtedness according to its terms, based upon standards normally used by persons in the business of making loans on real estate in the same or similar circumstances; or

(b) Increase the interest rate more than one percent per annum above the existing interest rate of the indebtedness or otherwise modify, for the benefit of the holder of the security interest, the terms and conditions of the indebtedness secured by such real estate, on account of the sale or transfer of such real estate or on account of the assumption of such indebtedness; or

(c) Charge, collect, or attempt to collect any fee in excess of one-half of one percent of the principal amount of the indebtedness outstanding, on account of the sale or transfer of such real estate or on account of the assumption of such indebtedness, not including title insurance, abstracting, credit report, survey, or other charges appertaining to the sale; or

(d) Enforce or attempt to enforce the provisions of any mortgage, deed of trust, or other real estate security instrument executed on or after July 1, 1975, which provisions are contrary to this section; but this section shall not be applicable to instruments executed prior to July 1, 1975, nor to the rights, duties, or interests flowing therefrom.

(2) The maximum increase allowed in paragraph (b) of subsection (1) of this section and the maximum fee allowed in paragraph (c) of subsection (1) of this section shall not be deemed required, minimum, or ordinary, but said interest increase and fee may, in any case, be less than the amount allowed.

(3) This section shall be applicable only to a security interest in real property utilized as residential dwelling units other than motels, hotels, and nursing homes.

(4) This section shall not be applicable in those cases in which the secretary of the department of housing and urban development, or his successor, matures the indebtedness on multiple-family housing projects pursuant to the current law and regulations of the federal housing administration.

(5) This section shall not be applicable to a person with a security interest in real estate who is not regularly engaged in the business of making real estate loans.

(6) In the event that the party assuming the indebtedness declines to agree to an increase in the interest rate as provided in paragraph (b) of subsection (1) of this section, said indebtedness may be prepaid without penalty or increased interest at any time within sixty days after said assumption; but if he does not make such prepayment within the sixty-day period he shall be liable for the increased interest rate from the date of the assumption, and any prepayment penalty provided for in the security instrument shall thereafter be in effect.

(7) The provisions of subsection (1) of this section shall not apply in cases of mortgage loans made on or after January 1, 1981, with proceeds of bonds issued pursuant to article 3 of title 29, C.R.S.

(8) The provisions of subsection (1) of this section shall not apply to indebtedness made or acquired by the Colorado housing and finance authority on or after April 1, 1981, secured by real estate, when said authority accelerates or matures, or requires or permits the acceleration or maturing of, indebtedness secured by real estate or when said authority increases, or requires or permits the increase of, the interest rate more than one percent per annum above the existing rate of the indebtedness in accordance with regulations of the Colorado housing and finance authority.

**Source:** L. 75: Entire section added, p. 1428, § 1, effective July 1. L. 76: (1)(c) amended, p. 315, § 70, effective May 20. L. 81: (8) added, p. 1827, § 1, effective April 2; (7) added, p. 1826, § 1, effective April 30. L. 87: (8) amended, p. 1197, § 20, effective May 20.

**Cross references:** For powers of the Colorado housing finance authority, see the "Colorado Housing and Finance Authority Act", part 7 of article 4 of title 29.

#### ANNOTATION

**Law reviews.** For article, "Due-On-Sale Law as Preempted by the Garn-St. Germain Act", see 12 Colo. Law. 591 (1983). For article, "The Influence of the U.S. Constitution on Colorado Real Property Law", see 16 Colo. Law. 1603 (1987).

**Lender to receive notice of impending sale.** Subsection (1)(a) contemplates that the lender

receive notice of an impending sale or transfer prior to closing so that, in the event acceleration of the indebtedness is warranted, the lender's position is not impaired. *Kemp v. Empire Sav., Bldg. & Loan Ass'n*, 635 P.2d 234 (Colo. App. 1981), *aff'd*, 660 P.2d 899 (Colo. 1983).

**Violation may be ground for acceleration.** Violation of the agreement to seek prior ap-



proval of transfers may be a ground for acceleration. *Kemp v. Empire Sav., Bldg. & Loan Ass'n*, 660 P.2d 899 (Colo. 1983).

**Limitation inapplicable to federal savings and loan associations.** The one percent limitation on the increase of interest rates set forth in subsection (1)(b) does not apply to federal savings and loan associations. *Dantus v. First Fed. Sav. & Loan Ass'n*, 502 F. Supp. 658 (D. Colo. 1980).

The doctrine of federal preemption precludes the application of subsection (1)(b) to federal savings and loan associations. *Haugen v. Western Fed. Sav. & Loan Ass'n*, 633 P.2d 497 (Colo. App. 1981).

A regulation of the federal home loan bank board permitting federal savings and loan associations to use due-on-sale clauses in their mortgage contracts preempts any restrictions imposed by state law on the exercise of these clauses. *Haugen v. Western Fed. Sav. & Loan Ass'n*, 649 P.2d 323 (Colo. 1982).

**Due-on-sale clauses are per se reasonable restraints on alienation.** *Income Realty & Mtg., Inc. v. Columbia Sav. & Loan Ass'n*, 661 P.2d 257 (Colo. 1983) (instrument executed prior to July 1, 1975).

The due-on-sale clause is a per se reasonable restraint on alienation and a case-by-case analysis of the justifiable interests of the parties is not warranted. *Krause v. Columbia Sav. & Loan Ass'n*, 661 P.2d 265 (Colo. 1983) (instrument executed prior to July 1, 1975).

A due-on-sale clause does not constitute an unreasonable restraint on alienation as applied to installment land contracts. *Income Realty & Mtg., Inc. v. Columbia Sav. & Loan Ass'n*, 661 P.2d 257 (Colo. 1983) (instrument executed prior to July 1, 1975). See *Rustic Hills Shopping Plaza, Inc. v. Columbia Sav. & Loan Ass'n*, 661 P.2d 254 (Colo. 1983) (instrument executed prior to July 1, 1975).

**Due-on-sale clause may be challenged only on ground of unconscionable conduct.** Due-on-sale clauses may be challenged only on the ground that the lender, in the exercise or enforcement of the clause, has engaged in unconscionable conduct. *Income Realty & Mtg., Inc. v. Columbia Sav. & Loan Ass'n*, 661 P.2d 257 (Colo. 1983) (instrument executed prior to July 1, 1975).

**Applied in** *Von Ehrenkrook v. Midland Fed. Sav. & Loan Ass'n*, 196 Colo. 179, 585 P.2d 589 (1979); *Krause v. Columbia Sav. & Loan Ass'n*, 631 P.2d 1158 (Colo. App. 1981).

**38-30-166. Joint ventures - ownership and transfer of property.** (1) Upon compliance with the provisions of subsection (2) of this section, a joint venture may acquire, convey, encumber, lease, or otherwise deal with any interest in property in the name of the joint venture set forth in the affidavit required by subsection (2) of this section and may do so regardless of whether the affidavit is recorded before or after the conveyance to the joint venture is recorded. The provisions of this subsection (1) shall apply to any interest in property acquired in the name of a joint venture either before or after August 8, 2001.

(2) (a) Any member of a joint venture may record with the county clerk and recorder of the county in which the interest in property is located an affidavit setting forth the following:

(I) A statement that the affidavit relates to a joint venture;

(II) The name of the joint venture; and

(III) The names and addresses of all of the joint venturers of the joint venture.

(b) The affidavit may set forth a statement that fewer than all of the joint venturers are authorized to act on behalf of the joint venture in any acquisition, conveyance, encumbrance, lease, or other dealing with an interest in property in the name of the joint venture. If such a statement is included, the affidavit:

(I) Shall designate the joint venturers or the manner of designating the joint venturers so authorized;

(II) May express such limitations upon the authority of such joint venturers as may exist; and

(III) Shall be executed by all of the joint venturers named in the affidavit as set forth in paragraph (a) of this subsection (2).

(c) If the affidavit does not contain a statement as set forth in paragraph (b) of this subsection (2), the affidavit shall be executed by at least one joint venturer named in the affidavit.

(d) Upon recording, the affidavit shall constitute prima facie evidence of the facts recited therein, the authority of the affiant to execute and record the affidavit, and the authority of the joint venturers who are thereby empowered to convey or otherwise act on behalf of the joint venture, insofar as the same affect title to any interest in property.

(3) This subsection (3) shall apply only to a joint venture that has recorded an affidavit pursuant to subsection (2) of this section. Where an interest in property is held in the name of a joint venture, such interest shall only be conveyed, encumbered, leased, or otherwise dealt with in the name of such joint venture by an instrument executed by all of the joint venturers named in the affidavit; except that, if the affidavit sets forth a statement as provided for in paragraph (b) of subsection (2) of this section, the joint venturers designated in such statement or designated in the manner provided in such statement may act in accordance with the statement with respect to such interest in property.

(4) This subsection (4) shall only apply to a joint venture that has recorded an affidavit pursuant to subsection (2) of this section. A lien or encumbrance arising out of a claim against a joint venturer may attach to the joint venturer's interest in the joint venture and to the separate property of the joint venturer but shall not attach to any property of the joint venture or any property or interest of any other joint venturer. A lien or encumbrance arising out of a claim against a joint venture may attach to the property of the joint venture. A lien or encumbrance arising out of a claim against a joint venture and a joint venturer may attach to the property of the joint venture, to the joint venturer's interest in the joint venture, and to the separate property of the joint venturer. On due application to a court of competent jurisdiction by any judgment creditor of a joint venturer, the court may charge such interest of such joint venturer with payment of the unsatisfied amount of the judgment, and with interest thereon, and may then or later appoint a receiver of distributions in respect of such interest.

(5) For the purposes of this section, the term "joint venture" does not include a partnership, as defined in the "Uniform Partnership Law", article 60 of title 7, C.R.S., or the "Colorado Uniform Partnership Act (1997)", article 64 of title 7, C.R.S., whether or not denominated a joint venture in its organizational documents or elsewhere. Except with respect to the provisions of subsection (4) of this section, as applied to any lien or encumbrance arising out of a claim by a joint venturer against another joint venturer in the joint venture, or against the joint venture itself, the provisions of this section shall not be interpreted to alter or affect the rights and duties between joint venturers of a joint venture, as may be required by law or by court decision.

(6) (Deleted by amendment, L. 2001, p. 400, § 4, effective August 8, 2001.)

**Source:** L. 77: Entire section added, p. 1714, § 1, effective June 1. L. 92: Entire section amended, p. 2122, § 1, effective May 14. L. 97: (5) amended, p. 919, §17, effective January 1, 1998. L. 2001: (1), (2), (3), and (6) amended, p. 400, § 4, effective August 8.

#### ANNOTATION

**Law reviews.** For article, "Signatures on Documents Affecting Title to Colorado Real Property — Part II", see 12 Colo. Law. 258 (1983). For article, "Partnership Status of Joint Ventures in Colorado", see 24 Colo. Law. 2553 (1995). For article, "Partnership Status of Joint Ventures in Colorado: Editorial Comments on CRS § 38-30-166", see 25 Colo. Law. 61 (February 1996). For article "Entity and Trade Name

Registration: 2001 Update", see 30 Colo. Law. 81 (October 2001). For article, "Title to Colorado Real Property Held in Trust", see 31 Colo. Law. 85 (May 2002).

**There is no requirement that a conveyer of trust property** either identify the trust in the conveyance document or sign the document as trustee. *Oken v. Hammer*, 791 P.2d 9 (Colo. App. 1990).

**38-30-167. Right of purchaser to obtain partial specific performance.** If it is impossible for a vendor of real property to convey a portion of the real property he contracted to convey, the vendee has a right to obtain a conveyance of that portion which it is possible to convey and a right to obtain damages or other equitable relief concerning the portion which it is impossible to convey. For the purposes of this section, "vendor" includes an optionor or a grantor of a right to repurchase or lease, and "vendee" includes an optionee or a holder of a right to repurchase or lease.

**Source:** L. 79: Entire section added, p. 1394, § 1, effective July 1.



## ANNOTATION

By conjoining the right of partial specific performance and a right to damages or other equitable relief, this statute simply makes it clear that the remedy of partial performance is an additional remedy rather than a substitute for

any relief to which the purchaser would be entitled for the vendor's inability to fully comply with the terms of the contract. *Brush Grocery Kart v. Sure Fine Mkt.*, 47 P.3d 680 (Colo. 2002).

**38-30-168. Unreasonable restrictions on renewable energy generation devices - definitions.** (1) (a) A covenant, restriction, or condition contained in any deed, contract, security instrument, or other instrument affecting the transfer or sale of, or any interest in, real property that effectively prohibits or restricts the installation or use of a renewable energy generation device is void and unenforceable.

(b) As used in this section, "renewable energy generation device" means either:

(I) A solar energy device, as defined in section 38-32.5-100.3; or

(II) A wind-electric generator that meets the interconnection standards established in rules promulgated by the public utilities commission pursuant to section 40-2-124, C.R.S.

(2) Subsection (1) of this section shall not apply to:

(a) Aesthetic provisions that impose reasonable restrictions on the dimensions, placement, or external appearance of a renewable energy generation device and that do not:

(I) Significantly increase the cost of the device; or

(II) Significantly decrease its performance or efficiency;

(b) Bona fide safety requirements, required by an applicable building code or recognized electrical safety standard, for the protection of persons and property; or

(c) Reasonable restrictions on the installation and use of wind-electric generators to reduce interference with the use and enjoyment by residents of property situated near wind-electric generators as a result of the sound associated with the wind-electric generators. Interference with the use and enjoyment of property by residents for the purpose of determining whether a restriction is reasonable shall be determined as a part of the architectural review process as required by the governing documents of the common interest community and shall include consideration of input by the individuals requesting approval from the common interest community to install a wind-electric generator.

(3) This section shall not be construed to confer upon any property owner the right to place a renewable energy generation device on property that is:

(a) Owned by another person;

(b) Leased, except with permission of the lessor;

(c) Collateral for a commercial loan, except with permission of the secured party; or

(d) A limited common element or general common element of a common interest community.

(4) In any litigation involving the significance of an increase in cost of a renewable energy generation device, for purposes of subparagraph (I) of paragraph (a) of subsection (2) of this section, the party that prevails on the issue of the significance of the increase shall be entitled to its reasonable attorney fees and costs incurred in litigating that issue. This subsection (4) shall not be construed to limit or prohibit an award of attorney fees or costs on other grounds or in connection with other issues.

**Source:** L. 79: Entire section added, p. 1396, § 4, effective May 25. L. 2008: Entire section amended, p. 617, § 1, effective August 5.

## ANNOTATION

**Applied** in *Governor's Ranch Homeowner's Ass'n v. Gunther*, 705 P.2d 1011 (Colo. App. 1985).

**38-30-169. Instruments of conveyance - removal of void and unenforceable restrictive covenants which are based upon race or religion.** (1) Any attorney, title insurance company, or title insurance agent authorized to do business in this state may remove by recording a new instrument any restrictive covenants which are based upon race or religion, or reference thereto, which are contained in any deed, contract, security instrument, or other instrument affecting the transfer or sale of, or any interest in, real property and which:

(a) Are held to be void and unenforceable by final determination of the supreme court of the state of Colorado or the supreme court of the United States; or

(b) Have been modified pursuant to the procedures specified in section 38-30-170.

(2) Restrictive covenants which are based upon race or religion may be removed from such documents pursuant to subsection (1) of this section only upon the transfer or sale of, or any interest in, real property subject to such restrictive covenants which occurs subsequent to such final judicial determination or modification specified in subsection (1) of this section.

(3) Notwithstanding any law to the contrary, any person who, in good faith and in the usual course of business, delivers any deed, contract, security instrument, or other instrument affecting the transfer or sale of, or any interest in, real property which contains any restrictive covenants which are based upon race or religion, or reference thereto, which are void and unenforceable by law shall be immune from civil liability. In addition, such delivery shall not constitute an unfair housing practice as specified in section 24-34-502 (1) (c), C.R.S. The provisions of this subsection (3) shall not apply to any person who:

(a) Represents or attempts to represent that such restrictive covenants which are based upon race or religion are valid and enforceable; or

(b) Honors or exercises or attempts to honor or exercise such restrictive covenants which are based upon race or religion.

**Source: L. 90:** Entire section added, p. 1645, § 1, effective April 16.

**38-30-170. Private restrictive covenants - modification - exception - procedures.**

(1) (a) Except as otherwise provided in paragraph (b) of this subsection (1), any private restrictive covenants which are held to be void and unenforceable by final determination of the supreme court of the state of Colorado or the supreme court of the United States may be modified pursuant to the procedures specified in subsection (2) of this section.

(b) The provisions of this section shall not apply to any private restrictive covenants which contain any express and written provisions concerning the modification of such private restrictive covenants.

(2) Upon good faith delivery of written notification to all owners of real property located within a subdivision, as indicated on the records of the county clerk and recorder of the county in which the subdivision is located, a meeting may be held not less than ten days after such notification has been given concerning the modification of any void and unenforceable private restrictive covenants. Such private restrictive covenants may be modified only upon the written approval of a majority of all of the owners of real property located within the subdivision. Following such approval, such private restrictive covenants, as modified, shall be filed for recording with such county clerk and recorder. A copy of such private restrictive covenants, as modified, shall be delivered by mail to all owners of record of real property located within the subdivision.

(3) The county clerk and recorder shall not be held liable for recording any private restrictive covenants, as modified pursuant to the provisions of this section, which were filed for recording with such county clerk and recorder.

(4) As used in this section, unless the context otherwise requires:

(a) "Modify" means to amend, terminate, remove, or cancel.

(b) "Private restrictive covenant" means any covenant, restriction, or condition included in the subdivision plat or in any recorded document, or any amendment thereto, which is based upon race or religion and which is applicable to real property located within such subdivision, but does not include any covenant, restriction, or condition imposed on such real property by any governmental entity.



(c) "Subdivision" means any parcel of land which is to be used for condominiums, apartments, or any other multiple-dwelling units or which is divided into two or more lots, parcels, or other divisions of land and for which a plat of such land has been filed for recording with the county clerk and recorder of the county in which such land is located.

**Source:** L. 90: Entire section added, p. 1645, § 1, effective April 16.

**38-30-171. Survival of remedies and title to corporate property after dissolution.**

(1) This section shall apply to corporations for profit that were both formed under the laws of this state and dissolved before July 1, 1994.

(2) The dissolution of a corporation shall not eliminate or impair any remedy available to or against the corporation or its directors, officers, or shareholders for any right or claim existing or any liability incurred prior to such dissolution if an action or other proceeding is commenced thereon within two years after the date of the dissolution. The foregoing limitation shall not apply to any action affecting title to real estate. Any action or proceeding by or against the corporation may be prosecuted or defended by the corporation in its corporate name. The shareholders, directors, and officers of the corporation shall have power to take such corporate and other action as shall be necessary or appropriate to effect any remedy available to the corporation, pursue any action or proceeding by the corporation, or defend against any action or proceeding against the corporation.

(3) (a) After dissolution of the corporation, title to any property of the corporation not previously distributed or disposed of by the corporation shall remain in the corporation. The majority of the surviving members of the last acting board of directors as named in the files of the secretary of state shall have full power and authority:

(I) To sue and be sued in the corporate name and, for purposes of suit against such corporation, each director is an agent for process; and

(II) To act on behalf of and in the name of such corporation to convey and dispose of any corporate property not distributed or disposed of in the dissolution.

(b) Final disposition of such property shall be made by the majority of the surviving directors in the manner provided by law at the time of dissolution of such corporation. Upon the death of the last survivor of such directors, the public trustee of the county in which property owned by such corporation is situated shall have full power and authority to act on behalf of and in the name of such corporation to convey and dispose of such property.

**Source:** L. 96: Entire section added, p. 1329, § 52, effective June 1.

**38-30-172. Evidence of existence and authority - definitions.** (1) Prima facie evidence of the existence of an entity and the authority of one or more persons to act on behalf of an entity to convey, encumber, or otherwise affect title to real property may be shown as provided in this section.

(2) As used in this section, unless the context otherwise requires:

(a) "Entity" means a person as defined in section 2-4-401, C.R.S., other than an individual, capable of holding title to real property.

(b) "Entity description" means the type of entity and may also include the name of the state, country, or other governmental authority under whose laws it was formed.

(c) "Recorded" means recorded with the county clerk and recorder of the county in which the real property is situated.

(d) "Statement of authority" means an instrument executed on behalf of the entity that contains:

(I) The name of the entity;

(II) The type of entity and the state, country, or other governmental authority under whose laws it was formed;

(III) A mailing address for the entity; and

(IV) The name or position of the person authorized to execute instruments conveying, encumbering, or otherwise affecting title to real property on behalf of the entity.

(3) Prima facie evidence of the existence of an entity that executed a recorded instrument purporting to convey, encumber, or otherwise affect title to real property may be shown by any one or more of the following recorded instruments:

(a) The instrument itself, if that instrument uses the same name and the same entity description, if any, as appeared in the instrument by which the entity purported to acquire title to the real property or any part thereof or any interest therein; or

(b) Another instrument that is required by law to be recorded to enable the entity to hold or convey title to real property; or

(c) Another instrument that is permitted by law to be recorded, that names the entity and gives the entity description of the entity and, that by law is prima facie evidence of the facts recited in the instrument insofar as such facts affect title to real property.

(4) Prima facie evidence of the authority of the person that executed an instrument on behalf of an entity purporting to convey, encumber, or otherwise affect title to real property may be shown by any one or more of the following recorded instruments:

(a) An instrument that is required or permitted by law to be recorded in order to evidence the authority of one or more persons by name or by position to execute instruments conveying, encumbering, or otherwise affecting title to real property on behalf of the entity; or

(b) A certified copy of an instrument on file with any agency or department of any state, country, or other governmental authority that evidences the authority of one or more persons by name or by position to execute instruments conveying, encumbering, or otherwise affecting title to real property on behalf of the entity; or

(c) A statement of authority.

(5) A statement of authority may contain any limitation as may exist upon the authority of the person named in the statement or holding the position described in the statement to bind the entity and any other matters concerning the manner in which the entity deals with any interest in real property. Upon recording, a statement of authority shall constitute prima facie evidence of the facts recited in the statement of authority insofar as the facts affect title to real property and prima facie evidence of the authority of the person executing the statement of authority to execute and record the statement of authority on behalf of the entity.

(6) Any recorded instrument described in subsection (4) of this section may be amended or superseded by the recording of a subsequent instrument of the type described in subsection (4) of this section. The absence of any limitation described in subsection (5) of this section in a recorded instrument described in subsection (4) of this section shall be prima facie evidence that no such limitations exist.

**Source:** L. 97: Entire section added, p. 1525, § 23, effective June 3. L. 98: IP(3), IP(4), and (5) amended, p. 627, § 39, effective July 1.

#### ANNOTATION

**Law reviews.** For article, "The New Statement of Authority for Colorado Real Estate", see 27 Colo. Law. 99 (July 1998). For article, "Title to Colorado Real Property Held in

Trust", see 31 Colo. Law. 85 (May 2002). For article "Entity and Trade Name Registration: 2004 Update", see 34 Colo. Law. 11 (January 2005).

**38-30-173. Survival of remedies and title to corporate property after dissolution - nonprofit corporations.** (1) This section shall apply to nonprofit corporations that were dissolved before July 1, 1998, and either formed under articles 20 to 29 of title 7, C.R.S., or elected or could have elected to accept such articles as set forth in articles 20 to 29 of title 7, C.R.S.; except that this section shall not apply to any corporation that was dissolved by operation of law before July 1, 1998, as a consequence of the suspension of such corporation and was eligible for reinstatement or restoration, renewal, and revival on June 30, 1998.

(2) The dissolution of a corporation shall not eliminate or impair any remedy available to or against the corporation or its directors, officers, or members for any right or claim



existing on dissolution or any liability incurred prior to such dissolution if an action or other proceeding is commenced within two years after the date of the dissolution; except that this subsection (2) shall not apply to any action affecting the title to real estate. Any action or proceeding by or against the corporation may be prosecuted or defended by the corporation in its corporate name. The members, directors, and officers of the corporation shall have the power to take such corporate and other action as shall be necessary or appropriate to effect any remedy available to the corporation, or defend any action or proceeding against the corporation.

(3) (a) After dissolution of the corporation, title to any property of the corporation not previously distributed or disposed of by the corporation shall remain in the corporation. The majority of the surviving members of the last acting board of directors as named in the files of the secretary of state shall have the power and ability to:

(I) Sue and be sued in the corporate name, and, for purposes of suit against such corporation, each director is an agent for service of process; and

(II) Act on behalf of and in the name of such corporation to convey and dispose of any corporate property not distributed or disposed of in the dissolution.

(b) Final disposition of such property shall be made by the majority of the surviving directors in the manner provided by law at the time of the dissolution of the corporation. On the date of the death of the last survivor of the directors, the public trustee of the county in which the property owned by such corporation is situated shall have the power and authority to act on behalf of and in the name of such corporation to convey and dispose of the property.

**Source:** L. 98: Entire section added, p. 627, § 40, effective July 1.

**Editor's note:** (1) Articles 20 to 29 of title 7, referenced in subsection (1), were repealed, effective July 1, 1998.

(2) Current provisions concerning nonprofit corporations are located in articles 121 to 137 of title 7.

## ARTICLE 30.5

### Conservation Easements

**Law reviews:** For article, "Conservation Easements: A General Practitioner's Overview", see 19 Colo. Law. 221 (1990); for comment, "Open Space Procurement Under Colorado's Scenic Easement Law", see 60 U. Colo. L. Rev. 383 (1989).

38-30.5-101.	Legislative intent.	38-30.5-107.	Release - termination.
38-30.5-102.	Conservation easement in gross.	38-30.5-108.	Enforcement - remedies.
38-30.5-103.	Nature of conservation easements in gross.	38-30.5-109.	Taxation.
38-30.5-104.	Creation of conservation easements in gross.	38-30.5-110.	Other interests not impaired.
38-30.5-105.	Residual estate.	38-30.5-111.	Validation.
38-30.5-106.	Recordation upon public records.	38-30.5-112.	Conservation easement - task force - creation - report - legislative declaration - repeal. (Repealed)

**38-30.5-101. Legislative intent.** The general assembly finds and declares that it is in the public interest to define conservation easements in gross, since such easements have not been defined by the judiciary. Further, the general assembly finds and declares that it is in the public interest to determine who may receive such easements and for what purpose such easements may be received.

**Source:** L. 76: Entire article added, p. 750, § 1, effective July 1.

**38-30.5-102. Conservation easement in gross.** "Conservation easement in gross", for the purposes of this article, means a right in the owner of the easement to prohibit or require

a limitation upon or an obligation to perform acts on or with respect to a land or water area, airspace above the land or water, or water rights beneficially used upon that land or water area, owned by the grantor appropriate to the retaining or maintaining of such land, water, airspace, or water rights, including improvements, predominantly in a natural, scenic, or open condition, or for wildlife habitat, or for agricultural, horticultural, wetlands, recreational, forest, or other use or condition consistent with the protection of open land, environmental quality or life-sustaining ecological diversity, or appropriate to the conservation and preservation of buildings, sites, or structures having historical, architectural, or cultural interest or value.

**Source:** **L. 76:** Entire article added, p. 750, § 1, effective July 1. **L. 2003:** Entire section amended, p. 990, § 1, effective August 6.

#### ANNOTATION

**Law reviews.** For article, "Protecting Open Space and Wildlife Habitat Under Colorado Law", see 24 Colo. Law. 2729 (1995).

**38-30.5-103. Nature of conservation easements in gross.** (1) A conservation easement in gross is an interest in real property freely transferable in whole or in part for the purposes stated in section 38-30.5-102 and transferable by any lawful method for the transfer of interests in real property in this state.

(2) A conservation easement in gross shall not be deemed personal in nature and shall constitute an interest in real property notwithstanding that it may be negative in character.

(3) A conservation easement in gross shall be perpetual unless otherwise stated in the instrument creating it.

(4) The particular characteristics of a conservation easement in gross shall be those granted or specified in the instrument creating the easement.

(5) A conservation easement in gross that encumbers water or a water right as permitted by section 38-30.5-104 (1) may be created only by the voluntary act of the owner of the water or water right and may be made revocable by the instrument creating it.

**Source:** **L. 76:** Entire article added, p. 751, § 1, effective July 1. **L. 2003:** (5) added, p. 990, § 2, effective August 6.

**38-30.5-104. Creation of conservation easements in gross.** (1) A conservation easement in gross may only be created by the record owners of the surface of the land and, if applicable, owners of the water or water rights beneficially used thereon by a deed or other instrument of conveyance specifically stating the intention of the grantor to create such an easement under this article.

(2) A conservation easement in gross may only be created through a grant to or a reservation by a governmental entity or a grant to or a reservation by a charitable organization exempt under section 501 (c) (3) of the federal "Internal Revenue Code of 1986", as amended, which organization was created at least two years prior to receipt of the conservation easement.

(3) Repealed.

(4) Conservation easements relating to historical, architectural, or cultural significance may only be applied to buildings, sites, or structures which have been listed in the national register of historic places or the state register of historic properties, which have been designated as a landmark by a local government or landmarks commission under the provisions of the ordinances of the locality involved, or which are listed as contributing building sites or structures within a national, state, or locally designated historic district.

(5) If a water right is represented by shares in a mutual ditch or reservoir company, a conservation easement in gross that encumbers the water right may be created or revoked



only after sixty days' notice and in accordance with the applicable requirements of the mutual ditch or reservoir company, including, but not limited to, its articles of incorporation and bylaws as amended from time to time.

**Source:** **L. 76:** Entire article added, p. 751, § 1, effective July 1. **L. 85:** (3) repealed and (4) amended, p. 1203, §§ 3, 1, effective July 1. **L. 99:** (2) amended, p. 632, § 49, effective August 4. **L. 2003:** (1) amended and (5) added, p. 991, § 3, effective August 6; (2) amended, p. 1022, § 1, effective August 6.

**38-30.5-105. Residual estate.** All interests not transferred and conveyed by the instrument creating the easement shall remain in the grantor of the easement, including the right to engage in all uses of the lands or water or water rights affected by the easement that are not inconsistent with the easement or prohibited by the easement or by law.

**Source:** **L. 76:** Entire article added, p. 751, § 1, effective July 1. **L. 2003:** Entire section amended, p. 991, § 4, effective August 6.

**38-30.5-106. Recordation upon public records.** Instruments creating, assigning, or otherwise transferring conservation easements in gross must be recorded upon the public records affecting the ownership of real property in order to be valid and shall be subject in all respects to the laws relating to such recordation.

**Source:** **L. 76:** Entire article added, p. 751, § 1, effective July 1.

**38-30.5-107. Release - termination.** Conservation easements in gross may, in whole or in part, be released, terminated, extinguished, or abandoned by merger with the underlying fee interest in the servient land or water rights or in any other manner in which easements may be lawfully terminated, released, extinguished, or abandoned.

**Source:** **L. 76:** Entire article added, p. 751, § 1, effective July 1. **L. 2003:** Entire section amended, p. 991, § 5, effective August 6.

**38-30.5-108. Enforcement - remedies.** (1) No conservation easement in gross shall be unenforceable by reason of lack of privity of contract or lack of benefit to particular land or because not expressed as running with the land.

(2) Actual or threatened injury to or impairment of a conservation easement in gross or the interest intended for protection by such easement may be prohibited or restrained by injunctive relief granted by any court of competent jurisdiction in a proceeding initiated by the grantor or by an owner of the easement.

(3) In addition to the remedy of injunctive relief, the holder of a conservation easement in gross shall be entitled to recover money damages for injury thereto or to the interest to be protected thereby. In assessing such damages, there may be taken into account, in addition to the cost of restoration and other usual rules of the law of damages, the loss of scenic, aesthetic, and environmental values.

**Source:** **L. 76:** Entire article added, p. 752, § 1, effective July 1.

**38-30.5-109. Taxation.** Conservation easements in gross shall be subject to assessment, taxation, or exemption from taxation in accordance with general laws applicable to the assessment and taxation of interests in real property. Real property subject to one or more conservation easements in gross shall be assessed, however, with due regard to the restricted uses to which the property may be devoted. The valuation for assessment of a conservation easement which is subject to assessment and taxation, plus the valuation for assessment of lands subject to such easement, shall equal the valuation for assessment which would have been determined as to such lands if there were no conservation easement.

**Source:** **L. 76:** Entire article added, p. 752, § 1, effective July 1.

**38-30.5-110. Other interests not impaired.** No interest in real property cognizable under the statutes, common law, or custom in effect in this state prior to July 1, 1976, nor any lease or sublease thereof at any time, nor any transfer of a water right or any change of a point of diversion decreed prior to the recordation of any conservation easement in gross restricting a transfer or change shall be impaired, invalidated, or in any way adversely affected by reason of any provision of this article. No provision of this article shall be construed to mean that conservation easements in gross were not lawful estates in land prior to July 1, 1976. Nothing in this article shall be construed so as to impair the rights of a public utility, as that term is defined by section 40-1-103, C.R.S., with respect to rights-of-way, easements, or other property rights upon which facilities, plants, or systems of a public utility are located or are to be located. Any conservation easement in gross concerning water or water rights shall be subject to the “Water Right Determination and Administration Act of 1969”, as amended, article 92 of title 37, C.R.S., and any decree adjudicating the water or water rights.

**Source:** **L. 76:** Entire article added, p. 752, § 1, effective July 1. **L. 2003:** Entire section amended, p. 991, § 6, effective August 6.

**38-30.5-111. Validation.** (1) Any conservation easement in gross created on or after July 1, 1976, but before July 1, 1985, that would have been valid under this article except for section 38-30.5-104 (3) is valid and shall be a binding, legal, and enforceable obligation. (2) Any conservation easement in gross affecting water rights created prior to August 6, 2003, shall be a binding, legal, and enforceable obligation if it complies with the requirements of this article.

**Source:** **L. 85:** Entire section added, p. 1203, § 2, effective July 1. **L. 2003:** Entire section amended, p. 992, § 7, effective August 6.

**Editor’s note:** Section 38-30.5-104 (3), which is referenced in this section, was repealed by L. 85, p. 1203, § 3, effective July 1, 1985.

**38-30.5-112. Conservation easement - task force - creation - report - legislative declaration - repeal. (Repealed)**

**Source:** **L. 2011:** Entire section added, (SB 11-050), ch. 304, p. 1460, § 1, effective June 8.

**Editor’s note:** Subsection (7) provided for the repeal of this section, effective November 1, 2011. (See L. 2011, p. 1460.)

ARTICLE 30.7

Wind Energy

38-30.7-101.	Legislative declaration.	38-30.7-104.	Reversion of easements.
38-30.7-102.	Definitions.	38-30.7-105.	Taxation.
38-30.7-103.	Wind energy agreements - recording - termination - transfer.		

**38-30.7-101. Legislative declaration.** The general assembly finds and declares that the right to wind energy is an interest in real property appurtenant to the surface estate.

**Source:** **L. 2012:** Entire article added, (HB 12-1105), ch. 230, p. 1011, § 1, effective August 8.



**38-30.7-102. Definitions.** As used in this article, unless the context otherwise requires:

(1) “Wind energy agreement” means a lease, license, easement, or other agreement, whether by grant or reservation, to develop or participate in the income from or the development of wind-powered energy generation.

(2) “Wind energy developer” means the owner of the surface estate or the lessee, easement holder, licensee, or contracting party under a wind energy agreement.

(3) “Wind energy right” means a property interest in the development of wind-powered energy generation.

**Source: L. 2012:** Entire article added, (HB 12-1105), ch. 230, p. 1011, § 1, effective August 8.

**38-30.7-103. Wind energy agreements - recording - termination - transfer.** (1) A wind energy right is not severable from the surface estate; except that wind energy may be developed pursuant to a wind energy agreement.

(2) A wind energy agreement is an interest in real property. The owner of the surface estate or the wind energy developer shall record a wind energy agreement or a notice or memorandum evidencing a wind energy agreement in the office of the county clerk and recorder in the county where the land subject to the agreement is located. The wind energy agreement or notice or memorandum evidencing a wind energy agreement must include the name of the owner of the surface estate, the name of the lessee, easement holder, licensee, or contracting party under the wind energy agreement, and the legal description of the property. The wind energy agreement or notice or memorandum evidencing a wind energy agreement must be indexed in both the grantor and grantee indices under the name of the owner of the surface estate and the lessee, easement holder, licensee, or contracting party under the wind energy agreement.

(3) (a) After a wind energy agreement has terminated, the owner of the surface estate may request the wind energy developer to record a release of the wind energy agreement or notice or memorandum evidencing a wind energy agreement in the office of the county clerk and recorder in the county where the land subject to the wind energy agreement is located. The release must include the name of the owner of the surface estate, the name of the lessee, easement holder, licensee, or contracting party under the wind energy agreement, the legal description of the property, and the original reception number or book and page number of the wind energy agreement. The release must be indexed in both the grantor and grantee indices under the name of the owner of the surface estate and the lessee, easement holder, licensee, or contracting party under the wind energy agreement. The owner of the surface estate or the owner’s designee shall make the request in writing and deliver it personally or by certified mail, first class postage prepaid, return receipt requested, to the wind energy developer’s last-known address. The wind energy developer shall record the release within ninety days after the receipt of the request.

(b) The wind energy developer shall record the release within ninety days after the receipt of the request. If the wind energy developer fails to record the release within ninety days after the receipt of the request, the wind energy developer is liable to the owner of the surface estate for any damages caused by the wind energy developer’s failure to record the release. A copy of the written request has the same force and effect as the original request in an action for damages.

(4) Nothing in this article alters, amends, diminishes, or invalidates wind energy agreements or conveyances made or entered into prior to July 1, 2012, so long as a contract, lease, memorandum, or other notice evidencing the acquisition, conveyance, or reservation of the wind energy rights is recorded in accordance with subsection (2) of this section by September 1, 2012.

(5) Nothing in this article restricts the transfer of a wind energy agreement, including the transfer of the right of the owner of the surface estate to receive payments under the wind energy agreement.

**Source: L. 2012:** Entire article added, (HB 12-1105), ch. 230, p. 1012, § 1, effective August 8.

**38-30.7-104. Reversion of easements.** (1) Unless the owner of the surface estate and wind energy developer otherwise agree, all easement interests acquired after July 1, 2012, for the purpose of producing wind energy revert to the owner of the surface estate if wind energy production has ceased for a continuous period of fifteen years or if the generation of electricity by a turbine has not commenced within fifteen years after the execution of a wind energy agreement. Reversion of an interest under this section does not transfer any obligation to restore or reclaim the surface estate.

(2) The lessee, easement holder, licensee, or contracting party under the wind energy agreement shall record in the office of the county clerk and recorder where the land subject to the wind energy agreement is located an affidavit stating that the generation of electricity by a turbine has commenced. If no such affidavit is recorded, then the wind energy agreement expires by its own terms. If no terms are given, the wind energy agreement expires no more than fifteen years after the execution of the wind energy agreement. The affidavit must include the name of the owner of the surface estate, the name of the lessee, easement holder, licensee, or contracting party under the wind energy agreement, the legal description of the property, and the original reception number or book and page number of the wind energy agreement. The affidavit must be indexed in both the grantor and grantee indices under the name of the owner of the surface estate and the lessee, easement holder, licensee, or contracting party under the wind energy agreement.

**Source: L. 2012:** Entire article added, (HB 12-1105), ch. 230, p. 1013, § 1, effective August 8.

**38-30.7-105. Taxation.** Equipment used in the development of wind energy is exempt from the levy and collection of personal property tax until such equipment is first used pursuant to section 39-3-118.5, C.R.S.

**Source: L. 2012:** Entire article added, (HB 12-1105), ch. 230, p. 1013, § 1, effective August 8.

ARTICLE 31

Co-ownership of Real Property

**Cross references:** For joint rights and obligations generally, see article 50 of title 13; for joint bank deposits, see § 11-105-105 and article 15 of title 15; for joint tenancy in personal property, see § 38-11-101.

PART 1		38-31-103.	Proof of death - certificate of death unavailable.
JOINT TENANCY IN REAL PROPERTY - PROOF OF DEATH		38-31-104.	False swearing or affirming - penalty.
38-31-101.	Joint tenancy expressed in instrument - when.	PART 2	
38-31-102.	Proof of death - certificate of death available - definitions.	TENANCY BY THE ENTIRETY	
		38-31-201.	Tenancy by the entirety.

PART 1

JOINT TENANCY IN REAL PROPERTY - PROOF OF DEATH

**38-31-101. Joint tenancy expressed in instrument - when.** (1) Except as otherwise provided in subsection (3) of this section and in section 38-31-201, no conveyance or devise of real property to two or more natural persons shall create an estate in joint tenancy in real property unless, in the instrument conveying the real property or in the will devising the real



property, it is declared that the real property is conveyed or devised in joint tenancy or to such natural persons as joint tenants. The abbreviation "JTWROS" and the phrase "as joint tenants with right of survivorship" or "in joint tenancy with right of survivorship" shall have the same meaning as the phrases "in joint tenancy" and "as joint tenants". Any grantor in any such instrument of conveyance may also be one of the grantees therein.

(1.5) (a) The doctrine of the four unities of time, title, interest, and possession is continued as part of the law of this state subject to subsections (1), (3), (4), (5), (6), and (7) of this section and paragraph (b) of this subsection (1.5).

(b) Subsections (1), (3), (4), (5), (6), and (7) of this section are intended and shall be construed to clarify, supplement, and, limited to their express terms, modify the doctrine of the four unities.

(c) For purposes of this subsection (1.5), the "doctrine of the four unities of time, title, interest, and possession" means the common law doctrine that a joint tenancy is created by conveyance or devise of real property to two or more persons at the same time of the same title to the same interest with the same right of possession and includes the right of survivorship.

(2) (Deleted by amendment, L. 2006, p. 240, § 1, effective July 1, 2006.)

(3) A conveyance or devise to two or more personal representatives, trustees, or other fiduciaries shall be presumed to create an estate in joint tenancy in real property and not a tenancy in common.

(4) An estate in joint tenancy in real property shall only be created in natural persons; except that this limitation shall not apply to a conveyance or devise of real property to two or more personal representatives, trustees, or other fiduciaries. Any conveyance or devise of real property to two or more persons that does not create or is not presumed to create an estate in joint tenancy in the manner described in this section shall be a conveyance or devise in tenancy in common or to tenants in common.

(5) (a) Except as provided in sections 38-35-118 and 38-41-202 (4), a joint tenant may sever the joint tenancy between himself or herself and all remaining joint tenants by unilaterally executing and recording an instrument conveying his or her interest in real property to himself or herself as a tenant in common. The joint tenancy shall be severed upon recording such instrument. If there are two or more remaining joint tenants, they shall continue to be joint tenants as among themselves.

(b) Filing a petition in bankruptcy by a joint tenant shall not sever a joint tenancy.

(6) (a) The interests in a joint tenancy may be equal or unequal. The interests in a joint tenancy are presumed to be equal and such presumption is:

(I) Conclusive as to all persons who obtain an interest in property held in joint tenancy when such persons are without notice of unequal interests and have relied on an instrument recorded pursuant to section 38-35-109; and

(II) Rebuttable for all other persons.

(b) This subsection (6) does not bar claims for equitable relief as among joint tenants, including but not limited to partition and accounting.

(c) Upon the death of a joint tenant, the deceased joint tenant's interest is terminated. In the case of one surviving joint tenant, his or her interest in the property shall continue free of the deceased joint tenant's interest. In the case of two or more surviving joint tenants, their interests shall continue in proportion to their respective interests at the time the joint tenancy was created.

(d) For purposes of the "Colorado Medical Assistance Act", articles 4, 5, and 6 of title 25.5, C.R.S., a joint tenancy shall be deemed to be a joint tenancy with equal interests among the joint tenants regardless of the language in the deed or other instrument creating the joint tenancy.

(7) Nothing in this section shall be deemed to abrogate any existing case law to the extent that such case law establishes other means of severing a joint tenancy.

**Source:** R.S. p. 106, § 3. G.L. § 162. G.S. § 200. R.S. 08: § 671. C.L. § 4872. CSA: C. 40, § 4. L. 39: p. 285, § 1. CRS 53: § 118-2-1. L. 55: p. 720, § 1. C.R.S. 1963: § 118-2-1. L. 96: Entire section amended, p. 661, § 15, effective July 1. L. 2002: Entire

section amended, p. 1361, § 14, effective July 1. **L. 2003:** (1) amended, p. 2002, § 67, effective May 22. **L. 2006:** Entire article amended, p. 240, § 1, effective July 1. **L. 2008:** (1.5), (5), (6), and (7) added, p. 681, § 1, effective April 25.

**Cross references:** For tenancy in common of mines, see article 44 of title 34.

## ANNOTATION

**Law reviews.** For article, "Five New Real Estate Standards for Denver", see 26 Dicta 131 (1949). For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 Dicta 281 (1949). For article, "Joint Tenancy in Colorado", see 26 Dicta 313 (1949). For article, "Signatures on Documents Affecting Title to Colorado Real Property — Part II", see 12 Colo. Law. 258 (1983). For article, "Commercial Condominium Association Considerations", see 12 Colo. Law. 1090 (1983). For article, "Tenancy by the Entirety in Colorado", see 13 Colo. Law. 230 (1984). For article, "Title to Colorado Real Property Held in Trust", see 31 Colo. Law. 85 (May 2002). For article, "Evolution of Joint Tenancy Law in Colorado: Changes to CRS § 38-31-101", see 38 Colo. Law. 65 (April 2009).

**Joint tenancy in Colorado is strictly limited** and its very existence circumscribed by statute. *Smith v. Greenburg*, 121 Colo. 417, 218 P.2d 514 (1950).

**Legislative policy is to prefer tenancies in common** at the expense of joint tenancies. *Estate of Kwatkowski*, 94 Colo. 222, 29 P.2d 639 (1934).

**Joint tenancy and tenancy in common distinguished.** The major distinguishing characteristic of joint tenancy, as opposed to tenancy in common, is right of survivorship in each of the cotenants. *Bradley v. Mann*, 34 Colo. App. 135, 525 P.2d 492 (1974), *aff'd*, 188 Colo. 392, 535 P.2d 213 (1975).

A court must presume the tenancies are not joint till something is shown otherwise. *Miller v. Buyer*, 82 Colo. 474, 261 P. 659 (1927).

This section raises a presumption against the creation of joint tenancies, so that if the parties to a partnership had intended a joint tenancy to apply only to one-half of the partnership property, or to a particular one-half interest in it, they could and—because of this section—should have specifically so stated. In *re Sullivan's Estate*, 121 Colo. 494, 218 P.2d 1064 (1950).

In the absence of an affirmative declaration that the estate devised is in joint tenancy, an estate in tenancy in common will be devised, unless it clearly and explicitly appears from the language employed that the testator understood the nature and incidents of the different estates and intended to create a joint tenancy. *Estate of Kwatkowski*, 94 Colo. 222, 29 P.2d 639 (1934); *Chilson v. Reed*, 154 Colo. 149, 389 P.2d 87 (1964).

**Mere use of word "jointly" is insufficient** for the purpose of expressing a joint tenancy. *Estate of Kwatkowski*, 94 Colo. 222, 29 P.2d 639 (1934).

**Language creates joint tenancy.** The statement in a corporate stock certificate that parties "as joint tenants with right of survivorship and not as tenants in common" are the owners of the stock, amply proclaims a joint tenancy, and upon its face the certificate must be considered as accomplishing that result. *Eisenhardt v. Lowell*, 105 Colo. 417, 98 P.2d 1001 (1940).

**Rights vest at creation of joint tenancy.** In real property, rights under a joint tenancy are fixed and vested in the joint tenants at the time of the creation of the joint tenancy; and once a joint tenancy is created, the donor no longer has the power to exercise absolute dominion over the property. He may not treat the whole property as his own, he cannot convey to a third party the interest he created in the joint tenant, and while he may occupy the whole property, he cannot exclude the other joint tenants from their right to use and enjoy the property, and he is liable to them for any depleting use he may make of the land. *Estate of Lee v. Graber*, 170 Colo. 419, 462 P.2d 492 (1969).

**Grantees under a joint tenancy deed are presumed to own equal shares** in the property conveyed, but parol evidence is admissible to overcome the presumption. *Duston v. Duston*, 31 Colo. App. 147, 498 P.2d 1174 (1972).

**Action by joint tenants inconsistent with survivorship right destroys tenancy.** In ascertaining whether a joint tenancy has been destroyed, resulting in a tenancy in common, this state has recently adopted the modern test which focuses on the intent of the parties with regard to the right of survivorship characteristic. Actions by the joint tenants which are inconsistent with the right of survivorship operate to terminate the joint tenancy. *Mangus v. Miller*, 35 Colo. App. 115, 532 P.2d 368 (1974).

**Action against joint tenancy.** Where several parties are defendants in a suit to quiet title, in order that they may be sued jointly, it must affirmatively appear that they are joint tenants in whatever interest they claim to have. *Miller v. Buyer*, 82 Colo. 474, 261 P. 659 (1927).

**Gift of joint interest is irrevocable.** A gift of a joint interest in real property is complete, perfect, and irrevocable. *Estate of Lee v. Graber*, 170 Colo. 419, 462 P.2d 492 (1969).



**A joint tenant may sever a joint tenancy by conveying the property to himself or herself as a tenant in common** without the need for an intermediary strawman. *Taylor v. Canterbury*, 92 P.3d 961 (Colo. 2004).

**Applied** in *Liden's Estate v. Foster*, 103 Colo. 58, 82 P.2d 775 (1938); *Liebhardt v. Avison*, 123 Colo. 338, 229 P.2d 993 (1951); *Franzen v. Zimmerman*, 127 Colo. 381, 256 P.2d 897 (1953).

**38-31-102. Proof of death - certificate of death available - definitions.** (1) A certificate of death or a certified copy thereof of a person who is a joint tenant may be placed of record with the county clerk and recorder of the county in which the real property affected by the joint tenancy is located, together with a supplementary affidavit. The supplementary affidavit, which shall be properly sworn to or affirmed by a person of legal age having personal knowledge of the facts and having no record interest in the real property, shall include the legal description of the real property and a statement that the person referred to in the certificate was at the time of death the owner of a joint tenancy interest in the real property. When recorded, the original certificate and supplementary affidavit, or certified copies thereof, shall be accepted in all courts of the state of Colorado as prima facie proof of the death of the joint tenant. The certificate and supplementary affidavit provided for in this section may also be used to provide proof of the death of a life tenant or any other person whose record interest in real property terminates upon the death of such person to the same extent as a joint tenant as provided in this section.

(2) As used in this part 1, unless the context otherwise requires, a "certificate of death or certified copy thereof" means a certificate of death meeting the requirements set forth in section 38-35-112 to be admitted as evidence or a copy of such a certificate of death certified by the public office that issued it.

**Source:** L. 23: p. 399, § 1. CSA: C. 92, § 1. CRS 53: § 118-2-2. C.R.S. 1963: § 118-2-2. L. 2002: Entire section amended, p. 1037, § 85, effective June 1. L. 2006: Entire article amended, p. 241, § 1, effective July 1.

**Cross references:** For certificate of death admitted as evidence of interest in real property, see § 38-35-112.

#### ANNOTATION

**Law reviews.** For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 *Dicta* 281 (1949). For article, "Highlights of the 1955 Colorado Legislative Session—Real Property", see 28 *Rocky Mt. L. Rev.* 58 (1955). For article, "Signatures on Documents Affecting Title to Colorado Real Property — Part II", see 12 *Colo. Law.* 258 (1983).

**This section does not establish mandatory and exclusive method of proving death in joint tenancy.** On the contrary, the statute offers a mere alternative method which may, but need not, be adopted. *Spaulding v. Porter*, 94 Colo. 496, 31 P.2d 711 (1934).

**38-31-103. Proof of death - certificate of death unavailable.** If a certificate of death or a certified copy thereof cannot be procured, an affidavit properly sworn to or affirmed by two or more persons of legal age having personal knowledge of the facts and having no record interest in the real property affected by the joint tenancy may be placed of record in the office of the county clerk and recorder of the county in which the real property is located. The affidavit shall include a statement that a certificate of death or certified copy thereof cannot be procured, and the reason therefor, the legal description of the real property, the date and place of death of the deceased person, and a statement that the person referred to in the affidavit was at the time of death an owner of a joint tenancy interest in the real property. When recorded, the original affidavit, or a certified copy thereof, shall be accepted in all courts in the state of Colorado as prima facie proof of the death of the joint tenant and the date and place of death of the joint tenant. The affidavit provided for in this section may also be used to provide proof of the death of a life tenant or any other person

whose record interest in real property terminates upon the death of the person and the date and place of death of the life tenant or other person to the same extent as a joint tenant as provided in this section.

**Source:** L. 23: p. 399, § 2. **CSA:** C. 92, § 2. **CRS 53:** § 118-2-3. **C.R.S 1963:** § 118-2-3. **L. 2002:** Entire section amended, p. 1037, §. 86, effective June 1. **L. 2006:** Entire article amended, p. 241, § 1, effective July 1.

**Cross references:** For certificate of death admitted as evidence of interest in real property, see § 38-35-112.

ANNOTATION

**Law reviews.** For article, “Curative Statutes of Colorado Respecting Titles to Real Estate”, see 26 Dicta 281 (1949). For article, “Signatures on Documents Affecting Title to Colorado Real Property — Part II”, see 12 Colo. Law. 258 (1983).

**38-31-104. False swearing or affirming - penalty.** Anyone falsely swearing to or affirming any affidavit provided for in sections 38-31-102 and 38-31-103 is guilty of perjury in the second degree and in addition thereto is liable for damages to any person for any loss consequent on the false swearing or affirming or on the recording of the affidavit so falsely sworn to or affirmed.

**Source:** L. 23: p. 400, § 3. **CSA:** C. 92, § 3. **CRS 53:** § 118-2-4. **C.R.S. 1963:** § 118-2-4. **L. 72:** p. 566, § 42. **L. 2006:** Entire article amended, p. 242, § 1, effective July 1.

**Cross references:** For perjury in the second degree and the penalty therefor, see §§ 18-8-503 and 18-1.3-501.

PART 2

TENANCY BY THE ENTIRETY

**38-31-201. Tenancy by the entirety.** (1) No conveyance of real property located in this state executed before or after July 1, 2006, shall create a tenancy by the entirety.  
(2) A conveyance of real property located in this state executed before July 1, 2006, that purports to create a tenancy by the entirety shall be presumed to create a joint tenancy.  
(3) A conveyance of real property located in this state executed on or after July 1, 2006, that purports to create a tenancy by the entirety shall create a joint tenancy.

**Source:** L. 2006: Entire article amended, p. 242, § 1, effective July 1.

ARTICLE 32

Estates Above Surface

38-32-101.	Estates may be created.	38-32-103.	Rights, incidents, and duties.
38-32-102.	Estates deemed estates in land.	38-32-104.	Laws on land applicable.
		38-32-105.	Estates affected.

**38-32-101. Estates may be created.** Estates, rights, and interests in areas above the surface of the ground, whether or not contiguous thereto, may be validly created in persons or corporations other than the owners of the land below such areas and shall be deemed to be estates, rights, and interests in lands.

**Source:** L. 53: p. 202, § 1. **CRS 53:** § 118-12-1. **C.R.S. 1963:** § 118-12-1.



**Cross references:** For sovereignty in the space above the lands and waters of Colorado, see § 41-1-106; for ownership of the same, see § 41-1-107.

ANNOTATION

**Law reviews.** For note, “The Creation of Estates in Airspace”, see 25 Rocky Mt. L. Rev. 354 (1953).

**Legislative intent.** The intent of the General Assembly in providing for the establishment of

estates in airspace was to subject all such estates to those legal provisions historically and by statute applicable to the traditional estate in real property. Ass’n of Owners, Satellite Apt., Inc. v. Otte, 38 Colo. App. 12, 550 P.2d 894 (1976).

**38-32-102. Estates deemed estates in land.** Estates, rights, and interests in such areas shall pass by descent and distribution in the same manner as estates, rights, and interests in land and may be held, enjoyed, possessed, alienated, conveyed, exchanged, transferred, assigned, demised, released, charged, mortgaged, or otherwise encumbered, devised, and bequeathed in the same manner, upon the same conditions, and for the same uses and purposes as estates, rights, and interests in land and shall be in all other respects dealt with and treated as estates, rights, and interests in land.

**Source:** L. 53: p. 202, § 2. CRS 53: § 118-12-2. C.R.S. 1963: § 118-12-2.

**38-32-103. Rights, incidents, and duties.** All of the rights, privileges, incidents, powers, remedies, burdens, duties, liabilities, and restrictions pertaining to estates, rights, and interests in land shall appertain and be applicable to such estates, rights, and interests in areas above the surface of the ground.

**Source:** L. 53: p. 202, § 3. CRS 53: § 118-12-3. C.R.S. 1963: § 118-12-3.

**38-32-104. Laws on land applicable.** The provisions of articles 30 to 44 of this title and of any other law of this state shall be applicable to estates, rights, and interests created in areas above the surface of the ground and to instruments creating, disposing of, or otherwise affecting such estates, rights, and interests wherever such provisions would be applicable to estates, rights, and interests in land or to instruments creating, disposing of, or otherwise affecting estates, rights, and interests in land.

**Source:** L. 53: p. 202, § 4. CRS 53: § 118-12-4. C.R.S. 1963: § 118-12-4.

**38-32-105. Estates affected.** The provisions of this article shall be applicable to such estates, rights, and interests created in areas above the surface of the ground, whether such estates, rights, and interests were created prior to or after March 12, 1953.

**Source:** L. 53: p. 203, § 5. CRS 53: § 118-12-5. C.R.S. 1963: § 118-12-5.

ARTICLE 32.5

Solar Easements

38-32.5-100.3.	Definitions.	38-32.5-102.	Contents.
38-32.5-101.	Solar easements - creation.	38-32.5-103.	Enforcement.

**38-32.5-100.3. Definitions.** As used in this article, unless the context otherwise requires:

- (1) “Solar easement” means the right of receiving sunlight across real property for any solar energy device. Such a right may be stated in any deed, will, or other instrument executed by or on behalf of any owner of land or sky space.
- (2) “Solar energy device” means a solar collector or other device or a structural design

feature of a structure which provides for the collection of sunlight and which comprises part of a system for the conversion of the sun’s radiant energy into thermal, chemical, mechanical, or electrical energy.

**Source:** **L. 79:** Entire section added, p. 1395, § 1, effective May 25.

**38-32.5-101. Solar easements - creation.** Any easement obtained for the purpose of exposure of a solar energy device shall be created in writing and shall be subject to the same conveyancing and instrument recording requirements as other easements; except that a solar easement shall not be acquired by prescription.

**Source:** **L. 75:** Entire article added, p. 1430, § 1, effective July 18. **L. 79:** Entire section amended, p. 1395, § 2, effective May 25.

**38-32.5-102. Contents.** (1) Any instrument creating a solar easement shall include, but the contents shall not be limited to:

(a) A description of the vertical and horizontal angles, expressed in degrees together with any pertinent hourly, diurnal, or seasonal variations thereof, and measured from the site of the solar energy device, within which the solar easement extends over the real property subject to the solar easement, or any other description which defines the three-dimensional space or the place and time of day in which an obstruction to direct sunlight is prohibited or limited;

(b) Any terms or conditions or both under which the solar easement is granted or will be terminated;

(c) Any provisions for compensation of the owner of the property benefiting from the solar easement in the event of interference with the enjoyment of the solar easement or compensation of the owner of the property subject to the solar easement for maintaining the solar easement;

(d) The restrictions placed upon vegetation, structures, and other objects which would impair or obstruct the passage of sunlight through the easement.

**Source:** **L. 75:** Entire article added, p. 1430, § 1, effective July 18. **L. 79:** (1)(a) amended and (1)(d) added, p. 1396, § 3, effective May 25.

**38-32.5-103. Enforcement.** In addition to other legal remedies, injunctive relief may be available if otherwise appropriate for the enforcement of solar easements. Nothing in this section shall be construed to affect legal remedies for the enforcement of other types of easements.

**Source:** **L. 79:** Entire section added, p. 1395, § 1, effective May 25.

ARTICLE 33

Condominium Ownership Act

38-33-101.	Short title.	38-33-107.	Records of receipts and expenditures - availability for examination.
38-33-102.	Condominium ownership recognized.	38-33-108.	Violations - penalty.
38-33-103.	Definitions.	38-33-109.	Unit owners’ liability.
38-33-104.	Assessment of condominium ownership.	38-33-110.	Time-sharing - definitions.
38-33-105.	Recording of declaration - certain rules and laws to apply.	38-33-111.	Special provisions applicable to time share ownership.
38-33-105.5.	Contents of declaration.	38-33-112.	Notification to residential tenants.
38-33-106.	Condominium bylaws - contents - exemptions.	38-33-113.	License to sell condominiums and time shares.



**38-33-101. Short title.** This article shall be known and may be cited as the "Condominium Ownership Act".

**Source:** L. 63: p. 782, § 1. C.R.S. 1963: § 118-15-1.

#### ANNOTATION

**Law reviews.** For article, "Rights of First Refusal in Condominium Documents", see 11 Colo. Law. 389 (1982). For symposium on condominium law and practice, see 11 Colo. Law. 2734 (1982).

**38-33-102. Condominium ownership recognized.** Condominium ownership of real property is recognized in this state. Whether created before or after April 30, 1963, such ownership shall be deemed to consist of a separate estate in an individual air space unit of a multi-unit property together with an undivided interest in common elements. The separate estate of any condominium owner of an individual air space unit and his common ownership of such common elements as are appurtenant to his individual air space unit by the terms of the recorded declaration are inseparable for any period of condominium ownership that is prescribed by the recorded declaration. Condominium ownership may exist on land owned in fee simple or held under an estate for years.

**Source:** L. 63: p. 782, § 1. C.R.S. 1963: § 118-15-2. L. 69: p. 982, § 1.

#### ANNOTATION

**Law reviews.** For article, "Converting a Duplex: Party Wall Declaration and Other Considerations", see 11 Colo. Law. 1201 (1982). For article, "Representing a Purchaser of a Time Share", see 11 Colo. Law. 1543 (1982). For symposium on condominium law and practice, see 11 Colo. Law. 2734 (1982).

**Legislative intent.** The intent of the General Assembly in providing for the establishment of estates in airspace was to subject all such estates

to those legal provisions historically and by statute applicable to the traditional estate in real property. *Ass'n of Owners, Satellite Apt., Inc. v. Otte*, 38 Colo. App. 12, 550 P.2d 894 (1976).

**Where common elements were owned by a townhome owners association,** townhome complex did not constitute a condominium. *Trailside Townhome Ass'n, Inc. v. Acierno*, 880 P.2d 1197 (Colo. 1994).

**38-33-103. Definitions.** As used in this article, unless the context otherwise requires:

(1) "Condominium unit" means an individual air space unit together with the interest in the common elements appurtenant to such unit.

(2) "Declaration" is an instrument recorded pursuant to section 38-33-105 and which defines the character, duration, rights, obligations, and limitations of condominium ownership.

(3) Unless otherwise provided in the declaration or by written consent of all the condominium owners, "general common elements" means: The land or the interest therein on which a building or buildings are located; the foundations, columns, girders, beams, supports, main walls, roofs, halls, corridors, lobbies, stairs, stairways, fire escapes, entrances, and exits of such building or buildings; the basements, yards, gardens, parking areas, and storage spaces; the premises for the lodging of custodians or persons in charge of the property; installations of central services such as power, light, gas, hot and cold water, heating, refrigeration, central air conditioning, and incinerating; the elevators, tanks, pumps, motors, fans, compressors, ducts, and in general all apparatus and installations existing for common use; such community and commercial facilities as may be provided for in the declaration; and all other parts of the property necessary or convenient to its existence, maintenance, and safety, or normally in common use.

(4) "Individual air space unit" consists of any enclosed room or rooms occupying all or part of a floor or floors in a building of one or more floors to be used for residential, professional, commercial, or industrial purposes which has access to a public street.

(5) "Limited common elements" means those common elements designated in the declaration as reserved for use by fewer than all the owners of the individual air space units.

**Source:** L. 63: p. 782, § 1. C.R.S. 1963: § 118-15-3. L. 69: p. 982, § 2.

#### ANNOTATION

**Law reviews.** For symposium on condominium law and practice, see 11 Colo. Law. 2734 (1982). For comment, "State and Local Regu-

lation of Timesharing in Colorado", see 56 U. Colo. L. Rev. 289 (1985).

**38-33-104. Assessment of condominium ownership.** Whenever condominium ownership of real property is created or separate assessment of condominium units is desired, a written notice thereof shall be delivered to the assessor of the county in which said real property is situated, which notice shall set forth descriptions of the condominium units. Thereafter all taxes, assessments, and other charges of this state or of any political subdivision, or of any special improvement district, or of any other taxing or assessing authority shall be assessed against and collected on each condominium unit, each of which shall be carried on the tax books as a separate and distinct parcel for that purpose and not on the building or property as a whole. The valuation of the general and limited common elements shall be assessed proportionately upon the individual air space unit in the manner provided in the declaration. The lien for taxes assessed to any individual condominium owner shall be confined to his condominium unit and to his undivided interest in the general and limited common elements. No forfeiture or sale of any condominium unit for delinquent taxes, assessments, or charges shall divest or in any way affect the title of other condominium units.

**Source:** L. 63: p. 783, § 1. C.R.S. 1963: § 118-15-4.

#### ANNOTATION

**Law reviews.** For symposium on condominium law and practice, see 11 Colo. Law. 2734 (1982). For article, "Homeowners Association

Assessments in Bankruptcy Cases", see 19 Colo. Law. 2221 (1990).

**38-33-105. Recording of declaration - certain rules and laws to apply.** (1) The declaration shall be recorded in the county where the condominium property is located. Such declaration shall provide for the filing for record of a map properly locating condominium units. Any instrument affecting the condominium unit may legally describe it by the identifying condominium unit number or symbol as shown on such map. If such declaration provides for the disposition of condominium units in the event of the destruction or obsolescence of buildings in which such units are situate and restricts partition of the common elements, the rules or laws known as the rule against perpetuities and the rule prohibiting unlawful restraints on alienation shall not be applied to defeat or limit any such provisions.

(2) To the extent that any such declaration contains a mandatory requirement that all condominium unit owners be members of an association or corporation or provides for the payment of charges assessed by the association upon condominium units or the appointment of an attorney-in-fact to deal with the property upon its destruction or obsolescence, any rule of law to the contrary notwithstanding, the same shall be considered as covenants running with the land binding upon all condominium owners and their successors in interest. Any common law rule terminating agency upon death or disability of a principal shall not be applied to defeat or limit any such provisions.

**Source:** L. 63: p. 784, § 1. C.R.S. 1963: § 118-15-5. L. 69: p. 983, § 3.



## ANNOTATION

**Law reviews.** For symposium on condominium law and practice, see 11 Colo. Law. 2734 (1982). For article, "Avoiding Perpetuities Problems in Condo Declarations", see 13 Colo. Law. 2229 (1984). For comment, "State and Local Regulation of Timesharing in Colorado", see 56 U. Colo. L. Rev. 289 (1985).

**Covenant concerning preemptive rights upheld.** Where the condominium declaration provides that, in the event an owner of a unit desires to sell such unit and receives a bona fide offer for such sale, the unit shall be offered to the remaining owners who shall have a first right to purchase for the same terms and conditions as the bona fide offer, such a restrictive covenant does not violate the rule against perpetuities, nor does it constitute a restraint on alienation. *Cambridge Co. v. East Slope Inv. Corp.*, 700 P.2d 537 (Colo. 1985).

**Language of subsection (1) concerning the rule against perpetuities** and restraints on alienation relates only to situations involving the destruction of obsolescence of condominium units. *Cambridge Co. v. East Slope Inv. Corp.*, 700 P.2d 537 (Colo. 1985).

**Constructive notice of declaration makes owner personally liable for unpaid assessments.** Given that the declaration regarding the condominium ownership was recorded in the public records of the county long before petitioner became the owner of his unit and that the deed under which he acquired title stated that the conveyance was subject to the terms of the declaration, petitioner, upon acquiring ownership, assumed and became personally liable for any accrued and unpaid assessments. *Chateaux Condominiums v. Daniels*, 754 P.2d 425 (Colo. App. 1988).

**Condominium owner waived right to assert homestead exemption** prior to a condominium association's assessment lien due to a condominium declaration which was in existence before owner took title. *Whispering Pines W. Condo. v. Treantos*, 780 P.2d 26 (Colo. App. 1989).

**Applied** in *Chateau Vill. N. Condominium Ass'n v. Jordan*, 643 P.2d 791 (Colo. App. 1982).

**38-33-105.5. Contents of declaration.** (1) The declaration shall contain:

- (a) The name of the condominium property, which shall include the word "condominium" or be followed by the words "a condominium";
  - (b) The name of every county in which any part of the condominium property is situated;
  - (c) A legally sufficient description of the real estate included in the condominium property;
  - (d) A description or delineation of the boundaries of each condominium unit, including its identifying number;
  - (e) A statement of the maximum number of condominium units that may be created by the subdivision or conversion of units in a multiple-unit dwelling owned by the declarant;
  - (f) A description of any limited common elements;
  - (g) A description of all general common elements;
  - (h) A description of all general common elements which may be conveyed to any person or entity other than the condominium unit owners;
  - (i) A description of all general common elements which may be allocated subsequently as limited common elements, together with a statement that they may be so allocated, and a description of the method by which the allocations are to be made;
  - (j) An allocation to each condominium unit of an undivided interest in the general common elements, a portion of the votes in the association, and a percentage or fraction of the common expenses of the association;
  - (k) Any restrictions on the use, occupancy, or alienation of the condominium units;
  - (l) The recording data for recorded easements and licenses appurtenant to, or included in, the condominium property or to which any portion of the condominium property is or may become subject;
  - (m) Reasonable provisions concerning the manner in which notice of matters affecting the condominium property may be given to condominium unit owners by the association or other condominium unit owners; and
  - (n) Any other matters the declarant deems appropriate.
- (2) This section shall apply to any condominium ownership of property created on or after July 1, 1983.

**Source:** L. 83: Entire section added, p. 593, § 3, effective May 25.

#### ANNOTATION

**Law reviews.** For comment, "State and Local Regulation of Timesharing in Colorado", see 56 U. Colo. L. Rev. 289 (1985).

**38-33-106. Condominium bylaws - contents - exemptions.** (1) Unless exempted, the administration and operation of multi-unit condominiums shall be governed by the declaration.

(2) At or before the execution of a contract for sale and, if none, before closing, every initial bona fide condominium unit buyer shall be provided by the seller with a copy of the bylaws, with amendments, if any, of the unit owners' association or corporation, and such bylaws and amendments shall be of a size print or type to be clearly legible.

(3) The bylaws shall contain or provide for at least the following:

(a) The election from among the unit owners of a board of managers, the number of persons constituting such board, and that the terms of at least one-third of the members of the board shall expire annually; the powers and duties of the board; the compensation, if any, of the members of the board; the method of removal from office of members of the board; and whether or not the board may engage the services of a manager or managing agent, or both, and specifying which of the powers and duties granted to the board may be delegated by the board to either or both of them; however, the board when so delegating shall not be relieved of its responsibility under the declaration;

(b) The method of calling meetings of the unit owners; the method of allocating votes to unit owners; what percentage of the unit owners, if other than a majority, constitutes a quorum; and what percentage is necessary to adopt decisions binding on all unit owners;

(c) The election of a president from among the board of managers, who shall preside over the meetings of the board of managers and of the unit owners;

(d) The election of a secretary, who shall keep the minutes of all meetings of the board of managers and of the unit owners and who, in general, shall perform all the duties incident to the office of secretary;

(e) The election of a treasurer, who shall keep the financial records and books of account. The treasurer may also serve as the secretary.

(f) The authorization to the board of managers to designate and remove personnel necessary for the operation, maintenance, repair, and replacement of the common elements;

(g) A statement that the unit owners and their mortgagees, if applicable, may inspect the records of receipts and expenditures of the board of managers pursuant to section 38-33-107 at convenient weekday business hours, and that, upon ten days' notice to the manager or board of managers and payment of a reasonable fee, any unit owner shall be furnished a statement of his account setting forth the amount of any unpaid assessments or other charges due and owing from such owner;

(h) A statement as to whether or not the condominium association is a not for profit corporation, an unincorporated association, or a corporation;

(i) The method of adopting and of amending administrative rules and regulations governing the operation and use of the common elements;

(j) The percentage of votes required to modify or amend the bylaws, but each one of the particulars set forth in this section shall always be embodied in the bylaws;

(k) The maintenance, repair, replacement, and improvement of the general and limited common elements and payments therefor, including a statement of whether or not such work requires prior approval of the unit owners' association or corporation when it would involve a large expense or exceed a certain amount;

(l) The method of estimating the amount of the budget; the manner of assessing and collecting from the unit owners their respective shares of such estimated expenses and of any other expenses lawfully agreed upon; and a statement concerning the division, if any, of the assessment charge between general and limited common elements and the amount or percent of such division;



(m) A list of the services provided by the unit owners' association or corporation which are paid for out of the regular assessment;

(n) A statement clearly and separately indicating what assessments, debts, or other obligations are assumed by the unit owner on his condominium unit;

(o) A statement as to whether or not additional liens, other than mechanics' liens, assessment liens, or tax liens, may be obtained against the general or limited common elements then existing in which the unit owner has a percentage ownership;

(p) Such restrictions on and requirements respecting the use and maintenance of the units and the use of the general and limited common elements as are designed to prevent unreasonable interference with the use of their respective units and said common elements by the several unit owners;

(q) Such restrictions on and requirements concerning the sale or lease of a unit including rights of first refusal on sale and any other restraints on the free alienability of the unit;

(r) A statement listing all major recreational facilities and to whom they are available and clearly indicating whether or not fees or charges, if any, in conjunction therewith, are in addition to the regular assessment;

(s) A statement relating to new additions of general and limited common elements to be constructed, including but not limited to:

(I) The effect on a unit owner in reference to his obligation for payment of the common expenses, including new recreational facilities, costs, and fees, if any;

(II) The effect on a unit owner in reference to his ownership interest in the existing general and limited common elements and new general and limited common elements;

(III) The effect on a unit owner in reference to his voting power in the association.

(4) Any declaration recorded on or after January 1, 1976, shall not conflict with the provisions of this section or bylaws made in accordance with this section. The requirements contained in paragraphs (k) to (s) of subsection (3) of this section need not be included in the bylaws if they are set forth in the declaration.

(5) This section shall not apply to:

(a) Commercial or industrial condominiums or any other condominiums not used for residential use;

(b) Condominiums of ten units or less;

(c) Condominiums established by a declaration recorded prior to January 1, 1976.

**Source: L. 75:** Entire section added, p. 1432, § 1, effective January 1, 1976.

#### ANNOTATION

**Law reviews.** For article, "Rights of First Refusal in Condominium Documents", see 11 Colo. Law. 389 (1982). For symposium on condominium law and practice, see 11 Colo. Law. 2734 (1982). For article, "Commercial Condo-

minium Association Considerations", see 12 Colo. Law. 1090 (1983). For comment, "State and Local Regulation of Timesharing in Colorado", see 56 U. Colo. L. Rev. 289 (1985).

**38-33-107. Records of receipts and expenditures - availability for examination.** The manager or board of managers, as the case may be, shall keep detailed, accurate records of the receipts and expenditures affecting the general and limited common elements. Such records authorizing the payments shall be available for examination by the unit owners at convenient weekday business hours.

**Source: L. 75:** Entire section added, p. 1434, § 1, effective January 1, 1976.

**38-33-108. Violations - penalty.** Any person who knowingly and willfully violates the provisions of section 38-33-106 or 38-33-107 is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than five hundred dollars.

**Source: L. 75:** Entire section added, p. 1434, § 1, effective January 1, 1976.

**38-33-109. Unit owners' liability.** In any suit or arbitration against a condominium unit owners' association wherein damages are awarded or settlement is made, the individual unit owner's liability in his capacity as a percentage owner of the general or limited common elements or as a member of the condominium association shall not exceed the amount of damages or settlement multiplied by his percentage ownership in the general or limited common elements, as the case may be. In the case of incorporation by unit owners, their liability as stockholders shall be determined as any other corporate stockholder.

**Source: L. 75:** Entire section added, p. 1434, § 1, effective January 1, 1976.

#### ANNOTATION

**Law reviews.** For symposium on condominium law and practice, see 11 Colo. Law. 2734 (1982). For article, "Commercial Condominium

Association Considerations", see 12 Colo. Law. 1090 (1983).

**38-33-110. Time-sharing - definitions.** As used in this section and section 38-33-111, unless the context otherwise requires:

(1) (a) "Interval estate" means a combination of:

(I) An estate for years terminating on a date certain, during which years title to a time share unit circulates among the interval owners in accordance with a fixed schedule, vesting in each such interval owner in turn for a period of time established by the said schedule, with the series thus established recurring annually until the arrival of the date certain; and

(II) A vested future interest in the same unit, consisting of an undivided interest in the remainder in fee simple, the magnitude of the future interest having been established by the time of the creation of the interval estate either by the project instruments or by the deed conveying the interval estate. The estate for years shall not be deemed to merge with the future interest, but neither the estate for years nor the future interest shall be conveyed or encumbered separately from the other.

(b) "Interval estate" also means an estate for years as described in subparagraph (I) of paragraph (a) of this subsection (1) where the remainder estate, as defined either by the project instruments or by the deed conveying the interval estate, is retained by the developer or his successors in interest.

(2) "Interval owner" means a person vested with legal title to an interval estate.

(3) "Interval unit" means a unit the title to which is or is to be divided into interval estates.

(4) "Project instruments" means the declaration, the bylaws, and any other set of restrictions or restrictive covenants, by whatever name denominated, which limit or restrict the use or occupancy of condominium units. "Project instruments" includes any lawful amendments to such instruments. "Project instruments" does not include any ordinance or other public regulation governing subdivisions, zoning, or other land use matters.

(5) "Time share estate" means either an interval estate or a time-span estate.

(6) "Time share owner" means a person vested with legal title to a time share estate.

(7) "Time share unit" means a unit the title to which is or is to be divided either into interval estates or time-span estates.

(8) "Time-span estate" means a combination of:

(a) An undivided interest in a present estate in fee simple in a unit, the magnitude of the interest having been established by the time of the creation of the time-span estate either by the project instruments or by the deed conveying the time-span estate; and

(b) An exclusive right to possession and occupancy of the unit during an annually recurring period of time defined and established by a recorded schedule set forth or referred to in the deed conveying the time-span estate.

(9) "Time-span owner" means a person vested with legal title to a time-span estate.

(10) "Time-span unit" means a unit the title to which is or is to be divided into time-span estates.

(11) "Unit owner" means a person vested with legal title to a unit, and, in the case of a time share unit, "unit owner" means all of the time share owners of that unit. When an



estate is subject to a deed of trust or a trust deed, "unit owner" means the person entitled to beneficial enjoyment of the estate and not to any trustee or trustees holding title merely as security for an obligation.

**Source:** L. 77: Entire section added, p. 1716, § 1, effective July 1.

#### ANNOTATION

**Law reviews.** For article, "Representing a Purchaser of a Time Share", see 11 Colo. Law. 1543 (1982). For symposium on condominium law and practice, see 11 Colo. Law. 2734 (1982). For comment, "State and Local Regulation of Timesharing in Colorado", see 56 U. Colo. L. Rev. 289 (1985).

**Enactment of section not change of use of land.** The enactment of this section and § 38-33-111 is not tantamount to a change of the use of the land nor is it a new regulation increasing

the use of the land. Bd. of County Comm'rs v. Colo. Bd. of Assmt. Appeals, 628 P.2d 156 (Colo. App. 1981).

**"Membership interests," which do not entitle purchasers to exclusive use of any particular unit, for any particular annual period, do not transfer any interest in real property,** and are not "time share estates" under this section. Bernhardt v. Hemphill, 878 P.2d 107 (Colo. App. 1994).

**38-33-111. Special provisions applicable to time share ownership.** (1) No time share estates shall be created with respect to any condominium unit except pursuant to provisions in the project instruments expressly permitting the creation of such estates. Each time share estate shall constitute for all purposes an estate or interest in real property, separate and distinct from all other time share estates in the same unit or any other unit, and such estates may be separately conveyed and encumbered.

(2) Repealed.

(3) With respect to each time share unit, each owner of a time share estate therein shall be individually liable to the unit owners' association or corporation for all assessments, property taxes both real and personal, and charges levied pursuant to the project instruments against or with respect to that unit, and such association or corporation shall be liable for the payment thereof, except to the extent that such instruments provide to the contrary. However, with respect to each other, each time share owner shall be responsible only for a fraction of such assessments, property taxes both real and personal, and charges proportionate to the magnitude of his undivided interest in the fee to the unit.

(4) No person shall have standing to bring suit for partition of any time share unit except in accordance with such procedures, conditions, restrictions, and limitations as the project instruments and the deeds to the time share estates may specify. Upon the entry of a final order in such a suit, it shall be conclusively presumed that all such procedures, conditions, restrictions, and limitations were adhered to.

(5) In the event that any condemnation award, any insurance proceeds, the proceeds of any sale, or any other sums shall become payable to all of the time share owners of a unit, the portion payable to each time share owner shall be proportionate to the magnitude of his undivided interest in the fee to the unit.

**Source:** L. 77: Entire section added, p. 1717, § 1, effective July 1. L. 79: (2) repealed and (3) amended, p. 1397, §§ 2, 1, effective May 22.

#### ANNOTATION

**Law reviews.** For article, "Representing a Purchaser of a Time Share", see 11 Colo. Law. 1543 (1982). For symposium on condominium law and practice, see 11 Colo. Law. 2734 (1982). For comment, "State and Local Regulation of Timesharing in Colorado", see 56 U. Colo. L. Rev. 289 (1985).

**Enactment of section not change of use of land.** The enactment of this section and § 38-33-110 is not tantamount to a change of the use of the land nor is it a new regulation increasing the use of the land. Bd. of County Comm'rs v. Colo. Bd. of Assmt. Appeals, 628 P.2d 156 (Colo. App. 1981).

**38-33-112. Notification to residential tenants.** (1) A developer who converts an existing multiple-unit dwelling into condominium units, upon recording of the declaration as required by section 38-33-105, shall notify each residential tenant of the dwelling of such conversion.

(2) Such notice shall be in writing and shall be sent by certified or registered mail, postage prepaid, and return receipt provided. Notice is complete upon mailing to the tenant at the tenant's last known address. Notice may also be made by delivery in person to the tenant of a copy of such written notice, in which event notice is complete upon such delivery.

(3) Said notice constitutes the notice to terminate the tenancy as provided by section 13-40-107, C.R.S.; except that no residential tenancy shall be terminated prior to the expiration date of the existing lease agreement, if any, unless consented to by both the tenant and the developer. If the term of the lease has less than ninety days remaining when notification is mailed or delivered, as the case may be, or if there is no written lease agreement, residential tenancy may not be terminated by the developer less than ninety days after the date the notice is mailed or delivered, as the case may be, to the tenant, unless consented to by both the tenant and the developer. The return receipt shall be prima facie evidence of receipt of notice. If the term of the lease has less than ninety days remaining when notification is mailed or delivered, as the case may be, the tenant may hold over for the remainder of said ninety-day period under the same terms and conditions of the lease agreement if the tenant makes timely rental payments and performs other conditions of the lease agreement.

(4) The tenancy may be terminated within the ninety days prescribed in subsection (3) of this section upon agreement by the tenant in consideration of the payment of all moving expenses by the developer or for such other consideration as mutually agreed upon. Such tenancy may also be terminated within the ninety days prescribed in subsection (3) of this section upon failure by the tenant to make timely rental or lease payments.

(5) Any person who applies for a residential tenancy after the recording of the declaration shall be informed of this recording at the time of application, and any leases executed after such recording may provide for termination within less than ninety days provided that the terms of the lease conspicuously disclose the intention to convert the property containing the leased premises to condominium ownership.

(6) The general assembly hereby finds and declares that the notification procedure set forth in this section is a matter of statewide concern. No county, municipality, or other political subdivision whether or not vested with home rule powers under article XX of the Colorado constitution, shall adopt or enforce any ordinance, rule, regulation, or policy which conflicts with the provisions of this section.

**Source:** L. 79: Entire section added, p. 1398, § 1, effective June 21. L. 83: (6) added, p. 594, § 4, effective May 25.

#### ANNOTATION

**Law reviews.** For symposium on condominium law and practice, see 11 Colo. Law. 2734 (1982).

**38-33-113. License to sell condominiums and time shares.** The general assembly hereby finds and declares that the licensing of persons to sell condominiums and time shares is a matter of statewide concern.

**Source:** L. 83: Entire section added, p. 594, § 5, effective May 25.

**Cross references:** For the licensing of real estate brokers and salespersons, see article 61 of title 12.



## ANNOTATION

**Law reviews.** For comment, "State and Local Regulation of Timesharing in Colorado", see 56 U. Colo. L. Rev. 289 (1985).

## ARTICLE 33.3

## Colorado Common Interest Ownership Act

**Editor's note:** The provisions of this act are based substantially on the "Uniform Common Interest Ownership Act", as promulgated by the National Conference of Commissioners on Uniform State Laws. Colorado did not adopt article 4 concerning protection of purchasers and the optional article 5 of said uniform act concerning administration and registration of common interest communities.

**Law reviews:** For article "Colorado Common Interest Ownership Act - How it is Doing", see 25 Colo. Law. 17 (November 1996); for article, "When the Developer Controls the Homeowner Association Board: The Benevolent Dictator?", see 31 Colo. Law. 91 (January 2002); for article, "S.B. 05-100 and 06-089—Impact on Colorado's Common Interest Communities", see 35 Colo. Law. 57 (December 2006).

## PART 1

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38-33.3-221.	Merger or consolidation of common interest communities.	38-33.3-316.5.	Time share estate - foreclosure - definitions.
38-33.3-221.5.	Withdrawal from merged common interest community.	38-33.3-317.	Association records.
38-33.3-222.	Addition of unspecified real estate.	38-33.3-318.	Association as trustee.
38-33.3-223.	Sale of unit - disclosure to buyer. (Repealed)	38-33.3-319.	Other applicable statutes.

## PART 3

MANAGEMENT OF THE COMMON  
INTEREST COMMUNITY

38-33.3-301. Organization of unit owners'

## PART 1

## GENERAL PROVISIONS

**38-33.3-101. Short title.** This article shall be known and may be cited as the "Colorado Common Interest Ownership Act".

**Source: L. 91:** Entire article added, p. 1701, § 1, effective July 1, 1992.

**38-33.3-102. Legislative declaration.** (1) The general assembly hereby finds, determines, and declares, as follows:

(a) That it is in the best interests of the state and its citizens to establish a clear, comprehensive, and uniform framework for the creation and operation of common interest communities;

(b) That the continuation of the economic prosperity of Colorado is dependent upon the strengthening of homeowner associations in common interest communities financially through the setting of budget guidelines, the creation of statutory assessment liens, the

## PART 4

## REGISTRATION

38-33.3-401. Registration - annual fees.



granting of six months' lien priority, the facilitation of borrowing, and more certain powers in the association to sue on behalf of the owners and through enhancing the financial stability of associations by increasing the association's powers to collect delinquent assessments, late charges, fines, and enforcement costs;

(c) That it is the policy of this state to give developers flexible development rights with specific obligations within a uniform structure of development of a common interest community that extends through the transition to owner control;

(d) That it is the policy of this state to promote effective and efficient property management through defined operational requirements that preserve flexibility for such homeowner associations;

(e) That it is the policy of this state to promote the availability of funds for financing the development of such homeowner associations by enabling lenders to extend the financial services to a greater market on a safer, more predictable basis because of standardized practices and prudent insurance and risk management obligations.

**Source:** L. 91: Entire article added, p. 1701, § 1, effective July 1, 1992.

#### ANNOTATION

**There is no support for the proposition that enactment of a legislative scheme governing the operation of homeowners' association thereby transforms such homeowners' asso-**

**ciation into cities or other governmental entities.** Woodmoor Improvement Ass'n v. Brenner, 919 P.2d 928 (Colo. App. 1996).

**38-33.3-103. Definitions.** As used in the declaration and bylaws of an association, unless specifically provided otherwise or unless the context otherwise requires, and in this article:

(1) "Affiliate of a declarant" means any person who controls, is controlled by, or is under common control with a declarant. A person controls a declarant if the person: Is a general partner, officer, director, or employee of the declarant; directly or indirectly, or acting in concert with one or more other persons or through one or more subsidiaries, owns, controls, holds with power to vote, or holds proxies representing more than twenty percent of the voting interests of the declarant; controls in any manner the election of a majority of the directors of the declarant; or has contributed more than twenty percent of the capital of the declarant. A person is controlled by a declarant if the declarant: Is a general partner, officer, director, or employee of the person; directly or indirectly, or acting in concert with one or more other persons or through one or more subsidiaries, owns, controls, holds with power to vote, or holds proxies representing more than twenty percent of the voting interests of the person; controls in any manner the election of a majority of the directors of the person; or has contributed more than twenty percent of the capital of the person. Control does not exist if the powers described in this subsection (1) are held solely as security for an obligation and are not exercised.

(2) "Allocated interests" means the following interests allocated to each unit:

(a) In a condominium, the undivided interest in the common elements, the common expense liability, and votes in the association;

(b) In a cooperative, the common expense liability and the ownership interest and votes in the association; and

(c) In a planned community, the common expense liability and votes in the association.

(2.5) "Approved for development" means that all or some portion of a particular parcel of real property is zoned or otherwise approved for construction of residential and other improvements and authorized for specified densities by the local land use authority having jurisdiction over such real property and includes any conceptual or final planned unit development approval.

(3) "Association" or "unit owners' association" means a unit owners' association organized under section 38-33.3-301.

(4) "Bylaws" means any instruments, however denominated, which are adopted by the association for the regulation and management of the association, including any amendments to those instruments.

(5) "Common elements" means:

(a) In a condominium or cooperative, all portions of the condominium or cooperative other than the units; and

(b) In a planned community, any real estate within a planned community owned or leased by the association, other than a unit.

(6) "Common expense liability" means the liability for common expenses allocated to each unit pursuant to section 38-33.3-207.

(7) "Common expenses" means expenditures made or liabilities incurred by or on behalf of the association, together with any allocations to reserves.

(8) "Common interest community" means real estate described in a declaration with respect to which a person, by virtue of such person's ownership of a unit, is obligated to pay for real estate taxes, insurance premiums, maintenance, or improvement of other real estate described in a declaration. Ownership of a unit does not include holding a leasehold interest in a unit of less than forty years, including renewal options. The period of the leasehold interest, including renewal options, is measured from the date the initial term commences.

(9) "Condominium" means a common interest community in which portions of the real estate are designated for separate ownership and the remainder of which is designated for common ownership solely by the owners of the separate ownership portions. A common interest community is not a condominium unless the undivided interests in the common elements are vested in the unit owners.

(10) "Cooperative" means a common interest community in which the real property is owned by an association, each member of which is entitled by virtue of such member's ownership interest in the association to exclusive possession of a unit.

(11) "Dealer" means a person in the business of selling units for such person's own account.

(12) "Declarant" means any person or group of persons acting in concert who:

(a) As part of a common promotional plan, offers to dispose of to a purchaser such declarant's interest in a unit not previously disposed of to a purchaser; or

(b) Reserves or succeeds to any special declarant right.

(13) "Declaration" means any recorded instruments however denominated, that create a common interest community, including any amendments to those instruments and also including, but not limited to, plats and maps.

(14) "Development rights" means any right or combination of rights reserved by a declarant in the declaration to:

(a) Add real estate to a common interest community;

(b) Create units, common elements, or limited common elements within a common interest community;

(c) Subdivide units or convert units into common elements; or

(d) Withdraw real estate from a common interest community.

(15) "Dispose" or "disposition" means a voluntary transfer of any legal or equitable interest in a unit, but the term does not include the transfer or release of a security interest.

(16) "Executive board" means the body, regardless of name, designated in the declaration to act on behalf of the association.

(16.5) "Horizontal boundary" means a plane of elevation relative to a described benchmark that defines either a lower or an upper dimension of a unit such that the real estate respectively below or above the defined plane is not a part of the unit.

(17) "Identifying number" means a symbol or address that identifies only one unit in a common interest community.

(17.5) "Large planned community" means a planned community that meets the criteria set forth in section 38-33.3-116.3 (1).

(18) "Leasehold common interest community" means a common interest community in which all or a portion of the real estate is subject to a lease, the expiration or termination of which will terminate the common interest community or reduce its size.

(19) "Limited common element" means a portion of the common elements allocated by the declaration or by operation of section 38-33.3-202 (1) (b) or (1) (d) for the exclusive use of one or more units but fewer than all of the units.



(19.5) "Map" means that part of a declaration that depicts all or any portion of a common interest community in three dimensions, is executed by a person that is authorized by this title to execute a declaration relating to the common interest community, and is recorded in the real estate records in every county in which any portion of the common interest community is located. A map is required for a common interest community with units having a horizontal boundary. A map and a plat may be combined in one instrument.

(20) "Master association" means an organization that is authorized to exercise some or all of the powers of one or more associations on behalf of one or more common interest communities or for the benefit of the unit owners of one or more common interest communities.

(21) "Person" means a natural person, a corporation, a partnership, an association, a trust, or any other entity or any combination thereof.

(21.5) "Phased community" means a common interest community in which the declarant retains development rights.

(22) "Planned community" means a common interest community that is not a condominium or cooperative. A condominium or cooperative may be part of a planned community.

(22.5) "Plat" means that part of a declaration that is a land survey plat as set forth in section 38-51-106, depicts all or any portion of a common interest community in two dimensions, is executed by a person that is authorized by this title to execute a declaration relating to the common interest community, and is recorded in the real estate records in every county in which any portion of the common interest community is located. A plat and a map may be combined in one instrument.

(23) "Proprietary lease" means an agreement with the association pursuant to which a member is entitled to exclusive possession of a unit in a cooperative.

(24) "Purchaser" means a person, other than a declarant or a dealer, who by means of a transfer acquires a legal or equitable interest in a unit, other than:

(a) A leasehold interest in a unit of less than forty years, including renewal options, with the period of the leasehold interest, including renewal options, being measured from the date the initial term commences; or

(b) A security interest.

(25) "Real estate" means any leasehold or other estate or interest in, over, or under land, including structures, fixtures, and other improvements and interests that, by custom, usage, or law, pass with a conveyance of land though not described in the contract of sale or instrument of conveyance. "Real estate" includes parcels with or without horizontal boundaries and spaces that may be filled with air or water.

(26) "Residential use" means use for dwelling or recreational purposes but does not include spaces or units primarily used for commercial income from, or service to, the public.

(27) "Rules and regulations" means any instruments, however denominated, which are adopted by the association for the regulation and management of the common interest community, including any amendment to those instruments.

(28) "Security interest" means an interest in real estate or personal property created by contract or conveyance which secures payment or performance of an obligation. The term includes a lien created by a mortgage, deed of trust, trust deed, security deed, contract for deed, land sales contract, lease intended as security, assignment of lease or rents intended as security, pledge of an ownership interest in an association, and any other consensual lien or title retention contract intended as security for an obligation.

(29) "Special declarant rights" means rights reserved for the benefit of a declarant to perform the following acts as specified in parts 2 and 3 of this article: To complete improvements indicated on plats and maps filed with the declaration; to exercise any development right; to maintain sales offices, management offices, signs advertising the common interest community, and models; to use easements through the common elements for the purpose of making improvements within the common interest community or within real estate which may be added to the common interest community; to make the common interest community subject to a master association; to merge or consolidate a common

interest community of the same form of ownership; or to appoint or remove any officer of the association or any executive board member during any period of declarant control.

(30) “Unit” means a physical portion of the common interest community which is designated for separate ownership or occupancy and the boundaries of which are described in or determined from the declaration. If a unit in a cooperative is owned by a unit owner or is sold, conveyed, voluntarily or involuntarily encumbered, or otherwise transferred by a unit owner, the interest in that unit which is owned, sold, conveyed, encumbered, or otherwise transferred is the right to possession of that unit under a proprietary lease, coupled with the allocated interests of that unit, and the association’s interest in that unit is not thereby affected.

(31) “Unit owner” means the declarant or other person who owns a unit, or a lessee of a unit in a leasehold common interest community whose lease expires simultaneously with any lease, the expiration or termination of which will remove the unit from the common interest community but does not include a person having an interest in a unit solely as security for an obligation. In a condominium or planned community, the declarant is the owner of any unit created by the declaration until that unit is conveyed to another person; in a cooperative, the declarant is treated as the owner of any unit to which allocated interests have been allocated pursuant to section 38-33.3-207 until that unit has been conveyed to another person, who may or may not be a declarant under this article.

(32) “Vertical boundary” means the defined limit of a unit that is not a horizontal boundary of that unit.

**Source:** **L. 91:** Entire article added, p. 1702, § 1, effective July 1, 1992. **L. 93:** IP, (8), and (25) amended and (16.5), (19.5), (22.5), and (32) added, p. 642, § 1, effective April 30. **L. 94:** (17.5) added, p. 2845, § 1, effective July 1; (22.5) amended, p. 1509, § 44, effective July 1. **L. 95:** (2.5) added, p. 236, § 1, effective July 1. **L. 97:** (22.5) amended, p. 151, § 2, effective March 28. **L. 98:** (20) amended, p. 477, § 1, effective July 1. **L. 2006:** (21.5) added, p. 1215, § 1, effective May 26.

## ANNOTATION

**Subdivision can be a common interest community as defined in subsection (8) even if it does not include common property.** Where subdivision covenants required homeowners to pay mandatory assessments for maintenance or improvement and the homeowners’ association was responsible for maintenance and improvement of the subdivision and enforcement of covenants, the absence of common property in the subdivision did not preclude the subdivision from being a common interest community because the scope of the phrase “other real estate” in subsection (8) is not restricted to common property. *Hiwan Homeowners Ass’n v. Knotts*, 215 P.3d 1271 (Colo. App. 2009).

**Based upon definition of “declaration” under subsection (13), in the absence of covenant imposing mandatory dues, homeowners association has the implied power to collect assessments from homeowners to pay for the maintenance of the common areas of the subdivision.** Here, the “declarations” for the homeowners association of the subdivision in effect at the time respondent lot owner purchased his lot incorporated all documents recorded up to that

date. At the time respondent lot owner purchased his lot, the declarations made clear that the homeowners association had the power to impose annual membership or use fees on lot owners. These declarations were sufficient to create a common interest community by implication, with the concomitant power to impose mandatory dues on lot owners to pay for the maintenance of common areas of the subdivision. The respondent lot owner, therefore, has an implied duty to pay his proportionate share of the cost of maintaining and operating the common area. *Evergreen Highlands Ass’n v. West*, 73 P.3d 1 (Colo. 2003).

**Based upon definition of “declaration” in subsection (13), a plat can be part of a declaration.** *Giguere v. SJS Family Enters.*, 155 P.3d 462 (Colo. App. 2006).

**“Subsequent filings” language used in declaration referenced development rights.** Lots not in existence at the time declaration was recorded had yet to be created, and, as such, they represent units that could be created in the future and fall under the definition of “development rights”. *Miller v. Curry*, 203 P.3d 626 (Colo. App. 2009).



**38-33.3-104. Variation by agreement.** Except as expressly provided in this article, provisions of this article may not be varied by agreement, and rights conferred by this article may not be waived. A declarant may not act under a power of attorney or use any other device to evade the limitations or prohibitions of this article or the declaration.

**Source: L. 91:** Entire article added, p. 1707, § 1, effective July 1, 1992.

**38-33.3-105. Separate titles and taxation.** (1) In a cooperative, unless the declaration provides that a unit owner's interest in a unit and its allocated interests is personal property, that interest is real estate for all purposes.

(2) In a condominium or planned community with common elements, each unit that has been created, together with its interest in the common elements, constitutes for all purposes a separate parcel of real estate and must be separately assessed and taxed. The valuation of the common elements shall be assessed proportionately to each unit, in the case of a condominium in accordance with such unit's allocated interests in the common elements, and in the case of a planned community in accordance with such unit's allocated common expense liability, set forth in the declaration, and the common elements shall not be separately taxed or assessed. Upon the filing for recording of a declaration for a condominium or planned community with common elements, the declarant shall deliver a copy of such filing to the assessor of each county in which such declaration was filed.

(3) In a planned community without common elements, the real estate comprising such planned community may be taxed and assessed in any manner provided by law.

**Source: L. 91:** Entire article added, p. 1707, § 1, effective July 1, 1992. **L. 93:** (1) and (2) amended, p. 643, § 2, effective April 30.

**38-33.3-106. Applicability of local ordinances, regulations, and building codes.** (1) A building code may not impose any requirement upon any structure in a common interest community which it would not impose upon a physically identical development under a different form of ownership; except that a minimum one hour fire wall may be required between units.

(2) In condominiums and cooperatives, no zoning, subdivision, or other real estate use law, ordinance, or regulation may prohibit the condominium or cooperative form of ownership or impose any requirement upon a condominium or cooperative which it would not impose upon a physically identical development under a different form of ownership.

**Source: L. 91:** Entire article added, p. 1707, § 1, effective July 1, 1992.

**38-33.3-106.5. Prohibitions contrary to public policy - patriotic and political expression - emergency vehicles - fire prevention - renewable energy generation devices - affordable housing - definitions.** (1) Notwithstanding any provision in the declaration, bylaws, or rules and regulations of the association to the contrary, an association shall not prohibit any of the following:

(a) The display of the American flag on a unit owner's property, in a window of the unit, or on a balcony adjoining the unit if the American flag is displayed in a manner consistent with the federal flag code, Pub.L. 94-344; 90 stat. 810; 4 U.S.C. secs. 4 to 10. The association may adopt reasonable rules regarding the placement and manner of display of the American flag. The association rules may regulate the location and size of flags and flagpoles, but shall not prohibit the installation of a flag or flagpole.

(b) The display of a service flag bearing a star denoting the service of the owner or occupant of the unit, or of a member of the owner's or occupant's immediate family, in the active or reserve military service of the United States during a time of war or armed conflict, on the inside of a window or door of the unit. The association may adopt reasonable rules regarding the size and manner of display of service flags; except that the maximum dimensions allowed shall be not less than nine inches by sixteen inches.

(c) (I) The display of a political sign by the owner or occupant of a unit on property within the boundaries of the unit or in a window of the unit; except that:

(A) An association may prohibit the display of political signs earlier than forty-five days before the day of an election and later than seven days after an election day; and

(B) An association may regulate the size and number of political signs in accordance with subparagraph (II) of this paragraph (c).

(II) The association shall permit at least one political sign per political office or ballot issue that is contested in a pending election. The maximum dimensions of each sign may be limited to the lesser of the following:

(A) The maximum size allowed by any applicable city, town, or county ordinance that regulates the size of political signs on residential property; or

(B) Thirty-six inches by forty-eight inches.

(III) As used in this paragraph (c), "political sign" means a sign that carries a message intended to influence the outcome of an election, including supporting or opposing the election of a candidate, the recall of a public official, or the passage of a ballot issue.

(d) The parking of a motor vehicle by the occupant of a unit on a street, driveway, or guest parking area in the common interest community if the vehicle is required to be available at designated periods at such occupant's residence as a condition of the occupant's employment and all of the following criteria are met:

(I) The vehicle has a gross vehicle weight rating of ten thousand pounds or less;

(II) The occupant is a bona fide member of a volunteer fire department or is employed by a primary provider of emergency fire fighting, law enforcement, ambulance, or emergency medical services;

(III) The vehicle bears an official emblem or other visible designation of the emergency service provider; and

(IV) Parking of the vehicle can be accomplished without obstructing emergency access or interfering with the reasonable needs of other unit owners or occupants to use streets, driveways, and guest parking spaces within the common interest community.

(e) The removal by a unit owner of trees, shrubs, or other vegetation to create defensible space around a dwelling for fire mitigation purposes, so long as such removal complies with a written defensible space plan created for the property by the Colorado state forest service, an individual or company certified by a local governmental entity to create such a plan, or the fire chief, fire marshal, or fire protection district within whose jurisdiction the unit is located, and is no more extensive than necessary to comply with such plan. The plan shall be registered with the association before the commencement of work. The association may require changes to the plan if the association obtains the consent of the person, official, or agency that originally created the plan. The work shall comply with applicable association standards regarding slash removal, stump height, revegetation, and contractor regulations.

(f) (Deleted by amendment, L. 2006, p. 1215, § 2, effective May 26, 2006.)

(g) Reasonable modifications to a unit or to common elements as necessary to afford a person with disabilities full use and enjoyment of the unit in accordance with the federal "Fair Housing Act of 1968", 42 U.S.C. sec. 3604 (f) (3) (A).

(h) (I) The right of a unit owner, public or private, to restrict or specify by deed, covenant, or other document:

(A) The permissible sale price, rental rate, or lease rate of the unit; or

(B) Occupancy or other requirements designed to promote affordable or workforce housing as such terms may be defined by the local housing authority.

(II) (A) Notwithstanding any other provision of law, the provisions of this paragraph (h) shall only apply to a county the population of which is less than one hundred thousand persons and that contains a ski lift licensed by the passenger tramway safety board created in section 25-5-703 (1), C.R.S.

(B) The provisions of this paragraph (h) shall not apply to a declarant-controlled community.

(III) Nothing in subparagraph (I) of this paragraph (h) shall be construed to prohibit the future owner of a unit against which a restriction or specification described in such subparagraph has been placed from lifting such restriction or specification on such unit as



long as any unit so released is replaced by another unit in the same common interest community on which the restriction or specification applies and the unit subject to the restriction or specification is reasonably equivalent to the unit being released in the determination of the beneficiary of the restriction or specification.

(IV) Except as otherwise provided in the declaration of the common interest community, any unit subject to the provisions of this paragraph (h) shall only be occupied by the owner of the unit.

(1.5) Notwithstanding any provision in the declaration, bylaws, or rules and regulations of the association to the contrary, an association shall not effectively prohibit renewable energy generation devices, as defined in section 38-30-168.

(2) Notwithstanding any provision in the declaration, bylaws, or rules and regulations of the association to the contrary, an association shall not require the use of cedar shakes or other flammable roofing materials.

**Source:** **L. 2005:** Entire section added, p. 1373, § 2, effective June 6. **L. 2006:** (1)(a), (1)(b), (1)(c), IP(1)(d), (1)(d)(II), (1)(d)(IV), and (1)(f) amended and (2) added, p. 1215, § 2, effective May 26. **L. 2008:** (1)(g) added, p. 556, § 1, effective July 1; (1.5) added, p. 620, § 3, effective August 5. **L. 2009:** (1)(h) added, (HB 09-1220), ch. 166, p. 732, § 1, effective August 5.

**38-33.3-106.7. Unreasonable restrictions on energy efficiency measures - definitions.** (1) (a) Notwithstanding any provision in the declaration, bylaws, or rules and regulations of the association to the contrary, an association shall not effectively prohibit the installation or use of an energy efficiency measure.

(b) As used in this section, “energy efficiency measure” means a device or structure that reduces the amount of energy derived from fossil fuels that is consumed by a residence or business located on the real property. “Energy efficiency measure” is further limited to include only the following types of devices or structures:

(I) An awning, shutter, trellis, ramada, or other shade structure that is marketed for the purpose of reducing energy consumption;

(II) A garage or attic fan and any associated vents or louvers;

(III) An evaporative cooler;

(IV) An energy-efficient outdoor lighting device, including without limitation a light fixture containing a coiled or straight fluorescent light bulb, and any solar recharging panel, motion detector, or other equipment connected to the lighting device; and

(V) A retractable clothesline.

(2) Subsection (1) of this section shall not apply to:

(a) Reasonable aesthetic provisions that govern the dimensions, placement, or external appearance of an energy efficiency measure. In creating reasonable aesthetic provisions, common interest communities shall consider:

(I) The impact on the purchase price and operating costs of the energy efficiency measure;

(II) The impact on the performance of the energy efficiency measure; and

(III) The criteria contained in the governing documents of the common interest community.

(b) Bona fide safety requirements, consistent with an applicable building code or recognized safety standard, for the protection of persons and property.

(3) This section shall not be construed to confer upon any property owner the right to place an energy efficiency measure on property that is:

(a) Owned by another person;

(b) Leased, except with permission of the lessor;

(c) Collateral for a commercial loan, except with permission of the secured party; or

(d) A limited common element or general common element of a common interest community.

**Source:** **L. 2008:** Entire section added, p. 618, § 2, effective August 5.

**38-33.3-107. Eminent domain.** (1) If a unit is acquired by eminent domain or part of a unit is acquired by eminent domain leaving the unit owner with a remnant which may not practically or lawfully be used for any purpose permitted by the declaration, the award must include compensation to the unit owner for that unit and its allocated interests whether or not any common elements are acquired. Upon acquisition, unless the decree otherwise provides, that unit's allocated interests are automatically reallocated to the remaining units in proportion to the respective allocated interests of those units before the taking. Any remnant of a unit remaining after part of a unit is taken under this subsection (1) is thereafter a common element.

(2) Except as provided in subsection (1) of this section, if part of a unit is acquired by eminent domain, the award must compensate the unit owner for the reduction in value of the unit and its interest in the common elements whether or not any common elements are acquired. Upon acquisition, unless the decree otherwise provides:

(a) That unit's allocated interests are reduced in proportion to the reduction in the size of the unit or on any other basis specified in the declaration; and

(b) The portion of allocated interests divested from the partially acquired unit is automatically reallocated to that unit and to the remaining units in proportion to the respective interests of those units before the taking, with the partially acquired unit participating in the reallocation on the basis of its reduced allocated interests.

(3) If part of the common elements is acquired by eminent domain, that portion of any award attributable to the common elements taken must be paid to the association. Unless the declaration provides otherwise, any portion of the award attributable to the acquisition of a limited common element must be equally divided among the owners of the units to which that limited common element was allocated at the time of acquisition. For the purposes of acquisition of a part of the common elements other than the limited common elements under this subsection (3), service of process on the association shall constitute sufficient notice to all unit owners, and service of process on each individual unit owner shall not be necessary.

(4) The court decree shall be recorded in every county in which any portion of the common interest community is located.

(5) The reallocations of allocated interests pursuant to this section shall be confirmed by an amendment to the declaration prepared, executed, and recorded by the association.

**Source:** L. 91: Entire article added, p. 1708, § 1, effective July 1, 1992.

**38-33.3-108. Supplemental general principles of law applicable.** The principles of law and equity, including, but not limited to, the law of corporations and unincorporated associations, the law of real property, and the law relative to capacity to contract, principal and agent, eminent domain, estoppel, fraud, misrepresentation, duress, coercion, mistake, receivership, substantial performance, or other validating or invalidating cause supplement the provisions of this article, except to the extent inconsistent with this article.

**Source:** L. 91: Entire article added, p. 1709, § 1, effective July 1, 1992.

**38-33.3-109. Construction against implicit repeal.** This article is intended to be a unified coverage of its subject matter, and no part of this article shall be construed to be impliedly repealed by subsequent legislation if that construction can reasonably be avoided.

**Source:** L. 91: Entire article added, p. 1709, § 1, effective July 1, 1992.

**38-33.3-110. Uniformity of application and construction.** This article shall be applied and construed so as to effectuate its general purpose to make uniform the law with respect to the subject of this article among states enacting it.

**Source:** L. 91: Entire article added, p. 1709, § 1, effective July 1, 1992.



**38-33.3-111. Severability.** If any provision of this article or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of this article which can be given effect without the invalid provisions or application, and, to this end, the provisions of this article are severable.

**Source: L. 91:** Entire article added, p. 1709, § 1, effective July 1, 1992.

**38-33.3-112. Unconscionable agreement or term of contract.** (1) The court, upon finding as a matter of law that a contract or contract clause relating to a common interest community was unconscionable at the time the contract was made, may refuse to enforce the contract, enforce the remainder of the contract without the unconscionable clause, or limit the application of any unconscionable clause in order to avoid an unconscionable result.

(2) Whenever it is claimed, or appears to the court, that a contract or any contract clause relating to a common interest community is or may be unconscionable, the parties, in order to aid the court in making the determination, shall be afforded a reasonable opportunity to present evidence as to:

(a) The commercial setting of the negotiations;

(b) Whether the first party has knowingly taken advantage of the inability of the second party reasonably to protect such second party's interests by reason of physical or mental infirmity, illiteracy, or inability to understand the language of the agreement or similar factors;

(c) The effect and purpose of the contract or clause; and

(d) If a sale, any gross disparity at the time of contracting between the amount charged for the property and the value of that property measured by the price at which similar property was readily obtainable in similar transactions. A disparity between the contract price and the value of the property measured by the price at which similar property was readily obtainable in similar transactions does not, of itself, render the contract unconscionable.

**Source: L. 91:** Entire article added, p. 1709, § 1, effective July 1, 1992. **L. 93:** (2)(b) amended, p. 643, § 3, effective April 30.

**38-33.3-113. Obligation of good faith.** Every contract or duty governed by this article imposes an obligation of good faith in its performance or enforcement.

**Source: L. 91:** Entire article added, p. 1710, § 1, effective July 1, 1992.

**38-33.3-114. Remedies to be liberally administered.** (1) The remedies provided by this article shall be liberally administered to the end that the aggrieved party is put in as good a position as if the other party had fully performed. However, consequential, special, or punitive damages may not be awarded except as specifically provided in this article or by other rule of law.

(2) Any right or obligation declared by this article is enforceable by judicial proceeding.

**Source: L. 91:** Entire article added, p. 1710, § 1, effective July 1, 1992.

**38-33.3-115. Applicability to new common interest communities.** Except as provided in section 38-33.3-116, this article applies to all common interest communities created within this state on or after July 1, 1992. The provisions of sections 38-33-101 to 38-33-109 do not apply to common interest communities created on or after July 1, 1992. The provisions of sections 38-33-110 to 38-33-113 shall remain in effect for all common interest communities.

**Source:** **L. 91:** Entire article added, p. 1710, § 1, effective July 1, 1992. **L. 93:** Entire section amended, p. 644, § 4, effective April 30.

**38-33.3-116. Exception for new small cooperatives and small and limited expense planned communities.** (1) If a cooperative created in this state on or after July 1, 1992, but prior to July 1, 1998, contains only units restricted to nonresidential use or contains no more than ten units and is not subject to any development rights, it is subject only to sections 38-33.3-105 to 38-33.3-107, unless the declaration provides that this entire article is applicable. If a planned community created in this state on or after July 1, 1992, but prior to July 1, 1998, contains no more than ten units and is not subject to any development rights or if a planned community provides, in its declaration, that the annual average common expense liability of each unit restricted to residential purposes, exclusive of optional user fees and any insurance premiums paid by the association, may not exceed three hundred dollars, it is subject only to sections 38-33.3-105 to 38-33.3-107, unless the declaration provides that this entire article is applicable.

(2) If a cooperative or planned community created in this state on or after July 1, 1998, contains only units restricted to nonresidential use, or contains no more than twenty units and is not subject to any development rights, it is subject only to sections 38-33.3-105 to 38-33.3-107, unless the declaration provides that this entire article is applicable. If a planned community created in this state after July 1, 1998, provides, in its declaration, that the annual average common expense liability of each unit restricted to residential purposes, exclusive of optional user fees and any insurance premiums paid by the association, may not exceed four hundred dollars, as adjusted pursuant to subsection (3) of this section, it is subject only to sections 38-33.3-105 to 38-33.3-107, unless the declaration provides that this entire article is applicable.

(3) The four-hundred-dollar limitation set forth in subsection (2) of this section shall be increased annually on July 1, 1999, and on July 1 of each succeeding year in accordance with any increase in the United States department of labor bureau of labor statistics final consumer price index for the Denver-Boulder consolidated metropolitan statistical area for the preceding calendar year. The limitation shall not be increased if the final consumer price index for the preceding calendar year did not increase and shall not be decreased if the final consumer price index for the preceding calendar year decreased.

**Source:** **L. 91:** Entire article added, p. 1710, § 1, effective July 1, 1992. **L. 93:** Entire section amended, p. 644, § 5, effective April 30. **L. 98:** Entire section amended, p. 477, § 2, effective July 1. **L. 2009:** (1) and (2) amended, (SB 09-249), ch. 248, p. 1119, § 1, effective May 14.

#### ANNOTATION

Having opted for an exemption from the Colorado Common Interest Ownership Act by limiting the amount of homeowners' dues assessed, a homeowners' association cannot refuse to be bound by such limitation and

therefore cannot impose a special assessment in an amount above such limit. *Quinn v. Castle Park Ranch Prop. Owners Ass'n*, 77 P.3d 823 (Colo. App. 2003).

**38-33.3-116.3. Large planned communities - exemption from certain requirements.** (1) A planned community shall be exempt from the provisions of this article as specified in subsection (3) of this section or as specifically exempted in any other provision of this article, if, at the time of recording the affidavit required pursuant to subsection (2) of this section, the real estate upon which the planned community is created meets both of the following requirements:

(a) It consists of at least two hundred acres;

(b) It is approved for development of at least five hundred residential units, excluding any interval estates, time-share estates, or time-span estates but including any interval units created pursuant to sections 38-33-110 and 38-33-111, and at least twenty thousand square feet of commercial use.



(c) (Deleted by amendment, L. 95, p. 236, § 2, effective July 1, 1995.)

(2) For an exemption authorized in subsection (1) of this section to apply, the property must be zoned within each county in which any part of such parcel is located, and the owner of the parcel shall record with the county clerk and recorder of each county in which any part of such parcel is located an affidavit setting forth the following:

- (a) The legal description of such parcel of land;
- (b) A statement that the party signing the affidavit is the owner of the parcel in its entirety in fee simple, excluding mineral interests;
- (c) The acreage of the parcel;
- (d) The zoning classification of the parcel, with a certified copy of applicable zoning regulations attached; and
- (e) A statement that neither the owner nor any officer, director, shareholder, partner, or other entity having more than a ten-percent equity interest in the owner has been convicted of a felony within the last ten years.

(3) A large planned community for which an affidavit has been filed pursuant to subsection (2) of this section shall be exempt from the following provisions of this article:

- (a) Section 38-33.3-205 (1) (e) to (1) (m);
- (b) Section 38-33.3-207 (3);
- (c) Section 38-33.3-208;
- (d) Section 38-33.3-209 (2) (b) to (2) (d), (2) (f), (2) (g), (4), and (6);
- (e) Section 38-33.3-210;
- (f) Section 38-33.3-212;
- (g) Section 38-33.3-213;
- (h) Section 38-33.3-215;
- (i) Section 38-33.3-217 (1);
- (j) Section 38-33.3-304.

(4) Section 38-33.3-217 (4) shall be applicable as follows: Except to the extent expressly permitted or required by other provisions of this article, no amendment may create or increase special declarant rights, increase the number of units or the allocated interests of a unit, or the uses to which any unit is restricted, in the absence of unanimous consent of the unit owners.

(5) (a) The exemption authorized by this section shall continue for the large planned community so long as the owner signing the affidavit is the owner of the real estate described in subsection (2) of this section; except that:

(I) Upon the sale, conveyance, or other transfer of any portion of the real estate within the large planned community, the portion sold, conveyed, or transferred shall become subject to all the provisions of this article;

(II) Any common interest community created on some but not all of the real estate within the large planned community shall be created pursuant to this article; and

(III) When a planned community no longer qualifies as a large planned community, as described in subsection (1) of this section, the exemptions authorized by this section shall no longer be applicable.

(b) Notwithstanding the provisions of subparagraph (III) of paragraph (a) of this subsection (5), all real estate described in a recorded declaration creating a large planned community shall remain subject to such recorded declaration.

(6) The association established for a large planned community shall operate with respect to large planned community-wide matters and shall not otherwise operate as the exclusive unit owners' association with respect to any unit.

(7) The association established for a large planned community shall keep in its principal office and make reasonably available to all unit owners, unit owners' authorized agents, and prospective purchasers of units a complete legal description of all common elements within the large planned community.

**Source:** L. 94: Entire section added, p. 2845, § 2, effective July 1. L. 95: IP(1), (1)(b), (1)(c), and (5) amended and (7) added, p. 236, § 2, effective July 1.

**38-33.3-117. Applicability to preexisting common interest communities.** (1) Except as provided in section 38-33.3-119, the following sections shall apply to all common interest communities created within this state before July 1, 1992, with respect to events and circumstances occurring on or after July 1, 1992:

- (a) 38-33.3-101 and 38-33.3-102;
- (b) 38-33.3-103, to the extent necessary in construing any of the other sections of this article;
- (c) 38-33.3-104 to 38-33.3-111;
- (d) 38-33.3-114;
- (e) 38-33.3-118;
- (f) 38-33.3-120;
- (g) 38-33.3-122 and 38-33.3-123;
- (h) 38-33.3-203 and 38-33.3-217 (7);
- (i) 38-33.3-302 (1) (a) to (1) (f), (1) (j) to (1) (m), and (1) (o) to (1) (q);
- (i.5) 38-33.3-221.5;
- (i.7) 38-33.3-303 (1) (b) and (3) (b);
- (j) 38-33.3-311;
- (k) 38-33.3-316;
- (l) 38-33.3-317, as it existed prior to January 1, 2006, 38-33.3-318, and 38-33.3-319.

(1.5) Except as provided in section 38-33.3-119, the following sections shall apply to all common interest communities created within this state before July 1, 1992, with respect to events and circumstances occurring on or after January 1, 2006:

- (a) (Deleted by amendment, L. 2006, p. 1217, § 3, effective May 26, 2006.)
- (b) 38-33.3-124;
- (c) 38-33.3-209.4 to 38-33.3-209.7;
- (d) 38-33.3-217 (1);
- (e) (Deleted by amendment, L. 2006, p. 1217, § 3, effective May 26, 2006.)
- (f) 38-33.3-301;
- (g) 38-33.3-302 (3) and (4);
- (h) 38-33.3-303 (1) (b), (3) (b), and (4) (b);
- (i) 38-33.3-308 (1), (2) (b), (2.5), and (4.5);
- (j) 38-33.3-310 (1) and (2);
- (k) 38-33.3-310.5;
- (l) 38-33.3-315 (7); and
- (m) 38-33.3-317.

(1.7) Except as provided in section 38-33.3-119, section 38-33.3-209.5 (1) (b) (IX) shall apply to all common interest communities created within this state before July 1, 1992, with respect to events and circumstances occurring on or after July 1, 2010.

(2) The sections specified in paragraphs (a) to (j) and (l) of subsection (1) of this section shall be applied and construed to establish a clear, comprehensive, and uniform framework for the operation and management of common interest communities within this state and to supplement the provisions of any declaration, bylaws, plat, or map in existence on June 30, 1992. Except for section 38-33.3-217 (7), in the event of specific conflicts between the provisions of the sections specified in paragraphs (a) to (j) and (l) of subsection (1) of this section, and express requirements or restrictions in a declaration, bylaws, a plat, or a map in existence on June 30, 1992, such requirements or restrictions in the declaration, bylaws, plat, or map shall control, but only to the extent necessary to avoid invalidation of the specific requirement or restriction in the declaration, bylaws, plat, or map. Sections 38-33.3-217 (7) and 38-33.3-316 shall be applied and construed as stated in such sections.

(3) Except as expressly provided for in this section, this article shall not apply to common interest communities created within this state before July 1, 1992.

(4) Section 38-33.3-308 (2) to (7) shall apply to all common interest communities created within this state before July 1, 1995, and shall apply to all meetings of the executive board of such a community or any committee thereof occurring on or after said date. In addition, said section 38-33.3-308 (2) to (7) shall apply to all common interest communities created on or after July 1, 1995, and shall apply to all meetings of the executive board of such a community or any committee thereof occurring on or after said date.



**Source:** **L. 91:** Entire article added, p. 1711, § 1, effective July 1, 1992; entire section amended, p. 1928, § 64, effective July 1, 1992. **L. 93:** Entire section amended, p. 644, § 6, effective April 30. **L. 95:** (4) added, p. 889, § 2, effective July 1. **L. 99:** (1)(h) amended, p. 695, § 2, effective May 19. **L. 2002:** (2) amended, p. 767, § 1, effective August 7. **L. 2005:** (1)(g) and (1)(l) amended and (1)(i.5) and (1.5) added, p. 1375, §§ 3, 4, effective January 1, 2006. **L. 2006:** (1)(g), (1.5)(a), and (1.5)(e) amended, p. 1217, § 3, effective May 26. **L. 2009:** (1)(i.7) and (1.7) added and (1.5)(h) amended, (HB 09-1359), ch. 257, p. 1165, §§ 3, 4, effective August 5.

## ANNOTATION

**The presumption that statutes apply prospectively is overcome here** because subsection (1) expressly provides for application to all common interest communities created before July 1, 1992. *Giguere v. SJS Family Enters.*, 155 P.3d 462 (Colo. App. 2006).

**Although subsection (1) does not list several statutory sections as applying to common**

**interest communities** created before July 1, 1992, some sections not listed may be referenced to determine whether the statute permits the substantive result to be accomplished by an amendment because the sections listed in subsection (1) are limited to procedural issues. *Giguere v. SJS Family Enters.*, 155 P.3d 462 (Colo. App. 2006).

**38-33.3-118. Procedure to elect treatment under the “Colorado Common Interest Ownership Act”.** (1) Any organization created prior to July 1, 1992, may elect to have the common interest community be treated as if it were created after June 30, 1992, and thereby subject the common interest community to all of the provisions contained in this article, in the following manner:

(a) If there are members or stockholders entitled to vote thereon, the board of directors may adopt a resolution recommending that such association accept this article and directing that the question of acceptance be submitted to a vote at a meeting of the members or stockholders entitled to vote thereon, which may be either an annual or special meeting. The question shall also be submitted whenever one-twentieth, or, in the case of an association with over one thousand members, one-fortieth, of the members or stockholders entitled to vote thereon so request. Written notice stating that the purpose, or one of the purposes, of the meeting is to consider electing to be treated as a common interest community organized after June 30, 1992, and thereby accepting the provisions of this article, together with a copy of this article, shall be given to each person entitled to vote at the meeting within the time and in the manner provided in the articles of incorporation, declaration, bylaws, or other governing documents for such association for the giving of notice of meetings to members. Such election to accept the provisions of this article shall require for adoption at least sixty-seven percent of the votes that the persons present at such meeting in person or by proxy are entitled to cast.

(b) If there are no persons entitled to vote thereon, the election to be treated as a common interest community under this article may be made at a meeting of the board of directors pursuant to a majority vote of the directors in office.

(2) A statement of election to accept the provisions of this article shall be executed and acknowledged by the president or vice-president and by the secretary or an assistant secretary of such association and shall set forth:

- (a) The name of the common interest community and association;
- (b) That the association has elected to accept the provisions of this article;
- (c) That there were persons entitled to vote thereon, the date of the meeting of such persons at which the election was made to be treated as a common interest community under this article, that a quorum was present at the meeting, and that such acceptance was authorized by at least sixty-seven percent of the votes that the members or stockholders present at such meeting in person or by proxy were entitled to cast;
- (d) That there were no members or stockholders entitled to vote thereon, the date of the meeting of the board of directors at which election to accept this article was made, that a quorum was present at the meeting, and that such acceptance was authorized by a majority vote of the directors present at such meeting;

(e) (Deleted by amendment, L. 93, p. 645, § 7, effective April 30, 1993.)

(f) The names and respective addresses of its officers and directors; and

(g) If there were no persons entitled to vote thereon but a common interest community has been created by virtue of compliance with section 38-33.3-103 (8), that the declarant desires for the common interest community to be subject to all the terms and provisions of this article.

(3) The original statement of election to be treated as a common interest community subject to the terms and conditions of this article shall be duly recorded in the office of the clerk and recorder for the county in which the common interest community is located.

(4) Upon the recording of the original statement of election to be treated as a common interest community subject to the provisions of this article, said common interest community shall be subject to all provisions of this article. Upon recording of the statement of election, such common interest community shall have the same powers and privileges and be subject to the same duties, restrictions, penalties, and liabilities as though it had been created after June 30, 1992.

(5) Notwithstanding any other provision of this section, and with respect to a common interest community making the election permitted by this section, this article shall apply only with respect to events and circumstances occurring on or after July 1, 1992, and does not invalidate provisions of any declaration, bylaws, or plats or maps in existence on June 30, 1992.

**Source:** L. 91: Entire article added, p. 1711, § 1, effective July 1, 1992; (5) amended, p. 1928, § 65, effective July 1, 1992. L. 93: IP(1), (1)(a), (2)(c), and (2)(e) amended, p. 645, § 7, effective April 30.

**38-33.3-119. Exception for small preexisting cooperatives and planned communities.** If a cooperative or planned community created within this state before July 1, 1992, contains no more than ten units and is not subject to any development rights, it is subject only to sections 38-33.3-105 to 38-33.3-107 unless the declaration is amended in conformity with applicable law and with the procedures and requirements of the declaration to take advantage of the provisions of section 38-33.3-120, in which case all the sections enumerated in section 38-33.3-117 apply to that planned community.

**Source:** L. 91: Entire article added, p. 1713, § 1, effective July 1, 1992. L. 2009: Entire section amended, (SB 09-249), ch. 248, p. 1120, § 2, effective May 14.

**38-33.3-120. Amendments to preexisting governing instruments.** (1) In the case of amendments to the declaration, bylaws, or plats and maps of any common interest community created within this state before July 1, 1992, which has not elected treatment under this article pursuant to section 38-33.3-118:

(a) If the substantive result accomplished by the amendment was permitted by law in effect prior to July 1, 1992, the amendment may be made either in accordance with that law, in which case that law applies to that amendment, or it may be made under this article; and

(b) If the substantive result accomplished by the amendment is permitted by this article, and was not permitted by law in effect prior to July 1, 1992, the amendment may be made under this article.

(2) An amendment to the declaration, bylaws, or plats and maps authorized by this section to be made under this article must be adopted in conformity with the procedures and requirements of the law that applied to the common interest community at the time it was created and with the procedures and requirements specified by those instruments. If an amendment grants to any person any rights, powers, or privileges permitted by this article, all correlative obligations, liabilities, and restrictions in this article also apply to that person.

(3) An amendment to the declaration may also be made pursuant to the procedures set forth in section 38-33.3-217 (7).

**Source:** L. 91: Entire article added, p. 1713, § 1, effective July 1, 1992. L. 2002: (3) added, p. 767, § 2, effective August 7.



## ANNOTATION

**There is a two-step process in reviewing the validity of an amendment to a plat of a common interest community created before July 1, 1992.** First, the amendment's validity as a question of substance is considered under sub-

section (1) and then the amendment's validity as a question of procedure is considered under subsection (2). *Giguere v. SJS Family Enters.*, 155 P.3d 462 (Colo. App. 2006).

**38-33.3-120.5. Extension of declaration term.** (1) If a common interest community has a declaration in effect with a limited term of years that was recorded prior to July 1, 1992, and if, before the term of the declaration expires, the unit owners in the common interest community have not amended the declaration pursuant to section 38-33.3-120 and in accordance with any conditions or fixed limitations described in the declaration, the declaration may be extended as provided in this section.

(2) The term of the declaration may be extended:

(a) If the executive board adopts a resolution recommending that the declaration be extended for a specific term not to exceed twenty years and directs that the question of extending the term of the declaration be submitted to the unit owners, as members of the association; and

(b) If an extension of the term of the declaration is approved by vote or agreement of unit owners of units to which at least sixty-seven percent of the votes in the association are allocated or any larger percentage the declaration specifies.

(3) Except for the extension of the term of a declaration as authorized by this section, no other provision of a declaration may be amended pursuant to the provisions of this section.

(4) For any meeting of unit owners at which a vote is to be taken on a proposed extension of the term of a declaration as provided in this section, the secretary or other officer specified in the bylaws shall provide written notice to each unit owner entitled to vote at the meeting stating that the purpose, or one of the purposes, of the meeting is to consider extending the term of the declaration. The notice shall be given in the time and manner specified in section 38-33.3-308 or in the articles of incorporation, declaration, bylaws, or other governing documents of the association.

(5) The extension of the declaration, if approved, shall be included in an amendment to the declaration and shall be executed, acknowledged, and recorded by the association in the records of the clerk and recorder of each county in which any portion of the common interest community is located. The amendment shall include:

(a) A statement of the name of the common interest community and the association;

(b) A statement that the association has elected to extend the term of the declaration pursuant to this section and the term of the approved extension;

(c) A statement that indicates that the executive board has adopted a resolution recommending that the declaration be extended for a specific term not to exceed twenty years, that sets forth the date of the meeting at which the unit owners elected to extend the term of the declaration, and that declares that the extension was authorized by a vote or agreement of unit owners of units to which at least sixty-seven percent of the votes in the association are allocated or any larger percentage the declaration specifies;

(d) A statement of the names and respective addresses of the officers and executive board members of the association.

(6) Upon the recording of the amendment required by subsection (5) of this section, and subject to the provisions of this section, a common interest community is subject to all provisions of the declaration, as amended.

**Source: L. 98:** Entire section added, p. 478, § 3, effective July 1.

**38-33.3-121. Applicability to nonresidential planned communities.** This article does not apply to a planned community in which all units are restricted exclusively to nonres-

idential use unless the declaration provides that the article does apply to that planned community. This article applies to a planned community containing both units that are restricted exclusively to nonresidential use and other units that are not so restricted, only if the declaration so provides or the real estate comprising the units that may be used for residential purposes would be a planned community in the absence of the units that may not be used for residential purposes.

**Source: L. 91:** Entire article added, p. 1714, § 1, effective July 1, 1992.

**38-33.3-122. Applicability to out-of-state common interest communities.** This article does not apply to common interest communities or units located outside this state.

**Source: L. 91:** Entire article added, p. 1714, § 1, effective July 1, 1992.

**38-33.3-123. Enforcement - limitation.** (1) (a) If any unit owner fails to timely pay assessments or any money or sums due to the association, the association may require reimbursement for collection costs and reasonable attorney fees and costs incurred as a result of such failure without the necessity of commencing a legal proceeding.

(b) For any failure to comply with the provisions of this article or any provision of the declaration, bylaws, articles, or rules and regulations, other than the payment of assessments or any money or sums due to the association, the association, any unit owner, or any class of unit owners adversely affected by the failure to comply may seek reimbursement for collection costs and reasonable attorney fees and costs incurred as a result of such failure to comply, without the necessity of commencing a legal proceeding.

(c) In any civil action to enforce or defend the provisions of this article or of the declaration, bylaws, articles, or rules and regulations, the court shall award reasonable attorney fees, costs, and costs of collection to the prevailing party.

(d) Notwithstanding paragraph (c) of this subsection (1), in connection with any claim in which a unit owner is alleged to have violated a provision of this article or of the declaration, bylaws, articles, or rules and regulations of the association and in which the court finds that the unit owner prevailed because the unit owner did not commit the alleged violation:

(I) The court shall award the unit owner reasonable attorney fees and costs incurred in asserting or defending the claim; and

(II) The court shall not award costs or attorney fees to the association. In addition, the association shall be precluded from allocating to the unit owner's account with the association any of the association's costs or attorney fees incurred in asserting or defending the claim.

(e) A unit owner shall not be deemed to have confessed judgment to attorney fees or collection costs.

(2) Notwithstanding any law to the contrary, no action shall be commenced or maintained to enforce the terms of any building restriction contained in the provisions of the declaration, bylaws, articles, or rules and regulations or to compel the removal of any building or improvement because of the violation of the terms of any such building restriction unless the action is commenced within one year from the date from which the person commencing the action knew or in the exercise of reasonable diligence should have known of the violation for which the action is sought to be brought or maintained.

**Source: L. 91:** Entire article added, p. 1714, § 1, effective July 1, 1992. **L. 96:** Entire section amended, p. 1087, § 1, effective May 23. **L. 2005:** (1) amended, p. 1376, § 5, effective January 1, 2006. **L. 2006:** (1)(c) amended, p. 1217, § 4, effective May 26.

#### ANNOTATION

The express language of this section requires a plaintiff to prevail on a claim to

obtain an award of attorney fees and no fees will be awarded where the merits of a defen-



dant's affirmative defenses have not yet been adjudicated. *Dunne v. Shenandoah Homeowners Ass'n, Inc.*, 12 P.3d 340 (Colo. App. 2000).

**Even assuming a trial court could determine that an overall case ended in a tie,** subsection (1)(c) requires a court to award fees "for each claim...to the party prevailing on such claim". Therefore, the statutory claim-by-claim approach differs from the C.R.C.P. 54(d) analysis of multiple claims cases. *Giguere v. SJS Family Enters.*, 155 P.3d 462 (Colo. App. 2006).

**By its express language this section does not apply to tort claims in which the plaintiff's primary purpose was not to enforce the covenants contained in the declaration but was to secure a damage award.** *Colo. Homes, Ltd. v. Loerch-Wilson*, 43 P.3d 718 (Colo. App. 2001).

**As a prevailing party on the defendant's claim for an assessment lien based on property damages,** plaintiff is entitled to attorney fees and costs for that aspect of the case. *Hallmark Bldg. Co. v. Westland Meadows Owners Ass'n, Inc.*, 983 P.2d 170 (Colo. App. 1999).

**Where a civil action is brought to enforce the covenants of a property owners' association,** both elements of subsection (1)(c) are met. *Cody Park v. Harder*, 251 P.3d 1 (Colo. App. 2009).

**The plain language of subsection (1)(c) does not require a prevailing party to be a unit owner to collect attorney fees,** and the omission of the language from this subsection, in light of its inclusion in other subsections of the statute, evidences the general assembly's intent not to limit recovery of attorney fees under that subsection to unit owners. *Cody Park v. Harder*, 251 P.3d 1 (Colo. App. 2009).

**No award of attorney fees to condominium association on appeal under C.A.R. 39.5 and**

**this section.** Subsection (1)(c) provides for recovery of attorney fees only in actions to "enforce or defend the provision of this article or of the declaration, bylaws, articles, or rules and regulations". Condominium association defended against purchasers' breach of contract action and sought declaratory action that contract was void. Neither purchasers' claims nor associations' counterclaims were to enforce or defend the article; thus, the statute does not apply. *Platt v. Aspenwood Condo. Ass'n*, 214 P.3d 1060 (Colo. App. 2009).

**Allocation of liability for 30% of attorney fees award to owner of lot improper** where owner did not attempt to use an easement that violated restrictive covenants, but merely refused to vacate the easement pending a legal determination as to its validity and where co-defendant actually commenced building a road in reliance on the easement. Allocation of liability for attorney fees must be commensurate with failure to comply with covenants and remand to the trial court for reapportionment of liability for attorney fees was necessary. *Buick v. Highland Meadow Estates*, 21 P.3d 860 (Colo. 2001).

**Statute of limitations defense was not preserved on appeal** where defendants raised the defense in their answer to plaintiffs' second amended complaint and in the trial management order, but failed to bring the defense to the court's attention in opening or closing statements, in an oral motion for a directed verdict, or in a motion for a new trial. *Highland Meadows Estates v. Buick*, 994 P.2d 459 (Colo. App. 1999), aff'd in part and rev'd in part on other grounds, 21 P.3d 860 (Colo. 2001).

**Applied** in *Giguere v. SJS Family Enters.*, 155 P.3d 462 (Colo. App. 2006); *Abril Meadows Homeowner's Ass'n v. Castro*, 211 P.3d 64 (Colo. App. 2009).

**38-33.3-124. Legislative declaration - alternative dispute resolution encouraged - policy statement required.** (1) (a) (I) The general assembly finds and declares that the cost, complexity, and delay inherent in court proceedings make litigation a particularly inefficient means of resolving neighborhood disputes. Therefore, common interest communities are encouraged to adopt protocols that make use of mediation or arbitration as alternatives to, or preconditions upon, the filing of a complaint between a unit owner and association in situations that do not involve an imminent threat to the peace, health, or safety of the community.

(II) The general assembly hereby specifically endorses and encourages associations, unit owners, managers, declarants, and all other parties to disputes arising under this article to agree to make use of all available public or private resources for alternative dispute resolution, including, without limitation, the resources offered by the office of dispute resolution within the Colorado judicial branch through its web site.

(b) On or before January 1, 2007, each association shall adopt a written policy setting forth its procedure for addressing disputes arising between the association and unit owners. The association shall make a copy of this policy available to unit owners upon request.

(2) (a) Any controversy between an association and a unit owner arising out of the provisions of this article may be submitted to mediation by agreement of the parties prior to the commencement of any legal proceeding.

(b) The mediation agreement, if one is reached, may be presented to the court as a

stipulation. Either party to the mediation may terminate the mediation process without prejudice.

(c) If either party subsequently violates the stipulation, the other party may apply immediately to the court for relief.

(3) The declaration, bylaws, or rules of the association may specify situations in which disputes shall be resolved by binding arbitration under the uniform arbitration act, part 2 of article 22 of title 13, C.R.S., or by another means of alternative dispute resolution under the "Dispute Resolution Act", part 3 of article 22 of title 13, C.R.S.

**Source:** **L. 98:** Entire section added, p. 471, § 1, effective July 1. **L. 2005:** Entire section amended, p. 1377, § 6, effective January 1, 2006. **L. 2006:** (1) amended, p. 1218, § 5, effective May 26. **L. 2008:** Entire section amended, p. 557, § 3, effective July 1.

## PART 2

### CREATION, ALTERATION, AND TERMINATION OF COMMON INTEREST COMMUNITIES

**38-33.3-201. Creation of common interest communities.** (1) A common interest community may be created pursuant to this article only by recording a declaration executed in the same manner as a deed and, in a cooperative, by conveying the real estate subject to that declaration to the association. The declaration must be recorded in every county in which any portion of the common interest community is located and must be indexed in the grantee's index in the name of the common interest community and in the name of the association and in the grantor's index in the name of each person executing the declaration. No common interest community is created until the plat or map for the common interest community is recorded.

(2) In a common interest community with horizontal unit boundaries, a declaration, or an amendment to a declaration, creating or adding units shall include a certificate of completion executed by an independent licensed or registered engineer, surveyor, or architect stating that all structural components of all buildings containing or comprising any units thereby created are substantially completed.

**Source:** **L. 91:** Entire article added, p. 1715, § 1, effective July 1, 1992. **L. 93:** Entire section amended, p. 646, § 8, effective April 30.

## ANNOTATION

**Since a declaration must be executed in the same manner as a deed**, it must be signed by the declarant to properly establish a homeowners' association. The declarant's signature on an accompanying document, such as a plat, is not sufficient. *Abril Meadows Homeowner's Ass'n v. Castro*, 211 P.3d 64 (Colo. App. 2009).

Actual awareness or knowledge of the declaration by a person sought to be bound by it cannot compensate for the absence of a signed declaration. *Abril Meadows Homeowner's Ass'n v. Castro*, 211 P.3d 64 (Colo. App. 2009).

**38-33.3-202. Unit boundaries.** (1) Except as provided by the declaration:

(a) If walls, floors, or ceilings are designated as boundaries of a unit, all lath, furring, wallboard, plasterboard, plaster, paneling, tiles, wallpaper, paint, and finished flooring and any other materials constituting any part of the finished surfaces thereof are a part of the unit, and all other portions of the walls, floors, or ceilings are a part of the common elements.

(b) If any chute, flue, duct, wire, conduit, bearing wall, bearing column, or other fixture lies partially within and partially outside the designated boundaries of a unit, any portion thereof serving only that unit is a limited common element allocated solely to that unit, and any portion thereof serving more than one unit or any portion of the common elements is a part of the common elements.



(c) Subject to the provisions of paragraph (b) of this subsection (1), all spaces, interior partitions, and other fixtures and improvements within the boundaries of a unit are a part of the unit.

(d) Any shutters, awnings, window boxes, doorsteps, stoops, porches, balconies, and patios and all exterior doors and windows or other fixtures designed to serve a single unit, but located outside the unit's boundaries, are limited common elements allocated exclusively to that unit.

**Source: L. 91:** Entire article added, p. 1715, § 1, effective July 1, 1992.

**38-33.3-203. Construction and validity of declaration and bylaws.** (1) All provisions of the declaration and bylaws are severable.

(2) The rule against perpetuities does not apply to defeat any provision of the declaration, bylaws, or rules and regulations.

(3) In the event of a conflict between the provisions of the declaration and the bylaws, the declaration prevails, except to the extent the declaration is inconsistent with this article.

(4) Title to a unit and common elements is not rendered unmarketable or otherwise affected by reason of an insubstantial failure of the declaration to comply with this article. Whether a substantial failure impairs marketability is not affected by this article.

**Source: L. 91:** Entire article added, p. 1716, § 1, effective July 1, 1992.

#### ANNOTATION

**Subsection (3) provides that the Common Interest Ownership Act prevails** over any inconsistent provision in a declaration. *Heritage Vill. Owners Ass'n v. Golden Heritage Investors, Ltd.*, 89 P.3d 513 (Colo. App. 2004).

**Development rights in a declaration that does not include a time limitation are void ab**

**initio.** Section 38-33.3-205 (1)(h) is unambiguous in requiring a time limitation, and failure to include such a limitation is not an insubstantial defect that may be overlooked under subsection (4) of this section. *Silverview at Overlook, LLC v. Overlook at Mt. Crested Butte Ltd. Liab. Co.*, 97 P.3d 252 (Colo. App. 2004).

**38-33.3-204. Description of units.** A description of a unit may set forth the name of the common interest community, the recording data for the declaration, the county in which the common interest community is located, and the identifying number of the unit. Such description is a legally sufficient description of that unit and all rights, obligations, and interests appurtenant to that unit which were created by the declaration or bylaws. It shall not be necessary to use the term "unit" as a part of a legally sufficient description of a unit.

**Source: L. 91:** Entire article added, p. 1716, § 1, effective July 1, 1992. **L. 92:** Entire section amended, p. 2181, § 51, effective June 2. **L. 93:** Entire section amended, p. 647, § 9, effective April 30.

**38-33.3-205. Contents of declaration.** (1) The declaration must contain:

(a) The names of the common interest community and the association and a statement that the common interest community is a condominium, cooperative, or planned community;

(b) The name of every county in which any part of the common interest community is situated;

(c) A legally sufficient description of the real estate included in the common interest community;

(d) A statement of the maximum number of units that the declarant reserves the right to create;

(e) In a condominium or planned community, a description, which may be by plat or map, of the boundaries of each unit created by the declaration, including the unit's identifying number; or, in a cooperative, a description, which may be by plat or map, of

each unit created by the declaration, including the unit's identifying number, its size or number of rooms, and its location within a building if it is within a building containing more than one unit;

(f) A description of any limited common elements, other than those specified in section 38-33.3-202 (1) (b) and (1) (d) or shown on the map as provided in section 38-33.3-209 (2) (j) and, in a planned community, any real estate that is or must become common elements;

(g) A description of any real estate, except real estate subject to development rights, that may be allocated subsequently as limited common elements, other than limited common elements specified in section 38-33.3-202 (1) (b) and (1) (d), together with a statement that they may be so allocated;

(h) A description of any development rights and other special declarant rights reserved by the declarant, together with a description sufficient to identify the real estate to which each of those rights applies and the time limit within which each of those rights must be exercised;

(i) If any development right may be exercised with respect to different parcels of real estate at different times, a statement to that effect together with:

(I) Either a statement fixing the boundaries of those portions and regulating the order in which those portions may be subjected to the exercise of each development right or a statement that no assurances are made in those regards; and

(II) A statement as to whether, if any development right is exercised in any portion of the real estate subject to that development right, that development right must be exercised in all or in any other portion of the remainder of that real estate;

(j) Any other conditions or limitations under which the rights described in paragraph (h) of this subsection (1) may be exercised or will lapse;

(k) An allocation to each unit of the allocated interests in the manner described in section 38-33.3-207;

(l) Any restrictions on the use, occupancy, and alienation of the units and on the amount for which a unit may be sold or on the amount that may be received by a unit owner on sale, condemnation, or casualty loss to the unit or to the common interest community or on termination of the common interest community;

(m) The recording data for recorded easements and licenses appurtenant to, or included in, the common interest community or to which any portion of the common interest community is or may become subject by virtue of a reservation in the declaration;

(n) All matters required by sections 38-33.3-201, 38-33.3-206 to 38-33.3-209, 38-33.3-215, 38-33.3-216, and 38-33.3-303 (4);

(o) Reasonable provisions concerning the manner in which notice of matters affecting the common interest community may be given to unit owners by the association or other unit owners;

(p) A statement, if applicable, that the planned community is a large planned community and is exercising certain exemptions from the "Colorado Common Interest Ownership Act" as such a large planned community;

(q) In a large planned community:

(I) A general description of every common element that the declarant is legally obligated to construct within the large planned community together with the approximate date by which each such common element is to be completed. The declarant shall be required to complete each such common element within a reasonable time after the date specified in the declaration, unless the declarant, due to an act of God, is unable to do so. The declarant shall not be legally obligated with respect to any common element not identified in the declaration.

(II) A general description of the type of any common element that the declarant anticipates may be constructed by, maintained by, or operated by the association. The association shall not assess members for the construction, maintenance, or operation of any common element that is not described pursuant to this subparagraph (II) unless such assessment is approved by the vote of a majority of the votes entitled to be cast in person or by proxy, other than by declarant, at a meeting duly convened as required by law.

(2) The declaration may contain any other matters the declarant considers appropriate.



(3) The plats and maps described in section 38-33.3-209 may contain certain information required to be included in the declaration by this section.

(4) A declarant may amend the declaration, a plat, or a map to correct clerical, typographical, or technical errors.

(5) A declarant may amend the declaration to comply with the requirements, standards, or guidelines of recognized secondary mortgage markets, the department of housing and urban development, the federal housing administration, the veterans administration, the federal home loan mortgage corporation, the government national mortgage association, or the federal national mortgage association.

**Source:** **L. 91:** Entire article added, p. 1716, § 1, effective July 1, 1992. **L. 93:** (1)(h) and (1)(n) amended, p. 647, § 10, effective April 30. **L. 94:** (1)(p) added, p. 2847, § 3, effective July 1. **L. 95:** (1)(q) added, p. 237, § 3, effective July 1. **L. 98:** (1)(h) amended and (4) and (5) added, p. 480, § 4, effective July 1.

#### ANNOTATION

**Since a declaration must be executed in the same manner as a deed**, it must be signed by the declarant to properly establish a homeowners' association. Where an accompanying plat bore the declarant's signature, but did not contain the information required by this section such as the description of any development rights reserved by the declarant or notice procedures pertaining to covenant violations, the filing was insufficient. *Abril Meadows Homeowner's Ass'n v. Castro*, 211 P.3d 64 (Colo. App. 2009).

**Airplane runway was not subject to the declaration of restrictions for a subdivision** because it was not a common area included in the legal description of the subdivision. Accordingly, recording data for a retained easement across the runway was not required by subsection (1)(m). *Brush Creek Airport, L.L.C. v.*

*Avion Park, L.L.C.*, 57 P.3d 738 (Colo. App. 2002).

**Development rights in a declaration that does not include a time limitation are void ab initio.** Subsection (1)(h) is unambiguous in requiring a time limitation, and failure to include such a limitation is not an insubstantial defect that may be overlooked under § 38-33.3-203 (4). *Silverview at Overlook, LLC v. Overlook at Mt. Crested Butte Ltd. Liab. Co.*, 97 P.3d 252 (Colo. App. 2004).

Because property owner failed to impose any time limit in declaration, property owner failed to properly reserve its development rights. Where a provision is automatically renewable indefinitely, the provision cannot be considered a time limit. *Miller v. Curry*, 203 P.3d 626 (Colo. App. 2009).

**38-33.3-206. Leasehold common interest communities.** (1) Any lease, the expiration or termination of which may terminate the common interest community or reduce its size, must be recorded. In a leasehold condominium or leasehold planned community, the declaration must contain the signature of each lessor of any such lease in order for the provisions of this section to be effective. The declaration must state:

- (a) The recording data for the lease;
- (b) The date on which the lease is scheduled to expire;
- (c) A legally sufficient description of the real estate subject to the lease;
- (d) Any rights of the unit owners to redeem the reversion and the manner whereby those rights may be exercised or state that they do not have those rights;
- (e) Any rights of the unit owners to remove any improvements within a reasonable time after the expiration or termination of the lease or state that they do not have those rights; and
- (f) Any rights of the unit owners to renew the lease and the conditions of any renewal or state that they do not have those rights.

(2) After the declaration for a leasehold condominium or leasehold planned community is recorded, neither the lessor nor the lessor's successor in interest may terminate the leasehold interest of a unit owner who makes timely payment of a unit owner's share of the rent and otherwise complies with all covenants which, if violated, would entitle the lessor to terminate the lease. A unit owner's leasehold interest in a condominium or planned community is not affected by failure of any other person to pay rent or fulfill any other covenant.

(3) Acquisition of the leasehold interest of any unit owner by the owner of the reversion or remainder does not merge the leasehold and fee simple interests unless the leasehold interests of all unit owners subject to that reversion or remainder are acquired.

(4) If the expiration or termination of a lease decreases the number of units in a common interest community, the allocated interests shall be reallocated in accordance with section 38-33.3-107 (1), as though those units had been taken by eminent domain. Reallocations shall be confirmed by an amendment to the declaration prepared, executed, and recorded by the association.

**Source: L. 91:** Entire article added, p. 1718, § 1, effective July 1, 1992.

**38-33.3-207. Allocation of allocated interests.** (1) The declaration must allocate to each unit:

(a) In a condominium, a fraction or percentage of undivided interests in the common elements and in the common expenses of the association and, to the extent not allocated in the bylaws of the association, a portion of the votes in the association;

(b) In a cooperative, an ownership interest in the association, a fraction or percentage of the common expenses of the association, and, to the extent not allocated in the bylaws of the association, a portion of the votes in the association;

(c) In a planned community, a fraction or percentage of the common expenses of the association and, to the extent not allocated in the bylaws of the association, a portion of the votes in the association; except that, in a large planned community, the common expenses of the association may be paid from assessments and allocated as set forth in the declaration and the votes in the association may be allocated as set forth in the declaration.

(2) The declaration must state the formulas used to establish allocations of interests. Those allocations may not discriminate in favor of units owned by the declarant or an affiliate of the declarant.

(3) If units may be added to or withdrawn from the common interest community, the declaration must state the formulas to be used to reallocate the allocated interests among all units included in the common interest community after the addition or withdrawal.

(4) (a) The declaration may provide:

(I) That different allocations of votes shall be made to the units on particular matters specified in the declaration;

(II) For cumulative voting only for the purpose of electing members of the executive board;

(III) For class voting on specified issues affecting the class, including the election of the executive board; and

(IV) For assessments including, but not limited to, assessments on retail sales and services not to exceed six percent of the amount charged for the retail sale or service, and real estate transfers not to exceed three percent of the real estate sales price or its equivalent.

(b) A declarant may not utilize cumulative or class voting for the purpose of evading any limitation imposed on declarants by this article, nor may units constitute a class because they are owned by a declarant.

(c) Assessments allowed under subparagraph (IV) of paragraph (a) of this subsection (4) shall be entitled to the lien provided for under section 38-33.3-316 (1) but shall not be entitled to the priority established by section 38-33.3-316 (2) (b).

(d) Communities with classes for voting specified in the declaration as allowed pursuant to subparagraph (III) of paragraph (a) of this subsection (4) may designate classes of members on a reasonable basis which do not allow the declarant to control the association beyond the period provided for in section 38-33.3-303, including, without limitation, residence owners, commercial space owners, and owners of lodging space and to elect members to the association executive board from such classes.

(5) Except for minor variations due to the rounding of fractions or percentages, the sum of the common expense liabilities and, in a condominium, the sum of the undivided interests in the common elements allocated at any time to all the units shall each equal one if stated as fractions or one hundred percent if stated as percentages. In the event of discrepancy



between an allocated interest and the result derived from application of the pertinent formula, the allocated interest prevails.

(6) In a condominium, the common elements are not subject to partition except as allowed for in section 38-33.3-312, and any purported conveyance, encumbrance, judicial sale, or other voluntary or involuntary transfer of an undivided interest in the common elements not allowed for in section 38-33.3-312, that is made without the unit to which that interest is allocated is void.

(7) In a cooperative, any purported conveyance, encumbrance, judicial sale, or other voluntary or involuntary transfer of an ownership interest in the association made without the possessory interest in the unit to which that interest is related is void.

**Source:** L. 91: Entire article added, p. 1719, § 1, effective July 1, 1992. L. 93: (1) amended, p. 647, § 11, effective April 30. L. 94: (1)(c) and (4)(a) amended and (4)(c) and (4)(d) added, p. 2847, § 4, effective July 1. L. 95: (4)(a)(IV) amended, p. 238, § 4, effective July 1. L. 98: (4)(a)(III), (4)(a)(IV), and (4)(d) amended, p. 480, § 5, effective July 1. L. 2002: (6) amended, p. 767, § 3, effective August 7.

**38-33.3-208. Limited common elements.** (1) Except for the limited common elements described in section 38-33.3-202 (1) (b) and (1) (d), the declaration shall specify to which unit or units each limited common element is allocated. That allocation may not be altered without the consent of the unit owners whose units are affected.

(2) Subject to any provisions of the declaration, a limited common element may be reallocated between or among units after compliance with the procedure set forth in this subsection (2). In order to reallocate limited common elements between or among units, the unit owners of those units, as the applicants, must submit an application for approval of the proposed reallocation to the executive board, which application shall be executed by those unit owners and shall include:

(a) The proposed form for an amendment to the declaration as may be necessary to show the reallocation of limited common elements between or among units;

(b) A deposit against attorney fees and costs which the association will incur in reviewing and effectuating the application, in an amount reasonably estimated by the executive board; and

(c) Such other information as may be reasonably requested by the executive board. No reallocation shall be effective without the approval of the executive board. The reallocation shall be effectuated by an amendment signed by the association and by those unit owners between or among whose units the reallocation is made, which amendment shall be recorded as provided in section 38-33.3-217 (3). All costs and attorney fees incurred by the association as a result of the application shall be the sole obligation of the applicants.

(3) A common element not previously allocated as a limited common element may be so allocated only pursuant to provisions in the declaration made in accordance with section 38-33.3-205 (1) (g). The allocations must be made by amendments to the declaration prepared, executed, and recorded by the declarant.

**Source:** L. 91: Entire article added, p. 1720, § 1, effective July 1, 1992.

**38-33.3-209. Plats and maps.** (1) A plat or map is a part of the declaration and is required for all common interest communities except cooperatives. A map is required only for a common interest community with units having a horizontal boundary. The requirements of this section shall be deemed satisfied so long as all of the information required by this section is contained in the declaration, a map or a plat, or some combination of any two or all of the three. Each plat or map must be clear and legible. When a map is required under any provision of this article, the map, a plat, or the declaration shall contain a certification that all information required by this section is contained in the declaration, the map or a plat, or some combination of any two or all of the three.

(2) In addition to meeting the requirements of a land survey plat as set forth in section 38-51-106, each map shall show the following, except to the extent such information is contained in the declaration or on a plat:

- (a) The name and a general schematic plan of the entire common interest community;
  - (b) The location and dimensions of all real estate not subject to development rights, or subject only to the development right to withdraw, and the location and dimensions of all existing improvements within that real estate;
  - (c) A legally sufficient description, which may be of the whole common interest community or any portion thereof, of any real estate subject to development rights and a description of the rights applicable to such real estate;
  - (d) The extent of any existing encroachments across any common interest community boundary;
  - (e) To the extent feasible, a legally sufficient description of all easements serving or burdening any portion of the common interest community;
  - (f) The location and dimensions of the vertical boundaries of each unit and that unit's identifying number;
  - (g) The location, with reference to established data, of the horizontal boundaries of each unit and that unit's identifying number;
  - (g.5) Any units in which the declarant has reserved the right to create additional units or common elements, identified appropriately;
  - (h) A legally sufficient description of any real estate in which the unit owners will own only an estate for years;
  - (i) The distance between noncontiguous parcels of real estate comprising the common interest community; and
  - (j) The approximate location and dimensions of limited common elements, including porches, balconies, and patios, other than the limited common elements described in section 38-33.3-202 (1) (b) and (1) (d).
- (3) (Deleted by amendment, L. 93, p. 648, § 12, effective April 30, 1993.)
- (4) (Deleted by amendment, L. 2007, p. 1799, § 1, effective July 1, 2007.)
- (5) Unless the declaration provides otherwise, the horizontal boundaries of any part of a unit located outside of a building have the same elevation as the horizontal boundaries of the inside part and need not be depicted on the plats and maps.
- (6) Upon exercising any development right, the declarant shall record an amendment to the declaration with respect to that real estate reflecting change as a result of such exercise necessary to conform to the requirements of subsections (1), (2), and (4) of this section or new certifications of maps previously recorded if those maps otherwise conform to the requirements of subsections (1), (2), and (4) of this section.
- (7) Any certification of a map required by this article must be made by a registered land surveyor.
- (8) The requirements of a plat or map under this article shall not be deemed to satisfy any subdivision platting requirement enacted by a county or municipality pursuant to section 30-28-133, C.R.S., part 1 of article 23 of title 31, C.R.S., or a similar provision of a home rule city, nor shall the plat or map requirements under this article be deemed to be incorporated into any subdivision platting requirements enacted by a county or municipality.
- (9) Any plat or map that was recorded on or after July 1, 1998, but prior to July 1, 2007, and that satisfies the requirements of this section in effect on July 1, 2007, is deemed to have satisfied the requirements of this section at the time it was recorded.

**Source:** L. 91: Entire article added, p. 1721, § 1, effective July 1, 1992. L. 93: (2)(a), (2)(f), (2)(g), (3), and (4)(b) amended, p. 648, § 12, effective April 30. L. 94: IP(2) amended, p. 1510, § 45, effective July 1. L. 97: IP(2) amended, p. 151, § 3, effective March 28. L. 98: (1), IP(2), (6), and (7) amended, p. 480, § 6, effective July 1. L. 2007: (1), (2), and (4) amended and (9) added, p. 1799, § 1, effective July 1.

#### ANNOTATION

The 1998 amendment to subsection (1) did not eliminate the need to file a plat or a map even if all pertinent information was con-

tained in the declaration, because § 38-33.3-201 (1) still provides that no common interest community is created until the plat or map for



the common interest community is recorded. *Snowmass Land Co. v. Two Creeks Homeowner's Ass'n*, 159 P.3d 662 (Colo. App. 2006).

**Airplane runway and retained easement across the runway were not required to be depicted on a subdivision plat** pursuant to subsections (2)(b) and (2)(e) because the runway was not a dedicated common area subject to the subdivision declarations and the easement therefore did not burden any part of the subdivi-

vision. *Brush Creek Airport, L.L.C. v. Avion Park, L.L.C.*, 57 P.3d 738 (Colo. App. 2002).

**The description on a plat that simply stated "Parcel A, Lot 3", in conjunction with the attached notes, failed to adequately label the plat or map to identify the development rights applicable to that parcel, as required by subsection (2)(c).** *Snowmass Land Co. v. Two Creeks Homeowner's Ass'n*, 159 P.3d 662 (Colo. App. 2006).

**38-33.3-209.4. Public disclosures required - identity of association - agent - manager - contact information.** (1) Within ninety days after assuming control from the declarant pursuant to section 38-33.3-303 (5), the association shall make the following information available to unit owners upon reasonable notice in accordance with subsection (3) of this section. In addition, if the association's address, designated agent, or management company changes, the association shall make updated information available within ninety days after the change:

- (a) The name of the association;
- (b) The name of the association's designated agent or management company, if any;
- (c) A valid physical address and telephone number for both the association and the designated agent or management company, if any;
- (d) The name of the common interest community;
- (e) The initial date of recording of the declaration; and
- (f) The reception number or book and page for the main document that constitutes the declaration.

(2) Within ninety days after assuming control from the declarant pursuant to section 38-33.3-303 (5), and within ninety days after the end of each fiscal year thereafter, the association shall make the following information available to unit owners upon reasonable notice in accordance with subsection (3) of this section:

- (a) The date on which its fiscal year commences;
- (b) Its operating budget for the current fiscal year;
- (c) A list, by unit type, of the association's current assessments, including both regular and special assessments;
- (d) Its annual financial statements, including any amounts held in reserve for the fiscal year immediately preceding the current annual disclosure;
- (e) The results of its most recent available financial audit or review;
- (f) A list of all association insurance policies, including, but not limited to, property, general liability, association director and officer professional liability, and fidelity policies. Such list shall include the company names, policy limits, policy deductibles, additional named insureds, and expiration dates of the policies listed.
- (g) All the association's bylaws, articles, and rules and regulations;
- (h) The minutes of the executive board and member meetings for the fiscal year immediately preceding the current annual disclosure; and
- (i) The association's responsible governance policies adopted under section 38-33.3-209.5.

(3) It is the intent of this section to allow the association the widest possible latitude in methods and means of disclosure, while requiring that the information be readily available at no cost to unit owners at their convenience. Disclosure shall be accomplished by one of the following means: Posting on an internet web page with accompanying notice of the web address via first-class mail or e-mail; the maintenance of a literature table or binder at the association's principal place of business; or mail or personal delivery. The cost of such distribution shall be accounted for as a common expense liability.

(4) Notwithstanding section 38-33.3-117 (1) (h.5), this section shall not apply to a unit, or the owner thereof, if the unit is a time-share unit, as defined in section 38-33-110 (7).

**Source:** **L. 2005:** Entire section added, p. 1377, § 7, effective January 1, 2006.  
**L. 2006:** (1) and (2)(e) amended, p. 1218, § 6, effective May 26.

**38-33.3-209.5. Responsible governance policies - due process for imposition of fines.** (1) To promote responsible governance, associations shall:

- (a) Maintain accurate and complete accounting records; and
- (b) Adopt policies, procedures, and rules and regulations concerning:
  - (I) Collection of unpaid assessments;
  - (II) Handling of conflicts of interest involving board members, which policies, procedures, and rules and regulations must include, at a minimum, the criteria described in subsection (4) of this section;
  - (III) Conduct of meetings, which may refer to applicable provisions of the nonprofit code or other recognized rules and principles;
  - (IV) Enforcement of covenants and rules, including notice and hearing procedures and the schedule of fines;
  - (V) Inspection and copying of association records by unit owners;
  - (VI) Investment of reserve funds;
  - (VII) Procedures for the adoption and amendment of policies, procedures, and rules;
  - (VIII) Procedures for addressing disputes arising between the association and unit owners; and
  - (IX) When the association has a reserve study prepared for the portions of the community maintained, repaired, replaced, and improved by the association; whether there is a funding plan for any work recommended by the reserve study and, if so, the projected sources of funding for the work; and whether the reserve study is based on a physical analysis and financial analysis. For the purposes of this subparagraph (IX), an internally conducted reserve study shall be sufficient.

(2) Notwithstanding any provision of the declaration, bylaws, articles, or rules and regulations to the contrary, the association may not fine any unit owner for an alleged violation unless:

(a) The association has adopted, and follows, a written policy governing the imposition of fines; and

(b) (I) The policy includes a fair and impartial fact-finding process concerning whether the alleged violation actually occurred and whether the unit owner is the one who should be held responsible for the violation. This process may be informal but shall, at a minimum, guarantee the unit owner notice and an opportunity to be heard before an impartial decision maker.

(II) As used in this paragraph (b), "impartial decision maker" means a person or group of persons who have the authority to make a decision regarding the enforcement of the association's covenants, conditions, and restrictions, including its architectural requirements, and the other rules and regulations of the association and do not have any direct personal or financial interest in the outcome. A decision maker shall not be deemed to have a direct personal or financial interest in the outcome if the decision maker will not, as a result of the outcome, receive any greater benefit or detriment than will the general membership of the association.

(3) If, as a result of the factfinding process described in subsection (2) of this section, it is determined that the unit owner should not be held responsible for the alleged violation, the association shall not allocate to the unit owner's account with the association any of the association's costs or attorney fees incurred in asserting or hearing the claim. Notwithstanding any provision in the declaration, bylaws, or rules and regulations of the association to the contrary, a unit owner shall not be deemed to have consented to pay such costs or fees.

(4) (a) The policies, procedures, and rules and regulations adopted by an association under subparagraph (II) of paragraph (b) of subsection (1) of this section must, at a minimum:

- (I) Define or describe the circumstances under which a conflict of interest exists;
- (II) Set forth procedures to follow when a conflict of interest exists, including how, and to whom, the conflict of interest must be disclosed and whether a board member must recuse himself or herself from discussing or voting on the issue; and
- (III) Provide for the periodic review of the association's conflict of interest policies, procedures, and rules and regulations.



(b) The policies, procedures, or rules and regulations adopted under this subsection (4) must be in accordance with section 38-33.3-310.5.

**Source:** **L. 2005:** Entire section added, p. 1377, § 7, effective January 1, 2006. **L. 2006:** (1)(a), (1)(b)(VI), and (1)(b)(VII) amended and (1)(b)(VIII) added, p. 1219, § 7, effective May 26. **L. 2008:** (2) and (3) added, p. 556, § 2, effective July 1. **L. 2009:** (1)(b)(IX) added, (HB 09-1359), ch. 257, p. 1164, § 1, effective August 5. **L. 2011:** (1)(b)(II) amended and (4) added, (HB 11-1124), ch. 105, p. 328, § 2, effective April 13.

**38-33.3-209.6. Executive board member education.** The board may authorize, and account for as a common expense, reimbursement of board members for their actual and necessary expenses incurred in attending educational meetings and seminars on responsible governance of unit owners' associations. The course content of such educational meetings and seminars shall be specific to Colorado, and shall make reference to applicable sections of this article.

**Source:** **L. 2005:** Entire section added, p. 1377, § 7, effective January 1, 2006.

**38-33.3-209.7. Owner education.** (1) The association shall provide, or cause to be provided, education to owners at no cost on at least an annual basis as to the general operations of the association and the rights and responsibilities of owners, the association, and its executive board under Colorado law. The criteria for compliance with this section shall be determined by the executive board.

(2) Notwithstanding section 38-33.3-117 (1.5) (c), this section shall not apply to an association that includes time-share units, as defined in section 38-33-110 (7).

**Source:** **L. 2005:** Entire section added, p. 1377, § 7, effective January 1, 2006.

**38-33.3-210. Exercise of development rights.** (1) To exercise any development right reserved under section 38-33.3-205 (1) (h), the declarant shall prepare, execute, and record an amendment to the declaration and, in a condominium or planned community, comply with the provisions of section 38-33.3-209. The declarant is the unit owner of any units thereby created. The amendment to the declaration must assign an identifying number to each new unit created and, except in the case of subdivision or conversion of units described in subsection (3) of this section, reallocate the allocated interests among all units. The amendment must describe any common elements and any limited common elements thereby created and, in the case of limited common elements, designate the unit to which each is allocated to the extent required by section 38-33.3-208.

(2) Additional development rights not previously reserved may be reserved within any real estate added to the common interest community if the amendment adding that real estate includes all matters required by section 38-33.3-205 or 38-33.3-206, as the case may be, and, in a condominium or planned community, the plats and maps include all matters required by section 38-33.3-209. This provision does not extend the time limit on the exercise of development rights imposed by the declaration pursuant to section 38-33.3-205 (1) (h).

(3) Whenever a declarant exercises a development right to subdivide or convert a unit previously created into additional units, common elements, or both:

(a) If the declarant converts the unit entirely to common elements, the amendment to the declaration must reallocate all the allocated interests of that unit among the other units as if that unit had been taken by eminent domain; and

(b) If the declarant subdivides the unit into two or more units, whether or not any part of the unit is converted into common elements, the amendment to the declaration must reallocate all the allocated interests of the unit among the units created by the subdivision in any reasonable manner prescribed by the declarant.

(4) If the declaration provides, pursuant to section 38-33.3-205, that all or a portion of the real estate is subject to a right of withdrawal:

(a) If all the real estate is subject to withdrawal, and the declaration does not describe separate portions of real estate subject to that right, none of the real estate may be withdrawn after a unit has been conveyed to a purchaser; and

(b) If any portion of the real estate is subject to withdrawal, it may not be withdrawn after a unit in that portion has been conveyed to a purchaser.

(5) If a declarant fails to exercise any development right within the time limit and in accordance with any conditions or fixed limitations described in the declaration pursuant to section 38-33.3-205 (1) (h), or records an instrument surrendering a development right, that development right shall lapse unless the association, upon the request of the declarant or the owner of the real estate subject to development right, agrees to an extension of the time period for exercise of the development right or a reinstatement of the development right subject to whatever terms, conditions, and limitations the association may impose on the subsequent exercise of the development right. The extension or renewal of the development right and any terms, conditions, and limitations shall be included in an amendment executed by the declarant or the owner of the real estate subject to development right and the association.

**Source:** L. 91: Entire article added, p. 1723, § 1, effective July 1, 1992. L. 93: (5) amended, p. 648, § 13, effective April 30. L. 98: (2) amended, p. 481, § 7, effective July 1.

**38-33.3-211. Alterations of units.** (1) Subject to the provisions of the declaration and other provisions of law, a unit owner:

(a) May make any improvements or alterations to his unit that do not impair the structural integrity, electrical systems, or mechanical systems or lessen the support of any portion of the common interest community;

(b) May not change the appearance of the common elements without permission of the association; or

(c) After acquiring an adjoining unit or an adjoining part of an adjoining unit, may remove or alter any intervening partition or create apertures therein, even if the partition in whole or in part is a common element, if those acts do not impair the structural integrity, electrical systems, or mechanical systems or lessen the support of any portion of the common interest community. Removal of partitions or creation of apertures under this paragraph (c) is not an alteration of boundaries.

**Source:** L. 91: Entire article added, p. 1724, § 1, effective July 1, 1992.

**38-33.3-212. Relocation of boundaries between adjoining units.** (1) Subject to the provisions of the declaration and other provisions of law, and pursuant to the procedures described in section 38-33.3-217, the boundaries between adjoining units may be relocated by an amendment to the declaration upon application to the association by the owners of those units.

(2) In order to relocate the boundaries between adjoining units, the owners of those units, as the applicant, must submit an application to the executive board, which application shall be executed by those owners and shall include:

(a) Evidence sufficient to the executive board that the applicant has complied with all local rules and ordinances and that the proposed relocation of boundaries does not violate the terms of any document evidencing a security interest;

(b) The proposed reallocation of interests, if any;

(c) The proposed form for amendments to the declaration, including the plats or maps, as may be necessary to show the altered boundaries between adjoining units, and their dimensions and identifying numbers;

(d) A deposit against attorney fees and costs which the association will incur in reviewing and effectuating the application, in an amount reasonably estimated by the executive board; and

(e) Such other information as may be reasonably requested by the executive board.



(3) No relocation of boundaries between adjoining units shall be effected without the necessary amendments to the declaration, plats, or maps, executed and recorded pursuant to section 38-33.3-217 (3) and (5).

(4) All costs and attorney fees incurred by the association as a result of an application shall be the sole obligation of the applicant.

**Source:** L. 91: Entire article added, p. 1725, § 1, effective July 1, 1992.

**38-33.3-213. Subdivision of units.** (1) If the declaration expressly so permits, a unit may be subdivided into two or more units. Subject to the provisions of the declaration and other provisions of law, and pursuant to the procedures described in this section, a unit owner may apply to the association to subdivide a unit.

(2) In order to subdivide a unit, the unit owner of such unit, as the applicant, must submit an application to the executive board, which application shall be executed by such owner and shall include:

(a) Evidence that the applicant of the proposed subdivision shall have complied with all building codes, fire codes, zoning codes, planned unit development requirements, master plans, and other applicable ordinances or resolutions adopted and enforced by the local governing body and that the proposed subdivision does not violate the terms of any document evidencing a security interest encumbering the unit;

(b) The proposed reallocation of interests, if any;

(c) The proposed form for amendments to the declaration, including the plats or maps, as may be necessary to show the units which are created by the subdivision and their dimensions, and identifying numbers;

(d) A deposit against attorney fees and costs which the association will incur in reviewing and effectuating the application, in an amount reasonably estimated by the executive board; and

(e) Such other information as may be reasonably requested by the executive board.

(3) No subdivision of units shall be effected without the necessary amendments to the declaration, plats, or maps, executed and recorded pursuant to section 38-33.3-217 (3) and (5).

(4) All costs and attorney fees incurred by the association as a result of an application shall be the sole obligation of the applicant.

**Source:** L. 91: Entire article added, p. 1726, § 1, effective July 1, 1992. L. 98: (1) amended, p. 481, § 8, effective July 1.

**38-33.3-214. Easement for encroachments.** To the extent that any unit or common element encroaches on any other unit or common element, a valid easement for the encroachment exists. The easement does not relieve a unit owner of liability in case of willful misconduct nor relieve a declarant or any other person of liability for failure to adhere to the plats and maps.

**Source:** L. 91: Entire article added, p. 1727, § 1, effective July 1, 1992.

**38-33.3-215. Use for sales purposes.** A declarant may maintain sales offices, management offices, and models in the common interest community only if the declaration so provides. Except as provided in a declaration, any real estate in a common interest community used as a sales office, management office, or model and not designated a unit by the declaration is a common element. If a declarant ceases to be a unit owner, such declarant ceases to have any rights with regard to any real estate used as a sales office, management office, or model, unless it is removed promptly from the common interest community in accordance with a right to remove reserved in the declaration. Subject to any limitations in the declaration, a declarant may maintain signs on the common elements advertising the common interest community. This section is subject to the provisions of other state laws and to local ordinances.

**Source: L. 91:** Entire article added, p. 1727, § 1, effective July 1, 1992. **L. 98:** Entire section amended, p. 481, § 9, effective July 1.

**38-33.3-216. Easement rights.** (1) Subject to the provisions of the declaration, a declarant has an easement through the common elements as may be reasonably necessary for the purpose of discharging a declarant's obligations or exercising special declarant rights, whether arising under this article or reserved in the declaration.

(2) In a planned community, subject to the provisions of the declaration and the ability of the association to regulate and convey or encumber the common elements as set forth in sections 38-33.3-302 (1) (f) and 38-33.3-312, the unit owners have an easement:

- (a) In the common elements for the purpose of access to their units; and
- (b) To use the common elements and all other real estate that must become common elements for all other purposes.

**Source: L. 91:** Entire article added, p. 1727, § 1, effective July 1, 1992.

**38-33.3-217. Amendment of declaration.** (1) (a) (I) Except as otherwise provided in subparagraphs (II) and (III) of this paragraph (a), the declaration, including the plats and maps, may be amended only by the affirmative vote or agreement of unit owners of units to which more than fifty percent of the votes in the association are allocated or any larger percentage, not to exceed sixty-seven percent, that the declaration specifies. Any provision in the declaration that purports to specify a percentage larger than sixty-seven percent is hereby declared void as contrary to public policy, and until amended, such provision shall be deemed to specify a percentage of sixty-seven percent. The declaration may specify a smaller percentage than a simple majority only if all of the units are restricted exclusively to nonresidential use. Nothing in this paragraph (a) shall be construed to prohibit the association from seeking a court order, in accordance with subsection (7) of this section, to reduce the required percentage to less than sixty-seven percent.

(II) If the declaration provides for an initial period of applicability to be followed by automatic extension periods, the declaration may be amended at any time in accordance with subparagraph (I) of this paragraph (a).

(III) This paragraph (a) shall not apply:

- (A) To the extent that its application is limited by subsection (4) of this section;
- (B) To amendments executed by a declarant under section 38-33.3-205 (4) and (5), 38-33.3-208 (3), 38-33.3-209 (6), 38-33.3-210, or 38-33.3-222;
- (C) To amendments executed by an association under section 38-33.3-107, 38-33.3-206 (4), 38-33.3-208 (2), 38-33.3-212, 38-33.3-213, or 38-33.3-218 (11) and (12);
- (D) To amendments executed by the district court for any county that includes all or any portion of a common interest community under subsection (7) of this section; or
- (E) To amendments that affect phased communities or declarant-controlled communities.

(b) (I) If the declaration requires first mortgagees to approve or consent to amendments, but does not set forth a procedure for registration or notification of first mortgagees, the association may:

(A) Send a dated, written notice and a copy of any proposed amendment by certified mail to each first mortgagee at its most recent address as shown on the recorded deed of trust or recorded assignment thereof; and

(B) Cause the dated notice, together with information on how to obtain a copy of the proposed amendment, to be printed in full at least twice, on separate occasions at least one week apart, in a newspaper of general circulation in the county in which the common interest community is located.

(II) A first mortgagee that does not deliver to the association a negative response within sixty days after the date of the notice specified in subparagraph (I) of this paragraph (b) shall be deemed to have approved the proposed amendment.

(III) The notification procedure set forth in this paragraph (b) is not mandatory. If the consent of first mortgagees is obtained without resort to this paragraph (b), and otherwise



in accordance with the declaration, the notice to first mortgagees shall be considered sufficient.

(2) No action to challenge the validity of an amendment adopted by the association pursuant to this section may be brought more than one year after the amendment is recorded.

(3) Every amendment to the declaration must be recorded in every county in which any portion of the common interest community is located and is effective only upon recordation. An amendment must be indexed in the grantee's index in the name of the common interest community and the association and in the grantor's index in the name of each person executing the amendment.

(4) (a) Except to the extent expressly permitted or required by other provisions of this article, no amendment may create or increase special declarant rights, increase the number of units, or change the boundaries of any unit or the allocated interests of a unit in the absence of a vote or agreement of unit owners of units to which at least sixty-seven percent of the votes in the association, including sixty-seven percent of the votes allocated to units not owned by a declarant, are allocated or any larger percentage the declaration specifies. The declaration may specify a smaller percentage only if all of the units are restricted exclusively to nonresidential use.

(b) The sixty-seven-percent maximum percentage stated in paragraph (a) of subsection (1) of this section shall not apply to any common interest community in which one unit owner, by virtue of the declaration, bylaws, or other governing documents of the association, is allocated sixty-seven percent or more of the votes in the association.

(4.5) Except to the extent expressly permitted or required by other provisions of this article, no amendment may change the uses to which any unit is restricted in the absence of a vote or agreement of unit owners of units to which at least sixty-seven percent of the votes in the association are allocated or any larger percentage the declaration specifies. The declaration may specify a smaller percentage only if all of the units are restricted exclusively to nonresidential use.

(5) Amendments to the declaration required by this article to be recorded by the association shall be prepared, executed, recorded, and certified on behalf of the association by any officer of the association designated for that purpose or, in the absence of designation, by the president of the association.

(6) All expenses associated with preparing and recording an amendment to the declaration shall be the sole responsibility of:

(a) In the case of an amendment pursuant to sections 38-33.3-208 (2), 38-33.3-212, and 38-33.3-213, the unit owners desiring the amendment; and

(b) In the case of an amendment pursuant to section 38-33.3-208 (3), 38-33.3-209 (6), or 38-33.3-210, the declarant; and

(c) In all other cases, the association.

(7) (a) The association, acting through its executive board pursuant to section 38-33.3-303 (1), may petition the district court for any county that includes all or any portion of the common interest community for an order amending the declaration of the common interest community if:

(I) The association has twice sent notice of the proposed amendment to all unit owners that are entitled by the declaration to vote on the proposed amendment or are required for approval of the proposed amendment by any means allowed pursuant to the provisions regarding notice to members in sections 7-121-402 and 7-127-104, C.R.S., of the "Colorado Revised Nonprofit Corporation Act", articles 121 to 137 of title 7, C.R.S.;

(II) The association has discussed the proposed amendment during at least one meeting of the association; and

(III) Unit owners of units to which are allocated more than fifty percent of the number of consents, approvals, or votes of the association that would be required to adopt the proposed amendment pursuant to the declaration have voted in favor of the proposed amendment.

(b) A petition filed pursuant to paragraph (a) of this subsection (7) shall include:

(I) A summary of:

(A) The procedures and requirements for amending the declaration that are set forth in the declaration;

(B) The proposed amendment to the declaration;

(C) The effect of and reason for the proposed amendment, including a statement of the circumstances that make the amendment necessary or advisable;

(D) The results of any vote taken with respect to the proposed amendment; and

(E) Any other matters that the association believes will be useful to the court in deciding whether to grant the petition; and

(II) As exhibits, copies of:

(A) The declaration as originally recorded and any recorded amendments to the declaration;

(B) The text of the proposed amendment;

(C) Copies of any notices sent pursuant to subparagraph (I) of paragraph (a) of this subsection (7); and

(D) Any other documents that the association believes will be useful to the court in deciding whether to grant the petition.

(c) Within three days of the filing of the petition, the district court shall set a date for hearing the petition. Unless the court finds that an emergency requires an immediate hearing, the hearing shall be held no earlier than forty-five days and no later than sixty days after the date the association filed the petition.

(d) No later than ten days after the date for hearing a petition is set pursuant to paragraph (c) of this subsection (7), the association shall:

(I) Send notice of the petition by any written means allowed pursuant to the provisions regarding notice to members in sections 7-121-402 and 7-127-104, C.R.S., of the "Colorado Revised Nonprofit Corporation Act", articles 121 to 137 of title 7, C.R.S., to any unit owner, by first-class mail, postage prepaid or by hand delivery to any declarant, and by first-class mail, postage prepaid, to any lender that holds a security interest in one or more units and is entitled by the declaration or any underwriting guidelines or requirements of that lender or of the federal national mortgage association, the federal home loan mortgage corporation, the federal housing administration, the veterans administration, or the government national mortgage corporation to vote on the proposed amendment. The notice shall include:

(A) A copy of the petition which need not include the exhibits attached to the original petition filed with the district court;

(B) The date the district court will hear the petition; and

(C) A statement that the court may grant the petition and order the proposed amendment to the declaration unless any declarant entitled by the declaration to vote on the proposed amendment, the federal housing administration, the veterans administration, more than thirty-three percent of the unit owners entitled by the declaration to vote on the proposed amendment, or more than thirty-three percent of the lenders that hold a security interest in one or more units and are entitled by the declaration to vote on the proposed amendment file written objections to the proposed amendment with the court prior to the hearing;

(II) File with the district court:

(A) A list of the names and mailing addresses of declarants, unit owners, and lenders that hold a security interest in one or more units and that are entitled by the declaration to vote on the proposed amendment; and

(B) A copy of the notice required by subparagraph (I) of this paragraph (d).

(e) The district court shall grant the petition after hearing if it finds that:

(I) The association has complied with all requirements of this subsection (7);

(II) No more than thirty-three percent of the unit owners entitled by the declaration to vote on the proposed amendment have filed written objections to the proposed amendment with the court prior to the hearing;

(III) Neither the federal housing administration nor the veterans administration is entitled to approve the proposed amendment, or if so entitled has not filed written objections to the proposed amendment with the court prior to the hearing;



(IV) Either the proposed amendment does not eliminate any rights or privileges designated in the declaration as belonging to a declarant or no declarant has filed written objections to the proposed amendment with the court prior to the hearing;

(V) Either the proposed amendment does not eliminate any rights or privileges designated in the declaration as belonging to any lenders that hold security interests in one or more units and that are entitled by the declaration to vote on the proposed amendment or no more than thirty-three percent of such lenders have filed written objections to the proposed amendment with the court prior to the hearing; and

(VI) The proposed amendment would neither terminate the declaration nor change the allocated interests of the unit owners as specified in the declaration, except as allowed pursuant to section 38-33.3-315.

(f) Upon granting a petition, the court shall enter an order approving the proposed amendment and requiring the association to record the amendment in each county that includes all or any portion of the common interest community. Once recorded, the amendment shall have the same legal effect as if it were adopted pursuant to any requirements set forth in the declaration.

**Source:** L. 91: Entire article added, p. 1727, § 1, effective July 1, 1992. L. 93: (1) amended, p. 649, § 14, effective April 30. L. 98: (1) and (4) amended and (4.5) added, p. 482, § 10, effective July 1. L. 99: (1) amended and (7) added, p. 692, § 1, effective May 19; (1) amended, p. 629, § 38, effective August 4. L. 2005: (1) amended, p. 1380, § 8, effective June 6. L. 2006: (1) and (4) amended, p. 1219, § 8, effective May 26.

**Editor's note:** Amendments to subsection (1) by Senate Bill 99-221 and House Bill 99-1360 were harmonized.

#### ANNOTATION

Because subsections (4) and (4.5) use the term “any unit”, rather than “all units”, and regardless of what owner approval percentage may be required procedurally, substantively subsections (4) and (4.5) permit changes to building and access envelopes of less than all the lots in a common interest community. *Giguere v. SJS Family Enters.*, 155 P.3d 462 (Colo. App. 2006).

Although subsection (4.5) governs situations where homeowners would like to

change an enumerated use to which a lot is restricted, it does not operate to preclude homeowners from seeking to create a new use restriction or to remove a specifically permitted land use pursuant to the terms of a declaration. *Good v. Bear Canyon Ranch Ass'n*, 160 P.3d 251 (Colo. App. 2007).

**38-33.3-218. Termination of common interest community.** (1) Except in the case of a taking of all the units by eminent domain, or in the case of foreclosure against an entire cooperative of a security interest that has priority over the declaration, a common interest community may be terminated only by agreement of unit owners of units to which at least sixty-seven percent of the votes in the association are allocated or any larger percentage the declaration specifies. The declaration may specify a smaller percentage only if all of the units in the common interest community are restricted exclusively to nonresidential uses.

(1.5) No planned community that is required to exist pursuant to a development or site plan shall be terminated by agreement of unit owners, unless a copy of the termination agreement is sent by certified mail or hand delivered to the governing body of every municipality in which a portion of the planned community is situated or, if the planned community is situated in an unincorporated area, to the board of county commissioners for every county in which a portion of the planned community is situated.

(2) An agreement of unit owners to terminate must be evidenced by their execution of a termination agreement or ratifications thereof in the same manner as a deed, by the requisite number of unit owners. The termination agreement must specify a date after which the agreement will be void unless it is recorded before that date. A termination agreement and all ratifications thereof must be recorded in every county in which a portion of the common interest community is situated and is effective only upon recordation.

(3) In the case of a condominium or planned community containing only units having horizontal boundaries described in the declaration, a termination agreement may provide that all of the common elements and units of the common interest community must be sold following termination. If, pursuant to the agreement, any real estate in the common interest community is to be sold following termination, the termination agreement must set forth the minimum terms of the sale.

(4) In the case of a condominium or planned community containing any units not having horizontal boundaries described in the declaration, a termination agreement may provide for sale of the common elements, but it may not require that the units be sold following termination, unless the declaration as originally recorded provided otherwise or all the unit owners consent to the sale.

(5) Subject to the provisions of a termination agreement described in subsections (3) and (4) of this section, the association, on behalf of the unit owners, may contract for the sale of real estate in a common interest community following termination, but the contract is not binding on the unit owners until approved pursuant to subsections (1) and (2) of this section. If any real estate is to be sold following termination, title to that real estate, upon termination, vests in the association as trustee for the holders of all interests in the units. Thereafter, the association has all the powers necessary and appropriate to effect the sale. Until the sale has been concluded and the proceeds thereof distributed, the association continues in existence with all the powers it had before termination. Proceeds of the sale must be distributed to unit owners and lienholders as their interests may appear, in accordance with subsections (8), (9), and (10) of this section, taking into account the value of property owned or distributed that is not sold so as to preserve the proportionate interests of each unit owner with respect to all property cumulatively. Unless otherwise specified in the termination agreement, as long as the association holds title to the real estate, each unit owner and the unit owner's successors in interest have an exclusive right to occupancy of the portion of the real estate that formerly constituted the unit. During the period of that occupancy, each unit owner and the unit owner's successors in interest remain liable for all assessments and other obligations imposed on unit owners by this article or the declaration.

(6) (a) In a planned community, if all or a portion of the common elements are not to be sold following termination, title to the common elements not sold vests in the unit owners upon termination as tenants in common in fractional interests that maintain, after taking into account the fair market value of property owned and the proceeds of property sold, their respective interests as provided in subsection (10) of this section with respect to all property appraised under said subsection (10), and liens on the units shift accordingly.

(b) In a common interest community, containing units having horizontal boundaries described in the declaration, title to the units not to be sold following termination vests in the unit owners upon termination as tenants in common in fractional interests that maintain, after taking into account the fair market value of property owned and the proceeds of property sold, their respective interests as provided in subsection (10) of this section with respect to all property appraised under said subsection (10), and liens on the units shift accordingly. While the tenancy in common exists, each unit owner and the unit owner's successors in interest have an exclusive right to occupancy of the portion of the real estate that formerly constituted such unit.

(7) Following termination of the common interest community, the proceeds of any sale of real estate, together with the assets of the association, are held by the association as trustee for unit owners and holders of liens on the units as their interests may appear.

(8) Upon termination of a condominium or planned community, creditors of the association who obtain a lien and duly record it in every county in which any portion of the common interest community is located are to be treated as if they had perfected liens on the units immediately before termination or when the lien is obtained and recorded, whichever is later.

(9) In a cooperative, the declaration may provide that all creditors of the association have priority over any interests of unit owners and creditors of unit owners. In that event, upon termination, creditors of the association who obtain a lien and duly record it in every county in which any portion of the cooperative is located are to be treated as if they had perfected liens against the cooperative immediately before termination or when the lien is



obtained and recorded, whichever is later. Unless the declaration provides that all creditors of the association have that priority:

(a) The lien of each creditor of the association which was perfected against the association before termination becomes, upon termination, a lien against each unit owner's interest in the unit as of the date the lien was perfected;

(b) Any other creditor of the association who obtains a lien and duly records it in every county in which any portion of the cooperative is located is to be treated upon termination as if the creditor had perfected a lien against each unit owner's interest immediately before termination or when the lien is obtained and recorded, whichever is later;

(c) The amount of the lien of an association's creditor described in paragraphs (a) and (b) of this subsection (9) against each unit owner's interest must be proportionate to the ratio which each unit's common expense liability bears to the common expense liability of all of the units;

(d) The lien of each creditor of each unit owner which was perfected before termination continues as a lien against that unit owner's unit as of the date the lien was perfected; and

(e) The assets of the association must be distributed to all unit owners and all lienholders as their interests may appear in the order described above. Creditors of the association are not entitled to payment from any unit owner in excess of the amount of the creditor's lien against that unit owner's interest.

(10) The respective interests of unit owners referred to in subsections (5) to (9) of this section are as follows:

(a) Except as provided in paragraph (b) of this subsection (10), the respective interests of unit owners are the combined fair market values of their units, allocated interests, any limited common elements, and, in the case of a planned community, any tenant in common interest, immediately before the termination, as determined by one or more independent appraisers selected by the association. The decision of the independent appraisers shall be distributed to the unit owners and becomes final unless disapproved within thirty days after distribution by unit owners of units to which twenty-five percent of the votes in the association are allocated. The proportion of any unit owner's interest to that of all unit owners is determined by dividing the fair market value of that unit owner's unit and its allocated interests by the total fair market values of all the units and their allocated interests.

(b) If any unit or any limited common element is destroyed to the extent that an appraisal of the fair market value thereof prior to destruction cannot be made, the interests of all unit owners are:

(I) In a condominium, their respective common element interests immediately before the termination;

(II) In a cooperative, their respective ownership interests immediately before the termination; and

(III) In a planned community, their respective common expense liabilities immediately before the termination.

(11) In a condominium or planned community, except as provided in subsection (12) of this section, foreclosure or enforcement of a lien or encumbrance against the entire common interest community does not terminate, of itself, the common interest community. Foreclosure or enforcement of a lien or encumbrance against a portion of the common interest community other than withdrawable real estate does not withdraw that portion from the common interest community. Foreclosure or enforcement of a lien or encumbrance against withdrawable real estate does not withdraw, of itself, that real estate from the common interest community, but the person taking title thereto may require from the association, upon request, an amendment to the declaration excluding the real estate from the common interest community prepared, executed, and recorded by the association.

(12) In a condominium or planned community, if a lien or encumbrance against a portion of the real estate comprising the common interest community has priority over the declaration and the lien or encumbrance has not been partially released, the parties foreclosing the lien or encumbrance, upon foreclosure, may record an instrument excluding the real estate subject to that lien or encumbrance from the common interest community.

The board of directors shall reallocate interests as if the foreclosed section were taken by eminent domain by an amendment to the declaration prepared, executed, and recorded by the association.

**Source: L. 91:** Entire article added, p. 1728, § 1, effective July 1, 1992. **L. 93:** (1), (5), (6), (8), IP(9), (9)(b), and (10)(a) amended, p. 649, § 15, effective April 30. **L. 2005:** (1.5) added, p. 1246, § 1, effective August 8.

**38-33.3-219. Rights of secured lenders.** (1) The declaration may require that all or a specified number or percentage of the lenders who hold security interests encumbering the units approve specified actions of the unit owners or the association as a condition to the effectiveness of those actions, but no requirement for approval may operate to:

(a) Deny or delegate control over the general administrative affairs of the association by the unit owners or the executive board; or

(b) Prevent the association or the executive board from commencing, intervening in, or settling any solicitation or proceeding; or

(c) Prevent any insurance trustee or the association from receiving and distributing any insurance proceeds pursuant to section 38-33.3-313.

**Source: L. 91:** Entire article added, p. 1732, § 1, effective July 1, 1992.

**38-33.3-220. Master associations.** (1) If the declaration provides that any of the powers of a unit owners' association described in section 38-33.3-302 are to be exercised by or may be delegated to a master association, all provisions of this article applicable to unit owners' associations apply to any such master association except as modified by this section.

(2) Unless it is acting in the capacity of an association described in section 38-33.3-301, a master association may exercise the powers set forth in section 38-33.3-302 (1) (b) only to the extent such powers are expressly permitted to be exercised by a master association in the declarations of common interest communities which are part of the master association or expressly described in the delegations of power from those common interest communities to the master association.

(3) If the declaration of any common interest community provides that the executive board may delegate certain powers to a master association, the members of the executive board have no liability for the acts or omissions of the master association with respect to those powers following delegation.

(4) The rights and responsibilities of unit owners with respect to the unit owners' association set forth in sections 38-33.3-303, 38-33.3-308, 38-33.3-309, 38-33.3-310, and 38-33.3-312 apply in the conduct of the affairs of a master association only to persons who elect the board of a master association, whether or not those persons are otherwise unit owners within the meaning of this article.

(5) Even if a master association is also an association described in section 38-33.3-301, the articles of incorporation and the declaration of each common interest community, the powers of which are assigned by the declaration or delegated to the master association, must provide that the executive board of the master association be elected after the period of declarant control, if any, in one of the following ways:

(a) All unit owners of all common interest communities subject to the master association may elect all members of the master association's executive board.

(b) All members of the executive boards of all common interest communities subject to the master association may elect all members of the master association's executive board.

(c) All unit owners of each common interest community subject to the master association may elect specified members of the master association's executive board.

(d) All members of the executive board of each common interest community subject to the master association may elect specified members of the master association's executive board.



**Source: L. 91:** Entire article added, p. 1733, § 1, effective July 1, 1992. **L. 98:** (1) amended, p. 482, § 11, effective July 1.

**38-33.3-221. Merger or consolidation of common interest communities.** (1) Any two or more common interest communities of the same form of ownership, by agreement of the unit owners as provided in subsection (2) of this section, may be merged or consolidated into a single common interest community. In the event of a merger or consolidation, unless the agreement otherwise provides, the resultant common interest community is the legal successor, for all purposes, of all of the preexisting common interest communities, and the operations and activities of all associations of the preexisting common interest communities are merged or consolidated into a single association that holds all powers, rights, obligations, assets, and liabilities of all preexisting associations.

(2) An agreement of two or more common interest communities to merge or consolidate pursuant to subsection (1) of this section must be evidenced by an agreement prepared, executed, recorded, and certified by the president of the association of each of the preexisting common interest communities following approval by owners of units to which are allocated the percentage of votes in each common interest community required to terminate that common interest community. The agreement must be recorded in every county in which a portion of the common interest community is located and is not effective until recorded.

(3) Every merger or consolidation agreement must provide for the reallocation of the allocated interests in the new association among the units of the resultant common interest community either by stating the reallocations or the formulas upon which they are based.

**Source: L. 91:** Entire article added, p. 1734, § 1, effective July 1, 1992.

**38-33.3-221.5. Withdrawal from merged common interest community.** (1) A common interest community that was merged or consolidated with another common interest community, or is party to an agreement to do so pursuant to section 38-33.3-221, may withdraw from the merged or consolidated common interest community or terminate the agreement to merge or consolidate, without the consent of the other common interest community or communities involved, if the common interest community wishing to withdraw meets all of the following criteria:

- (a) It is a separate, platted subdivision;
  - (b) Its unit owners are required to pay into two common interest communities or separate unit owners' associations;
  - (c) It is or has been a self-operating common interest community or association continuously for at least twenty-five years;
  - (d) The total number of unit owners comprising it is fifteen percent or less of the total number of unit owners in the merged or consolidated common interest community or association;
  - (e) Its unit owners have approved the withdrawal by a majority vote and the owners of units representing at least seventy-five percent of the allocated interests in the common interest community wishing to withdraw participated in the vote; and
  - (f) Its withdrawal would not substantially impair the ability of the remainder of the merged common interest community or association to:
    - (I) Enforce existing covenants;
    - (II) Maintain existing facilities; or
    - (III) Continue to exist.
- (2) If an association has met the requirements set forth in subsection (1) of this section, it shall be considered withdrawn as of the date of the election at which its unit owners voted to withdraw.

**Source: L. 2005:** Entire section added, p. 1380, § 9, effective January 1, 2006.

**38-33.3-222. Addition of unspecified real estate.** In a common interest community, if the right is originally reserved in the declaration, the declarant, in addition to any other

development right, may amend the declaration at any time during as many years as are specified in the declaration to add additional real estate to the common interest community without describing the location of that real estate in the original declaration; but the area of real estate added to the common interest community pursuant to this section may not exceed ten percent of the total area of real estate described in section 38-33.3-205 (1) (c) and (1) (h), and the declarant may not in any event increase the number of units in the common interest community beyond the number stated in the original declaration pursuant to section 38-33.3-205 (1) (d), except as provided in section 38-33.3-217 (4).

**Source: L. 91:** Entire article added, p. 1735, § 1, effective July 1, 1992. **L. 98:** Entire section amended, p. 483, § 12, effective July 1.

### **38-33.3-223. Sale of unit - disclosure to buyer. (Repealed)**

**Source: L. 2005:** Entire section added, p. 1381, § 10, effective January 1, 2006. **L. 2006:** Entire section repealed, p. 1225, § 14, effective May 26.

## **PART 3**

### **MANAGEMENT OF THE COMMON INTEREST COMMUNITY**

**38-33.3-301. Organization of unit owners' association.** A unit owners' association shall be organized no later than the date the first unit in the common interest community is conveyed to a purchaser. The membership of the association at all times shall consist exclusively of all unit owners or, following termination of the common interest community, of all former unit owners entitled to distributions of proceeds under section 38-33.3-218, or their heirs, personal representatives, successors, or assigns. The association shall be organized as a nonprofit, not-for-profit, or for-profit corporation or as a limited liability company in accordance with the laws of the state of Colorado; except that the failure of the association to incorporate or organize as a limited liability company will not adversely affect either the existence of the common interest community for purposes of this article or the rights of persons acting in reliance upon such existence, other than as specifically provided in section 38-33.3-316. Neither the choice of entity nor the organizational structure of the association shall be deemed to affect its substantive rights and obligations under this article.

**Source: L. 91:** Entire article added, p. 1735, § 1, effective July 1, 1992. **L. 98:** Entire section amended, p. 483, § 13, effective July 1. **L. 2005:** Entire section amended, p. 1382, § 11, effective January 1, 2006.

**38-33.3-302. Powers of unit owners' association.** (1) Except as provided in subsections (2) and (3) of this section, and subject to the provisions of the declaration, the association, without specific authorization in the declaration, may:

- (a) Adopt and amend bylaws and rules and regulations;
- (b) Adopt and amend budgets for revenues, expenditures, and reserves and collect assessments for common expenses from unit owners;
- (c) Hire and terminate managing agents and other employees, agents, and independent contractors;
- (d) Institute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the common interest community;
- (e) Make contracts and incur liabilities;
- (f) Regulate the use, maintenance, repair, replacement, and modification of common elements;
- (g) Cause additional improvements to be made as a part of the common elements;



(h) Acquire, hold, encumber, and convey in its own name any right, title, or interest to real or personal property, subject to the following exceptions:

(I) Common elements in a condominium or planned community may be conveyed or subjected to a security interest only pursuant to section 38-33.3-312; and

(II) Part of a cooperative may be conveyed, or all or part of a cooperative may be subjected to a security interest, only pursuant to section 38-33.3-312;

(i) Grant easements, leases, licenses, and concessions through or over the common elements;

(j) Impose and receive any payments, fees, or charges for the use, rental, or operation of the common elements other than limited common elements described in section 38-33.3-202 (1) (b) and (1) (d);

(k) Impose charges for late payment of assessments, recover reasonable attorney fees and other legal costs for collection of assessments and other actions to enforce the power of the association, regardless of whether or not suit was initiated, and, after notice and an opportunity to be heard, levy reasonable fines for violations of the declaration, bylaws, and rules and regulations of the association;

(l) Impose reasonable charges for the preparation and recordation of amendments to the declaration or statements of unpaid assessments;

(m) Provide for the indemnification of its officers and executive board and maintain directors' and officers' liability insurance;

(n) Assign its right to future income, including the right to receive common expense assessments, but only to the extent the declaration expressly so provides;

(o) Exercise any other powers conferred by the declaration or bylaws;

(p) Exercise all other powers that may be exercised in this state by legal entities of the same type as the association; and

(q) Exercise any other powers necessary and proper for the governance and operation of the association.

(2) The declaration may not impose limitations on the power of the association to deal with the declarant that are more restrictive than the limitations imposed on the power of the association to deal with other persons.

(3) (a) Any managing agent, employee, independent contractor, or other person acting on behalf of the association shall be subject to this article to the same extent as the association itself would be.

(b) Decisions concerning the approval or denial of a unit owner's application for architectural or landscaping changes shall be made in accordance with standards and procedures set forth in the declaration or in duly adopted rules and regulations or bylaws of the association, and shall not be made arbitrarily or capriciously.

(4) (a) The association's contract with a managing agent shall be terminable for cause without penalty to the association. Any such contract shall be subject to renegotiation.

(b) Notwithstanding section 38-33.3-117 (1.5) (g), this subsection (4) shall not apply to an association that includes time-share units, as defined in section 38-33-110 (7).

**Source:** L. 91: Entire article added, p. 1735, § 1, effective July 1, 1992. L. 2005: IP(1) amended and (3) and (4) added, p. 1382, § 12, effective January 1, 2006.

#### ANNOTATION

**Law reviews.** For article, "The Construction Defect Action Reform Act", see 30 Colo. Law. 121 (October 2001).

**Subsection (1)(d) authorizes an association to pursue damage claims on behalf of two or more unit owners** regardless of whether individual units or common areas were damaged. *Heritage Vill. Owners Ass'n v. Golden Heritage Investors, Ltd.*, 89 P.3d 513 (Colo. App. 2004).

**This section confers standing** upon unit owners' associations to pursue damages claims

on behalf of two or more unit owners with respect to matters affecting their individual units. *Yacht Club II Homeowners Ass'n v. A.C. Excavating*, 94 P.3d 1177 (Colo. App. 2003), *aff'd*, 114 P.3d 862 (Colo. 2005).

**Subsection (1)(d) confers standing upon owner's common interest community association to defend litigation in its own name on behalf of itself or two or more unit owners on matters affecting the common interest community.** It does not establish the adequacy as a

matter of law of the representation by an association of lot owners belonging to the association who were absent from the underlying action. Because conflicting interests exist between the association and the absent owners, representation was not adequate. When assessing preju-

dice, the court must consider whether the interests of an absent party are adequately represented by those already a party to the litigation. *Clubhouse at Fairway Pines v. Fairway Pines Estates*, 214 P.3d 451 (Colo. App. 2008).

**38-33.3-303. Executive board members and officers - powers and duties - reserve funds - reserve study - audit.** (1) (a) Except as provided in the declaration, the bylaws, or subsection (3) of this section or any other provisions of this article, the executive board may act in all instances on behalf of the association.

(b) Notwithstanding any provision of the declaration or bylaws to the contrary, all members of the executive board shall have available to them all information related to the responsibilities and operation of the association obtained by any other member of the executive board. This information shall include, but is not necessarily limited to, reports of detailed monthly expenditures, contracts to which the association is a party, and copies of communications, reports, and opinions to and from any member of the executive board or any managing agent, attorney, or accountant employed or engaged by the executive board to whom the executive board delegates responsibilities under this article.

(2) Except as otherwise provided in subsection (2.5) of this section:

(a) If appointed by the declarant, in the performance of their duties, the officers and members of the executive board are required to exercise the care required of fiduciaries of the unit owners.

(b) If not appointed by the declarant, no member of the executive board and no officer shall be liable for actions taken or omissions made in the performance of such member's duties except for wanton and willful acts or omissions.

(2.5) With regard to the investment of reserve funds of the association, the officers and members of the executive board shall be subject to the standards set forth in section 7-128-401, C.R.S.; except that, as used in that section:

(a) "Corporation" or "nonprofit corporation" means the association.

(b) "Director" means a member of the association's executive board.

(c) "Officer" means any person designated as an officer of the association and any person to whom the executive board delegates responsibilities under this article, including, without limitation, a managing agent, attorney, or accountant employed by the executive board.

(3) (a) The executive board may not act on behalf of the association to amend the declaration, to terminate the common interest community, or to elect members of the executive board or determine the qualifications, powers and duties, or terms of office of executive board members, but the executive board may fill vacancies in its membership for the unexpired portion of any term.

(b) Committees of the association shall be appointed pursuant to the governing documents of the association or, if the governing documents contain no applicable provisions, pursuant to section 7-128-206, C.R.S. The person appointed after August 15, 2009, to preside over any such committee shall meet the same qualifications as are required by the governing documents of the association for election or appointment to the executive board of the association.

(4) (a) Within ninety days after adoption of any proposed budget for the common interest community, the executive board shall mail, by ordinary first-class mail, or otherwise deliver a summary of the budget to all the unit owners and shall set a date for a meeting of the unit owners to consider the budget. Such meeting shall occur within a reasonable time after mailing or other delivery of the summary, or as allowed for in the bylaws. The executive board shall give notice to the unit owners of the meeting as allowed for in the bylaws. Unless the declaration requires otherwise, the budget proposed by the executive board does not require approval from the unit owners and it will be deemed approved by the unit owners in the absence of a veto at the noticed meeting by a majority of all unit owners, or if permitted in the declaration, a majority of a class of unit owners, or any larger percentage specified in the declaration, whether or not a quorum is present. In the event that



the proposed budget is vetoed, the periodic budget last proposed by the executive board and not vetoed by the unit owners must be continued until a subsequent budget proposed by the executive board is not vetoed by the unit owners.

(b) (I) At the discretion of the executive board or upon request pursuant to subparagraph (II) or (III) of this paragraph (b) as applicable, the books and records of the association shall be subject to an audit, using generally accepted auditing standards, or a review, using statements on standards for accounting and review services, by an independent and qualified person selected by the board. Such person need not be a certified public accountant except in the case of an audit. A person selected to conduct a review shall have at least a basic understanding of the principles of accounting as a result of prior business experience, education above the high school level, or bona fide home study. The audit or review report shall cover the association's financial statements, which shall be prepared using generally accepted accounting principles or the cash or tax basis of accounting.

(II) An audit shall be required under this paragraph (b) only when both of the following conditions are met:

(A) The association has annual revenues or expenditures of at least two hundred fifty thousand dollars; and

(B) An audit is requested by the owners of at least one-third of the units represented by the association.

(III) A review shall be required under this paragraph (b) only when requested by the owners of at least one-third of the units represented by the association.

(IV) Copies of an audit or review under this paragraph (b) shall be made available upon request to any unit owner beginning no later than thirty days after its completion.

(V) Notwithstanding section 38-33.3-117 (1.5) (h), this paragraph (b) shall not apply to an association that includes time-share units, as defined in section 38-33-110 (7).

(5) (a) Subject to subsection (6) of this section:

(I) The declaration, except a declaration for a large planned community, may provide for a period of declarant control of the association, during which period a declarant, or persons designated by such declarant, may appoint and remove the officers and members of the executive board. Regardless of the period of declarant control provided in the declaration, a period of declarant control terminates no later than the earlier of sixty days after conveyance of seventy-five percent of the units that may be created to unit owners other than a declarant, two years after the last conveyance of a unit by the declarant in the ordinary course of business, or two years after any right to add new units was last exercised.

(II) The declaration for a large planned community may provide for a period of declarant control of the association during which period a declarant, or persons designated by such declarant, may appoint and remove the officers and members of the executive board. Regardless of the period of declarant control provided in the declaration, a period of declarant control terminates in a large planned community no later than the earlier of sixty days after conveyance of seventy-five percent of the maximum number of units that may be created under zoning or other governmental development approvals in effect for the large planned community at any given time to unit owners other than a declarant, six years after the last conveyance of a unit by the declarant in the ordinary course of business, or twenty years after recordation of the declaration.

(b) A declarant may voluntarily surrender the right to appoint and remove officers and members of the executive board before termination of the period of declarant control, but, in that event, the declarant may require, for the duration of the period of declarant control, that specified actions of the association or executive board, as described in a recorded instrument executed by the declarant, be approved by the declarant before they become effective.

(c) If a period of declarant control is to terminate in a large planned community pursuant to subparagraph (II) of paragraph (a) of this subsection (5), the declarant, or persons designated by the declarant, shall no longer have the right to appoint and remove the officers and members of the executive board unless, prior to the termination date, the association approves an extension of the declarant's ability to appoint and remove no more than a majority of the executive board by vote of a majority of the votes entitled to be cast in person or by proxy, other than by the declarant, at a meeting duly convened as required

by law. Any such approval by the association may contain conditions and limitations. Such extension of declarant's appointment and removal power, together with any conditions and limitations approved as provided in this paragraph (c), shall be included in an amendment to the declaration previously executed by the declarant.

(6) Not later than sixty days after conveyance of twenty-five percent of the units that may be created to unit owners other than a declarant, at least one member and not less than twenty-five percent of the members of the executive board must be elected by unit owners other than the declarant. Not later than sixty days after conveyance of fifty percent of the units that may be created to unit owners other than a declarant, not less than thirty-three and one-third percent of the members of the executive board must be elected by unit owners other than the declarant.

(7) Except as otherwise provided in section 38-33.3-220 (5), not later than the termination of any period of declarant control, the unit owners shall elect an executive board of at least three members, at least a majority of whom must be unit owners other than the declarant or designated representatives of unit owners other than the declarant. The executive board shall elect the officers. The executive board members and officers shall take office upon election.

(8) Notwithstanding any provision of the declaration or bylaws to the contrary, the unit owners, by a vote of sixty-seven percent of all persons present and entitled to vote at any meeting of the unit owners at which a quorum is present, may remove any member of the executive board with or without cause, other than a member appointed by the declarant or a member elected pursuant to a class vote under section 38-33.3-207 (4).

(9) Within sixty days after the unit owners other than the declarant elect a majority of the members of the executive board, the declarant shall deliver to the association all property of the unit owners and of the association held by or controlled by the declarant, including without limitation the following items:

(a) The original or a certified copy of the recorded declaration as amended, the association's articles of incorporation, if the association is incorporated, bylaws, minute books, other books and records, and any rules and regulations which may have been promulgated;

(b) An accounting for association funds and financial statements, from the date the association received funds and ending on the date the period of declarant control ends. The financial statements shall be audited by an independent certified public accountant and shall be accompanied by the accountant's letter, expressing either the opinion that the financial statements present fairly the financial position of the association in conformity with generally accepted accounting principles or a disclaimer of the accountant's ability to attest to the fairness of the presentation of the financial information in conformity with generally accepted accounting principles and the reasons therefor. The expense of the audit shall not be paid for or charged to the association.

(c) The association funds or control thereof;

(d) All of the declarant's tangible personal property that has been represented by the declarant to be the property of the association or all of the declarant's tangible personal property that is necessary for, and has been used exclusively in, the operation and enjoyment of the common elements, and inventories of these properties;

(e) A copy, for the nonexclusive use by the association, of any plans and specifications used in the construction of the improvements in the common interest community;

(f) All insurance policies then in force, in which the unit owners, the association, or its directors and officers are named as insured persons;

(g) Copies of any certificates of occupancy that may have been issued with respect to any improvements comprising the common interest community;

(h) Any other permits issued by governmental bodies applicable to the common interest community and which are currently in force or which were issued within one year prior to the date on which unit owners other than the declarant took control of the association;

(i) Written warranties of the contractor, subcontractors, suppliers, and manufacturers that are still effective;

(j) A roster of unit owners and mortgagees and their addresses and telephone numbers, if known, as shown on the declarant's records;



(k) Employment contracts in which the association is a contracting party;

(l) Any service contract in which the association is a contracting party or in which the association or the unit owners have any obligation to pay a fee to the persons performing the services; and

(m) For large planned communities, copies of all recorded deeds and all recorded and unrecorded leases evidencing ownership or leasehold rights of the large planned community unit owners' association in all common elements within the large planned community.

**Source:** **L. 91:** Entire article added, p. 1737, § 1, effective July 1, 1992. **L. 93:** (7), (8), and (9)(e) amended, p. 651, § 16, effective April 30. **L. 94:** (5) and (8) amended, p. 2848, § 5, effective July 1. **L. 95:** (5)(a), (9)(k), and (9)(l) amended and (5)(c) and (9)(m) added, pp. 238, 239, §§ 5, 6, effective July 1. **L. 2002:** (4) and (5)(a)(I) amended, p. 768, § 4, effective August 7. **L. 2005:** (4) amended, p. 1383, § 13, effective January 1, 2006. **L. 2006:** (2) and (4)(b) amended and (2.5) added, p. 1221, § 9, effective May 26. **L. 2009:** (1) and (3) amended, (HB 09-1359), ch. 257, p. 1164, § 2, effective August 5.

#### ANNOTATION

**Director did not breach fiduciary duty to homeowners' association**, although a director of the association, by installing a satellite dish in violation of a covenant, where the plan was submitted for approval, approval was granted,

and director was not involved in the decision whether to grant initial approval for the dish. *Woodmoor Improvement Ass'n v. Brenner*, 919 P.2d 928 (Colo. App. 1996).

**38-33.3-303.5. Construction defect actions - disclosure.** (1) (a) In the event the executive board, pursuant to section 38-33.3-302 (1) (d), institutes an action asserting defects in the construction of five or more units, the provisions of this section shall apply. For purposes of this section, "action" shall have the same meaning as set forth in section 13-20-803 (1), C.R.S.

(b) The executive board shall substantially comply with the provisions of this section.

(2) (a) Prior to the service of the summons and complaint on any defendant with respect to an action governed by this section, the executive board shall mail or deliver written notice of the commencement or anticipated commencement of such action to each unit owner at the last known address described in the association's records.

(b) The notice required by paragraph (a) of this subsection (2) shall state a general description of the following:

(I) The nature of the action and the relief sought; and

(II) The expenses and fees that the executive board anticipates will be incurred in prosecuting the action.

(3) Nothing in this section shall be construed to:

(a) Require the disclosure in the notice or the disclosure to a unit owner of attorney-client communications or other privileged communications;

(b) Permit the notice to serve as a basis for any person to assert the waiver of any applicable privilege or right of confidentiality resulting from, or to claim immunity in connection with, the disclosure of information in the notice; or

(c) Limit or impair the authority of the executive board to contract for legal services, or limit or impair the ability to enforce such a contract for legal services.

**Source:** **L. 2001:** Entire section added, p. 390, § 3, effective August 8.

**38-33.3-304. Transfer of special declarant rights.** (1) A special declarant right created or reserved under this article may be transferred only by an instrument evidencing the transfer recorded in every county in which any portion of the common interest community is located. The instrument is not effective unless executed by the transferee.

(2) Upon transfer of any special declarant right, the liability of a transferor declarant is as follows:

(a) A transferor is not relieved of any obligation or liability arising before the transfer and remains liable for warranty obligations imposed upon such transferor by this article. Lack of privity does not deprive any unit owner of standing to bring an action to enforce any obligation of the transferor.

(b) If a successor to any special declarant right is an affiliate of a declarant, the transferor is jointly and severally liable with the successor for the liabilities and obligations of the successor which relate to the common interest community.

(c) If a transferor retains any special declarant rights but transfers other special declarant rights to a successor who is not an affiliate of the declarant, the transferor is liable for any obligations or liabilities imposed on a declarant by this article or by the declaration relating to the retained special declarant rights and arising after the transfer.

(d) A transferor has no liability for any act or omission or any breach of a contractual or warranty obligation arising from the exercise of a special declarant right by a successor declarant who is not an affiliate of the transferor.

(3) Unless otherwise provided in a mortgage instrument, deed of trust, or other agreement creating a security interest, in case of foreclosure of a security interest, sale by a trustee under an agreement creating a security interest, tax sale, judicial sale, or sale under bankruptcy or receivership proceedings of any units owned by a declarant or real estate in a common interest community subject to development rights, a person acquiring title to all the property being foreclosed or sold succeeds to only those special declarant rights related to that property held by that declarant which are specified in a written instrument prepared, executed, and recorded by such person at or about the same time as the judgment or instrument or by which such person obtained title to all of the property being foreclosed or sold.

(4) Upon foreclosure of a security interest, sale by a trustee under an agreement creating a security interest, tax sale, judicial sale, or sale under bankruptcy act or receivership proceedings of all interests in a common interest community owned by a declarant:

(a) The declarant ceases to have any special declarant rights; and

(b) The period of declarant control terminates unless the instrument which is required by subsection (3) of this section to be prepared, executed, and recorded at or about the same time as the judgment or instrument conveying title provides for transfer of all special declarant rights to a successor declarant.

(5) The liabilities and obligations of persons who succeed to special declarant rights are as follows:

(a) A successor to any special declarant right who is an affiliate of a declarant is subject to all obligations and liabilities imposed on any declarant by this article or by the declaration.

(b) A successor to any special declarant right, other than a successor described in paragraph (c) or (d) of this subsection (5) or a successor who is an affiliate of a declarant, is subject to all obligations and liabilities imposed by this article or the declaration:

(I) On a declarant which relate to the successor's exercise or nonexercise of special declarant rights; or

(II) On the declarant's transferor, other than:

(A) Misrepresentations by any previous declarant;

(B) Warranty obligations on improvements made by any previous declarant or made before the common interest community was created;

(C) Breach of any fiduciary obligation by any previous declarant or such declarant's appointees to the executive board; or

(D) Any liability or obligation imposed on the transferor as a result of the transferor's acts or omissions after the transfer.

(c) A successor to only a right reserved in the declaration to maintain models, sales offices, and signs, if such successor is not an affiliate of a declarant, may not exercise any other special declarant right and is not subject to any liability or obligation as a declarant.

(d) A successor to all special declarant rights held by a transferor who succeeded to those rights pursuant to the instrument prepared, executed, and recorded by such person pursuant to the provisions of subsection (3) of this section may declare such successor's intention in such recorded instrument to hold those rights solely for transfer to another



person. Thereafter, until transferring all special declarant rights to any person acquiring title to any unit or real estate subject to development rights owned by the successor or until recording an instrument permitting exercise of all those rights, that successor may not exercise any of those rights other than the right held by such successor's transferor to control the executive board in accordance with the provisions of section 38-33.3-303 (5) for the duration of any period of declarant control, and any attempted exercise of those rights is void. So long as a successor declarant may not exercise special declarant rights under this subsection (5), such successor declarant is not subject to any liability or obligation as a declarant, other than liability for the successor's acts and omissions under section 38-33.3-303 (4).

(6) Nothing in this section subjects any successor to a special declarant right to any claims against or other obligations of a transferor declarant, other than claims and obligations arising under this article or the declaration.

**Source: L. 91:** Entire article added, p. 1740, § 1, effective July 1, 1992.

**38-33.3-305. Termination of contracts and leases of declarant.** (1) The following contracts and leases, if entered into before the executive board elected by the unit owners pursuant to section 38-33.3-303 (7) takes office, may be terminated without penalty by the association, at any time after the executive board elected by the unit owners pursuant to section 38-33.3-303 (7) takes office, upon not less than ninety days' notice to the other party:

(a) Any management contract, employment contract, or lease of recreational or parking areas or facilities;

(b) Any other contract or lease between the association and a declarant or an affiliate of a declarant; or

(c) Any contract or lease that is not bona fide or was unconscionable to the unit owners at the time entered into under the circumstances then prevailing.

(2) Subsection (1) of this section does not apply to any lease the termination of which would terminate the common interest community or reduce its size, unless the real estate subject to that lease was included in the common interest community for the purpose of avoiding the right of the association to terminate a lease under this section or a proprietary lease.

**Source: L. 91:** Entire article added, p. 1743, § 1, effective July 1, 1992.

**38-33.3-306. Bylaws.** (1) In addition to complying with applicable sections, if any, of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, C.R.S., or the "Colorado Revised Nonprofit Corporation Act", articles 121 to 137 of title 7, C.R.S., if the common interest community is organized pursuant thereto, the bylaws of the association must provide:

(a) The number of members of the executive board and the titles of the officers of the association;

(b) Election by the executive board of a president, a treasurer, a secretary, and any other officers of the association the bylaws specify;

(c) The qualifications, powers and duties, and terms of office of, and manner of electing and removing, executive board members and officers and the manner of filling vacancies;

(d) Which, if any, of its powers the executive board or officers may delegate to other persons or to a managing agent;

(e) Which of its officers may prepare, execute, certify, and record amendments to the declaration on behalf of the association; and

(f) A method for amending the bylaws.

(2) Subject to the provisions of the declaration, the bylaws may provide for any other matters the association deems necessary and appropriate.

(3) (a) If an association with thirty or more units delegates powers of the executive board or officers relating to collection, deposit, transfer, or disbursement of association

funds to other persons or to a managing agent, the bylaws of the association shall require the following:

(I) That the other persons or managing agent maintain fidelity insurance coverage or a bond in an amount not less than fifty thousand dollars or such higher amount as the executive board may require;

(II) That the other persons or managing agent maintain all funds and accounts of the association separate from the funds and accounts of other associations managed by the other persons or managing agent and maintain all reserve accounts of each association so managed separate from operational accounts of the association;

(III) That an annual accounting for association funds and a financial statement be prepared and presented to the association by the managing agent, a public accountant, or a certified public accountant.

(b) Repealed.

**Source:** **L. 91:** Entire article added, p. 1743, § 1, effective July 1, 1992. **L. 92:** (3) added, p. 2096, § 1, effective July 1, 1993. **L. 93:** (3) amended, p. 1464, § 10, effective June 6; IP(1) amended, p. 865, § 40, effective July 1, 1994. **L. 96:** (3)(b) repealed, p. 1088, § 2, effective May 23. **L. 97:** IP(1) amended, p. 764, § 36, effective July 1, 1998.

**38-33.3-307. Upkeep of the common interest community.** (1) Except to the extent provided by the declaration, subsection (2) of this section, or section 38-33.3-313 (9), the association is responsible for maintenance, repair, and replacement of the common elements, and each unit owner is responsible for maintenance, repair, and replacement of such owner's unit. Each unit owner shall afford to the association and the other unit owners, and to their agents or employees, access through such owner's unit reasonably necessary for those purposes. If damage is inflicted, or a strong likelihood exists that it will be inflicted, on the common elements or any unit through which access is taken, the unit owner responsible for the damage, or expense to avoid damage, or the association if it is responsible, is liable for the cost of prompt repair.

(1.5) Maintenance, repair, or replacement of any drainage structure or facilities, or other public improvements required by the local governmental entity as a condition of development of the common interest community or any part thereof shall be the responsibility of the association, unless such improvements have been dedicated to and accepted by the local governmental entity for the purpose of maintenance, repair, or replacement or unless such maintenance, repair, or replacement has been authorized by law to be performed by a special district or other municipal or quasi-municipal entity.

(2) In addition to the liability that a declarant as a unit owner has under this article, the declarant alone is liable for all expenses in connection with real estate within the common interest community subject to development rights. No other unit owner and no other portion of the common interest community is subject to a claim for payment of those expenses. Unless the declaration provides otherwise, any income or proceeds from real estate subject to development rights inures to the declarant. If the declarant fails to pay all expenses in connection with real estate within the common interest community subject to development rights, the association may pay such expenses, and such expenses shall be assessed as a common expense against the real estate subject to development rights, and the association may enforce the assessment pursuant to section 38-33.3-316 by treating such real estate as if it were a unit. If the association acquires title to the real estate subject to the development rights through foreclosure or otherwise, the development rights shall not be extinguished thereby, and, thereafter, the association may succeed to any special declarant rights specified in a written instrument prepared, executed, and recorded by the association in accordance with the requirements of section 38-33.3-304 (3).

(3) In a planned community, if all development rights have expired with respect to any real estate, the declarant remains liable for all expenses of that real estate unless, upon expiration, the declaration provides that the real estate becomes common elements or units.

**Source:** **L. 91:** Entire article added, p. 1744, § 1, effective July 1, 1992. **L. 93:** (2) amended, p. 651, § 17, effective April 30. **L. 98:** (2) amended, p. 483, § 14, effective July 1.



**38-33.3-308. Meetings.** (1) Meetings of the unit owners, as the members of the association, shall be held at least once each year. Special meetings of the unit owners may be called by the president, by a majority of the executive board, or by unit owners having twenty percent, or any lower percentage specified in the bylaws, of the votes in the association. Not less than ten nor more than fifty days in advance of any meeting of the unit owners, the secretary or other officer specified in the bylaws shall cause notice to be hand delivered or sent prepaid by United States mail to the mailing address of each unit or to any other mailing address designated in writing by the unit owner. The notice of any meeting of the unit owners shall be physically posted in a conspicuous place, to the extent that such posting is feasible and practicable, in addition to any electronic posting or electronic mail notices that may be given pursuant to paragraph (b) of subsection (2) of this section. The notice shall state the time and place of the meeting and the items on the agenda, including the general nature of any proposed amendment to the declaration or bylaws, any budget changes, and any proposal to remove an officer or member of the executive board.

(2) (a) All regular and special meetings of the association's executive board, or any committee thereof, shall be open to attendance by all members of the association or their representatives. Agendas for meetings of the executive board shall be made reasonably available for examination by all members of the association or their representatives.

(b) (I) The association is encouraged to provide all notices and agendas required by this article in electronic form, by posting on a web site or otherwise, in addition to printed form. If such electronic means are available, the association shall provide notice of all regular and special meetings of unit owners by electronic mail to all unit owners who so request and who furnish the association with their electronic mail addresses. Electronic notice of a special meeting shall be given as soon as possible but at least twenty-four hours before the meeting.

(II) Notwithstanding section 38-33.3-117 (1.5) (i), this paragraph (b) shall not apply to an association that includes time-share units, as defined in section 38-33-110 (7), C.R.S.

(2.5) (a) Notwithstanding any provision in the declaration, bylaws, or other documents to the contrary, all meetings of the association and board of directors are open to every unit owner of the association, or to any person designated by a unit owner in writing as the unit owner's representative.

(b) At an appropriate time determined by the board, but before the board votes on an issue under discussion, unit owners or their designated representatives shall be permitted to speak regarding that issue. The board may place reasonable time restrictions on persons speaking during the meeting. If more than one person desires to address an issue and there are opposing views, the board shall provide for a reasonable number of persons to speak on each side of the issue.

(c) Notwithstanding section 38-33.3-117 (1.5) (i), this subsection (2.5) shall not apply to an association that includes time-share units, as defined in section 38-33-110 (7).

(3) The members of the executive board or any committee thereof may hold an executive or closed door session and may restrict attendance to executive board members and such other persons requested by the executive board during a regular or specially announced meeting or a part thereof. The matters to be discussed at such an executive session shall include only matters enumerated in paragraphs (a) to (f) of subsection (4) of this section.

(4) Matters for discussion by an executive or closed session are limited to:

(a) Matters pertaining to employees of the association or the managing agent's contract or involving the employment, promotion, discipline, or dismissal of an officer, agent, or employee of the association;

(b) Consultation with legal counsel concerning disputes that are the subject of pending or imminent court proceedings or matters that are privileged or confidential between attorney and client;

(c) Investigative proceedings concerning possible or actual criminal misconduct;

(d) Matters subject to specific constitutional, statutory, or judicially imposed requirements protecting particular proceedings or matters from public disclosure;

(e) Any matter the disclosure of which would constitute an unwarranted invasion of individual privacy;

(f) Review of or discussion relating to any written or oral communication from legal counsel.

(4.5) Upon the final resolution of any matter for which the board received legal advice or that concerned pending or contemplated litigation, the board may elect to preserve the attorney-client privilege in any appropriate manner, or it may elect to disclose such information, as it deems appropriate, about such matter in an open meeting.

(5) Prior to the time the members of the executive board or any committee thereof convene in executive session, the chair of the body shall announce the general matter of discussion as enumerated in paragraphs (a) to (f) of subsection (4) of this section.

(6) No rule or regulation of the board or any committee thereof shall be adopted during an executive session. A rule or regulation may be validly adopted only during a regular or special meeting or after the body goes back into regular session following an executive session.

(7) The minutes of all meetings at which an executive session was held shall indicate that an executive session was held and the general subject matter of the executive session.

**Source:** L. 91: Entire article added, p. 1745, § 1, effective July 1, 1992. L. 95: Entire section amended, p. 888, § 1, effective July 1. L. 98: (2) amended, p. 484, § 15, effective July 1. L. 2002: (4)(a) amended and (4)(f) added, p. 768, § 5, effective August 7. L. 2005: (3) and (5) amended, p. 781, § 71, effective June 1; (1) and (2) amended and (2.5) and (4.5) added, p. 1384, § 14, effective January 1, 2006. L. 2006: (1), (2.5)(a), and (2.5)(b) amended, p. 1222, § 10, effective May 26.

**38-33.3-309. Quorums.** (1) Unless the bylaws provide otherwise, a quorum is deemed present throughout any meeting of the association if persons entitled to cast twenty percent, or, in the case of an association with over one thousand unit owners, ten percent, of the votes which may be cast for election of the executive board are present, in person or by proxy at the beginning of the meeting.

(2) Unless the bylaws specify a larger percentage, a quorum is deemed present throughout any meeting of the executive board if persons entitled to cast fifty percent of the votes on that board are present at the beginning of the meeting or grant their proxy, as provided in section 7-128-205 (4), C.R.S.

**Source:** L. 91: Entire article added, p. 1745, § 1, effective July 1, 1992. L. 98: (2) amended, p. 484, § 16, effective July 1.

**38-33.3-310. Voting - proxies.** (1) (a) If only one of the multiple owners of a unit is present at a meeting of the association, such owner is entitled to cast all the votes allocated to that unit. If more than one of the multiple owners are present, the votes allocated to that unit may be cast only in accordance with the agreement of a majority in interest of the owners, unless the declaration expressly provides otherwise. There is majority agreement if any one of the multiple owners casts the votes allocated to that unit without protest being made promptly to the person presiding over the meeting by any of the other owners of the unit.

(b) (I) (A) Votes for contested positions on the executive board shall be taken by secret ballot. This sub-subparagraph (A) shall not apply to an association whose governing documents provide for election of positions on the executive board by delegates on behalf of the unit owners.

(B) At the discretion of the board or upon the request of twenty percent of the unit owners who are present at the meeting or represented by proxy, if a quorum has been achieved, a vote on any matter affecting the common interest community on which all unit owners are entitled to vote shall be by secret ballot.

(C) Ballots shall be counted by a neutral third party or by a committee of volunteers. Such volunteers shall be unit owners who are selected or appointed at an open meeting, in a fair manner, by the chair of the board or another person presiding during that portion of



the meeting. The volunteers shall not be board members and, in the case of a contested election for a board position, shall not be candidates.

(D) The results of a vote taken by secret ballot shall be reported without reference to the names, addresses, or other identifying information of unit owners participating in such vote.

(II) Notwithstanding section 38-33.3-117 (1.5) (j), this paragraph (b) shall not apply to an association that includes time-share units, as defined in section 38-33-110 (7).

(2) (a) Votes allocated to a unit may be cast pursuant to a proxy duly executed by a unit owner. A proxy shall not be valid if obtained through fraud or misrepresentation. Unless otherwise provided in the declaration, bylaws, or rules of the association, appointment of proxies may be made substantially as provided in section 7-127-203, C.R.S.

(b) If a unit is owned by more than one person, each owner of the unit may vote or register protest to the casting of votes by the other owners of the unit through a duly executed proxy. A unit owner may not revoke a proxy given pursuant to this section except by actual notice of revocation to the person presiding over a meeting of the association. A proxy is void if it is not dated or purports to be revocable without notice. A proxy terminates eleven months after its date, unless it provides otherwise.

(c) The association is entitled to reject a vote, consent, written ballot, waiver, proxy appointment, or proxy appointment revocation if the secretary or other officer or agent authorized to tabulate votes, acting in good faith, has reasonable basis for doubt about the validity of the signature on it or about the signatory's authority to sign for the unit owner.

(d) The association and its officer or agent who accepts or rejects a vote, consent, written ballot, waiver, proxy appointment, or proxy appointment revocation in good faith and in accordance with the standards of this section are not liable in damages for the consequences of the acceptance or rejection.

(e) Any action of the association based on the acceptance or rejection of a vote, consent, written ballot, waiver, proxy appointment, or proxy appointment revocation under this section is valid unless a court of competent jurisdiction determines otherwise.

(3) (a) If the declaration requires that votes on specified matters affecting the common interest community be cast by lessees rather than unit owners of leased units:

(I) The provisions of subsections (1) and (2) of this section apply to lessees as if they were unit owners;

(II) Unit owners who have leased their units to other persons may not cast votes on those specified matters; and

(III) Lessees are entitled to notice of meetings, access to records, and other rights respecting those matters as if they were unit owners.

(b) Unit owners must also be given notice, in the manner provided in section 38-33.3-308, of all meetings at which lessees are entitled to vote.

(4) No votes allocated to a unit owned by the association may be cast.

**Source:** L. 91: Entire article added, p. 1745, § 1, effective July 1, 1992. L. 2005: (1) and (2) amended, p. 1385, § 15, effective January 1, 2006. L. 2006: (1)(b)(I) amended, p. 1223, § 11, effective May 26.

**38-33.3-310.5. Executive board - conflicts of interest - definitions.** (1) Section 7-128-501, C.R.S., shall apply to members of the executive board; except that, as used in that section:

(a) "Corporation" or "nonprofit corporation" means the association.

(b) "Director" means a member of the association's executive board.

(c) "Officer" means any person designated as an officer of the association and any person to whom the board delegates responsibilities under this article, including, without limitation, a managing agent, attorney, or accountant employed by the board.

**Source:** L. 2005: Entire section added, p. 1386, § 16, effective January 1, 2006. L. 2006: Entire section R&RE, p. 1223, § 12, effective May 26.

**38-33.3-311. Tort and contract liability.** (1) Neither the association nor any unit owner except the declarant is liable for any cause of action based upon that declarant's acts or omissions in connection with any part of the common interest community which that declarant has the responsibility to maintain. Otherwise, any action alleging an act or omission by the association must be brought against the association and not against any unit owner. If the act or omission occurred during any period of declarant control and the association gives the declarant reasonable notice of and an opportunity to defend against the action, the declarant who then controlled the association is liable to the association or to any unit owner for all tort losses not covered by insurance suffered by the association or that unit owner and all costs that the association would not have incurred but for such act or omission. Whenever the declarant is liable to the association under this section, the declarant is also liable for all expenses of litigation, including reasonable attorney fees, incurred by the association. Any statute of limitation affecting the association's right of action under this section is tolled until the period of declarant control terminates. A unit owner is not precluded from maintaining an action contemplated by this section by being a unit owner or a member or officer of the association.

(2) The declarant is liable to the association for all funds of the association collected during the period of declarant control which were not properly expended.

**Source: L. 91:** Entire article added, p. 1746, § 1, effective July 1, 1992.

#### ANNOTATION

**Subsection (1) does not establish the adequacy as a matter of law of the representation by a common interest community association of lot owners belonging to the association who were absent from the underlying action.** Because conflicting interests exist between the association and the absent owners, representation

was not adequate. When assessing prejudice, the court must consider whether the interests of an absent party are adequately represented by those already a party to the litigation. *Clubhouse at Fairway Pines v. Fairway Pines Estates*, 214 P.3d 451 (Colo. App. 2008).

**38-33.3-312. Conveyance or encumbrance of common elements.** (1) In a condominium or planned community, portions of the common elements may be conveyed or subjected to a security interest by the association if persons entitled to cast at least sixty-seven percent of the votes in the association, including sixty-seven percent of the votes allocated to units not owned by a declarant, or any larger percentage the declaration specifies, agree to that action; except that all owners of units to which any limited common element is allocated must agree in order to convey that limited common element or subject it to a security interest. The declaration may specify a smaller percentage only if all of the units are restricted exclusively to nonresidential uses. Proceeds of the sale are an asset of the association.

(2) Part of a cooperative may be conveyed and all or part of a cooperative may be subjected to a security interest by the association if persons entitled to cast at least sixty-seven percent of the votes in the association, including sixty-seven percent of the votes allocated to units not owned by a declarant, or any larger percentage the declaration specifies, agree to that action; except that, if fewer than all of the units or limited common elements are to be conveyed or subjected to a security interest, then all unit owners of those units, or the units to which those limited common elements are allocated, must agree in order to convey those units or limited common elements or subject them to a security interest. The declaration may specify a smaller percentage only if all of the units are restricted exclusively to nonresidential uses. Proceeds of the sale are an asset of the association. Any purported conveyance or other voluntary transfer of an entire cooperative, unless made in compliance with section 38-33.3-218, is void.

(3) An agreement to convey, or subject to a security interest, common elements in a condominium or planned community, or, in a cooperative, an agreement to convey, or subject to a security interest, any part of a cooperative, must be evidenced by the execution of an agreement, in the same manner as a deed, by the association. The agreement must



specify a date after which the agreement will be void unless approved by the requisite percentage of owners. Any grant, conveyance, or deed executed by the association must be recorded in every county in which a portion of the common interest community is situated and is effective only upon recordation.

(4) The association, on behalf of the unit owners, may contract to convey an interest in a common interest community pursuant to subsection (1) of this section, but the contract is not enforceable against the association until approved pursuant to subsections (1) and (2) of this section and executed and ratified pursuant to subsection (3) of this section. Thereafter, the association has all powers necessary and appropriate to effect the conveyance or encumbrance, including the power to execute deeds or other instruments.

(5) Unless in compliance with this section, any purported conveyance, encumbrance, judicial sale, or other transfer of common elements or any other part of a cooperative is void.

(6) A conveyance or encumbrance of common elements pursuant to this section shall not deprive any unit of its rights of ingress and egress of the unit and support of the unit.

(7) Unless the declaration otherwise provides, a conveyance or encumbrance of common elements pursuant to this section does not affect the priority or validity of preexisting encumbrances.

(8) In a cooperative, the association may acquire, hold, encumber, or convey a proprietary lease without complying with this section.

**Source:** L. 91: Entire article added, p. 1747, § 1, effective July 1, 1992. L. 93: (1) and (5) amended, p. 652, § 18, effective April 30. L. 98: (1) to (3) amended, p. 484, § 17, effective July 1.

#### ANNOTATION

Subsection (3) requires that, when requisite number of unit owners approve the sale of new units, such approval be executed as a written agreement demonstrating that association has authority to enter into contracts to sell the new units. Nothing in the record shows that the unit owners executed any type of agreement approving the sale of new units. *Platt v. Aspenwood Condo. Ass'n*, 214 P.3d 1060 (Colo. App. 2009).

“Contract” referred to in subsection (4) must be ratified by the unit owners to be enforceable. Subsection (4) allows an association to enter into a contract but requires ratification for the contract to be enforceable. Association could enter into a contract but it could not also ratify the contract; therefore, the unit owners were required to ratify the contract to render it enforceable. *Platt v. Aspenwood Condo. Ass'n*, 214 P.3d 1060 (Colo. App. 2009).

Under subsection (5), a “purported conveyance”, not “the agreement to convey” or “the contract”, is void for noncompliance with subsections (1) through (4). Although plaintiffs entered into contract to purchase new condominium unit, the unit was not conveyed to them; therefore, because the contract was not

ratified by the unit owners, it was unenforceable, and the plaintiffs specific performance claim cannot stand. *Platt v. Aspenwood Condo. Ass'n*, 214 P.3d 1060 (Colo. App. 2009).

Trial court erred in dismissing plaintiffs’ breach of implied covenant of good faith and fair dealing claim, because subsection (5) pertains to conveyances and not to the contract. *Platt v. Aspenwood Condo. Ass'n*, 214 P.3d 1060 (Colo. App. 2009).

Contract for sale of condominium unit is not void under subsection (5). Because contract was not ratified by the unit owners, it is unenforceable, and purchasers’ specific performance claim cannot stand. Nothing in the record shows that unit owners executed any type of agreement approving the sale of two new units. Reading subsections (3) and (4) together, “contract” referred to in subsection (4) must be ratified by the unit owners to render it enforceable. Moreover, subsection (5) pertains to conveyances and not to the contract. Although purchasers entered into contract to purchase a new condominium unit, the unit was not conveyed to them. Thus, subsection (5) was not triggered. *Platt v. Aspenwood Condo. Ass'n*, 214 P.3d 1060 (Colo. App. 2009).

**38-33.3-313. Insurance.** (1) Commencing not later than the time of the first conveyance of a unit to a person other than a declarant, the association shall maintain, to the extent reasonably available:

(a) Property insurance on the common elements and, in a planned community, also on

property that must become common elements, for broad form covered causes of loss; except that the total amount of insurance must be not less than the full insurable replacement cost of the insured property less applicable deductibles at the time the insurance is purchased and at each renewal date, exclusive of land, excavations, foundations, and other items normally excluded from property policies; and

(b) Commercial general liability insurance against claims and liabilities arising in connection with the ownership, existence, use, or management of the common elements, and, in cooperatives, also of all units, in an amount, if any, specified by the common interest community instruments or otherwise deemed sufficient in the judgment of the executive board but not less than any amount specified in the association documents, insuring the executive board, the unit owners' association, the management agent, and their respective employees, agents, and all persons acting as agents. The declarant shall be included as an additional insured in such declarant's capacity as a unit owner and board member. The unit owners shall be included as additional insureds but only for claims and liabilities arising in connection with the ownership, existence, use, or management of the common elements and, in cooperatives, also of all units. The insurance shall cover claims of one or more insured parties against other insured parties.

(2) In the case of a building that is part of a cooperative or that contains units having horizontal boundaries described in the declaration, the insurance maintained under paragraph (a) of subsection (1) of this section must include the units but not the finished interior surfaces of the walls, floors, and ceilings of the units. The insurance need not include improvements and betterments installed by unit owners, but if they are covered, any increased charge shall be assessed by the association to those owners.

(3) If the insurance described in subsections (1) and (2) of this section is not reasonably available, or if any policy of such insurance is cancelled or not renewed without a replacement policy therefore having been obtained, the association promptly shall cause notice of that fact to be hand delivered or sent prepaid by United States mail to all unit owners. The declaration may require the association to carry any other insurance, and the association in any event may carry any other insurance it considers appropriate, including insurance on units it is not obligated to insure, to protect the association or the unit owners.

(4) Insurance policies carried pursuant to subsections (1) and (2) of this section must provide that:

(a) Each unit owner is an insured person under the policy with respect to liability arising out of such unit owner's interest in the common elements or membership in the association;

(b) The insurer waives its rights to subrogation under the policy against any unit owner or member of his household;

(c) No act or omission by any unit owner, unless acting within the scope of such unit owner's authority on behalf of the association, will void the policy or be a condition to recovery under the policy; and

(d) If, at the time of a loss under the policy, there is other insurance in the name of a unit owner covering the same risk covered by the policy, the association's policy provides primary insurance.

(5) Any loss covered by the property insurance policy described in paragraph (a) of subsection (1) and subsection (2) of this section must be adjusted with the association, but the insurance proceeds for that loss shall be payable to any insurance trustee designated for that purpose, or otherwise to the association, and not to any holder of a security interest. The insurance trustee or the association shall hold any insurance proceeds in trust for the association unit owners and lienholders as their interests may appear. Subject to the provisions of subsection (9) of this section, the proceeds must be disbursed first for the repair or restoration of the damaged property, and the association, unit owners, and lienholders are not entitled to receive payment of any portion of the proceeds unless there is a surplus of proceeds after the property has been completely repaired or restored or the common interest community is terminated.

(6) The association may adopt and establish written nondiscriminatory policies and procedures relating to the submittal of claims, responsibility for deductibles, and any other matters of claims adjustment. To the extent the association settles claims for damages to real



property, it shall have the authority to assess negligent unit owners causing such loss or benefiting from such repair or restoration all deductibles paid by the association. In the event that more than one unit is damaged by a loss, the association in its reasonable discretion may assess each unit owner a pro rata share of any deductible paid by the association.

(7) An insurance policy issued to the association does not obviate the need for unit owners to obtain insurance for their own benefit.

(8) An insurer that has issued an insurance policy for the insurance described in subsections (1) and (2) of this section shall issue certificates or memoranda of insurance to the association and, upon request, to any unit owner or holder of a security interest. Unless otherwise provided by statute, the insurer issuing the policy may not cancel or refuse to renew it until thirty days after notice of the proposed cancellation or nonrenewal has been mailed to the association, and each unit owner and holder of a security interest to whom a certificate or memorandum of insurance has been issued, at their respective last-known addresses.

(9) (a) Any portion of the common interest community for which insurance is required under this section which is damaged or destroyed must be repaired or replaced promptly by the association unless:

(I) The common interest community is terminated, in which case section 38-33.3-218 applies;

(II) Repair or replacement would be illegal under any state or local statute or ordinance governing health or safety;

(III) Sixty-seven percent of the unit owners, including every owner of a unit or assigned limited common element that will not be rebuilt, vote not to rebuild; or

(IV) Prior to the conveyance of any unit to a person other than the declarant, the holder of a deed of trust or mortgage on the damaged portion of the common interest community rightfully demands all or a substantial part of the insurance proceeds.

(b) The cost of repair or replacement in excess of insurance proceeds and reserves is a common expense. If the entire common interest community is not repaired or replaced, the insurance proceeds attributable to the damaged common elements must be used to restore the damaged area to a condition compatible with the remainder of the common interest community, and, except to the extent that other persons will be distributees, the insurance proceeds attributable to units and limited common elements that are not rebuilt must be distributed to the owners of those units and the owners of the units to which those limited common elements were allocated, or to lienholders, as their interests may appear, and the remainder of the proceeds must be distributed to all the unit owners or lienholders, as their interests may appear, as follows:

(I) In a condominium, in proportion to the common element interests of all the units; and

(II) In a cooperative or planned community, in proportion to the common expense liabilities of all the units; except that, in a fixed or limited equity cooperative, the unit owner may not receive more of the proceeds than would satisfy the unit owner's entitlements under the declaration if the unit owner leaves the cooperative. In such a cooperative, the proceeds that remain after satisfying the unit owner's obligations continue to be held in trust by the association for the benefit of the cooperative. If the unit owners vote not to rebuild any unit, that unit's allocated interests are automatically reallocated upon the vote as if the unit had been condemned under section 38-33.3-107, and the association promptly shall prepare, execute, and record an amendment to the declaration reflecting the reallocations.

(10) If any unit owner or employee of an association with thirty or more units controls or disburses funds of the common interest community, the association must obtain and maintain, to the extent reasonably available, fidelity insurance. Coverage shall not be less in aggregate than two months' current assessments plus reserves, as calculated from the current budget of the association.

(11) Any person employed as an independent contractor by an association with thirty or more units for the purposes of managing a common interest community must obtain and maintain fidelity insurance in an amount not less than the amount specified in subsection

(10) of this section, unless the association names such person as an insured employee in a contract of fidelity insurance, pursuant to subsection (10) of this section.

(12) The association may carry fidelity insurance in amounts greater than required in subsection (10) of this section and may require any independent contractor employed for the purposes of managing a common interest community to carry more fidelity insurance coverage than required in subsection (10) of this section.

(13) Premiums for insurance that the association acquires and other expenses connected with acquiring such insurance are common expenses.

**Source:** L. 91: Entire article added, p. 1748, § 1, effective July 1, 1992. L. 98: (9)(a)(III) amended, p. 485, § 18, effective July 1.

**38-33.3-314. Surplus funds.** Unless otherwise provided in the declaration, any surplus funds of the association remaining after payment of or provision for common expenses and any prepayment of or provision for reserves shall be paid to the unit owners in proportion to their common expense liabilities or credited to them to reduce their future common expense assessments.

**Source:** L. 91: Entire article added, p. 1752, § 1, effective July 1, 1992. L. 93: Entire section amended, p. 652, § 19, effective April 30.

**38-33.3-315. Assessments for common expenses.** (1) Until the association makes a common expense assessment, the declarant shall pay all common expenses. After any assessment has been made by the association, assessments shall be made no less frequently than annually and shall be based on a budget adopted no less frequently than annually by the association.

(2) Except for assessments under subsections (3) and (4) of this section and section 38-33.3-207 (4) (a) (IV), all common expenses shall be assessed against all the units in accordance with the allocations set forth in the declaration pursuant to section 38-33.3-207 (1) and (2). Any past-due common expense assessment or installment thereof shall bear interest at the rate established by the association not exceeding twenty-one percent per year.

(3) To the extent required by the declaration:

(a) Any common expense associated with the maintenance, repair, or replacement of a limited common element shall be assessed against the units to which that limited common element is assigned, equally, or in any other proportion the declaration provides;

(b) Any common expense or portion thereof benefiting fewer than all of the units shall be assessed exclusively against the units benefited; and

(c) The costs of insurance shall be assessed in proportion to risk, and the costs of utilities shall be assessed in proportion to usage.

(4) If any common expense is caused by the misconduct of any unit owner, the association may assess that expense exclusively against such owner's unit.

(5) If common expense liabilities are reallocated, common expense assessments and any installment thereof not yet due shall be recalculated in accordance with the reallocated common expense liabilities.

(6) Each unit owner is liable for assessments made against such owner's unit during the period of ownership of such unit. No unit owner may be exempt from liability for payment of the assessments by waiver of the use or enjoyment of any of the common elements or by abandonment of the unit against which the assessments are made.

(7) Unless otherwise specifically provided in the declaration or bylaws, the association may enter into an escrow agreement with the holder of a unit owner's mortgage so that assessments may be combined with the unit owner's mortgage payments and paid at the same time and in the same manner; except that any such escrow agreement shall comply with any applicable rules of the federal housing administration, department of housing and urban development, veterans' administration, or other government agency.

**Source:** L. 91: Entire article added, p. 1753, § 1, effective July 1, 1992. L. 93: (6) amended, p. 653, § 20, effective April 30. L. 94: (2) amended, p. 2849, § 6, effective July 1. L. 2005: (7) added, p. 1387, § 17, effective January 1, 2006.



## ANNOTATION

**Summary judgment was not appropriate in an action brought by an association to collect unpaid association dues for a timeshare unit** where the owner of the unit made a sufficient showing that the developer, in connection with a resale program, agreed to pay the dues, and the association and the developer were, for all practical purposes, one and the same. *Club Telluride Owners Ass'n, Inc. v. Mitchell*, 70 P.3d 502 (Colo. App. 2002).

**Relieving the owner of a timeshare unit of an obligation to pay dues when the developer**

**agreed to pay the dues in connection with a resale program was not void as against public policy.** This section prohibits preferential assessments among units. It does not address agreements concerning how assessments will be paid. The statutory scheme would not be frustrated if the association accepted the developer and its successor as the primary obligors and looked to the owner as surety after exhausting collection efforts against the primary obligors. *Club Telluride Owners Ass'n, Inc. v. Mitchell*, 70 P.3d 502 (Colo. App. 2002).

**38-33.3-316. Lien for assessments.** (1) The association, if such association is incorporated or organized as a limited liability company, has a statutory lien on a unit for any assessment levied against that unit or fines imposed against its unit owner. Unless the declaration otherwise provides, fees, charges, late charges, attorney fees, fines, and interest charged pursuant to section 38-33.3-302 (1) (j), (1) (k), and (1) (l), section 38-33.3-313 (6), and section 38-33.3-315 (2) are enforceable as assessments under this article. The amount of the lien shall include all those items set forth in this section from the time such items become due. If an assessment is payable in installments, each installment is a lien from the time it becomes due, including the due date set by any valid association's acceleration of installment obligations.

(2) (a) A lien under this section is prior to all other liens and encumbrances on a unit except:

(I) Liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes, or takes subject to;

(II) A security interest on the unit which has priority over all other security interests on the unit and which was recorded before the date on which the assessment sought to be enforced became delinquent, or, in a cooperative, a security interest encumbering only the unit owner's interest which has priority over all other security interests on the unit and which was perfected before the date on which the assessment sought to be enforced became delinquent; and

(III) Liens for real estate taxes and other governmental assessments or charges against the unit or cooperative.

(b) Subject to paragraph (d) of this subsection (2), a lien under this section is also prior to the security interests described in subparagraph (II) of paragraph (a) of this subsection (2) to the extent of:

(I) An amount equal to the common expense assessments based on a periodic budget adopted by the association under section 38-33.3-315 (1) which would have become due, in the absence of any acceleration, during the six months immediately preceding institution by either the association or any party holding a lien senior to any part of the association lien created under this section of an action or a nonjudicial foreclosure either to enforce or to extinguish the lien.

(II) (Deleted by amendment, L. 93, p. 653, § 21, effective April 30, 1993.)

(c) This subsection (2) does not affect the priority of mechanics' or materialmen's liens or the priority of liens for other assessments made by the association. A lien under this section is not subject to the provisions of part 2 of article 41 of this title or to the provisions of section 15-11-201, C.R.S.

(d) The association shall have the statutory lien described in subsection (1) of this section for any assessment levied or fine imposed after June 30, 1992. Such lien shall have the priority described in this subsection (2) if the other lien or encumbrance is created after June 30, 1992.

(3) Unless the declaration otherwise provides, if two or more associations have liens for assessments created at any time on the same property, those liens have equal priority.

(4) Recording of the declaration constitutes record notice and perfection of the lien. No further recordation of any claim of lien for assessments is required.

(5) A lien for unpaid assessments is extinguished unless proceedings to enforce the lien are instituted within six years after the full amount of assessments become due.

(6) This section does not prohibit actions or suits to recover sums for which subsection (1) of this section creates a lien or to prohibit an association from taking a deed in lieu of foreclosure.

(7) The association shall be entitled to costs and reasonable attorney fees incurred by the association in a judgment or decree in any action or suit brought by the association under this section.

(8) The association shall furnish to a unit owner or such unit owner's designee or to a holder of a security interest or its designee upon written request, delivered personally or by certified mail, first-class postage prepaid, return receipt, to the association's registered agent, a written statement setting forth the amount of unpaid assessments currently levied against such owner's unit. The statement shall be furnished within fourteen calendar days after receipt of the request and is binding on the association, the executive board, and every unit owner. If no statement is furnished to the unit owner or holder of a security interest or his or her designee, delivered personally or by certified mail, first-class postage prepaid, return receipt requested, to the inquiring party, then the association shall have no right to assert a lien upon the unit for unpaid assessments which were due as of the date of the request.

(9) In any action by an association to collect assessments or to foreclose a lien for unpaid assessments, the court may appoint a receiver of the unit owner to collect all sums alleged to be due from the unit owner prior to or during the pending of the action. The court may order the receiver to pay any sums held by the receiver to the association during the pending of the action to the extent of the association's common expense assessments.

(10) In a cooperative, upon nonpayment of an assessment on a unit, the unit owner may be evicted in the same manner as provided by law in the case of an unlawful holdover by a commercial tenant, and the lien may be foreclosed as provided by this section.

(11) The association's lien may be foreclosed by any of the following means:

(a) In a condominium or planned community, the association's lien may be foreclosed in like manner as a mortgage on real estate.

(b) In a cooperative whose unit owners' interests in the units are real estate as determined in accordance with the provisions of section 38-33.3-105, the association's lien must be foreclosed in like manner as a mortgage on real estate.

(c) In a cooperative whose unit owners' interests in the units are personal property, as determined in accordance with the provisions of section 38-33.3-105, the association's lien must be foreclosed as a security interest under the "Uniform Commercial Code", title 4, C.R.S.

**Source:** L. 91: Entire article added, p. 1753, § 1, effective July 1, 1992. L. 93: (1), (2)(b), (4), and (8) amended and (2)(d) added, p. 653, § 21, effective April 30. L. 98: (1) amended, p. 485, § 19, effective July 1.

#### ANNOTATION

Where an association is misnamed in its recorded lien statement, the misnomer does not affect its right to foreclose, because this section does not require an association to record a statement to perfect the statutory lien. In the absence of evidence that the misnomer frustrated the identification of the association or caused confusion to the defendants, the association is entitled to foreclose the lien. *Sunstone at Colo. Springs Homeowners Ass'n v. White*, 56 P.3d 127 (Colo. App. 2002).

In addition to common expense assessments, a special priority lien held by a homeowners' association under subsection (2)(b)(I) may include late charges, attorney fees, fines, and interest. *First Atl. Mortgage v. Sunstone N. Homeowners Ass'n*, 121 P.3d 254 (Colo. App. 2005).

Upon foreclosure by the lender, condominium association's lien for unpaid assessments was senior to that of the lender's first deed of trust to the extent of six months of assess-



**ments.** The association has a super-priority lien over the lender's otherwise senior deed of trust in the event of a foreclosure commenced by the association or the lender, which lien is limited to delinquent assessments accruing within six months of the initiation of foreclosure proceedings. Further, the association's super-priority

lien includes interest, charges, late charges, fines, and attorney fees so long as the total does not exceed the limit. *BA Mortg. v. Quail Creek Condo. Ass'n*, 192 P.3d 447 (Colo. App. 2008).

**Applied** in *BA Mortg. v. Quail Creek Condo. Ass'n*, 192 P.3d 447 (Colo. App. 2008).

**38-33.3-316.5. Time share estate - foreclosure - definitions.** (1) As used in this section, unless the context otherwise requires:

(a) "Junior lienor" has the same meaning as set forth in section 38-38-100.3 (12), C.R.S.

(b) "Obligor" means the person liable for the assessment levied against a time share estate pursuant to section 38-33.3-316 or the record owner of the time share estate.

(c) "Time share estate" has the same meaning as set forth in section 38-33-110 (5).

(2) A plaintiff may commence a single judicial foreclosure action pursuant to section 38-33.3-316 (11), joining as defendants multiple obligors with separate time share estates and the junior lienors thereto, if:

(a) The judicial foreclosure action involves a single common interest community;

(b) The declaration giving rise to the right of the association to collect assessments creates default and remedy obligations that are substantially the same for each obligor named as a defendant in the judicial foreclosure action;

(c) The action is limited to a claim for judicial foreclosure brought pursuant to section 38-33.3-316 (11); and

(d) The plaintiff does not allege, with respect to any obligor, that the association's lien is prior to any security interest described in section 38-33.3-316 (2) (a) (II), even if such a claim could be made pursuant to section 38-33.3-316 (2) (b) (I).

(3) In a judicial foreclosure action in which multiple obligors with separate time share estates and the junior lienors thereto have been joined as defendants in accordance with this section:

(a) In addition to any other circumstances where severance is proper under the Colorado rules of civil procedure, the court may sever for separate trial any disputed claim or claims;

(b) If service by publication of two or more defendants is permitted by law, the plaintiff may publish a single notice for all joined defendants for whom service by publication is permitted, so long as all information that would be required by law to be provided in the published notice as to each defendant individually is included in the combined published notice. Nothing in this paragraph (b) shall be interpreted to allow service by publication of any defendant if service by publication is not otherwise permitted by law with respect to that defendant.

(c) The action shall be deemed a single action, suit, or proceeding for purposes of payment of filing fees, notwithstanding any action by the court pursuant to paragraph (a) of this subsection (3), so long as the plaintiff complies with subsection (2) of this section.

(4) Notwithstanding that multiple obligors with separate time share estates may be joined in a single judicial foreclosure action, unless otherwise ordered by the court, each time share estate foreclosed pursuant to this section shall be subject to a separate foreclosure sale, and any cure or redemption rights with respect to such time share estate shall remain separate.

(5) The plaintiff in an action brought pursuant to this section is deemed to waive any claims against a defendant for a deficiency remaining after the foreclosure of the lien for assessment and for attorney fees related to the foreclosure action.

**Source:** L. 2008: Entire section added, p. 1522, § 1, effective August 5.

**38-33.3-317. Association records.** (1) (a) The association shall keep financial records sufficiently detailed to enable the association to comply with section 38-33.3-316 (8) concerning statements of unpaid assessments.

(b) The association shall keep as permanent records minutes of all meetings of unit owners and the executive board, a record of all actions taken by the unit owners or executive board by written ballot or written consent in lieu of a meeting, a record of all actions taken by a committee of the executive board in place of the executive board on behalf of the association, and a record of all waivers of notices of meetings of unit owners and of the executive board or any committee of the executive board.

(c) (I) The association or its agent shall maintain a record of unit owners in a form that permits preparation of a list of the names and addresses of all unit owners, showing the number of votes each unit owner is entitled to vote.

(II) Notwithstanding section 38-33.3-117 (1) (I), this paragraph (c) shall not apply to a unit, or the owner thereof, if the unit is a time-share unit, as defined in section 38-33-110 (7).

(d) The association shall maintain its records in written form or in another form capable of conversion into written form within a reasonable time.

(2) (a) Except as otherwise provided in paragraph (b) of this subsection (2), all financial and other records shall be made reasonably available for examination and copying by any unit owner and such owner's authorized agents.

(b) (I) Notwithstanding paragraph (a) of this subsection (2), a membership list or any part thereof may not be obtained or used by any person for any purpose unrelated to a unit owner's interest as a unit owner without consent of the executive board.

(II) Without limiting the generality of subparagraph (I) of this paragraph (b), without the consent of the executive board, a membership list or any part thereof may not be:

(A) Used to solicit money or property unless such money or property will be used solely to solicit the votes of the unit owners in an election to be held by the association;

(B) Used for any commercial purpose; or

(C) Sold to or purchased by any person.

(3) The association may charge a fee, which may be collected in advance but which shall not exceed the association's actual cost per page, for copies of association records.

(4) As used in this section, "reasonably available" means available during normal business hours, upon notice of five business days, or at the next regularly scheduled meeting if such meeting occurs within thirty days after the request, to the extent that:

(a) The request is made in good faith and for a proper purpose;

(b) The request describes with reasonable particularity the records sought and the purpose of the request; and

(c) The records are relevant to the purpose of the request.

(5) In addition to the records specified in subsection (1) of this section, the association shall keep a copy of each of the following records at its principal office:

(a) Its articles of incorporation, if it is a corporation, or the corresponding organizational documents if it is another form of entity;

(b) The declaration;

(c) The covenants;

(d) Its bylaws;

(e) Resolutions adopted by its executive board relating to the characteristics, qualifications, rights, limitations, and obligations of unit owners or any class or category of unit owners;

(f) The minutes of all unit owners' meetings, and records of all action taken by unit owners without a meeting, for the past three years;

(g) All written communications within the past three years to unit owners generally as unit owners;

(h) A list of the names and business or home addresses of its current directors and officers;

(i) Its most recent annual report, if any; and

(j) All financial audits or reviews conducted pursuant to section 38-33.3-303 (4) (b) during the immediately preceding three years.

(6) This section shall not be construed to affect:

(a) The right of a unit owner to inspect records:



(I) Under corporation statutes governing the inspection of lists of shareholders or members prior to an annual meeting; or

(II) If the unit owner is in litigation with the association, to the same extent as any other litigant; or

(b) The power of a court, independently of this article, to compel the production of association records for examination on proof by a unit owner of proper purpose.

(7) This section shall not be construed to invalidate any provision of the declaration, bylaws, the corporate law under which the association is organized, or other documents that more broadly defines records of the association that are subject to inspection and copying by unit owners, or that grants unit owners freer access to such records; except that the privacy protections contained in paragraph (b) of subsection (2) of this section shall supersede any such provision.

**Editor's note:** This version of this section is effective until January 1, 2013.

**38-33.3-317. Association records.** (1) In addition to any records specifically defined in the association's declaration or bylaws or expressly required by section 38-33.3-209.4 (2), the association must maintain the following, all of which shall be deemed to be the sole records of the association for purposes of document retention and production to owners:

(a) Detailed records of receipts and expenditures affecting the operation and administration of the association;

(b) Records of claims for construction defects and amounts received pursuant to settlement of those claims;

(c) Minutes of all meetings of its unit owners and executive board, a record of all actions taken by the unit owners or executive board without a meeting, and a record of all actions taken by any committee of the executive board;

(d) Written communications among, and the votes cast by, executive board members that are:

(I) Directly related to an action taken by the board without a meeting pursuant to section 7-128-202, C.R.S.; or

(II) Directly related to an action taken by the board without a meeting pursuant to the association's bylaws;

(e) The names of unit owners in a form that permits preparation of a list of the names of all unit owners and the physical mailing addresses at which the association communicates with them, showing the number of votes each unit owner is entitled to vote; except that this paragraph (e) does not apply to a unit, or the owner thereof, if the unit is a time-share unit, as defined in section 38-33-110 (7);

(f) Its current declaration, covenants, bylaws, articles of incorporation, if it is a corporation, or the corresponding organizational documents if it is another form of entity, rules and regulations, responsible governance policies adopted pursuant to section 38-33.3-209.5, and other policies adopted by the executive board;

(g) Financial statements as described in section 7-136-106, C.R.S., for the past three years and tax returns of the association for the past seven years, to the extent available;

(h) A list of the names, electronic mail addresses, and physical mailing addresses of its current executive board members and officers;

(i) Its most recent annual report delivered to the secretary of state, if any;

(j) Financial records sufficiently detailed to enable the association to comply with section 38-33.3-316 (8) concerning statements of unpaid assessments;

(k) The association's most recent reserve study, if any;

(l) Current written contracts to which the association is a party and contracts for work performed for the association within the immediately preceding two years;

(m) Records of executive board or committee actions to approve or deny any requests for design or architectural approval from unit owners;

(n) Ballots, proxies, and other records related to voting by unit owners for one year after the election, action, or vote to which they relate;

(o) Resolutions adopted by its board of directors relating to the characteristics, qualifications, rights, limitations, and obligations of members or any class or category of members; and

(p) All written communications within the past three years to all unit owners generally as unit owners.

(2) (a) Subject to subsections (3), (3.5), and (4) of this section, all records maintained by the association must be available for examination and copying by a unit owner or the owner's authorized agent. The association may require unit owners to submit a written request, describing with reasonable particularity the records sought, at least ten days prior to inspection or production of the documents and may limit examination and copying times to normal business hours or the next regularly scheduled executive board meeting if the meeting occurs within thirty days after the request. Notwithstanding any provision of the declaration, bylaws, articles, or rules and regulations of the association to the contrary, the association may not condition the production of records upon the statement of a proper purpose.

(b) (I) Notwithstanding paragraph (a) of this subsection (2), a membership list or any part thereof may not be obtained or used by any person for any purpose unrelated to a unit owner's interest as a unit owner without consent of the executive board.

(II) Without limiting the generality of subparagraph (I) of this paragraph (b), without the consent of the executive board, a membership list or any part thereof may not be:

(A) Used to solicit money or property unless such money or property will be used solely to solicit the votes of the unit owners in an election to be held by the association;

(B) Used for any commercial purpose; or

(C) Sold to or purchased by any person.

(3) Records maintained by an association may be withheld from inspection and copying to the extent that they are or concern:

(a) Architectural drawings, plans, and designs, unless released upon the written consent of the legal owner of the drawings, plans, or designs;

(b) Contracts, leases, bids, or records related to transactions to purchase or provide goods or services that are currently in or under negotiation;

(c) Communications with legal counsel that are otherwise protected by the attorney-client privilege or the attorney work product doctrine;

(d) Disclosure of information in violation of law;

(e) Records of an executive session of an executive board;

(f) Individual units other than those of the requesting owner; or

(g) The names and physical mailing addresses of unit owners if the unit is a time-share unit, as defined in section 38-33-110 (7), C.R.S.

(3.5) Records maintained by an association are not subject to inspection and copying, and must be withheld, to the extent that they are or concern:

(a) Personnel, salary, or medical records relating to specific individuals; or

(b) Personal identification and account information of members, including bank account information, telephone numbers, electronic mail addresses, driver's license numbers, and social security numbers.

(4) The association may impose a reasonable charge, which may be collected in advance and may cover the costs of labor and material, for copies of association records. The charge may not exceed the estimated cost of production and reproduction of the records.

(5) A right to copy records under this section includes the right to receive copies by photocopying or other means, including the receipt of copies through an electronic transmission if available, upon request by the unit owner.

(6) An association is not obligated to compile or synthesize information.

(7) Association records and the information contained within those records shall not be used for commercial purposes.



**Source:** **L. 91:** Entire article added, p. 1756, § 1, effective July 1, 1992. **L. 2005:** Entire section amended, p. 1387, § 18, effective January 1, 2006. **L. 2006:** (2), (3), (4), and (7) amended, p. 1224, § 13, effective May 26. **L. 2012:** Entire section R&RE, (HB 12-1237), ch. 232, p. 1016, § 1, effective January 1, 2013.

#### ANNOTATION

**Under subsections (1) and (2)(a), an association must make reasonably available records it owns and its agent maintains** even if the association itself does not actually create or

keep the records. *Glenwright v. St. James Place Condo. Ass'n*, 197 P.3d 264 (Colo. App. 2008) (decided prior to the 2005 amendment).

**38-33.3-318. Association as trustee.** With respect to a third person dealing with the association in the association's capacity as a trustee, the existence of trust powers and their proper exercise by the association may be assumed without inquiry. A third person is not bound to inquire whether the association has the power to act as trustee or is properly exercising trust powers. A third person, without actual knowledge that the association is exceeding or improperly exercising its powers, is fully protected in dealing with the association as if it possessed and properly exercised the powers it purports to exercise. A third person is not bound to assure the proper application of trust assets paid or delivered to the association in its capacity as trustee.

**Source:** **L. 91:** Entire article added, p. 1756, § 1, effective July 1, 1992.

**38-33.3-319. Other applicable statutes.** To the extent that provisions of this article conflict with applicable provisions in the "Colorado Business Corporation Act", articles 101 to 117 of title 7, C.R.S., the "Colorado Revised Nonprofit Corporation Act", articles 121 to 137 of title 7, C.R.S., the "Uniform Partnership Law", article 60 of title 7, C.R.S., the "Colorado Uniform Partnership Act (1997)", article 64 of title 7, C.R.S., the "Colorado Uniform Limited Partnership Act of 1981", article 62 of title 7, C.R.S., article 1 of this title, article 55 of title 7, C.R.S., article 33.5 of this title, and section 39-1-103 (10), C.R.S., and any other laws of the state of Colorado which now exist or which are subsequently enacted, the provisions of this article shall control.

**Source:** **L. 91:** Entire article added, p. 1756, § 1, effective July 1, 1992. **L. 93:** Entire section amended, p. 865, § 41, effective July 1, 1994. **L. 97:** Entire section amended, p. 919, § 18, effective January 1, 1998; entire section amended, p. 764, § 37, effective July 1, 1998.

**Editor's note:** Amendments to this section by House Bill 97-1237 and Senate Bill 97-91 were harmonized.

#### PART 4

#### REGISTRATION

**38-33.3-401. Registration - annual fees.** (1) Every unit owners' association organized under section 38-33.3-301 shall register annually with the director of the division of real estate, in the form and manner specified by the director.

(2) (a) Except as otherwise provided in paragraph (b) of this subsection (2), the annual registration shall be accompanied by a fee in the amount set by the director in accordance with section 12-61-111.5, C.R.S., and shall include the information required to be disclosed under section 38-33.3-209.4 (1). The information shall be updated within ninety days of any change, in accordance with section 38-33.3-209.4 (1).

(b) A unit owners' association shall be exempt from the fee, but not the registration requirement, if the association:

(I) Has annual revenues of five thousand dollars or less; or

(II) Is not authorized to make assessments and does not have any revenue.

(3) A registration shall be valid for one year. An association that fails to register, or whose annual registration has expired, is ineligible to impose or enforce a lien for assessments under section 38-33.3-316 or to pursue any action or employ any enforcement mechanism otherwise available to it under section 38-33.3-123 until it is again validly registered pursuant to this section. A lien for assessments previously filed during a period in which the association was validly registered or before registration was required pursuant to this section shall not be extinguished by a lapse in the association's registration, but any pending enforcement proceedings related to such lien shall be suspended, and any applicable time limits tolled, until the association is again validly registered pursuant to this section.

(4) Administratively final determinations by the director of the division of real estate concerning the validity or timeliness of registrations under this section are subject to judicial review pursuant to section 24-4-106 (11), C.R.S.

**Source: L. 2010:** Entire part added, (HB 10-1278), ch. 365, p. 1723, § 5, effective January 1, 2011.

## ARTICLE 33.5

### Cooperative Housing Corporations - Housing for Members

38-33.5-101.	Method of formation - purpose.	housing - stock certificates held by tenant-stockholders.
38-33.5-102.	Requirements for articles of incorporation of cooperative housing corporations.	38-33.5-105. Provisions to be included in proprietary lease or right of tenancy issued by corporation.
38-33.5-103.	Provisions relating to taxes, interest, and depreciation on corporate property.	38-33.5-106. Exemption from securities laws.
38-33.5-104.	Financing of cooperative	

**38-33.5-101. Method of formation - purpose.** Cooperative housing corporations may be formed by any three or more adult residents of this state associating themselves to form a cooperative or nonprofit corporation, pursuant to article 55, 56, or 58 of title 7, C.R.S., or the "Colorado Revised Nonprofit Corporation Act", articles 121 to 137 of title 7, C.R.S. The specified purpose of the entity must be to provide each stockholder in or member of the entity with the right to occupy, for dwelling purposes, a house or an apartment in a building owned or leased by the entity.

**Source: L. 80:** Entire article added, p. 704, § 1, effective July 1. **L. 97:** Entire section amended, p. 764, § 38, effective July 1, 1998. **L. 2011:** Entire section amended, (SB 11-191), ch. 197, p. 820, § 5, effective April 2, 2012.

## ANNOTATION

**Law reviews.** For article, "Rights of First Refusal in Condominium Documents", see 11 Colo. Law. 389 (1982). For symposium on condominium law and practice, see 11 Colo. Law.

2734 (1982). For article, "Cooperative Housing Corporations in Colorado", see 13 Colo. Law. 2013 (1984).

**38-33.5-102. Requirements for articles of incorporation of cooperative housing corporations.** (1) In addition to any other requirements for articles of incorporation imposed by the "Colorado Revised Nonprofit Corporation Act", articles 121 to 137 of title 7, C.R.S., such articles of incorporation shall, in the case of cooperative housing corporations, include the following provisions:

(a) That the corporation shall have only one class of stock outstanding;



(b) That each stockholder is entitled, solely by reason of his ownership of stock in the corporation, to occupy, for dwelling purposes, a house or an apartment in a building owned or leased by the corporation;

(c) That the interest of each stockholder in the corporation shall be inseparable from and appurtenant to the right of occupancy, and shall be deemed an estate in real property for all purposes, and shall not be deemed personal property;

(d) That no stockholder is entitled to receive any distribution not out of earnings and profits of the corporation except on a complete or partial liquidation of the corporation.

**Source:** L. 80: Entire article added, p. 704, § 1, effective July 1. L. 97: IP(1) amended, p. 764, § 39, effective July 1, 1998.

**38-33.5-103. Provisions relating to taxes, interest, and depreciation on corporate property.** (1) The bylaws of a cooperative housing corporation shall provide that no less than eighty percent of the gross income of the corporation in any taxable year shall be derived from payments from tenant-stockholders. For the purposes of this article, "tenant-stockholder" means an individual who is a stockholder in the corporation and whose stock is fully paid when measured by his proportionate share of the value of the corporation's equity in the property.

(2) The bylaws shall further provide that each tenant-stockholder shall be credited with his proportionate payment of real estate taxes paid or incurred in any year on the buildings and other improvements owned or leased by the corporation in which the tenant-stockholder's living quarters are located, together with the land to which such improvements are appurtenant, and likewise with respect to interest paid or incurred by the corporation as well as depreciation on real and personal property which are proper deductions related to the said lands and improvements thereon for purposes of state and federal income taxation.

**Source:** L. 80: Entire article added, p. 705, § 1, effective July 1.

**38-33.5-104. Financing of cooperative housing - stock certificates held by tenant-stockholders.** Stock certificates or membership certificates issued by cooperative housing corporations to tenant-stockholders shall be valid securities for investment by savings and loan associations, when the conditions imposed by section 11-41-119 (13), C.R.S., are met.

**Source:** L. 80: Entire article added, p. 705, § 1, effective July 1. L. 99: Entire section amended, p. 629, § 39, effective August 4.

**38-33.5-105. Provisions to be included in proprietary lease or right of tenancy issued by corporation.** (1) Every stockholder of a cooperative housing corporation shall be entitled to receive from the corporation a proprietary lease or right of tenancy document which shall include the following provisions:

(a) That no sublease in excess of one year, amendment, or modification to such proprietary lease or right of tenancy in the property shall be permitted or created without the lender's prior written consent; and

(b) That the security for a loan against the tenant-stockholder's interest shall be in the nature of a real property security interest, and any default of such loan shall entitle the lender to treat such default in the same manner as a default of a loan secured by real property.

**Source:** L. 80: Entire article added, p. 705, § 1, effective July 1.

#### ANNOTATION

Assessor properly attributed the value of common area residential improvements built on agricultural land to the owner lots of a

common interest community. The attribution comported with the overall scheme of property taxation. *Jet Black, LLC v. Routt County Bd. of*

County Comm'rs, 165 P.3d 744 (Colo. App. 2006).

The phrase in subsection (2) stating that “common elements shall not be separately taxed or assessed” is merely a recognition that the value of common elements is inherently included as a component of each indi-

vidual unit’s total actual value and will be assessed and taxed as part of the unit’s overall assessment and taxation, rather than separately taxed or assessed to the association as was previously done. Manor Vail Condominium Ass’n v. Bd. of Equaliz., 956 P. 2d 654 (Colo. App. 1998).

**38-33.5-106. Exemption from securities laws.** Any stock certificate or other evidence of membership issued by a cooperative housing corporation as an investment in its stock or capital to tenant-stockholders of such corporation is exempt from securities laws contained in article 51 of title 11, C.R.S.

**Source:** L. 80: Entire article added, p. 705, § 1, effective July 1.

ARTICLE 34

Rules of Construction

38-34-101.	General policy regarding titles.	38-34-104.	Death of trustee.
38-34-102.	Official name as part of signature.	38-34-105.	When deed transferred before incorporation.
38-34-103.	Building or use restrictions strictly construed.	38-34-106.	When corporate existence expires.

**38-34-101. General policy regarding titles.** It is the purpose and intention of this article and article 35, part 2 of article 39, and part 1 of article 41 of this title to render titles to real property and every interest therein more secure and marketable, and it is declared to be the policy in this state that this article and all other laws concerning or affecting title to real property and every interest therein and all recorded instruments, decrees, and orders of courts of record, including all proceedings in the suits or causes wherein such orders or decrees have been entered or rendered, shall be liberally construed with the end in view of rendering such titles absolute and free from technical defects so that subsequent purchasers and encumbrancers by way of mortgage, judgment, or otherwise may rely on the record title and so that the record title of the party in possession is sustained and not defeated by technical or strict constructions.

**Source:** L. 27: p. 605, § 44. CSA: C. 40, § 151. CRS 53: § 118-8-1. C.R.S. 1963: § 118-8-1. L. 92: Entire section amended, p. 2185, § 65, effective June 2.

ANNOTATION

**Law reviews.** For an article regarding recording of a deed as evidence of delivery, see 7 Dicta 8 (1930). For article, “Curative Statutes of Colorado Respecting Titles to Real Estate”, see 16 Dicta 35 (1939). For article, “A Legislative Pattern for Protection of Real Estate Titles”, see 24 Dicta 9 (1947). For article, “Curative Statutes of Colorado Respecting Titles to Real Estate”, see 26 Dicta 281 (1949). For note, “‘Color of Title’ in the Colorado Short Statutes of Limitation”, see 21 Rocky Mt. L. Rev. 226

(1949). For article, “Summary of Denver Bar-Sponsored Bills Passed by General Assembly”, see 28 Dicta 173 (1951). For note, “The Effect of Tax Titles upon Easements and Restrictions Upon the Use of Land in Colorado”, see 33 Dicta 228 (1956).  
**Applied** in Birkby v. Wilson, 92 Colo. 281, 19 P.2d 490 (1933); Rock v. Fastenau, 122 Colo. 41, 219 P.2d 781 (1950); Fees-Krey, Inc. v. Page, 42 Colo. App. 8, 591 P.2d 1339 (1978).

**38-34-102. Official name as part of signature.** Where, from the body of an instrument, it is apparent that a person is conveying or is acting in some official or representative



capacity and the signature to the instrument omits the statement of the official or representative capacity, it shall be presumed that the official or representative capacity is a part of the signature.

**Source:** L. 27: p. 605, § 45. CSA: C. 40, § 152. CRS 53: § 118-8-2. C.R.S. 1963: § 118-8-2.

**38-34-103. Building or use restrictions strictly construed.** Building restrictions and all restrictions as to the use or occupancy of real property shall be strictly construed, and restrictions which provide for the forfeiture or defeasance of title to or an interest in real property because of the violation of the restrictions on other real property and if the parcels of real property are owned by different persons or individuals shall be construed as applying only to the property embraced in the restriction and owned by the party on whose property the violation of the restriction occurred.

**Source:** L. 27: p. 606, § 46. CSA: C. 40, § 153. CRS 53: § 118-8-3. C.R.S. 1963: § 118-8-3.

#### ANNOTATION

**Law reviews.** For note, "The Effect of Tax Titles Upon Easements and Restrictions Upon the Use of Land in Colorado", see 33 Dicta 228 (1956). For article, "Subdivision", see 28 Rocky Mt. L. Rev. 471 (1956).

Under this section, any doubt relative to the meaning and application of a covenant must be resolved in favor of unrestricted use of property and all restrictions relative to the use or occupancy of real property must be strictly construed. Covenant provision that allowed "two horses or bovine animals to be kept on a lot of five or less acres" did not prohibit

sheep from being maintained on such a lot. *Dunne v. Shenandoah Homeowners Ass'n, Inc.*, 12 P.3d 340 (Colo. App. 2000).

**Phrase "single-family dwelling" in restrictive covenant is a structural restriction and not a use restriction.** *Double D Manor v. Evergreen Meadows*, 773 P.2d 1046 (Colo. 1989).

**Use of single-family dwelling as group home for developmentally disabled children is a residential use** and does not violate residential use requirement of restrictive covenant. *Double D Manor v. Evergreen Meadows*, 773 P.2d 1046 (Colo. 1989).

**38-34-104. Death of trustee.** Upon the death of a sole trustee or the surviving trustee of an express trust created by any written instrument affecting title to real property, the trust shall not descend to the heirs of such trustee nor pass to his personal representative, but the trust if then unexecuted shall vest in the then public trustee and his successors in office of the county wherein the real estate is situate, with all powers of the original trustee. The district court may, upon application of any party in interest, appoint a new trustee except in such cases where by law or by the instrument a successor in trust is provided, and in such cases the trust shall vest in such successor.

**Source:** L. 27: p. 606, § 48. CSA: C. 40, § 155. CRS 53: § 118-8-5. C.R.S. 1963: § 118-8-5.

**Cross references:** For succession of title to property held in trust for churches or religious societies, see § 7-52-105.

#### ANNOTATION

**Law reviews.** For article, "Title to Colorado Real Property Held in Trust", see 31 Colo. Law. 85 (May 2002).

**38-34-105. When deed transferred before incorporation.** If at the time of the delivery of a deed describing the grantee as a corporation no incorporation papers have been

filed and if thereafter proper incorporation papers are filed, the title to the real property shall vest in the grantee as soon as the grantee is incorporated and no other instrument of conveyance shall be required. As to all such conveyances executed prior to March 28, 1927, it shall be conclusively presumed that the title vested in the incorporators in trust for the grantee and that said incorporators properly conveyed the real property to the grantee when the grantee was incorporated unless within one year from March 28, 1927, there is filed in the office of the proper recorder a written explanation or statement of the transaction signed and acknowledged by the proper parties.

**Source:** L. 27: p. 607, § 49. CSA: C. 40, § 156. CRS 53: § 118-8-6. C.R.S. 1963: § 118-8-6.

**38-34-106. When corporate existence expires.** When the corporate existence of any corporation having an interest in real property expires and there is an attempted renewal or extension of its corporate existence either within the time provided for by law or thereafter, a conveyance thereafter by such purported corporation vests in the grantee the interest of the former corporation, and where such cases have occurred prior to March 28, 1927, the title or interest so conveyed shall be presumed to have been properly passed to the grantee.

**Source:** L. 27: p. 607, § 50. CSA: C. 40, § 157. CRS 53: § 118-8-7. C.R.S. 1963: § 118-8-7.

**Conveyancing and Evidence of Title**

**ARTICLE 35**

**Conveyancing and Recording**

**PART 1**

**GENERAL PROVISIONS**

38-35-101.	Acknowledgments - form - prima facie evidence.	38-35-110.
38-35-102.	When unacknowledged instruments prima facie evidence.	38-35-111.
38-35-103.	Acknowledgment before notary.	38-35-112.
38-35-104.	Acknowledged instruments as evidence.	38-35-113.
38-35-105.	Foreign instruments, prima facie evidence.	38-35-114.
38-35-106.	Deeds - acknowledgment, absent or defective - notice - deemed proper, when.	38-35-115.
38-35-106.5.	Written instruments - information regarding property description.	38-35-116.
38-35-107.	Recitals in deeds prima facie evidence - when.	38-35-117.
38-35-108.	Reference to some other instrument affects only the parties thereto.	38-35-118.
38-35-109.	Instrument may be recorded - validity of unrecorded instruments - liability for fraudulent documents.	38-35-119.
38-35-109.5.	Recording of instruments con-	38-35-120.
		38-35-121.

veying real property to public entities.
Lis pendens as notice - issuance of certificate - expiration.
Option to purchase - notice for one year only.
Certificate of death when properly recorded may be admitted as evidence.
Affidavits referring to death, intestacy, heirship, accepted as prima facie evidence.
Actions - parties to be named.
Execution by foreign representative of instrument regarding real estate prior to filing certified copies of order of appointment.
Variances in names in instruments affecting the title to real property.
Mortgages, not a conveyance - lien theory.
Homestead, how conveyed - claimant insane.
Release not a conveyance.
Record of first and last parcels includes intervening parcels.
Conveyance or reservation of a



	mineral interest - geothermal resources.		residential transfer fee covenants - notice requirements for existing residential transfer fee covenants - written statement of transfer fee payable - affidavit - legislative declaration - definitions.
38-35-122.	Inclusion of street address and assessor information with legal description.		
38-35-123.	Liens - notice - current address.		
38-35-124.	Requirements upon satisfaction of indebtedness.		
38-35-124.5.	Effect of written payoff statement.		PART 2
38-35-125.	Closing and settlement services - disbursement of funds.		SPURIOUS LIENS AND DOCUMENTS
38-35-126.	Contract for deed - escrow of tax moneys - written notice.	38-35-201.	Definitions.
38-35-127.	Unenforceability of prospective	38-35-202.	Recording or filing.
		38-35-203.	Action to enforce.
		38-35-204.	Order to show cause.

PART 1

GENERAL PROVISIONS

**38-35-101. Acknowledgments - form - prima facie evidence.** (1) No officer authorized to take acknowledgments of instruments affecting title to real property shall take or certify such acknowledgments unless the person making the same is personally known to such officer to be the identical person he represents himself to be or is proved to be such by at least one credible person known to such officer. It shall not be necessary to state such fact in his certificate of acknowledgment attached to any instrument affecting title to real property.

(2) Any deed or other instrument relating to or affecting title to real property acknowledged substantially in accordance with the following form before a proper official shall be prima facie evidence of the proper execution thereof:

STATE OF COLORADO )  
 ) ss.  
County of ..... )

The foregoing instrument was acknowledged before me this ..... day of ....., 20...., by .....  
(if by natural person or persons, insert name or names; if by person acting in representative or official capacity or as attorney-in-fact, insert name of person as executor, attorney-in-fact, or other capacity or description; if by officer of corporation, insert name of such officer or officers as the president or other officers of such corporation, naming it). If acknowledgment is taken by a notary public, the date of expiration of his commission shall also appear on the certificate.

Witness my hand and official seal.

.....  
Title of Officer

(3) As to any instrument acknowledged substantially in accordance with the above form of acknowledgment, such acknowledgment shall be prima facie evidence:

(a) That the person named therein as acknowledging the instrument appeared in person before the official taking the acknowledgment and was personally known to such official to be the person whose name was subscribed to the instrument and that such person acknowledged that he signed the instrument as his free and voluntary act for the uses and purposes therein set forth;

(b) If the acknowledgment is by a person in a representative or official capacity, that the person acknowledging the instrument acknowledged it to be his free and voluntary act in such capacity or as the free and voluntary act of the principal, person, or entity represented;

(c) If the person acknowledging is an officer of a corporation, that such person was known to the official taking the acknowledgment to be such corporate officer and that the instrument was executed and acknowledged by such corporate officer, with proper authority from the corporation, as the act of such corporation;

(d) If the persons acknowledging are directors, trustees, or managers of a dissolved or expired corporation, acting last before the time of the dissolution or expiration of such corporation, or the survivors of them, that such persons were such corporate directors, trustees, or managers, or the survivors of them, and that the instrument was executed and acknowledged by them with proper authority;

(e) If the person acknowledging is a partner, that such person was such partner and that the instrument was executed and acknowledged by such partner with proper authority from such partnership as the act of such partnership.

(4) If such instrument has been acknowledged in the manner provided in this section and has been recorded in the office of the proper county clerk and recorder, it shall also be prima facie evidence of due delivery of such instrument, irrespective of the length of time that may have elapsed between the date of such instrument and the date when such instrument was so recorded. The provisions of this section shall relate and apply to all instruments which have been executed prior to May 4, 1937, as well as to all instruments which are executed after said date, irrespective of whether such instruments have been acknowledged before or after said date and irrespective of whether such instruments are recorded before or after said date.

(5) The seal required to be affixed to a deed or other instrument under the provisions of this section may consist of a rubber stamp with a facsimile affixed thereon of the seal required to be used and may be placed or stamped upon the deed or other instrument requiring the seal with indelible ink.

**Source:** L. 27: p. 585, § 1. CSA: C. 40, § 107. L. 37: p. 477, § 1. L. 39: p. 289, § 1. CRS 53: § 118-6-1. L. 55: p. 721, § 1. C.R.S. 1963: § 118-6-1. L. 75: (5) added, p. 489, § 7, effective July 14.

**Cross references:** For who may take acknowledgments, see § 38-30-126; for specification for notary public's seal and showing of expiration of commission, see § 12-55-112.

## ANNOTATION

**Law reviews.** For article on the recording of a deed as evidence of delivery, see 7 Dicta 8 (1930). For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 16 Dicta 35 (1939). For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 16 Dicta 71 (1940). For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 Dicta 281 (1949). For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 Dicta 321 (1949). For article, "Evidence in the Proof of Real Estate Titles", see 24 Rocky Mt. L. Rev. 424 (1952). For article, "Highlights of the 1955 Colorado Legislative Session—Real Property", see 28 Rocky Mt. L. Rev. 58 (1955). For article, "Survey of Title Irregularities, Curative Statutes and Title Standards in Colorado", see 35 U. Colo. L. Rev. 21 (1962). For article, "Signatures on Documents Affecting Title to Colorado Real Property — Parts I and III", see 12 Colo. Law. 61 and 447 (1983).

**Purpose of this article is to make real estate titles more safe, secure and marketable.** To this

end a liberal construction is required and in interpreting this article, it is necessary to construe its various sections harmoniously. *Birkby v. Wilson*, 92 Colo. 281, 19 P.2d 490 (1933).

One of the purposes of recording acts is the avoidance of secret liens and consequent frauds attendant upon them. *Moore v. Chalmers-Galloway Live Stock Co.*, 90 Colo. 548, 10 P.2d 950 (1933).

**Legislative intent.** When the General Assembly provided for the short form of acknowledgment as a substitute for the long form, it was a substitution for all purposes, and it is not intended that the long form of acknowledgment should bestow certain advantages not conferred by the short form. *Rock v. Fastenau*, 122 Colo. 41, 219 P.2d 781 (1950).

**Acknowledgement not required for effective conveyance.** Unless there is an express statutory provision to the contrary a deed of real estate to be effective as a conveyance or transfer of real estate, as between grantor and grantee, need not be acknowledged at all. *Am. Nat'l Bank v. Silverthorn*, 87 Colo. 345, 287 P. 641 (1930).



**Innocent subsequent purchasers are protected.** The rights of innocent subsequent purchasers of property conveyed by an unacknowledged instrument may be protected, but not the privies in estate of the grantor. *Am. Nat'l Bank v. Silverthorn*, 87 Colo. 345, 287 P. 641 (1930).

**Section inapplicable to acknowledgment of articles of incorporation.** Neither the provisions of this section as to the acknowledgment of deeds, nor the reasons therefor, apply to the acknowledgment of articles of incorporation. *People ex rel. Bernard v. Cheeseman*, 7 Colo. 376, 3 P. 716 (1884).

**When proof of identity unnecessary.** It is not necessary to prove the identity to the certifying officer, of one making acknowledgment of the execution of a deed, when the officer has knowledge of the identity from a source that satisfies his conscience: as through introduction by a mutual friend. *Nippel v. Hammond*, 4 Colo. 211 (1878).

**Acknowledgment of deed by corporate secretary is prima facie proof.** The acknowledgment by the secretary of a corporation's deed is prima facie proof that the note and mortgage were signed by the proper officers and the seal attached to the mortgage is the corporate seal of the company, in accordance with this section. *Bliss v. Harris*, 38 Colo. 72, 87 P. 1076 (1906).

**Possession of duly acknowledged deed is presumptive evidence of delivery.** Possession of a duly acknowledged and recorded deed is presumptive evidence of its delivery, and the burden is upon a party asserting nondelivery to prove that fact. *White v. White*, 149 Colo. 166, 368 P.2d 417 (1962).

Presumption of delivery arises from recordation of a deed. *Carmack v. Place*, 188 Colo. 303, 535 P.2d 197 (1975).

**Once acknowledgement and recording of deed is established, burden shifts to opponent to prove nondelivery.** *Jacquez v. Jacquez*, 694 P.2d 1292 (Colo. App. 1984).

**Presumption of delivery relates back to date of deed's execution.** Upon recording, the rebuttable presumption of delivery arising from recordation relates back to the date of the execution of the deed. *Carmach v. Place*, 188 Colo. 303, 535 P.2d 197 (1975).

When a deed is properly recorded, a rebuttable presumption of due delivery arises which relates back to the date of execution of the deed, and the burden shifts to the opponent to demonstrate non-delivery. *Brown v. Bd. of County Comm'rs*, 720 P.2d 579 (Colo. App. 1985).

**The presumption that delivery relates back to the date of the deed's execution is rebuttable,** and therefore where a mineral deed was held in escrow pending full payment, there could be no earlier delivery than the date the deed was released from escrow. *Tuttle v. Burrows*, 852 P.2d 1314 (Colo. App. 1992).

**Section includes treasurer's deeds.** This section is sufficiently broad to include treasurer's deeds. *Colpitts v. Fastenau*, 117 Colo. 594, 192 P.2d 524 (1948).

**Applied in** *Cody v. Butterfield*, 1 Colo. 377 (1871); *Consolidated Gregory Co. v. Raber*, 1 Colo. 511 (1872); *McCraw v. Welch*, 2 Colo. 284 (1874); *Cowell v. Colo. Springs Co.*, 3 Colo. 82 (1876); *Knight v. Lawrence*, 19 Colo. 425, 36 P. 242 (1894); *Monroe v. Monroe*, 99 Colo. 401, 63 P.2d 459 (1936); *Grusing v. Parke*, 120 Colo. 555, 212 P.2d 102 (1949); *Winslett v. Rozan*, 279 F.2d 654 (10th Cir. 1960).

**38-35-102. When unacknowledged instruments prima facie evidence.** (1) When an instrument, which by its terms constitutes a promise or obligation for the payment of money and also by its terms gives or creates or purports to give or to create a lien upon real estate as security for the payment of such money, at the time that such instrument has been filed for record in the office of the county clerk and recorder of the county in which said real estate is situate, irrespective of whether such recording is the original recording of such instrument or a recording of such instrument subsequent to its original recording, bears upon its face or upon its back an assignment, transfer, or endorsement thereof, such instrument and such assignment, transfer, or endorsement thereof or the recorded copy of such instrument and of such assignment, transfer, or endorsement thereof or a certified copy of the recorded copy of said instrument and of such assignment, transfer, or endorsement thereof certified by the county clerk and recorder shall be admissible in evidence as and shall constitute prima facie evidence of such transfer, assignment, or endorsement of such instrument from the person whose purported signature is affixed to such assignment, transfer, or endorsement to the person named in such assignment, transfer, or endorsement as the assignee, transferee, or endorsee of such instrument, irrespective of whether or not such assignment, transfer, or endorsement has been acknowledged in the manner provided by law for the acknowledgment of instruments relating to or affecting title to real property or acknowledged at all.

(2) The provisions of this section shall relate and apply to all of such instruments which have been executed prior to May 4, 1937, as well as to all such instruments executed after said date, irrespective of whether said assignments, transfers, or endorsements were

executed before or after May 4, 1937, and irrespective of whether such instruments and such assignments, transfers, and endorsements thereof were recorded before or after said date.

**Source:** L. 37: p. 479, § 2. CSA: C. 40, § 107(1). CRS 53: § 118-6-2. C.R.S. 1963: § 118-6-2.

#### ANNOTATION

**Law reviews.** For comment, "Water: State-wide or Local Concern? City of Thornton v. Farmers Reservoir & Irrigation Co., 194 Colo. 526, 575 P.2d 382 (1978)", see 56 Den. L. J. 625 (1979).

**Deed with improperly authenticated acknowledgment inadmissible.** Where the deed was acknowledged before a justice of the peace in a different county from that in which the claim is situated, and no certificate to the official character of the officer taking the acknowledgment, or to the genuineness of his signature, was attached, as required by subsection (1), nor was any other proof of the due execution of the deed offered, the acknowledgment of this deed was not properly authenticated, and the deed is not admissible into evidence without further proof of its execution. McGinnis v. Egbert, 8 Colo. 41, 5 P. 652 (1884).

**Deed properly admitted absent objection to proof of execution.** Where an objection to the admissibility of the deed went only to the want of a proper acknowledgment, and did not go to the fact that the execution of the instrument had not been otherwise proved in the manner required by the rules of evidence applicable to such a writing, the deed, not having been objected to on this ground, was properly admitted. Lambert v. Murray, 52 Colo. 156, 120 P. 415 (1911).

**Applied in** Holladay v. Dailey, 1 Colo. 460 (1872); Owers v. Olathe Silver Mining Co., 6 Colo. App. 1, 39 P. 980 (1895); Edson-Keith & Co. v. Bedwell, 52 Colo. 310, 122 P. 392 (1912); Milwaukee Gold Mining Co. v. Tomkins-Christy Hdwe. Co., 26 Colo. App. 155, 141 P. 527 (1914).

**38-35-103. Acknowledgment before notary.** In addition to the officers empowered by law to take acknowledgments within or without the United States, deeds and other instruments in writing may be acknowledged before any notary public having a notarial seal.

**Source:** L. 27: p. 587, § 2. CSA: C. 40, § 108. CRS 53: § 118-6-3. C.R.S. 1963: § 118-6-3.

#### ANNOTATION

**Law reviews.** For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 Dicta 281 (1949). For article, "Signa-

tures on Documents Affecting Title to Colorado Real Property — Part I", see 12 Colo. Law. 61 (1983).

**38-35-104. Acknowledged instruments as evidence.** All deeds, powers of attorney, agreements, or other instruments in writing conveying, encumbering, or affecting the title to real property, acknowledged or proved in accordance with this article or acknowledged, attested, or proved in accordance with the laws of this state or the local laws of the mining district wherein such real property is situate, in force at the date of such acknowledgment, attestation, or proof, may be read in evidence without further proof of the execution thereof. The record of any such deed, power of attorney, agreement, or other instrument in writing, whether an original record of any mining district or a copy thereof deposited in the county clerk and recorder's office of any county in accordance with the laws of this state as a part of the records of such mining district or a record of such county clerk and recorder's office when the same appears by such record to be properly acknowledged, attested, or proved in accordance with the laws of this state or of the proper mining district in force at the date of such acknowledgment, attestation, or proof, or a transcript from any such record certified by the county clerk and recorder of the proper county where such deed, power of attorney,



or agreement made by law is recorded may be read in evidence with like effect as the original of such deed, agreement, power of attorney, or other instrument in writing, properly acknowledged, attested, or proved as provided in this article.

**Source:** L. 27: p. 587, § 3. CSA: C. 40, § 109. CRS 53: § 118-6-4. C.R.S. 1963: § 118-6-4.

#### ANNOTATION

**Law reviews.** For article, "Evidence in the Proof of Real Estate Titles", see 24 Rocky Mt. L. Rev. 424 (1952). For article, "Signatures on Documents Affecting Title to Colorado Real Property — Part I", see 12 Colo. Law. 61 (1983).

**Advantage of having a deed acknowledged and certified** is that it may be read into evidence without additional proof of its execution. *Knight v. Lawrence*, 19 Colo. 425, 36 P. 242 (1894).

**Deed admissible despite lapse of time.** Where a deed was admittedly signed by grantors and witnessed by their neighbor, on the date shown thereon and was acknowledged before a notary public the following day in statutory form, and some 10 years later, it was filed of record, the deed is therefore admissible in evi-

dence as prima facie proof of its free, voluntary, and proper execution, acknowledgment, and delivery, irrespective of the lapse of time between the date of execution and date of recordation. *Winslett v. Rozan*, 279 F.2d 654 (10th Cir. 1960).

**Deed inadmissible where acknowledgment certificate is nullity.** Where the certificate of acknowledgment is a nullity, and thus afforded no proof of the execution of the deed, unless its execution was otherwise proved, the deed itself, if produced, would be inadmissible in evidence. *Trowbridge v. Addoms*, 23 Colo. 518, 48 P. 535 (1897).

**Applied** in *Sullivan v. Hense*, 2 Colo. 424 (1874); *Eagan v. Mahoney*, 24 Colo. App. 285, 134 P. 156, 174 P. 1119 (1913).

**38-35-105. Foreign instruments, prima facie evidence.** All deeds, powers of attorney, agreements, or other instruments in writing conveying, encumbering, or affecting title to real property in this state purporting to have been acknowledged or proved out of this state before a notary public or other officer empowered by the laws of this state to take acknowledgments, if the form of acknowledgment is in substantial compliance with the laws of the state or territory where taken or in substantial compliance with the requirement of this article, shall be deemed prima facie to have been properly acknowledged or proved before proper officers, and such deeds or other instruments in writing or the record thereof or a certified copy of the record thereof shall be received as prima facie evidence of the execution, acknowledgment, and delivery thereof.

**Source:** L. 27: p. 588, § 4. CSA: C. 40, § 110. CRS 53: § 118-6-5. C.R.S. 1963: § 118-6-5.

#### ANNOTATION

**Law reviews.** For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 Dicta 281 (1949).

**38-35-106. Deeds - acknowledgment, absent or defective - notice - deemed proper, when.** (1) Any written instrument required or permitted to be acknowledged affecting title to real property, whether acknowledged, unacknowledged, or defectively acknowledged, after being recorded in the office of the county clerk and recorder of the county where the real property is situate, shall be notice to all persons or classes of persons claiming any interest in said property.

(2) Any unacknowledged or defectively acknowledged instrument which has remained of record for a period of ten years in such office shall be deemed to have been properly acknowledged. This section shall apply to all recorded instruments.

(3) A document required or permitted to be acknowledged affecting title to real

property that is signed in a person's official capacity by a public trustee, county treasurer, county sheriff, or a deputy of such an official acting for that official that contains the seal of such an official shall be deemed to have been properly acknowledged.

**Source:** L. 27: p. 589, § 5. CSA: C. 40, § 111. L. 37: p. 481, § 3. CRS 53: § 118-6-6. L. 59: p. 641, § 1. C.R.S. 1963: § 118-6-6. L. 2004: (3) added, p. 1371, § 8, effective May 28.

#### ANNOTATION

**Law reviews.** For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 Dicta 281 (1949). For article, "Evidence in the Proof of Real Estate Titles", see 24 Rocky Mt. L. Rev. 424 (1952).

**Failure to search record destroys validity of lack of notice claim.** The trial court erred in

its conclusion that the wife did not need to search the record, because her failure to search the record destroys the validity of her claim that she had no notice or knowledge of the liens, and her failure to establish this constituent of fraud prevents recovery. *Ingels v. Ingels*, 29 Colo. App. 585, 487 P.2d 812 (1971).

**38-35-106.5. Written instruments - information regarding property description.** Except as otherwise provided in this article, any deed, power of attorney, agreement, or other instrument in writing executed and recorded on or after July 1, 1992, which contains a newly created legal description of real property shall include the name and address of the person who created such legal description. Nothing in this section shall affect the validity or recordability of any instrument which is prepared in violation of this section. Nothing in this section shall confer liability upon a person who prepares any instrument which is in violation of this section.

**Source:** L. 92: Entire section added, p. 2107, § 1, effective April 9.

**38-35-107. Recitals in deeds prima facie evidence - when.** All recitals contained in deeds, powers of attorney, agreements, or other instruments in writing conveying, encumbering, or affecting title to real property that have remained of record in the office of the county clerk and recorder of the county where the real property affected is situated for a period of twenty years shall be accepted and received as prima facie evidence of the facts recited therein. This section shall not apply to the recitals, exceptions, and reservations described in section 38-35-108 and affidavits described in section 38-35-109 (5).

**Source:** L. 27: p. 589, § 6. CSA: C. 40, § 112. CRS 53: § 118-6-7. C.R.S. 1963: § 118-6-7. L. 2003: Entire section amended, p. 834, § 2, effective August 6.

#### ANNOTATION

**Law reviews.** For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 Dicta 321 (1949). For article, "Marketable Title: What Certifiable Copies of Court Papers Should Appear of Record?", see 34 Dicta 7 (1957).

**Recital in 1982 amendment to protective covenants cannot, in and of itself, expand or change restrictions on ability to modify contained in 1972 protective covenants.** *West v. Evergreen Highlands Ass'n*, 55 P.3d 151 (Colo. App. 2001).

**38-35-108. Reference to some other instrument affects only the parties thereto.** When a deed or any other instrument in writing affecting title to real property has been recorded and such deed or other instrument contains a recitation of or reference to some other instrument purporting to affect title to said real property, such recitation or reference shall bind only the parties to the instrument and shall not be notice to any other person whatsoever unless the instrument mentioned or referred to in the recital is of record in the county where the real property is situated. Unless the same is so recorded, no person other than the parties to the instrument shall be required to make any inquiry or investigation



concerning such recitation or reference. All such recitations or references contained in deeds and instruments recorded prior to March 28, 1927, shall, after the expiration of one year from March 28, 1927, cease to be notice unless the instrument referred to in said reservation, exception, or reference is actually recorded within said one-year period.

**Source:** L. 27: p. 589, § 7. CSA: C. 40, § 113. CRS 53: § 118-6-8. C.R.S. 1963: § 118-6-8.

#### ANNOTATION

**Law reviews.** For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 Dicta 321 (1949). For article, "Converting a Duplex: Party Wall Declaration and Other Considerations", see 11 Colo. Law. 1201 (1982). For article, "Limitation of Bank's Liabilities in Letters of Credit Agreements", see 15 Colo. Law. 1019 (1986).

**Section limits general rule.** The general rule that recitals in conveyances in the purchaser's chain of title are binding on him has been narrowed in Colorado by this section. Page v. Fees-Krey, Inc., 617 P.2d 1188 (Colo. 1980).

The general rule that a purchaser is bound by recitals in conveyances or other instruments of transfer in the chain of title is narrowed by this section. Gilpin Inv. Co. v. Blake, 712 P.2d 1051 (Colo. App. 1985).

**Description by reference to a prior deed** recorded in the same county is sanctioned by this section. Linville v. Russell, 168 Colo. 459, 452 P.2d 18 (1969).

**Applied** in Rocky Mt. Fuel Co. v. Clayton Coal Co., 110 Colo. 334, 134 P.2d 1062 (1943); Swofford v. Colo. Nat'l Bank, 628 P.2d 184 (Colo. App. 1981).

**38-35-109. Instrument may be recorded - validity of unrecorded instruments - liability for fraudulent documents.** (1) All deeds, powers of attorney, agreements, or other instruments in writing conveying, encumbering, or affecting the title to real property, certificates, and certified copies of orders, judgments, and decrees of courts of record may be recorded in the office of the county clerk and recorder of the county where such real property is situated; except that all instruments conveying the title of real property to the state or a political subdivision shall be recorded pursuant to section 38-35-109.5. No such unrecorded instrument or document shall be valid against any person with any kind of rights in or to such real property who first records and those holding rights under such person, except between the parties thereto and against those having notice thereof prior to acquisition of such rights. This is a race-notice recording statute. In all cases where by law an instrument may be filed in the office of a county clerk and recorder, the filing thereof in such office shall be equivalent to the recording thereof, and the recording thereof in the office of such county clerk and recorder shall be equivalent to the filing thereof.

(1.5) (a) Any person may record in the office of the county clerk and recorder of any county a master form mortgage or master form deed of trust. Such forms shall be entitled to recordation without any acknowledgment or signature; without identification of any specific real property; and without naming any specific mortgagor, mortgagee, trustor, beneficiary, or trustee. Every instrument shall contain on the face of the document "Master form recorded by (name of person causing instrument to be recorded)." The county clerk and recorder shall index such master forms in the grantee index under the name of the person causing it to be recorded.

(b) (1) Any of the provisions of such master form instrument may be incorporated by reference in any mortgage or deed of trust encumbering real estate situated within the state, if such reference in the mortgage or deed of trust states the following:

(A) That the master form instrument was recorded in the county in which the mortgage or deed of trust is offered for record;

(B) The date when recorded and the book and page or pages or reception or index number where such master form was recorded;

(C) That a copy of the provisions of the master form instrument was furnished to the person executing the mortgage or deed of trust; and

(D) If fewer than all of the provisions of the referenced master form are being adopted or incorporated, a statement identifying by paragraph, section, or other specification method which will clearly identify the incorporated provision or provisions, provided that in the

absence of specific designation, the entire referenced master form will be deemed to be incorporated.

(II) The recording of any mortgage or deed of trust which has incorporated by reference any of the provisions of a master form recorded as provided in this section shall have the same effect as if such provisions of such master form had been set forth fully in the mortgage or deed of trust.

(2) All deeds dated after January 1, 1977, and recorded with the county clerk and recorder pursuant to subsection (1) of this section shall include a notation of the legal address of the grantee of the instrument, including road or street address if applicable. Any such deed submitted to the county clerk and recorder lacking such address shall not be recorded and shall be returned to the person requesting the recordation. Acceptance of a deed by the county clerk and recorder in violation of this subsection (2) shall not make such deed invalid. A notation as required in this subsection (2) may be made by a person other than the grantee after the execution of the deed.

(3) Any person who offers to have recorded or filed in the office of the county clerk and recorder any document purporting to convey, encumber, create a lien against, or otherwise affect the title to real property, knowing or having a reason to know that such document is forged or groundless, contains a material misstatement or false claim, or is otherwise invalid, shall be liable to the owner of such real property for the sum of not less than one thousand dollars or for actual damages caused thereby, whichever is greater, together with reasonable attorney fees. Any grantee or other person purportedly benefited by a recorded document that purports to convey, encumber, create a lien against, or otherwise affect the title to real property and is forged or groundless, contains a material misstatement or false claim, or is otherwise invalid who willfully refuses to release such document of record upon request of the owner of the real property affected shall be liable to such owner for the damages and attorney fees provided for in this subsection (3).

(4) Repealed.

(5) (a) An affidavit, executed under penalty of perjury, stating facts enumerated under paragraph (b) of this subsection (5) and made by a person who has actual knowledge of, and is competent to testify in a court of competent jurisdiction about, the facts in such affidavit may affect the title to real property within the state and may be recorded in the office of the county clerk and recorder in the county in which the real property is situated.

(b) When recorded, an affidavit as described in paragraph (a) of this subsection (5), or a certified copy of such affidavit, shall constitute prima facie evidence of one or more of the following facts:

(I) The name, age, identity, residence, or service in the armed forces of any party;

(II) Whether the land embraced in any conveyance or any part of such land or right therein has been in the actual possession of any party or parties within the chain of title;

(III) If furnished by a professional land surveyor as defined in section 12-25-202, C.R.S., a surveyor's affidavit of correction in accordance with section 38-51-111 or a land survey plat in accordance with section 38-51-106, that reconciles conflicts and ambiguities in descriptions of land in recorded instruments;

(IV) A scrivener's error.

(c) An affidavit filed under this subsection (5) shall state that the affiant has actual knowledge of, and is competent to testify to, the facts in the affidavit and shall include a description of the land, the title that may be affected by facts stated in such affidavit, a reference to an instrument of record containing such description, the name of the person appearing by the record to be the owner of such land at the time of the recording of the affidavit, and an acknowledgment that the affiant is testifying under penalty of perjury. The recorder shall index the affidavit in the name of the record owner.

**Source:** L. 27: p. 590, § 8. CSA: C. 40, § 114. CRS 53: § 118-6-9. C.R.S. 1963: § 118-6-9. L. 76: Entire section amended, p. 753, § 2, effective January 1, 1977. L. 80: (1) amended and (3) and (4) added, p. 708, § 1, effective July 1. L. 84: (1) amended, p. 979, § 1, effective July 1. L. 89: (1) amended, p. 348, § 2, effective April 5. L. 96: (1), (3), and (4) amended, p. 1554, § 1, effective July 1. L. 97: (4) repealed, p. 38, § 3, effective March 20; (1) amended, p. 20, § 2, effective July 1. L. 2001: (1.5) added, p. 294,



§ 1, effective July 1. **L. 2003:** (5) added, p. 835, § 3, effective August 6. **L. 2010:** (5)(b)(III) amended, (HB 10-1085), ch. 95, p. 326, § 7, effective August 11.

## ANNOTATION

- I. General Consideration.
- II. Instruments to Which Section Applies.
- III. Notice.
  - A. Record as Notice.
  - B. Notice of Unrecorded Instruments.
- IV. Priorities.
  - A. General Principles.
  - B. Illustrative Cases.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 *Dicta* 321 (1949). For article, "The Perennial Problem of Security Priority and Recordation", see 24 *Rocky Mt. L. Rev.* 180 (1952). For article, "Conclusiveness of United States Oil Shale Placer Mining Claim Patents", see 43 *Den. L. Ctr. J.* 24 (1966). For note, "Creditor's Rights in Colorado and the Federal Tax Lien Act of 1966", see 40 *U. Colo. L. Rev.* 433 (1968). For comment on *Eastwood v. Shedd*, 166 *Colo.* 136, 442 P.2d 423 (1968), appearing below, see 41 *U. Colo. L. Rev.* 290 (1969). For note, "The Colorado Recording Act: Race-Notice or Pure Notice?", see 51 *Den. L.J.* (1974). For article, "Race Notice or Pure Notice", see 13 *Colo. Law.* 1405 (1984). For article, "Unrecorded PUD Plans: On the Frontier of Due Diligence", see 19 *Colo. Law.* 1089 (1990). For article, "The Colorado Recording Act - Part I: History and Character of the Act", see 24 *Colo. Law.* 1329 (1995). For article, "The Colorado Recording Act - Part II: Notice Under the Recording Act", see 24 *Colo. Law.* 1573 (1995). For article, "The Colorado Recording Act - Part III: Priority of Recording", see 24 *Colo. Law.* 2209 (1995).

**This section is constitutional**, and does not violate the 14th amendment to federal constitution. *Moore v. Chalmers-Galloway Live Stock Co.*, 90 *Colo.* 548, 10 P.2d 950 (1932).

**Term "purporting" in subsection (3)** is not unconstitutionally vague. *People v. Forgey*, 770 P.2d 781 (Colo. 1989).

**The intent of the general assembly in enacting this section was to halt the filing of invalid liens against real property.** *Turkey Creek L.L.C. v. Anglo Am. Consol. Corp.*, 43 P.3d 701 (Colo. App. 2001).

**Evident purpose of this section** is to provide an effectual remedy against the loss accruing to subsequent purchasers of real estate arising from the existence of secret or concealed conveyances thereof unknown to the subsequent purchaser. *Hallett v. Alexander*, 50 *Colo.* 37, 114 P.

490, (1911); *Lewin v. Telluride Iron Works Co.*, 272 F. 590 (8th Cir. 1921).

Recording acts have been enacted in response to a need to provide protection for purchasers of real property against the risk of prior secret conveyances by the seller. *Page v. Fees-Krey, Inc.*, 617 P.2d 1188 (Colo. 1980).

This section was not enacted for the benefit of lienholders and the owners of incumbrances upon real estate only, but for all bona fide purchasers as well. *McMurtrie v. Riddell*, 9 *Colo.* 497, 13 P. 181 (1886).

**The last sentence in subsection (3) was intended to facilitate the quick withdrawal of an unjustified lien filed in the name of someone other than the individual who had recorded the document.** *Dahl v. Young*, 862 P.2d 969 (Colo. App. 1993).

**Applicability of section.** This section applies to a deed which was theretofore executed but withheld from record eight years before the statute became operative and two years after the passage of the act. *Moore v. Chalmers-Galloway Live Stock Co.*, 90 *Colo.* 548, 10 P.2d 950 (1932).

The recording act applies to an instrument creating an overriding royalty carved out of the working interest in an oil and gas lease. *Page v. Fees-Krey, Inc.*, 617 P.2d 1188 (Colo. 1980).

**How protection effected.** The protection of subsequent purchasers is effected by requiring every deed to be recorded before it can be of any effect as against such purchasers. *Hallett v. Alexander*, 50 *Colo.* 37, 114 P. 490 (1911); *Lewin v. Telluride Iron Works Co.*, 272 F. 590 (8th Cir. 1921).

**This section is not abrogated by the stolen property statute.** There is no recovery under the stolen property statute against a good faith purchaser who holds record title to real property, even if the real property was earlier conveyed under fraudulent circumstances. *Strekal v. Espe*, 114 P.3d 67 (Colo. App. 2004).

**"Groundless document" as used in this section means** one for which there is no rational basis in fact or law to support a proponent's claim. *Int'l Tech. Instruments, Inc. v. Eng'g Measurement Co.*, 678 P.2d 558 (Colo. App. 1983); *Harris v. Hanson*, 821 P.2d 821 (Colo. App. 1991).

Claim of purchaser under a contract for the purchase and sale of property was groundless where purchaser refused to close on property for the agreed purchase price knowing or having reason to know at the time of recording the contract for purchase and sale as a lien that the filing presented a false claim to purchase the

property. *Harris v. Hanson*, 821 P.2d 821 (Colo. App. 1991); *Hohn v. Morrison*, 870 P.2d 513 (Colo. App. 1993).

**Although “willful” has not been defined within the context of this section** it is appropriate to give it its plain and ordinary meaning. Malicious intent is not required for willfulness. Nor must the offending party have actually gained anything by his or her actions. All that is required is that the party acted voluntarily, purposefully, and with a conscious disregard for the consequences of his or her conduct. *Hohn v. Morrison*, 870 P.2d 513 (Colo. App. 1993).

**Filing of lien document with reason to know that such filing would unjustifiably cloud property’s title justifies charges under section**, regardless of whether valid lien was created. *People v. Marston*, 772 P.2d 615 (Colo. 1989).

**Subsection (3) prohibiting filing of frivolous lien on real property** is violated when a party files a document which does not comply with requirements necessary to create a lien, knowing or having reason to know the document was unfounded. *People v. Forgey*, 770 P.2d 781 (Colo. 1989).

By its plain wording, subsection (3) provides that damages for false recording shall be the actual damages incurred but no less than one thousand dollars. It makes no mention of a daily damage penalty and none may be implied. *Martinez v. Affordable Hous. Network, Inc.*, 109 P.3d 983 (Colo. App. 2004), rev’d on other grounds, 123 P.3d 1201 (Colo. 2005).

**Notice of lis pendens was groundless and invalid under subsection (3)** because the plaintiffs’ original complaint sought only monetary damages and did not affect title to real property. The validity of a notice of lis pendens is determined when it is recorded, and the subsequent filing of an amended complaint that asserts an equitable lien claim cannot relate back to the date of the original complaint and thereby render an invalid notice of lis pendens valid. *Brossia v. Rick Constr., Ltd.*, 81 P.3d 1126 (Colo. App. 2003).

**Payment for the filing of and authorization for the issuance of deeds of trust indicated a purpose or intent to have deeds of trust recorded.** Thus, trial court did not err in determining that deeds of trust were “offered” for recording. *Turkey Creek L.L.C. v. Anglo Am. Consol. Corp.*, 43 P.3d 701 (Colo. App. 2001).

**Purchaser under a contract for the sale and purchase of real property violated subsection (3)** where the purchaser refused to close on property for the agreed purchase price, later relinquished his claim for specific performance of the sales contract, and refused to remove cloud on title of property after repeated requests by the sellers. *Harris v. Hanson*, 821 P.2d 821 (Colo. App. 1991).

**There was evidence the defendant knowingly recorded a judgment lien after it had been fully satisfied** since he had consulted with attorneys, stated that he was familiar with the operations of the county clerk and recorder, and had on a number of occasions recorded documents in the office to make them a matter of public record. *Dahl v. Young*, 862 P.2d 969 (Colo. App. 1993).

**Trial court wrongly held that property owner claiming private prescriptive easement violated subsection (3) by filing sworn affidavits describing prior purchasers’ historic use of the tract at issue on the grounds affidavits unjustifiably clouded title of adverse property claimants.** The affidavits unjustifiably clouded title because property owner failed to obtain a court decree expressly establishing an easement prior to filing them. However, a party may lawfully record a document putting others on notice of a prescriptive easement over another’s property regardless of whether a court has yet recognized the existence of the easement. *Brown v. Faatz*, 197 P.3d 245 (Colo. App. 2008).

**Affidavits describing prior purchasers’ historic use of the tract at issue are instruments encumbering or affecting title to real property within the meaning of subsections (1) and (3).** Nonetheless, recording of the affidavits by property owner claiming easement, which clouded title of other property claimants, did not in and of itself constitute a violation of subsection (3). The statute only prohibits the recording of documents that the person knows or has reason to know are forged, groundless, contain a material misstatement or false claim, or are otherwise invalid. Here, the easement claimant did not know or have reason to know that the affidavits contained material misstatements, and the trial court’s findings that claimant should have known the affidavits were “groundless” or “otherwise invalid” were based on misapprehensions of the law. Accordingly, property owner claiming easement did not violate subsection (3). *Brown v. Faatz*, 197 P.3d 245 (Colo. App. 2008).

**Trial court’s findings were deficient because although it determined the hourly rate there was no mention of the reasonableness of the hours expended or the propriety of the tasks performed.** *Dahl v. Young*, 862 P.2d 969 (Colo. App. 1993).

**Trial court did not err by determining that lis pendens filed by condominium purchasers was not spurious at the time it was filed.** Purchaser’s contract claim, while unsuccessful, was advanced in good faith. While purchasers’ claim for specific performance that formed basis of lis pendens was effectively denied by the trial court’s recognition that the contract that afforded the remedy of specific performance was terminated, purchasers advanced rational arguments, based upon facts and the law, in support



of its continued existence and these arguments were not groundless or otherwise spurious. At the time of recording the lis pendens, purchasers did not know or have reason to know the trial court would later find the contract to be void under § 38-33.3-312 (5). By extension, the lis pendens, while filed and recorded, was not a spurious document. *Platt v. Aspenwood Condo. Ass'n*, 214 P.3d 1060 (Colo. App. 2009).

**Applied** in *Gillett v. Gaffney*, 3 Colo. 351 (1877); *First Nat'l Bank v. Campbell*, 2 Colo. App. 271, 30 P. 357 (1892); *Gates Iron Works v. Cohen*, 7 Colo. App. 341, 43 P. 667 (1896); *Shannon v. Timm*, 22 Colo. 167, 43 P. 1021 (1896); *Wahrenberger v. Waid*, 8 Colo. App. 200, 45 P. 518 (1896); *Smith v. Russell*, 20 Colo. App. 554, 80 P. 474 (1905); *Mulford v. Rowland*, 45 Colo. 172, 100 P. 603 (1909); *Brinker v. Malloy*, 53 Colo. 186, 125 P. 507 (1912); *Brackett v. McClure*, 24 Colo. App. 524, 135 P. 1110 (1913); *Clay, Robinson & Co. v. Atencio*, 74 Colo. 17, 218 P. 906 (1923); *Stetler v. Winegar*, 75 Colo. 500, 226 P. 858 (1924); *Donahue v. Kohler-McLister Paint Co.*, 81 Colo. 244, 254 P. 989 (1927); *People ex rel. Fed. Land Bank v. Ginn*, 106 Colo. 417, 106 P.2d 479 (1940); *Stewart v. Lamm*, 132 Colo. 484, 289 P.2d 916 (1955); *Doyle v. McBee*, 161 Colo. 130, 420 P.2d 247 (1966); *Plew v. Colo. Lumber Prods.*, 28 Colo. App. 557, 481 P.2d 127 (1970); *First Nat'l Bank v. Groussman*, 29 Colo. App. 215, 483 P.2d 398 (1971); *Shamrock Land & Cattle Co. v. Hagen*, 30 Colo. App. 127, 489 P.2d 607 (1971); *Thomas & Son Transf. Line v. Kenyon, Inc.*, 40 Colo. App. 150, 574 P.2d 107 (1977), *aff'd*, 96 Colo. 386, 586 P.2d (1978); *Brown v. Brown*, 43 Colo. App. 535, 608 P.2d 840 (1980); *Kuehn v. Kuehn*, 642 P.2d 524 (Colo. App. 1981).

## II. INSTRUMENTS TO WHICH SECTION APPLIES.

**Bond for conveyance of real estate.** The assignment by the obligee or his assignee of a bond for the conveyance of real estate comes clearly within the provisions of subsection (1) of this section and, unless recorded will not take effect as against a subsequent bona fide purchaser or encumbrancer without notice. *McFarran v. Knox*, 5 Colo. 217 (1880).

**Quitclaim deed effectual to pass real estate property.** A quit claim deed is as effectual to pass the title to real estate as any other, and the purchaser accepting such deed, without notice of prior rights, will be as fully protected as if his deed contained full covenants of warranty. *Bradbury v. Davis*, 5 Colo. 265 (1880); *Delta County Land & Cattle Co. v. Talcott*, 17 Colo. App. 316, 68 P. 985 (1902); *Houlahan v. Fin. Consol. Mining Co.*, 34 Colo. 365, 82 P. 484

(1905); *Hallett v. Alexander*, 50 Colo. 37, 114 P. 490 (1911); *Kelsey v. Norris*, 53 Colo. 306, 125 P. 111 (1912).

**A contract for future conveyance of lands** is within subsection (1), and an assignment by the purchaser of his right under such contract, not recorded, is without effect as to a creditor of such purchaser who, without notice of the assignment, levies an execution upon the land. *Salisbury v. La Fitte*, 57 Colo. 358, 141 P. 484 (1914).

**Deed of release** is a deed affecting title to real estate. *Delta County Land & Cattle Co. v. Talcott*, 17 Colo. App. 316, 68 P. 985 (1902).

**Contract of joint adventure** which gives a party an equitable interest in the real estate involved is one "affecting the title" thereto under subsection (1), and is recordable. *Austin v. Stephen*, 89 Colo. 177, 300 P. 364 (1931).

**Water adjudication decrees.** The court recommended that a certified copy of water adjudication decrees be filed in the county clerk and recorder's office, as permitted by subsection (1), to give notice as there provided. *Davis v. Hurt*, 81 Colo. 10, 253 P. 394 (1927).

**Overriding royalty carved out of working interest in oil and gas lease** is an interest in real property and is therefore subject to the rules of priority of this article. *Fees-Krey, Inc. v. Page*, 42 Colo. App. 8, 591 P.2d 1339 (1978), *rev'd* on other grounds, 617 P.2d 1188 (Colo. App. 1980).

**Spouse's interest following filing of dissolution proceeding.** Whatever interest a wife has in her husband's property upon the filing of a dissolution proceeding is still subject to the requirements of Colorado's recording laws. If the wife does not record, the ex-husband's trustee in bankruptcy may acquire superior rights. In re *Harms*, 7 B.R. 398 (D. Colo. 1980).

**Recording statutes do not apply to the enforceability of planned unit development (PUD) plans.** PUD plans are filed pursuant to legislative enactments and constitute a form of rezoning. Recording of PUD plan provisions under the recording act is not required because the notice goals of the recording act are satisfied by the PUD approval process. A PUD plan is not an instrument affecting title to real property within the purview of the recording statutes. *South Creek Assocs. v. Bixby*, 781 P.2d 1027 (Colo. 1989).

**Race-notice statute cannot be used to determine the priority of creditors**, because the judgment debtor did not have a legal or equitable interest in the property. Where a judgment debtor had neither a legal nor an equitable interest in a property, recording a judgment does not create a lien on the property, because there is no interest on which the lien could attach. Consequently, this section does not apply. *Shepler v. Whalen*, 119 P.3d 1084 (Colo. 2005).

### III. NOTICE.

#### A. Record as Notice.

**This section is a race-notice statute.** Nile Valley Fed. Sav. & Loan Ass'n v. Sec. Title Guarantee Corp., 813 P.2d 849 (Colo. App. 1991).

**The race-notice system protects buyers** who record their liens without notice of prior unrecorded conveyances or liens. Joondeph v. Hicks, 235 P.3d 303 (Colo. 2010).

**Recording of deeds under this section is notice to all the world** of the interest in land held by the person recording. Botkin v. Pyle, 91 Colo. 221, 14 P.2d 187 (1932).

**Purchaser may rely upon records.** If, upon their face, the records are complete, and show that the title is good, in the absence of information to the contrary from any other source, he may safely rely upon them. Delta County Land & Cattle Co. v. Talcott, 17 Colo. App. 316, 68 P. 985 (1902). See Perkins v. Adams, 16 Colo. App. 96, 63 P. 792 (1901); King v. Ackroyd, 28 Colo. 488, 66 P. 906 (1901).

**Purchaser is bound by record.** A purchaser of real estate is bound to know what the records disclose concerning the title, and if they indicate the existence of some outside condition by which it may be affected, he is bound to investigate, and he is charged with knowledge of the facts to which the investigation would lead. Delta County Land & Cattle Co. v. Talcott, 17 Colo. App. 316, 68 P. 985 (1902). See Perkins v. Adams, 16 Colo. App. 96, 63 P. 792 (1901); King v. Ackroyd, 28 Colo. 488, 66 P. 906 (1901).

Unless otherwise provided by statute, a purchaser is bound by recitals in conveyances or other instruments of transfer in his chain of title even where the instrument containing the recitals is not recorded. Page v. Fees-Krey, Inc., 617 P.2d 1188 (Colo. 1980).

**Creditor is charged with knowledge of homestead claims through recording statute,** and his lack of knowledge through inadvertence would be immaterial. Am. Heritage Bank & Trust Co. v. Trees, 35 Colo. App. 147, 532 P.2d 380 (1974).

**Notice or lack thereof to joint tenant is irrelevant** to the determination of validity of the conveyance. Carmack v. Place, 188 Colo. 303, 535 P.2d 197 (1975).

**Person deemed to have constructive notice of recorded encumbrances.** Armove v. First Fed. Sav. & Loan Ass'n, 713 P.2d 1329 (Colo. App. 1985).

Proper recording of documents provides constructive notice of interests affecting title. Collins v. Scott, 943 P.2d 20 (Colo. App. 1996).

**The record of an instrument is notice only to those persons claiming under the same chain of title who are bound to search for it.** Collins v. Scott, 943 P.2d 20 (Colo. App. 1996).

**Documents outside the chain of title provide no notice unless a possible irregularity appears in the record** that indicates the existence of some outside interest by which the title may be affected. In such cases, a purchaser is bound to investigate and is charged with knowledge of the facts to which the investigation would have led. Collins v. Scott, 943 P.2d 20 (Colo. App. 1996).

**Party was put on constructive notice of transfer by prior recording of quitclaim deed.** A search of the grantor-grantee index from the date the will was admitted to probate would have disclosed the quitclaim deed. The deed was not outside the chain of title. Collins v. Scott, 943 P.2d 20 (Colo. App. 1996).

**Recording in office of federal bureau of land management is not constructive notice** to a person acquiring an interest in property in Colorado. Fees-Krey, Inc. v. Page, 42 Colo. App. 8, 591 P.2d 1339 (1978), rev'd on other grounds, 617 P.2d 1188 (Colo. 1980).

**Where deeds of trust to property owned by a partnership were signed by the individual partners and recorded under their names,** there was no indication of conveyance of the property by the partnership and the bankruptcy trustee for the partnership estate was not charged with constructive notice of the deeds of trust signed by the individual partners. Nile Valley Fed. Sav. & Loan Ass'n v. Sec. Title Guarantee Corp., 813 P.2d 849 (Colo. App. 1991).

**The party preparing deeds of trust for signature is charged with the responsibility of complying with the statutes.** Thus, the savings and loan association taking deeds of trust on property owned by a partnership as collateral on promissory notes could not claim the partnership's bankruptcy trustee had constructive notice of the deeds where the deeds were incorrectly prepared by the savings and loan association, were signed by the individual partners rather than by the partnership, and were filed under the partners' names. Nile Valley Fed. Sav. & Loan Ass'n v. Sec. Title Guarantee Corp., 813 P.2d 849 (Colo. App. 1991).

**Status of purchaser of leased property.** Having notice of tenancy by virtue of the lessee's possession, the purchaser of leased property has a duty to inquire of the lessee concerning its rights in the leased property, and such purchaser takes subject to all rights which would have been revealed by reasonable inquiry, including the lessee's rights of first refusal. Cohen v. Thomas & Son Transf. Line, 196 Colo. 386, 586 P.2d 39 (1978).

#### B. Notice of Unrecorded Instruments.

**Purpose of subsection (1).** The meaning and intent of subsection (1) is that no prior unrecorded conveyance or contract, affecting the



title to land, shall take effect as to any subsequent bona fide purchaser without notice, or as to any one who, in good faith and without notice of a prior unrecorded deed or other instrument, acquires a lien or incumbrance on the same tract of land. *McMurtrie v. Riddell*, 9 Colo. 497, 13 P. 181 (1886).

**Unrecorded deed ineffective against creditor without notice.** An unrecorded deed does not take effect as against an execution creditor without notice. *Knox v. McFarran*, 4 Colo. 586 (1879); *McMurtrie v. Riddell*, 9 Colo. 497, 13 P. 181 (1886); *Jerome v. Carbonate Nat'l Bank*, 22 Colo. 37, 43 P. 215 (1896); *Western Chem. Mfg. Co. v. McCaffrey*, 47 Colo. 397, 107 P. 1081 (1910); *Hallett v. Alexander*, 50 Colo. 37, 114 P. 490 (1911).

**As to bona fide purchasers.** An unrecorded deed, though binding upon the grantor, his heirs, and devisees, is a nullity as to bona fide purchasers or encumbrancers without notice. *Hallett v. Alexander*, 50 Colo. 37, 114 P. 490 (1911); *Carroll v. Kit Carson Land Co.*, 24 Colo. App. 217, 133 P. 148 (1913).

**Notice constructive if means exist to obtain knowledge.** Notice may be constructive or implied from the fact that there existed means of knowledge which the party did not use. *Jaramillo v. McLoy*, 263 F. Supp. 870 (D. Colo. 1967).

**Knowledge by agent** that land across which easement ran was going to be sold and of closing date was sufficient to put easement purchaser on inquiry notice of existence of receipt and option contract to sell land, rendering easement subject to prior unrecorded interest under receipt and option contract. *Enerwest, Inc. v. Dyco Petroleum Corp.*, 716 P.2d 1130 (Colo. App. 1986).

**All instruments affecting title have same standing for recording purposes.** All instruments affecting the title to real property are given the same standing for recording purposes and, by the terms of subsection (1), they may all be recorded, and if they are not recorded, they are without validity as against any class of persons holding any kind of rights except as between the parties themselves and those who have actual notice of the unrecorded instrument. *Plew v. Colo. Lumber Prods.*, 28 Colo. App. 557, 481 P.2d 127 (1970).

**Joint tenant not protected from unrecorded deed.** A joint tenant is not in the "class of persons with any kind of rights" in the property, and thereby is not protected from an unrecorded deed. *Carmack v. Place*, 188 Colo. 303, 535 P.2d 197 (1975).

**Internal revenue service lien against property belonging to former husband does not reach former wife's interest in that property.** Although unrecorded, the separation agreement, which severed the joint tenancy and conveyed a life estate to the former wife, prevented former

husband from contesting the ownership of interest conveyed to her. The IRS stands in the shoes of the former husband, who has no rights to property interest conveyed to former wife to which the tax lien could attach, where the IRS stipulated that its tax levy did not reach any interest of the former wife. *United States v. Gibbons*, 71 F.3d 1496 (10th Cir. 1995).

**Party which had obtained authorization from surface estate owner to drill test hole to determine existence and extent of coal deposits, but not from owner of unrecorded coal lease or owner of mineral estate as required, was not party "with any kind of rights" entitled to protection of recording statute against coal lease owner's action for unauthorized geologic exploration.** *Grynberg v. City of Northglenn*, 739 P.2d 230 (Colo. 1987).

**Recording statutes do not apply to the enforceability of planned unit development (PUD) plans.** PUD plans are filed pursuant to legislative enactments and constitute a form of rezoning. Recording of PUD plan provisions under the recording act is not required because the notice goals of the recording act are satisfied by the PUD approval process. A PUD plan is not an instrument affecting title to real property within the purview of the recording statutes. *South Creek Assocs. v. Bixby*, 781 P.2d 1027 (Colo. 1989).

**Defense of bona fide purchaser must be presented by answer unless it appears by the complaint.** *Allen v. Blanche Gold Mining Co.*, 46 Colo. 199, 102 P. 1072 (1909).

#### IV. PRIORITIES.

##### A. General Principles.

On its face, the recording statute provides a method by which a later grantee of rights in real property can, under certain circumstances, perfect its title against an earlier grantee. However, a failure of the later grantee to qualify for the benefits of the statute does not necessarily mean that its interests are subordinate to those of an earlier grantee. If the later grantee has notice of the earlier unrecorded instrument or fails to record first, the recording statute simply fails to provide a mechanism for determining the priority of the competing interests, and none will be imputed to it. *ALH Holding Co. v. Bank of Telluride*, 18 P.3d 742 (Colo. 2000).

**Instrument first recorded has priority.** As between two trust deeds on the same property executed at the same time and as a part of the same transaction, the instrument first recorded is first in right. *Bray v. Trower*, 87 Colo. 240, 286 P. 275 (1930).

The purchaser whose conveyance is first filed for record is entitled to a preference, and obtains the title, regardless of the date of its execution.

Houlahan v. Fin. Consol. Mining Co., 34 Colo. 365, 82 P. 484 (1905).

Where two trust deeds are given to secure payment of the purchase price of property, they are of equal dignity in this respect, and the one which is recorded first constitutes the senior lien of the two. *Bray v. Trower*, 87 Colo. 240, 286 P. 275 (1930).

A junior deed first recorded, to one who purchases in good faith, is preferred to a prior deed not recorded. *Kelsey v. Norris*, 53 Colo. 306, 125 P. 111 (1912).

**This section is a "race-notice statute"** granting priority to a second grantee only if he takes the instrument without notice of the prior conveyance and gets his instrument recorded ahead of the prior instrument. *Eastwood v. Shedd*, 166 Colo. 136, 442 P.2d 423 (1968).

**Order of judgment creditors is order transcripts filed.** Equitable liens accrue to the benefit of judgment creditors in the order that the transcripts of judgment were filed. *Fort Lupton State Bank v. Murata*, 626 P.2d 757 (Colo. App. 1981).

**Attachment lien takes precedence over unrecorded title.** The lien of an attachment is an encumbrance within the meaning of subsection (1), and takes precedence over an unrecorded title or interest, of which the attaching creditor had no notice at the time of his attachment. *Perkins v. Adams*, 16 Colo. App. 96, 63 P. 792 (1901).

The "shelter rule" provides that one who is not a bona fide purchaser, but who takes an interest in property from a bona fide purchaser, may be sheltered in the latter's protective status. *Strekal v. Espe*, 114 P.3d 67 (Colo. App. 2004).

Under the shelter rule, party who buys real property from good faith purchaser who had no notice of potential title defect will acquire the status of that good faith purchaser without notice even though the party took the property with notice of a *lis pendens*. *Strekal v. Espe*, 114 P.3d 67 (Colo. App. 2004).

## B. Illustrative Cases.

**Donee with duly recorded instrument entitled to protection.** The donee of real property,

who has duly recorded the instrument of conveyance, is entitled to the protection of the Colorado conveyancing and recording act. *Eastwood v. Shedd*, 166 Colo. 136, 442 P.2d 423 (1968).

**Failure to file assignment.** Where plaintiff neglected to avail himself of the permission afforded by subsection (1) to file his assignment, his equity must be held inferior to the equity of a subsequent purchaser of the mortgaged property, who relied solely upon the record title, which showed on its face an unencumbered title in his remote grantor. *Stetler v. Winegar*, 75 Colo. 500, 226 P. 858 (1924).

**Judgment lien superior to secret lien created by oral agreement.** A judgment lien was held superior to any secret lien or trust existing in favor of the trustee created by oral agreement between the trustee and the *cestuis que trust* of which the judgment creditors had no notice. *Teller v. Hill*, 18 Colo. App. 509, 72 P. 811 (1903).

**Judgment under creditor's bill deemed binding on purchasers from debtor.** A judgment under a creditor's bill subjecting debtor's interest in lands to plaintiff's claim, is binding on purchasers from the debtor, although they were not parties to the suit, their deed being unrecorded at the time the action was instituted. *Shuck v. Quackenbush*, 75 Colo. 592, 227 P. 1041 (1924).

**Holder of prior perfected deed of trust has priority over an attorney's charging lien** where holder of deed has no actual or constructive notice of the attorney's lien. *Cottonwood Hill, Inc. v. Ansay*, 782 P.2d 1207 (Colo. App. 1989).

**The holder of an interest in real property does not acquire a preferred title to such property by filing first** when such holder has agreed that a subsequent encumbrance is superior. *Fleet Real Estate Funding Corp. v. Koch*, 805 P.2d 1206 (Colo. App. 1991).

## 38-35-109.5. Recording of instruments conveying real property to public entities.

(1) Any instrument, including, but not limited to, a resolution, ordinance, deed, conveyance document, plat, or survey, conveying the title of real property to the state or a political subdivision shall be recorded in the office of the clerk and recorder of the county in which such real property is situated within thirty days of such conveyance. If the state or a political subdivision fails to record such instrument pursuant to this section, the state or political subdivision shall be liable for the amount of interest incurred by the county pursuant to the provisions of section 39-12-111, C.R.S., due to such failure to record.

(2) For purposes of satisfying the recording requirement in subsection (1) of this section, the executive director of the appropriate state department or his or her designee shall record any instrument conveying the title of real property to the state, and a political



subdivision shall designate an appropriate official or officials who shall record any instrument conveying the title of real property to the political subdivision.

(3) For purposes of this section, "political subdivision" means a county, city and county, city, town, service authority, school district, local improvement district, law enforcement authority, water, sanitation, fire protection, metropolitan, irrigation, drainage, or other special district or any other kind of municipal, quasi-municipal, or public corporation organized pursuant to law.

**Source: L. 97:** Entire section added, p. 19, § 1, effective July 1.

**38-35-110. Lis pendens as notice - issuance of certificate - expiration.** (1) After filing any pleading in an action in any court of record of this state or in any district court of the United States within this state wherein relief is claimed affecting the title to real property, any party to such action may record in the office of the county clerk and recorder in the county or counties in which the real property or any portion thereof is situated a notice of lis pendens containing the name of the court where such action is pending, the names of the parties to such action at the time of such recording, and a legal description of the real property. The failure to name a party or describe a portion of the real property in such notice shall not affect the sufficiency of such notice, or the sufficiency of an extension of such notice pursuant to the provisions of subsection (4) of this section, as to the interest of the parties named in such notice or in such extension in the real property described therein. From the time of recording, such notice of lis pendens shall be notice to any person thereafter acquiring, by, through, or under any party named in such notice, an interest in the real property described in the notice in the county or counties where recorded that the interest so acquired may be affected by the action described in the notice.

(2) (a) Unless a timely notice of appeal is filed while a notice of lis pendens is in effect or unless the notice of lis pendens has expired and ceased to be notice as provided in subsection (6) of this section, except as provided in sections 38-22-132 and 38-22.5-111, a recorded notice of lis pendens shall remain in effect until the earliest of the following:

(I) The action is dismissed without an order of the court;

(II) Forty-five days elapses following the entry of an appealable order determining that certain real property specifically described in such order, or a specifically described interest therein, will not be affected by a judgment on the issues then pending, but the notice of lis pendens shall remain in effect as to all other real property described in such notice; or

(III) Forty-five days elapses following the entry of final judgment in the trial court as to all parties and as to some or all of the real property described in the notice of lis pendens, or a specifically described interest therein, but the notice of lis pendens shall remain in effect as to all other property described in such notice.

(b) For the purposes of subparagraphs (II) and (III) of paragraph (a) of this subsection (2), the forty-five-day period shall commence on the first day allowed for the filing of an appeal.

(c) If a timely notice of appeal is filed while a notice of lis pendens is in effect or if the notice of lis pendens is filed after an appeal is filed, such notice of lis pendens shall remain in effect until the earliest of the following:

(I) The notice of lis pendens expires and ceases to be notice as provided in subsection (6) of this section;

(II) The court having jurisdiction over the action enters an order determining that the notice of lis pendens is no longer in effect;

(III) Thirty days elapses following the issuance of a mandate by the appellate court; except that, if the mandate issued by the appellate court remands the case to a lower court for further proceedings, the notice of lis pendens shall remain in effect subject to the provisions of paragraph (a) of this subsection (2).

(3) (a) Upon request by any person, the clerk of the trial court shall issue a certificate stating whether, as of a specified date, a judgment was entered in the action described in such certificate and the date of such judgment or, if the action was dismissed, the date of such dismissal and whether such dismissal was by court order, by notice, or by stipulation. In either case, the certificate shall also state either that, as of a specified date, posttrial

motions have not been filed or that posttrial motions have been filed, identifying such motions and the action, if any, taken on such motions and the date of such action. The certificate shall also state that either there is or is not an advisory copy of a notice of appeal of the action filed with the trial court.

(b) Upon request by any person, the clerk of the appellate court shall issue a certificate stating, as of a specified date, either that appellate proceedings respecting the action described in such certificate have not been commenced or that such proceedings have been commenced and stating the date of such commencement. If appellate proceedings have been commenced, the certificate shall also state either that a formal mandate has or has not been issued and, if not issued, that either a judgment, an opinion of the court, and directions as to costs have not been issued or have been issued and the dates thereof.

(c) Upon being recorded with the county clerk and recorder of the county or counties wherein the real property or any portion thereof is situated, any such certificate issued by the clerk of the trial court or the clerk of the appellate court shall constitute prima facie evidence of the facts therein stated.

(4) Except as provided in subsection (6) of this section, a recorded notice of lis pendens which has not ceased to be in effect as provided in subsection (2) of this section shall expire and cease to be notice to any person for any purpose six years after the date of its recording, unless an extension of the notice of lis pendens is recorded prior to its expiration. A timely recorded extension showing the information required in subsection (1) of this section, showing that such is an extension of an original notice of lis pendens, and showing the recording date of the original notice of lis pendens shall extend the effect of the original notice for six years after the date of recording the extension or to such earlier date as such notice ceases to be in effect as provided in subsection (2) of this section.

(5) A new notice of lis pendens meeting all the requirements of subsection (1) of this section may be recorded at any time while the action is pending and shall be notice to the same extent as provided in subsection (1) of this section; except that such new notice shall be notice only from the time of its recording.

(6) Any notice of lis pendens recorded prior to March 20, 1992, which does not cease to be in effect as provided in subsection (2) of this section and which is not extended as provided in subsection (4) of this section shall expire and cease to be notice to any person for any purpose six years after the date of its recording or two years after March 20, 1992, whichever is later.

**Source:** L. 27: p. 590, § 9. CSA: C. 40, § 115. CRS 53: § 118-6-10. C.R.S. 1963: § 118-6-10. L. 92: Entire section amended, p. 2103, § 1, effective March 20. L. 2002: (1) amended, p. 51, § 3, effective March 21. L. 2011: IP(2)(a) amended, (SB 11-264), ch. 279, p. 1251, § 4, effective July 1.

**Cross references:** (1) For the filing of a notice of lis pendens, see C.R.C.P. 105(f).

(2) For the legislative declaration in the 2011 act amending the introductory portion to subsection (2)(a), see section 1 of chapter 279, Session Laws of Colorado 2011.

## ANNOTATION

**Law reviews.** For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 Dicta 321 (1949).

**The intended purpose for filing a notice of lis pendens is to provide notice** to anyone who may acquire an interest in the property during the pendency of litigation so that he or she will be bound by its outcome. *Moore & Assocs. Realty, Inc. v. Arrowhead at Vail*, 892 P.2d 367 (Colo. App. 1994) (decided under former C.R.C.P. 105 (f)(1)); *Brossia v. Rick Constr., L.T.D.*, 81 P.3d 1126 (Colo. App. 2003).

**Effect of filing lis pendens.** *Tinglof v. Askerlund*, 96 Colo. 27, 39 P.2d 1039 (1934).

**Notice of lis pendens did not constitute filing or recording** of an equitable lien against the property. *Thomas v. Oken*, 699 P.2d 7 (Colo. App. 1984); *Alien, Inc. v. Futterman*, 924 P.2d 1063 (Colo. App. 1995).

**Validity of a notice of lis pendens is determined when it is recorded**, and the subsequent filing of an amended complaint that asserts an equitable lien claim cannot relate back to the date of the original complaint and thereby ren-



der an invalid notice of lis pendens valid. *Brossia v. Rick Constr., L.T.D.*, 81 P.3d 1126 (Colo. App. 2003).

**Lis pendens terminates with dismissal of plaintiff's appeal.** A subsequent settlement between the parties did not resurrect the lis pendens and thus was not binding on the interests of a third party which had filed an interest on the property during the pendency of the lis pendens. *Perry Park Country Club, Inc. v. Manhattan Sav. Bank*, 813 P.2d 841 (Colo. App. 1991).

**Notice recorded pursuant to § 38-22-129 does not satisfy the notice requirement of this section.** *Weize Co., LLC v. Colo. Reg'l Constr.*, 251 P.3d 489 (Colo. App. 2010).

**District court correctly determined that notice of lis pendens was of no effect vis-a-vis defendant holding deed of trust on the property and, therefore, did not impair defendant's right to foreclose on the property.** A notice of lis pendens is not notice to a person who acquires an interest in property from someone other than the parties named in the notice. Here, it is undisputed that the deed of trust to the subject property was not given to defendant's assignor by plaintiffs, because defendant's assignor did not acquire its interest in the property "by, through, or under any party named in" the notice of lis pendens. By the express language of subsection (1), therefore, the notice of lis pendens was not notice to defendant of plaintiff's claimed interest in the property. *Thomas v. Lynx United Group, LLC*, 159 P.3d 789 (Colo. App. 2006).

**Notice of lis pendens was ineffective as to defendant's assignor because defendant's assignor did not acquire its interest in the property "by, through, or under any party named in" the notice of lis pendens and because it could not be found in defendant's chain of title and, therefore, failed to provide constructive notice of plaintiff's interest in property.** Subsection (1) expressly provides that a notice of lis pendens must be recorded in the office of the county clerk and recorder of the county in which the real property is located. Interests in property that do not appear in the chain of title, as shown by the grantor and

grantee indices, do not give notice to purchasers of those interests. Here, notice of lis pendens that failed to list record holder of title to property was outside defendant's chain of title. As a matter of law, therefore, it did not provide constructive notice of plaintiff's claimed interest in the property, notwithstanding that it was filed in the office of the county clerk and recorder. Accordingly, defendant properly permitted to foreclose on the deed of trust. *Thomas v. Lynx United Group, LLC*, 159 P.3d 789 (Colo. App. 2006).

**Filing motion to amend or supplement complaint to add a count relating to property purchased with allegedly fraudulently transferred funds immediately prior to recording lis pendens, was filing of pleading under this section.** *Emarine v. Haley*, 892 P.2d 343 (Colo. App. 1994) (decided under former C.R.C.P. 105 (f)(1)).

**Although this section does not expressly authorize the filing of a notice of lis pendens in a federal action, its plain language includes the filing of a notice of an action in any court.** *Alien, Inc. v. Futterman*, 924 P.2d 1063 (Colo. App. 1995).

**A party to an out-of-state action affecting title to real property in Colorado is entitled to file a notice of lis pendens.** *Kerns v. Kerns*, 53 P.3d 1157 (Colo. 2002).

**Trial court had no authority to release notice of lis pendens while plaintiffs' claims remained pending in federal court.** *Alien, Inc. v. Futterman*, 924 P.2d 1063 (Colo. App. 1995).

**An equitable action to impose a constructive trust on real property located within the state of Colorado entitles the party bringing the action to file a notice of lis pendens against that property in accordance with this section.** *Kerns v. Kerns*, 53 P.3d 1157 (Colo. 2002).

**The phrase "[t]he court having jurisdiction over the action" in subsection (2)(c)(II) does not mean the judge presiding over the underlying probate matter.** *Pierce v. Francis*, 194 P.3d 505 (Colo. App. 2008).

**Applied in** *Hammersley v. District Court*, 199 Colo. 442, 610 P.2d 94 (1980); *In re Harms*, 7 B.R. 398 (D. Colo. 1980); *In re Tarletz*, 27 Bankr. 787 (Bankr. D. Colo. 1983).

**38-35-111. Option to purchase - notice for one year only.** (1) Recorded instruments in writing of the nature of an option to purchase affecting title to real property under the terms of which instruments possession is not delivered to the purchaser shall not constitute notice to any person for a period of more than one year after the time specified in such instrument for the conveyance of said property. After the expiration of such period, such instrument shall cease to be notice to any person for any purpose.

(2) All such instruments which have been recorded prior to March 28, 1927, shall constitute notice only for one year from said date if the time for performance therein fixed has expired. Thereafter such instruments shall cease to be notice to any person for any purpose. In the event the time for performance specified in such instrument has not expired by March 28, 1927, such instrument shall constitute notice only for a period of one year

from the time in said instrument specified for performance, and thereafter the same shall cease to be notice to any person for any purpose.

(3) If a notice of lis pendens conforming to the requirements of section 38-35-110 is recorded prior to the expiration of the one-year period, such instrument shall continue to be notice until the later of the expiration of such period or the date the lis pendens ceases to be in effect or expires and ceases to be notice in accordance with the provisions of section 38-35-110.

**Source:** L. 27: p. 591, § 10. CSA: C. 40, § 116. CRS 53: § 118-6-11. C.R.S. 1963: § 118-6-11. L. 2002: (3) amended, p. 51, § 4, effective March 21.

#### ANNOTATION

**Law reviews.** For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 Dicta 321 (1949).

**Applied** in Brown v. Brown, 43 Colo. App. 535, 608 P.2d 840 (1980).

**38-35-112. Certificate of death when properly recorded may be admitted as evidence.** A certificate of death issued by a public official, whose apparent official duties include the keeping of records of death, of any state, territory, county, parish, district, city, town, village, province, nation, or other governmental agency or subdivision thereof or a copy of any such certificate of death certified by such public official or by the county clerk and recorder of any county in the state of Colorado in whose office the same or a certified copy thereof has been recorded shall, insofar as the death may affect any interest in real property, be prima facie evidence of the death so certified and of the time and place of such death and shall be admissible in evidence in any court in the state of Colorado. Such method of proving death shall not be exclusive and nothing in this section shall be construed to prevent the proof of the death of any person in any other manner authorized by law.

**Source:** L. 27: p. 591, § 11. CSA: C. 40, § 117. CRS 53: § 118-6-12. C.R.S. 1963: § 118-6-12.

**Cross references:** For proof of ownership of joint tenancy of real property, see §§ 38-31-102 and 38-31-103.

#### ANNOTATION

**Law reviews.** For article, "Scientific Findings on Death and Coroner's Inquest", see 20 Rocky Mt. L. Rev. 197 (1948). For article, "Curative Statutes of Colorado Respecting Titles to

Real Estate", see 26 Dicta 281 (1949). For article, "Standard Pleading Samples to Be Used in Quiet Title Litigation", see 30 Dicta 39 (1953).

**38-35-113. Affidavits referring to death, intestacy, heirship, accepted as prima facie evidence.** All statements relating to death, intestacy, heirship, relationship, age, sex, names, and identity of persons contained in affidavits which remain of record for a period of twenty years in the office of the county clerk and recorder of the county where the real property affected by the facts stated in such affidavits is situated shall be accepted and received as prima facie evidence of the facts stated in such affidavits insofar as such facts affect title to real property.

**Source:** L. 41: p. 605, § 1. CSA: C. 40, § 117(1). CRS 53: § 118-6-13. C.R.S. 1963: § 118-6-13.



## ANNOTATION

**Law reviews.** For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 Dicta 281 (1949).

**38-35-114. Actions - parties to be named.** No person claiming any interest in real property under or through a person named as a defendant in an action concerning real property to which the Colorado rules of civil procedure are applicable need be made a party to such action unless his interest is shown of record in the office of the county clerk and recorder in the county where such real property is situated, and the decree shall be as conclusive against him as if he had been made a party. If such action is for the recovery of actual possession of the property, the party in actual possession shall be made a party.

**Source:** L. 41: p. 605, § 2. CSA: C. 40, § 117(2). CRS 53: § 118-6-14. C.R.S. 1963: § 118-6-14.

## ANNOTATION

**Purchasers and redemptioners are parties to foreclosure proceedings.** Purchasers at a judicial mortgage sale and redemptioners become parties to such foreclosure proceedings, subject to the jurisdiction of the court with respect to all

matters of such sale or redemption. *Norman, Inc. v. Holman*, 105 Colo. 294, 97 P.2d 739 (1939).

**Applied** in *Stoll v. Colo. Inv. & Realty Co.*, 78 Colo. 233, 241 P. 725 (1925).

**38-35-115. Execution by foreign representative of instrument regarding real estate prior to filing certified copies of order of appointment.** When, by statute in effect at the time of the execution by an executor, trustee, or other representative appointed by a court or tribunal of a state other than Colorado or of a territory of the United States or of a country beyond the limits of the United States of an instrument of conveyance or encumbrance or contract concerning real estate in Colorado in accordance with the powers conferred by a will, testament, or codicil admitted to probate by such court or tribunal, a certified copy or an exemplified copy of the letters testamentary or trusteeship issued by such court or tribunal under such will, testament, or codicil or of the order of appointment by such court or tribunal is required to be filed for record with the county clerk and recorder of the county wherein is situated such real estate, the filing for record with such county clerk and recorder of such certified copy or exemplified copy of letters or order after the execution of such instrument of conveyance or encumbrance or contract shall have the same force and effect that it would have had if it had been filed for record with such county clerk and recorder prior to the execution of such instrument of conveyance or encumbrance or contract, whether such instrument of conveyance or encumbrance or contract was executed before or after April 17, 1941, and whether such certified copy or exemplified copy was so filed for record before or after said date.

**Source:** L. 41: p. 605, § 3. CSA: C. 40, § 117(3). CRS 53: § 118-6-15. C.R.S. 1963: § 118-6-15.

**38-35-116. Variances in names in instruments affecting the title to real property.** (1) (a) The middle name or the initial of a middle name appearing in a name contained in an instrument affecting the title to real property or in a signature or an acknowledgment shall be deemed prima facie to be a material part of such name.

(b) One or more of the following variances between any two instruments affecting the title to the same real property shall not destroy or impair the presumption that the person so named is the same person in both instruments:

(I) The full first name appearing in one and only the initial letter of that first name appearing in the other;

(II) A full middle name appearing in one and only the initial letter of that middle name appearing in the other;

(III) The initial letter of a middle name appearing in one and not appearing in the other; or

(IV) A full middle name appearing in one and not appearing in the other.

(c) In spite of a variance described in paragraph (b) of this subsection (1), the person so named in both instruments shall be presumed to be the same person until such time as the contrary appears, and, until such time, such instruments, the record of such instruments, or a certified copy of the record of such instruments shall be admissible in evidence as though the names in the two instruments were identical.

(2) (Deleted by amendment, L. 2003, p. 833, § 1, effective August 6, 2003.)

(3) The word "instruments" as used in this section means not only instruments voluntarily executed but also papers filed or issued in or in connection with actions and other proceedings in court and orders, judgments, and decrees entered therein and transcripts of such judgments, proceedings in foreclosure pursuant to powers of sale, certificates of birth, certificates of death, and certificates of marriage.

**Source:** L. 41: p. 607, § 1. CSA: C. 40, § 117(4). CRS 53: § 118-6-16. L. 61: p. 644, § 1. C.R.S. 1963: § 118-6-16. L. 73: p. 613, § 4. L. 2003: (1) and (2) amended, p. 833, § 1, effective August 6.

#### ANNOTATION

**Law reviews.** For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 Dicta 321 (1949). For article, "Guess Who's Coming to Closing", see 11 Colo. Law. 689 (1982). For article, "Signatures on Documents Affecting Title to Colorado Real Property — Part I", see 12 Colo. Law. 61 (1983).

**This section supports a conclusion that, when an individual uses a first initial, the individual's middle name is deemed to be**

**material in identifying such individual** rather than a conclusion that the difference between a full first name and an initial is presumed to be material. Franklin Bank, N.A. v. Bowling, 74 P.3d 308 (Colo. 2003).

**When an individual uses an initial rather than a first name,** the individual's middle name carries more import. Franklin Bank, N.A. v. Bowling, 74 P.3d 308 (Colo. 2003).

**38-35-117. Mortgages, not a conveyance - lien theory.** Mortgages, trust deeds, or other instruments intended to secure the payment of an obligation affecting title to or an interest in real property shall not be deemed a conveyance, regardless of its terms, so as to enable the owner of the obligation secured to recover possession of real property without foreclosure and sale, but the same shall be deemed a lien.

**Source:** L. 27: p. 592, § 12. CSA: C. 40, § 118. CRS 53: § 118-6-17. C.R.S. 1963: § 118-6-17.

**Cross references:** For sales by public trustee, see article 37 of this title.

#### ANNOTATION

I. General Consideration.

II. Effect of Section.

III. Evidence.

#### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "Must Colorado Real Property Installment Sale Contracts Be Foreclosed as Mortgages?", see 9 Dicta 320 (1932). For note, "Validity of 'Myself' Notes

and Deeds of Trust", see 30 Rocky Mt. L. Rev. 195 (1958).

**Value tends to show transaction's character.** In an action to have a deed, absolute on its face, declared a mortgage, value is one test tending to show the character of the transaction. Wilson v. Giem, 90 Colo. 27, 5 P.2d 880 (1931); Taylor v. Briggs, 99 Colo. 89, 60 P.2d 1081 (1936).

**Deeds as security agreement within section.** Where the grantor executed deeds for certain



real property to the grantee under an agreement, the agreement is a security arrangement in the fullest sense since it provided for extension of existing loans, set forth the terms of future loans, and left grantor in possession and holding equitable title; therefore, the deeds are instruments which secured the payment of an obligation, and as such, they fell squarely within the provisions of this section and had the legal effect of mortgages and had to be foreclosed as such. *Weil v. Colo. Livestock Prod. Credit Ass'n*, 30 Colo. App. 301, 494 P.2d 134 (1971).

**Cannot sever a joint tenancy.** Deed of trust is not a conveyance but is, instead, a lien and thus cannot sever a joint tenancy. *Webster v. Mauz*, 702 P.2d 297 (Colo. App. 1985).

**Equitable mortgage.** A deed deposited in escrow to be delivered to the grantee on failure of the grantor to pay a debt due the grantee is an equitable mortgage. *Larson v. Hinds*, 155 Colo. 282, 394 P.2d 129 (1964).

**Conveyance with contemporaneous bond to reconvey evidence of mortgage.** A conveyance of land, with contemporaneous bond to reconvey, is sometimes accepted as strong evidence that a mortgage is intended, but where it appears that an absolute transfer is the purpose of the parties, this intention prevails. *Baird v. Baird*, 48 Colo. 506, 111 P. 79 (1910).

**No instrument intended to secure the payment of a debt shall be deemed a conveyance, regardless of its terms.** *Ver Straten v. Worth*, 79 Colo. 30, 243 P. 1104 (1926); *Reid v. Pyle*, 51 P.3d 1064 (Colo. App. 2002).

**Quitclaim deed with contemporaneous written agreement constituting security.** A quitclaim deed, taken in connection with a contemporaneous written agreement concerning possession of the property, held to constitute security for a debt, and therefore a mortgage. *Ver Straten v. Worth*, 79 Colo. 30, 243 P. 1104 (1926).

**Deed of trust given as security deemed mortgage.** A deed of trust given as security for a debt is a mortgage. *McGovney v. Gwillim*, 16 Colo. App. 284, 65 P. 346 (1901).

**Quitclaim deed given as security deemed mortgage.** A quitclaim deed, given and intended as security for a debt, is a mortgage. *Morris v. Cheney*, 81 Colo. 393, 255 P. 987 (1927).

**Installment contract for sale of land deemed mortgage.** Where A contracted to sell land to B, the latter to pay the purchase price in installments, the contract is in effect a mortgage which secured to A the performance of the obligations of B. *Pope v. Parker*, 84 Colo. 535, 271 P. 1118 (1928).

**Where vendor retains possession of property sold.** A contract for the sale and purchase of real estate on the installment plan, where the vendor retained possession is not to be a mortgage, and not to be treated as such under this

section. *Am. Mtg. Co. v. Logan*, 90 Colo. 157, 7 P.2d 953 (1932).

**Installment contract where time is of essence not mortgage.** An installment contract where time is of the essence is not a mortgage and is not to be treated as such, for if it were, either actually or in effect, a mortgage, the vendor could not recover possession under the unlawful detainer act until after foreclosure and sale, and then only in the event that he purchased at the sale. *Am. Mtg. Co. v. Logan*, 90 Colo. 157, 7 P.2d 953 (1932).

**Lease and option to purchase property granted to lessee as consideration for allowing foreclosure of a deed of trust given to creditors for purchase price** did not constitute an equitable mortgage where there was no underlying debt or obligation secured by the return of title to property to creditors and the granting of a lease and option to lessee. *Alien, Inc. v. Futterman*, 924 P.2d 1063 (Colo. App. 1995).

**Stipulation that mortgagee becomes absolute owner upon default void.** No force will be given to a stipulation in a mortgage, or in a deed intended as a mortgage, or in any instrument executed at the same time accompanying such deed by which the mortgagor agrees that, if he fails to make payment by a stated time, the mortgagee shall become the absolute owner of the property because the deed when executed, being simply a mortgage for the security of a debt, cannot become anything else, except through the execution of a subsequent agreement based upon a valuable consideration. *Larson v. Hinds*, 155 Colo. 282, 394 P.2d 129 (1964).

**Provision for vendor's re-entry upon default void.** A provision in sale contract that upon default vendor might re-enter and sell premises is void. *Pope v. Parker*, 84 Colo. 535, 271 P. 1118 (1928).

**Receiver to be appointed to collect rents and profits.** Although this section provides that the owner of a real estate mortgage shall not be entitled to the possession of the mortgaged property without foreclosure and sale, where such a mortgage pledges rents and profits as part of the security, and the security is inadequate and the mortgagor insolvent, a court of equity may appoint a receiver any time after filing the suit of foreclosure to collect the rents and profits and have the same applied on the mortgage debt. *Moncrieff v. Hare*, 38 Colo. 221, 87 P. 1082 (1906); *Elmira Mechanics' Soc'y v. Stanchfield*, 160 F. 811 (8th Cir. 1908).

**A director's deed resulting from an IRS tax sale** was not an instrument intended to secure payment of an obligation under this section and was not a lien that must be foreclosed upon in order for the plaintiffs to assert their ownership rights. *Behr v. Burge*, 940 P.2d 1084 (Colo. App. 1996).

**Applied** in *Fairview Mining Corp. v. Am. Mines & Smelting Co.*, 86 Colo. 77, 278 P. 800 (1929); *Jenkins v. Peet*, 19 Bankr. 105 (Bankr. D. Colo. 1982).

## II. EFFECT OF SECTION.

**Mortgage does not vest title in the mortgagee.** *Fehringer v. Martin*, 22 Colo. App. 634, 126 P. 1131 (1912).

**The mortgagor is still the owner, notwithstanding the mortgage.** *Hendricks v. Town of Julesburg*, 55 Colo. 59, 132 P. 61 (1913).

**Mortgagee has a lien merely;** if the mortgagee is out of possession and not entitled to possession, he cannot maintain an action of trespass for damages. *Pueblo & A.V.R.R. v. Beshoas*, 8 Colo. 32, 5 P. 639 (1884).

**This section deprives the mortgagee of all possession and right of possession,** before or after the condition is broken, until after foreclosure and sale. *Pueblo & A.V.R.R. v. Beshoas*, 8 Colo. 32, 5 P. 639 (1884); *Moncrieff v. Hare*, 38 Colo. 221, 87 P. 1082 (1906); *Fidelity Bond & Mtg. Co. v. Paul*, 90 Colo. 94, 6 P.2d 462 (1931); *Erwin v. West*, 105 Colo. 71, 99 P.2d 201 (1939).

Mortgagee has no right to possession until after foreclosure and sale and expiration of period of redemption. *Morris v. Cheney*, 81 Colo. 393, 255 P. 987 (1927); *Moncrieff v. Hare*, 38 Colo. 221, 87 P. 1082 (1906).

**Colorado has adopted by statute a lien theory of mortgages,** which theory generally prohibits a mortgagee from acquiring possession of a mortgaged property until a foreclosure and sale have occurred. *Martinez v. Continental Enter.*, 730 P.2d 308 (Colo. 1986).

**Under a lien theory, the mortgage on a deed of trust creates a lien against real property but does not convey title.** *Hohn v. Morrison*, 870 P.2d 513 (Colo. App. 1993).

**In a lien theory jurisdiction such as Colorado,** a mortgage, deed of trust, or other interest "intended to secure the payment of an obligation affecting title to or an interest in real property shall not be deemed a conveyance" but is, instead, a lien; however, the fact that a mortgage or deed of trust is a security interest, rather than an ownership interest in real property, does not mean that it is not an asset. *Herstam v. Bd. of Dirs.*, 895 P.2d 1131 (Colo. App. 1995).

**Section's effect unchanged if mortgage in form of deed absolute.** The fact that the mortgage is in the form of a deed absolute on its face does not change the rule, provided by this section, as it affects the mortgagee and his representatives. *Pueblo & A.V.R.R. v. Beshoas*, 8 Colo. 32, 5 P. 639 (1884); *Fehringer v. Martin*, 22 Colo. App. 634, 126 P. 1131 (1912).

**An unconditional tender of the amount due by the debtor releases the lien of the mortgage unless the creditor establishes a justifiable and**

good faith reason for rejection of the tender. *Hohn v. Morrison*, 870 P.2d 513 (Colo. App. 1993).

**To the extent a clause in a deed of trust giving the mortgagee the right to possession of property subject to the deed of trust on default on note was inconsistent with statute dealing with right to possession, the statute prevails.** *Martinez v. Continental Enter.*, 730 P.2d 308 (Colo. 1986).

**Regardless of the terms in the deed of trust, lender has only an inchoate right to rents until mortgagor defaults and lender takes some "effectual step"**, such as filing foreclosure or gaining rightful possession, to subject assigned rents to payment of the debt. *Galleria Towers v. Crump Warren & Sommer*, 831 P.2d 908 (Colo. App. 1991).

Where tenant is released from rental obligations by mortgagor prior to foreclosure by lender, lender's rights to receive rents are not vested and therefore extinguished by the release. *Galleria Towers v. Crump Warren & Sommer*, 831 P.2d 908 (Colo. App. 1991).

## III. EVIDENCE.

**Extrinsic evidence may prove deed.** A deed, purporting to be an absolute conveyance, may be proven by extrinsic evidence, either parol or written, to be in effect a mortgage. *Larson v. Hinds*, 155 Colo. 282, 394 P.2d 129 (1964); *Baird v. Baird*, 48 Colo. 506, 111 P. 79 (1910); *Davis v. Pursel*, 55 Colo. 287, 134 P. 107 (1913); *Denver Sanitarium & Hosp. Ass'n v. Roberts*, 65 Colo. 60, 174 P. 300 (1918); *Oppegard v. Oppegard*, 90 Colo. 483, 10 P.2d 333 (1932).

**Oral evidence is admissible to show a deed is a mortgage,** even though fraud or mistake is not alleged specifically. *Ver Straten v. Worth*, 79 Colo. 30, 243 P. 1104 (1926).

Oral evidence is admissible to show that the deed in effect is a mortgage, notwithstanding a contemporaneous written agreement.; *Townsend v. Petersen*, 12 Colo. 491, 21 P. 619 (1889); *Armor v. Spalding*, 14 Colo. 302, 23 P. 789 (1890); *Perot v. Cooper*, 17 Colo. 80, 28 P. 391 (1891); *Davis v. Hopkins*, 18 Colo. 153, 32 P. 70 (1893); *Butsch v. Smith*, 40 Colo. 64, 90 P. 61 (1907); *Blackstock v. Robertson*, 42 Colo. 472, 94 P. 336 (1908).

In an action to redeem from what purports to be an absolute sale of lands, though the object of the parties to the transaction is expressed in one or more separate writings, it is competent to prove by parol evidence that the real transaction is a mortgage, regardless of the number of writings by which it is evidenced. *Blackstock v. Robertson*, 42 Colo. 472, 94 P. 336 (1908).

**Evidence must be clear, certain, and unequivocal,** and it must be convincing beyond a reasonable doubt in order to sustain a bill to declare an absolute deed a mortgage. *Baird v.*



Baird, 48 Colo. 506, 111 P. 79 (1910); Denver Sanitarium & Hosp. Ass'n v. Roberts, 65 Colo. 60, 174 P. 300 (1918); Oppegard v. Oppegard, 90 Colo. 483, 10 P.2d 333 (1932); Whitsett v. Kershow, 4 Colo. 419 (1878); Townsend v. Petersen, 12 Colo. 491, 21 P. 619 (1889); Armor v. Spalding, 14 Colo. 302, 23 P. 789 (1890); Davis v. Hopkins, 18 Colo. 153, 32 P. 70 (1893); Graff v. Portland Town & Mineral Co., 12 Colo.

App. 106, 54 P. 854 (1898); Butsch v. Smith, 40 Colo. 64, 90 P. 61 (1907); Enos v. Anderson, 40 Colo. 395, 93 P. 475 (1907).

**Party alleging mortgage has burden of proof.** The burden of so establishing the fact rests upon the party who alleges the conveyance to be a mortgage. Oppegard v. Oppegard, 90 Colo. 483., 10 P.2d 333 (1932).

**38-35-118. Homestead, how conveyed - claimant insane.** (1) Except as provided in section 38-41-202 (3), to convey or encumber homesteaded property, the husband and wife, if the owner thereof is married, shall execute the conveyance or encumbrance. Such conveyance or encumbrance may be by one instrument or separate instruments which may be acknowledged in the manner provided by articles 30 to 44 of this title. A recital in any recorded conveyance or encumbrance of real property of the marital status of the party executing the same or that the property is or is not occupied as a home by the owner thereof or his family shall be prima facie evidence of the facts therein stated. If the owner of the homesteaded property and a person of the opposite sex, both bearing the same surname, join in the conveyance or encumbrance thereof, the identity of surnames shall be prima facie evidence that such parties are husband and wife for the purposes of this article.

(2) A homestead exemption may be released by an instrument in writing, signed by the party who could convey said property. A statement contained in a mortgage, deed of trust, or other instrument creating a lien waiving or releasing the homestead shall be construed only as a subordination of the homestead to such mortgage, deed of trust, or other lien.

(3) If the homestead is claimed by a person who at the time of conveyance or encumbrance thereof is insane or mentally incompetent and for whose estate there is a conservator duly appointed by a court of competent jurisdiction as provided by the laws of Colorado, the court having jurisdiction of the estate of such insane or mentally incompetent person, wherever it appears to be in the best interests of the ward, may by order empower such conservator to convey or encumber the homestead of such insane or mentally incompetent person.

(4) If such insane or mentally incompetent person is married, the conservator of the estate of the insane or mentally incompetent spouse, when so authorized by court to convey or encumber the homestead of his ward, may do so by a single instrument in writing jointly executed by such conservator and the other spouse, not insane, or such conservator may convey or encumber such homestead of his ward by a separate instrument.

(5) In all cases wherein the court orders a conveyance or encumbrance of a homestead claimed by an insane or mentally incompetent person, the actual consideration for the conveyance or encumbrance of such homestead, whether in money or equivalent property, but not to exceed the sum of five thousand dollars in amount or value, shall be delivered to and accounted for by the conservator of the estate of such insane or mentally incompetent person and such funds or property coming into the possession of the conservator from such sources shall not be liable for the debts of the insane or mentally incompetent person.

**Source:** L. 27: p. 592, § 13. CSA: C. 40, § 119. L. 47: p. 359, § 1. L. 53: p. 414, § 7. CRS 53: § 118-6-18. C.R.S. 1963: § 118-6-18. L. 77: (1) amended, p. 1719, § 1, effective May 27.

**Cross references:** For homestead exemptions, see part 2 of article 41 of this title; for appointment of a conservator for a person under disability or a minor, see part 4 of article 14 of title 15.

#### ANNOTATION

**Law reviews.** For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 Dicta 281 (1949). For note, "When is Homestead Title Marketable?", see 28 Dicta

415 (1951). For comment on the 1953 amendment, see 30 Dicta 192 (1953). For note, "The Homestead Rights of Minor Children in Solvent Estates", see 25 Rocky Mt. L. Rev. 370 (1953).

**Signatures of both joint tenants were not needed to encumber property that was homesteaded solely** by operation of automatic provisions of § 38-41-202, and either of two joint tenants could encumber or convey the interest

that he owned upon his signature unless a written declaration of homestead rights was recorded. *Comm. Factors of Denver v. Clarke & Waggener*, 684 P.2d 261 (Colo. App. 1984).

**38-35-119. Release not a conveyance.** All instruments executed for the purpose of releasing any lien or encumbrance against real property shall be considered only as discharging and canceling such lien or encumbrance. No such release shall convey to any person, except the record owner of the property, any right, title, or interest in the property. Words of conveyance used in any such release shall be construed only as provided in this section.

**Source:** L. 27: p. 593, § 14. CSA: C. 40, § 120. CRS 53: § 118-6-19. C.R.S. 1963: § 118-6-19.

#### ANNOTATION

**Law reviews.** For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 16 Dicta 71 (1940). For article, "Curative

Statutes of Colorado Respecting Titles to Real Estate", see 26 Dicta 321 (1949).

**38-35-120. Record of first and last parcels includes intervening parcels.** All instruments wherein the parcels of property affected are not separately enumerated or listed but are described as being from one numbered, lettered, or designated parcel to another shall be construed as including the first and last designated parcels and also the intervening parcels unless a contrary intention is expressly and clearly set forth in the instrument.

**Source:** L. 27: p. 593, § 15. CSA: C. 40, § 121. CRS 53: § 118-6-20. C.R.S. 1963: § 118-6-20.

**38-35-121. Conveyance or reservation of a mineral interest - geothermal resources.** As respects instruments executed prior to May 17, 1974, which convey title to real property or an interest therein, it shall be presumed that reference to minerals or mineral rights does not include geothermal resources unless geothermal resources are specifically mentioned. As respects such instruments executed on and after May 17, 1974, reference to minerals or mineral rights shall not include geothermal resources unless specifically mentioned.

**Source:** L. 74: Entire section added, p. 316, § 8, effective May 17.

**38-35-122. Inclusion of street address and assessor information with legal description.** (1) (a) All documents of title relating to real property, including instruments creating a lien on real property, except mechanics' liens and judgment liens, shall include as an aid to identification, immediately preceding or following the legal description of the property, the street address or comparable identifying numbers, if such address or numbers are displayed on the property or any building thereon.

(b) Preparers of conveyance documents may include as an aid to identification, immediately preceding or following the legal description of the property, the assessor's schedule number or parcel number.

(2) Should any variance or ambiguity result from the inclusion of a street address, identifying number, or assessor's schedule number or parcel number on a document, the legal description of the property shall govern.

(3) The fact that a document of title does not contain an address, identifying number, or assessor's schedule number or parcel number shall not render the document ineffective nor render title unmarketable if the legal description appears therein.



**Source:** L. 75: Entire section added, p. 1436, § 1, effective July 1. L. 84: (1) amended, p. 981, § 1, effective July 1. L. 94: Entire section amended, p. 30, § 1, effective March 9.

#### ANNOTATION

**This section requires certain information to be included in all documents of title.** Guar. Bank & Trust Co. v. LaSalle Nat'l Bank Ass'n, 111 P.3d 521 (Colo. App. 2004).

**Trustee not entitled to avoid deed of trust containing error in property's block number** and is therefore not entitled to sell the property

free and clear of liens or obtain related relief based upon the potential avoidance of the deed of trust. In re Taylor, 422 B.R. 270 (Bankr. D. Colo. 2009).

**38-35-123. Liens - notice - current address.** (1) Any instrument which creates a lien on real property, except mechanics' liens, when recorded in the office of the county clerk and recorder of the county where such real property is situated shall include on its face the current mailing address of the lienor and lienee when such instrument is recorded. In the case of judgment liens, such address shall be placed on the document by the lienor.

(2) Failure to comply with this section shall not affect the validity of the recording of the instrument or of the instrument itself.

**Source:** L. 84: Entire section added, p. 981, § 2, effective July 1.

**38-35-124. Requirements upon satisfaction of indebtedness.** Except as provided in articles 22 and 23 of this title, when all indebtedness, whether absolute or contingent, secured by a lien on real property has been satisfied, unless the debtor requests in writing that the lien not be released, the creditor or holder of the indebtedness shall, within ninety days after the satisfaction of the indebtedness and receipt from the debtor of the reasonable costs of procuring and recording the release documents, record with the appropriate clerk and recorder the documents necessary to release or satisfy the lien of record or, in the case of an indebtedness secured by a deed of trust to a public trustee, file with the public trustee the documents required for a release as prescribed by section 38-39-102. If the debtor requests in writing that the lien be released, or fails to request in writing that the lien not be released, then the debtor's request or the actual release shall cancel any obligations on the part of the creditor or holder to make any further loan or advance that would be secured by the lien. If the person satisfying the indebtedness requests in writing delivery to him or her of the cancelled instruments of indebtedness at the time of satisfaction, the creditor or holder shall be relieved of any further obligation or liability under this section after such delivery has been completed. Upon satisfaction of the indebtedness, the creditor or holder shall return to the person satisfying the indebtedness all papers and personal property of the debtor that have been held by the creditor or holder in connection with the indebtedness. Any creditor or holder who fails to comply with this section shall be liable to the owner of the real property encumbered by such indebtedness and to any other person liable on such indebtedness for all actual economic loss incurred enforcing the rights provided under this section, including reasonable attorney fees and costs.

**Source:** L. 87: Entire section added, p. 1338, § 1, effective April 22. L. 91: Entire section amended, p. 1920, § 48, effective June 1. L. 2002: Entire section amended, p. 1331, § 2, effective July 1.

#### ANNOTATION

**In action brought against the United States by local housing authority to quiet title to real property, federal law preempted this Colorado statute.** Hous. Authority of City of Fort Collins v. U.S., 980 F.2d 624 (10th Cir. 1992).

**This section clearly and unequivocally requires a satisfaction of an indebtedness before a creditor is required to file the documents necessary for a release of lien.** Hohn v. Morrison, 870 P.2d 513 (Colo. App. 1993).

**This section clearly requires that, upon tender of a payment fully satisfying an obligation secured by real property, the deed of trust securing that obligation must be released.** *Crown Bank v. Crowder Mortgage Corp.*, 5 P.3d 954 (Colo. App. 2000).

A lender cannot place conditions on its release of a deed of trust other than the satisfaction of the indebtedness secured by that deed of trust. This conclusion is consistent with the apparent purpose of the statute, which is to permit the

owners of real property to obtain the release of liens by the payment of the full amount secured by the lien and thereby permit the owner to sell, pledge, or otherwise deal with the property of the lien. If a lien holder were permitted further to condition the release of the lien, it could use that ability to coerce settlement of other disputes or accounts, a result the statute was clearly intended to prevent. *Crown Bank v. Crowder Mortgage Corp.*, 5 P.3d 954 (Colo. App. 2000).

**38-35-124.5. Effect of written payoff statement.** (1) Any person or entity providing closing and settlement services for a real estate transaction and to whom a payoff statement is addressed shall be entitled to reasonably rely on the amounts that are set forth in such payoff statement for the time frame set forth therein and shall not be liable to the creditor or holder of the indebtedness or its agent for any omitted amounts, unless a written amendment is received by such person or entity prior to the closing of the transaction. Upon payment to the creditor or holder of the amounts stated in the written payoff statement, as may be amended, such creditor or holder shall be required to comply with the release provisions of section 38-35-124.

(2) Any creditor or holder of the indebtedness who fails to comply with the release provisions of section 38-35-124 as required by subsection (1) of this section shall be liable to those persons or entities to whom the written payoff statement was addressed for any actual economic loss suffered by such persons or entities, including reasonable attorney fees and costs in enforcing the provisions of this section.

(3) Notwithstanding the provisions of this section, in the event of an error in the written payoff statement provided by a creditor or holder of the indebtedness or its agent, the creditor shall retain any remedies, legal or equitable, to collect directly against the obligor any unsecured additional amounts determined to be outstanding.

**Source: L. 2002:** Entire section added, p. 1332, § 3, effective July 1.

**38-35-125. Closing and settlement services - disbursement of funds.** (1) As used in this section, unless the context otherwise requires:

(a) “Available for immediate withdrawal as a matter of right” includes funds transferred by any of the following means:

(I) Any wire transfer;

(II) Any certified check, cashier’s check, teller’s check, or any other instrument as defined by federal regulation CC, 12 CFR 229.10 (c).

(a.5) “Closing and settlement services” means those services which benefit the parties to the sale, lease, encumbrance, mortgage, or creation of a secured interest in and to real property and the receipt and disbursement of money in connection with any sale, lease, encumbrance, mortgage, or deed of trust.

(b) “Financial institution” means an entity that is authorized under the laws of this state, another state, or the United States to make loans and receive deposits and has its deposits insured by the federal deposit insurance corporation or its successor or the national credit union share insurance fund.

(c) (Deleted by amendment, L. 2004, p. 1206, § 83, effective August 4, 2004.)

(2) No person or entity that provides closing and settlement services for a real estate transaction shall disburse funds as a part of such services until those funds have been received and are either: Available for immediate withdrawal as a matter of right from the financial institution in which the funds have been deposited; or available for immediate withdrawal as a consequence of an agreement of a financial institution in which the funds are to be deposited or a financial institution upon which the funds are to be drawn. Any such agreement shall be made with or for the benefit of the person or entity providing closing and settlement services for a real estate transaction. Notwithstanding the provisions of this



subsection (2), the person or entity providing closing and settlement services may advance funds, not to exceed five hundred dollars, on behalf of interested parties for the transaction to pay incidental fees for such items as tax certificates and recording costs or to cover minor changes in the closing adjustments.

(3) The requirements of subsection (2) of this section may be waived by the seller in the real estate transaction if:

(a) It is specified as part of written closing instructions in advance of closing that the seller waives the requirements set forth in subsection (2) of this section and that the person or entity conducting the closing, unless such person or entity is the seller, is not to handle the receipt and disbursement of funds as part of the closing; and

(b) Any holder of a lien encumbering the property up to the time of closing agrees, in writing, to such waiver and further agrees, in writing, to release such lien immediately upon receipt of a check from the closing drawn in the amount of the outstanding indebtedness secured by such lien. Such an agreement shall obligate the lienholder to release such lien regardless of whether the payoff check received has been or will be honored.

(4) Any seller who so requests as part of written closing instructions in advance of closing shall be entitled to receive the proceeds of closing in a cashier's check or in funds electronically transferred to an account specified by the seller.

(5) Failure to comply with the provisions of this section shall be deemed a deceptive trade practice, as provided in section 6-1-105 (1) (v), C.R.S., and the attorney general or a district attorney may apply to the appropriate district court of this state for an order to effect the purposes of this section.

**Source:** **L. 88:** Entire section added, p. 1259, § 1, effective July 1. **L. 89:** (1)(c) added, p. 1445, § 1, effective April 6. **L. 2004:** (1)(b) amended, p. 156, § 73, effective July 1; (1) amended, p. 1206, § 83, effective August 4.

**Editor's note:** Amendments to subsection (1) by Senate Bill 04-239 and House Bill 04-1126 were harmonized.

#### ANNOTATION

**Law reviews.** For article, "'Good Funds' Law and New Title Insurance Regulations", see 18 Colo. Law. 233 (1989).

**By failing to require "good funds" to complete a real estate closing in violation of § 10-**

**11-108 and this section, title insurance agency injected an "illegal purpose" into the situation and the bargain became illegal.** Guardian Title Agency, LLC v. Matrix Capital Bank, 141 F. Supp.2d 1277 (D. Colo. 2001).

**38-35-126. Contract for deed - escrow of tax moneys - written notice.** (1) (a) Parties entering into a contract for deed to real property shall designate the public trustee of the county where the real property is located to act as escrow agent for moneys paid or to be paid by the purchaser to meet the property tax obligations on the real property, including the seller's credit at closing for the current year's property taxes and periodic property tax payments, which the contract shall provide will be made monthly by the purchaser to the public trustee. The purchaser shall be responsible for payment to the public trustee of the escrow fee pursuant to section 38-37-104 (1) (d). Once each year during the month of April, upon notice from the county treasurer, the public trustee shall, to the extent funds are on deposit in the escrow account, transfer sufficient funds from the escrow account to the county treasurer for payment of property taxes on the real property for the prior taxable year. The public trustee shall continue as escrow agent for tax moneys collected on the real property until the deed to the real property is delivered to the purchaser and recorded. At the time of delivery, the public trustee shall release to the purchaser any moneys remaining in the escrow account and the receipts for all property taxes paid on the property by the public trustee. If the public trustee determines that the escrow is no longer necessary, the public trustee may terminate the escrow account. The public trustee shall notify the county treasurer of the termination and shall transfer any moneys held in escrow to the county treasurer for payment of property taxes in accordance with section 39-10-104.5, C.R.S. Any

amount so transferred by the public trustee shall be subtracted from the amount of property tax payable on the real property at the time annual property taxes for the current or subsequent taxable years are due. Upon termination of the escrow account, any amount not accepted by the county treasurer upon transfer shall be returned by the public trustee to the person holding title to the real property that is the subject of the contract for deed to real property.

(b) For the purposes of this section, a “contract for deed to real property” means a contract for the sale of real property which provides that the purchaser shall assume possession of the real property and the rights and responsibilities of ownership of the real property but that the deed to such real property will not be delivered to the purchaser for at least one hundred eighty days following the latest execution date on the contract for deed to real property and not until the purchaser has met certain conditions such as payment of the full contract price or a specified portion thereof. “Contract for deed to real property” includes installment land contracts.

(c) The public trustee shall deposit tax moneys received pursuant to the provisions of paragraph (a) of this subsection (1) in an escrow account opened for such purpose in one or more financial institutions which are in compliance with and qualified and defined in article 10.5 of title 11, C.R.S. Moneys from more than one transaction may be commingled in one account, to be accounted for separately. If the escrow account opened by the public trustee under the provisions of this subsection (1) bears interest, such interest shall be retained by the public trustee to defray expenses arising from the administration of such escrow account.

(d) A public trustee may designate an alternate to act as escrow agent on any contract for deed to real property in which the public trustee is designated as escrow agent pursuant to the provisions of this section; except that such alternate shall not be a party to the contract for deed to real property. Such designation shall be made by sending written notification of such designation to the parties to such contract and to the county treasurer. Such notice shall include the name and legal address of the designated alternate and the date such designated alternate shall assume the duties of escrow agent. Such designated alternate shall have all of the duties and powers of the public trustee to act as escrow agent on a contract for deed to real property as stated in this section. In the event that the public trustee designates an alternate to serve as escrow agent, the purchaser shall pay to the designated alternate the escrow fee as stated in paragraph (a) of this subsection (1).

(2) Within ninety days of executing and delivering a contract for deed to real property, the seller shall file with the county treasurer of the county wherein the real property is located a written notice of transfer by contract for deed to real property. Such notice shall not operate to convey title. Such notice shall include the name and legal address of the seller, the name and legal address of the purchaser, a legal description of the real property, the date upon which the contract for deed to real property was executed and delivered, and the date or conditions upon which the deed to the real property will be delivered to the purchaser, absent default. In addition, within ninety days of executing and delivering the contract for deed to real property, the seller shall file a real estate transfer declaration with the county assessor of the county wherein the property is located, pursuant to the provisions of section 39-14-102, C.R.S.

(3) The buyer shall have the option of voiding any contract for deed to real property which fails to designate the public trustee as escrow agent for deposit of property tax moneys or for which no written notice is filed with the county treasurer’s office or the county assessor’s office. Upon avoidance of such contract, the buyer shall be entitled to the return of all payments made on the contract, with statutory interest as defined in section 5-12-102, C.R.S., and reasonable attorney fees and costs. This avoidance right shall expire on the date seven years after the latest execution date on the contract for deed to real property unless exercised prior to such date.

(4) The provisions of subsections (1) and (3) of this section shall not apply to the parties to a contract for deed to real property so long as the seller complies with the requirements of subsection (2) of this section, so long as the real property which is the subject of such contract for deed to real property is not subdivided into parcels which are smaller than one acre, and so long as the seller pays the annual property tax obligations on the real property



which is the subject of such contract for deed to real property or submits a bond or an irrevocable letter of credit in the amount of the taxes due on such real property to the county treasurer, either of which shall be immediately payable to such county treasurer upon default. Payment of such property taxes or submittal of such bond or irrevocable letter of credit shall be made within thirty days of mailing of the notice of taxes due from the county treasurer and prior to seeking reimbursement from the purchaser.

(5) Repealed.

**Source:** **L. 92:** Entire section added, p. 2098, § 1, effective July 1. **L. 93:** (4) added, p. 509, § 1, effective April 26; (5) added, p. 1743, § 1, effective July 1. **L. 94:** (5) repealed, p. 1645, § 78, effective May 31. **L. 2006:** (1)(a) amended, p. 1479, § 36, effective January 1, 2008.

**Editor's note:** The effective date for amendments made to subsection (1)(a) by chapter 305, Session Laws of Colorado 2006, was changed from July 1, 2007, to January 1, 2008, by section 27 of chapter 404, Session Laws of Colorado 2007. (See L. 2007, p. 1849.)

#### ANNOTATION

**Where installment land contract failed to include required provision under subsection (1)(a) designating the public trustee as escrow agent, contract violated mandate of this section, and buyers were entitled to void it.** *Haan v. Traylor*, 79 P.3d 114 (Colo. App. 2003).

Upon voidance of a contract under subsection (1)(a), buyers were also entitled to an award of their reasonable attorney fees and costs under subsection (3). *Haan v. Traylor*, 79 P.3d 114 (Colo. App. 2003).

**Buyer's claim under subsection (3) to void installment land contract was an affirmative defense and compulsory counterclaim.** As such, defense and claim should have been asserted in buyer's responsive pleading (or amended responsive pleading) or they are waived. Buyer's claim was related to seller's claim and, therefore, was a compulsory counterclaim. *Dinosaur Park Invs., L.L.C. v. Tello*, 192 P.3d 513 (Colo. App. 2008).

**District court erred in allowing buyer under C.R.C.P. 15(a) to amend his answer to raise defense under subsection (3) following trial after ruling before trial that he would not be permitted to raise such defense.** Where a defense or claim is not pleaded or intentionally and actually tried, a court cannot render a judgment thereon. This rule cannot be circumvented by allowing a party to amend his or her answer after trial where the defense or claim was not tried by express or implied consent. *Dinosaur Park Invs., L.L.C. v. Tello*, 192 P.3d 513 (Colo. App. 2008).

Further, the district court abused its discretion in effectively permitting buyer to amend his answer after trial because seller was clearly prejudiced. *Dinosaur Park Invs., L.L.C. v. Tello*, 192 P.3d 513 (Colo. App. 2008).

**38-35-127. Unenforceability of prospective residential transfer fee covenants - notice requirements for existing residential transfer fee covenants - written statement of transfer fee payable - affidavit - legislative declaration - definitions.** (1) The general assembly hereby finds, determines, and declares that:

(a) The public policy of this state favors the transferability and marketability of interests in residential real property free from unreasonable restraints on alienation and covenants or servitudes that do not touch and concern the residential real property; and

(b) A transfer fee covenant as applied to residential real property violates this public policy by impairing the transferability and marketability of title to affected residential real property and constitutes an unreasonable restraint on alienation, regardless of the duration of the transfer fee covenant or the amount of the transfer fee set forth in the transfer fee covenant.

(2) As used in this section, unless the context otherwise requires:

(a) "Conveyance" means the sale, gift, conveyance, assignment, inheritance, or other transfer of an ownership interest in residential real property located in this state either upon which there are residential improvements or upon which the construction of residential improvements has commenced.

(b) "Excluded provision" means any one of the following:

(I) Any provision of a purchase contract, option, mortgage, deed of trust, security agreement, agreement engaging a real estate broker for brokerage services, lease, or other agreement that obligates one party to the agreement to pay the other, as full or partial consideration for the agreement or for a waiver of rights under the agreement, an amount determined under the agreement, if the amount constitutes:

(A) Principal, interest, charges, fees, or other amounts to the extent payable by a borrower to a lender, including seller carry-back financing, pursuant to a loan secured by a mortgage, deed of trust, or other security agreement encumbering residential real property, including, without limitation, any fee payable to the lender for consenting to an assumption of the loan or a conveyance subject to the security agreement, any fees or charges payable to the lender for estoppel letters or certificates, and any shared appreciation interest or profit participation or other consideration payable to the lender in connection with the loan;

(B) Compensation or expense reimbursement paid to a licensed real estate broker for brokerage services rendered in connection with the conveyance for which the compensation is earned or a one-time fee paid to a closing agent, title insurance company, property management company, management company for an association of unit owners, mortgage loan originator, mortgage broker, or other party for services rendered in connection with the conveyance for which the fee is earned; or

(C) Any rent, reimbursement, charge, fee, or other amount to the extent payable by a lessee to a lessor under a lease, including, without limitation, any fee payable to the lessor for consenting to an assignment, subletting, encumbrance, or transfer of the lease;

(II) Any provision in a deed, memorandum, short form, or other document recorded for the purpose of providing record notice of an agreement described in subparagraph (I) of this paragraph (b);

(III) To the extent permitted by law, any provision in a document imposing a tax, fee, charge, assessment, fine, or other amount, to the extent payable to or imposed, directly or indirectly, by a governmental authority or a quasi-governmental entity or to such authority's or entity's successors and assigns, and including, without limitation, an amount imposed by any owner of residential real property as the declarant pursuant to a recorded declaration of transfer fee covenants that assigns or otherwise designates the right to receive and utilize the proceeds of such transfer fee to a governmental authority or quasi-governmental entity, or to such authority's or entity's successors and assigns, including any bond trustee or lender with respect to financing transactions of such authority or entity;

(IV) Any provision in a recorded document, regardless of whether the document is recorded before, on, or after May 23, 2011, requiring payment of a fee, charge, assessment, fine, or other amount only to the extent payable to or collected by an association of unit owners, homeowners, property owners, condominium owners, or similar mandatory membership organization, including a cooperative, mobile home, time share unit, or common interest community association;

(V) Any provision in a document requiring payment of a fee, charge, assessment, dues, contribution, or other amount, only to the extent payable to an organization described in section 501 (c) (3), 501 (c) (4), or 501 (c) (7) of the federal "Internal Revenue Code of 1986", as amended, for the purpose of benefiting the community in which the affected real property is located, the common areas of the community, or any adjacent or contiguous real property and supporting activities such as cultural, educational, charitable, affordable housing, preservation of open space, recreational, transportation, environmental, conservation, or similar activities;

(VI) Any provision in a document requiring payment of an amount to the extent required pursuant to a recorded covenant or servitude that imposes limitations on the use of residential real property pursuant to an environmental remediation project pertaining to such property; or

(VII) Any provision in a recorded deed, memorandum, short form, or other recorded document requiring payment of an amount that, once paid, shall not bind any successor in title to the interest in residential real property and that shall in no event be payable by a grantee upon the conveyance of residential real property upon which there are residential improvements.



(c) "Payee" means the person, entity, or organization, or their successors and assigns, specified in the transfer fee covenant to which a transfer fee is to be paid.

(d) "Residential improvements" shall have the same meaning as set forth in section 39-1-102 (14.3), C.R.S.

(e) "Residential real property" shall have the same meaning as set forth in section 39-1-102 (14.5), C.R.S.

(f) "Time share unit" shall have the same meaning as set forth in section 38-33-110 (7).

(g) "Transfer fee" means a fee or charge required to be paid by a transfer fee covenant, any portion of which is payable upon conveyance or payable for the right to make or accept such conveyance, regardless of whether the fee or charge is a fixed amount or is determined as a percentage of the value of the residential real property, the purchase price, or any other form of consideration given for the conveyance.

(h) "Transfer fee covenant" means a provision in a document, whether recorded or not and however denominated, that requires or purports to require the payment of a transfer fee, or part of a transfer fee, to a payee. A transfer fee covenant shall not include, nor shall this section apply to, an excluded provision.

(3) (a) Any transfer fee covenant recorded on or after May 23, 2011, or any lien recorded on or after May 23, 2011, to the extent that it purports to secure the payment of a transfer fee, shall not, upon conveyance, be binding on or enforceable against the affected real property or be payable for the right to make or accept such conveyance, nor shall such covenant or lien be binding on or enforceable against any subsequent owner, purchaser, or holder of any mortgage, deed of trust, or other security interest encumbering the affected real property.

(b) Any person who records, or causes or suffers to be recorded, a transfer fee covenant on or after May 23, 2011, and fails to release such covenant and any lien purporting to secure the payment of a transfer fee within thirty days after written request for the release is sent to the last-known address of the payee as specified in the transfer fee covenant personally or by certified mail, first-class postage prepaid, return receipt requested, shall be liable for all of the following:

(I) Any actual damages resulting from the imposition of the transfer fee covenant on a conveyance, including the amount of any transfer fee paid by a party to the conveyance; and

(II) All reasonable actual attorney fees, expenses, and costs incurred by a party to the conveyance or by a holder of a mortgage, deed of trust, or other security interest encumbering the residential real property subject to the transfer fee covenant in connection with an action to:

(A) Recover a transfer fee paid;

(B) Quiet title to the residential real property burdened by the transfer fee covenant; or

(C) Show cause why the transfer fee covenant, or any lien purporting to secure the payment of a transfer fee, should not be declared invalid.

(4) (a) In the case of any transfer fee covenant, or any amendment to such covenant, recorded prior to May 23, 2011, the payee, as a condition of payment of the transfer fee, shall record against the residential real property burdened by the transfer fee covenant, in the office of the county clerk and recorder for the county in which the residential real property is situated, not later than October 1, 2011, a notice of transfer fee.

(b) The notice of transfer fee required by paragraph (a) of this subsection (4) shall:

(I) Be entitled "notice of transfer fee", which title shall be in at least fourteen-point boldface type;

(II) Specify the amount of the transfer fee if the transfer fee is a flat amount or the percentage of the sales price constituting the transfer fee if the transfer fee is determined as a percentage of the value of the residential real property, or such other basis by which the transfer fee is to be calculated;

(III) Provide actual cost examples of the transfer fee for a home priced at two hundred fifty thousand dollars, a home priced at five hundred thousand dollars, and a home priced at seven hundred fifty thousand dollars;

(IV) Specify the date or circumstances under which the transfer fee payment requirement expires, if any;

(V) Describe the general purpose for which the moneys from the transfer fee will be used;

(VI) Identify the name of the payee and specific contact information for the payee, including mailing address, regarding where the moneys are to be sent;

(VII) Contain the acknowledged signature of the payee;

(VIII) Identify the name of the owner and the legal description of the residential real property burdened by the transfer fee covenant, as disclosed by the records of the county clerk and recorder; and

(IX) Specify the method of releasing any lien recorded against the residential real property pursuant to the transfer fee covenant.

(c) The payee may file an amendment to the notice of transfer fee containing new contact information, and such amendment shall contain the recording information of the notice of transfer fee that it amends, the name of the owner, and the legal description of the residential real property burdened by the transfer fee covenant as contained in the records of the county clerk and recorder at the time of the recording of the amendment.

(d) The office of the county clerk and recorder shall index the notice of transfer fee under the names of the persons, entities, or organizations identified in paragraph (b) of this subsection (4) or as such names may be identified in a notice that has been amended under paragraph (c) of this subsection (4). The office of the county clerk and recorder shall not be required to examine any other information contained in the notice of transfer fee or any amendment to such notice.

(5) If the payee fails to comply fully with paragraph (a) or (b) of subsection (4) of this section, the grantor of any residential real property burdened by the transfer fee covenant may proceed with the conveyance to any grantee and in doing so shall be deemed to have acted in good faith and shall not be subject to any obligations under the transfer fee covenant. All conveyances thereafter shall be free and clear of any such transfer fee and transfer fee covenant.

(6) (a) Upon written request made by the owner, or the owner's designee, delivered personally or by certified mail, first-class postage prepaid, return receipt requested, to the payee's address shown on the notice of transfer fee or any amendment to the notice, the payee shall furnish to the owner or the owner's designee a written statement specifying the amount of the transfer fee payable. If the payee fails to provide such statement within thirty days after the date a written request for the same is sent to the address shown in the notice of transfer fee in order to obtain a release of such fee, then the owner or the owner's designee, on recording of the affidavit required under subparagraph (I) of paragraph (b) of this subsection (6), may convey any interest in the residential real property to any grantee without payment of the transfer fee and such conveyance shall not be subject to the transfer fee and transfer fee covenant.

(b) (I) An affidavit, executed under penalty of perjury, stating the facts specified under paragraph (a) of this subsection (6) and containing, at a minimum, the information set out in subparagraph (III) of this paragraph (b), and made by one or more persons, if applicable, who has actual knowledge of, and is competent to testify in a court of competent jurisdiction about, the facts in such affidavit, shall be recorded prior to, simultaneously with, or within forty-five days after a deed or other instrument conveying the interest in the residential real property burdened by the transfer fee covenant is recorded in the office of the county clerk and recorder in the county in which the residential real property is situated.

(II) When recorded, an affidavit as described in subparagraph (I) of this paragraph (b) shall constitute prima facie evidence that:

(A) A request for the written statement of the transfer fee payable in order to obtain a release of the fee imposed by the transfer fee covenant was sent to the address shown in the notice of transfer fee or in any amendment to such notice; and

(B) The payee failed to provide the written statement of the transfer fee payable within thirty days of the date of the notice sent to the address shown in the notice of transfer fee or in any amendment to such notice.

(III) An affidavit filed under subparagraph (I) of this paragraph (b) shall state that the affiant has actual knowledge of, and is competent to testify to, the facts in the affidavit and shall include the legal description of the residential real property burdened by the transfer



fee covenant; the name of the person appearing who is on record as the owner of such residential real property at the time of the signing of such affidavit; the name of the grantee of the conveyance to be recorded; a reference, by recording information, to the instrument of record containing the transfer fee covenant; and an acknowledgment that the affiant is testifying under penalty of perjury.

(IV) The office of the county clerk and recorder shall index the affidavit in the name of the record owner shown therein.

(V) In no event shall the liability of the affiant to any payee for nonpayment of the transfer fee exceed the amount stated in the notice of transfer fee covenant for that particular conveyance; except that nothing in this section shall confer any liability upon any person or title company, or any agent or employee of such company, that executes an affidavit on request of any grantor when the person or title company has actual knowledge of some or all of the matters contained in the affidavit, unless that person or title company is proven to have acted in bad faith or with gross negligence.

(7) Notwithstanding any other provision contained in the transfer fee covenant, any notice given under this section shall be sent to the last-known address of the payee as specified in the notice of transfer fee or in any amendment to the notice.

(8) Notwithstanding any other provision of this section, subsections (4), (5), and (6) of this section shall not apply to a nonprofit organization formed prior to May 23, 2011, that is either described in section 501 (c) (3), 501 (c) (4), or 501 (c) (7) of the federal "Internal Revenue Code of 1986", as amended, or that is organized in accordance with the provisions of article 30 of title 7, C.R.S., article 40 of title 7, C.R.S., or articles 121 to 137 of title 7, C.R.S., and that is a payee under a transfer fee covenant recorded prior to May 23, 2011.

(9) This section shall not be construed to imply that any transfer fee covenant or excluded provision is valid or enforceable solely as the result of the enactment of this section.

**Source: L. 2011:** Entire section added, (SB 11-234), ch. 198, p. 822, § 1, effective May 23.

## PART 2

### SPURIOUS LIENS AND DOCUMENTS

**38-35-201. Definitions.** As used in this part 2, unless the context otherwise requires:

(1) "Federal official or employee" means an appointed or elected official or any employee of the government of the United States of America or of any agency of such government as defined for purposes of the "Federal Tort Claims Act", 28 U.S.C. sec. 2671.

(2) "Lien" means an encumbrance on real or personal property as security for the payment of a debt or performance of an obligation.

(3) "Spurious document" means any document that is forged or groundless, contains a material misstatement or false claim, or is otherwise patently invalid.

(4) "Spurious lien" means a purported lien or claim of lien that:

(a) Is not provided for by a specific Colorado or federal statute or by a specific ordinance or charter of a home rule municipality;

(b) Is not created, suffered, assumed, or agreed to by the owner of the property it purports to encumber; or

(c) Is not imposed by order, judgment, or decree of a state court or a federal court.

(5) "State court" means a court established pursuant to title 13, C.R.S.

(6) "State or local official or employee" means an appointed or elected official or any employee of:

(a) The state of Colorado;

(b) Any agency, board, commission, or state department in any branch of state government;

(c) Any institution of higher education; or

(d) Any school district, political subdivision, county, municipality, intergovernmental agency, or other unit of local government in Colorado.

**Source:** L. 97: Entire part added, p. 35, § 1, effective March 20. L. 98: (4)(a) amended, p. 152, § 1, effective April 2.

### ANNOTATION

**For purposes of satisfying the definition of “spurious document” under subsection (3), a document is “groundless” for which a proponent can advance no rational argument based on evidence or the law to support the claim of a lien.** Westar Holdings P’ship v. Reece, 991 P.2d 328 (Colo. App. 1999).

**Notice of lis pendens may be a spurious document**, which includes any document that is forged or groundless, contains a material misstatement or false claim, or is otherwise patently invalid. Pierce v. Francis, 194 P.3d 505 (Colo. App. 2008); Shyanne Props., LLC v. Torp, 210 P.3d 490 (Colo. App. 2009).

**“Wild deed” is “patently invalid” and thus a spurious document under subsection (3).** A deed of trust executed by a grantor with no right, title, or interest in the subject properties the deed purported to convey is outside the chain of title, a “wild deed”, and a spurious document. GMAC Mortgage Corp. v. PWI Group, 155 P.3d 556 (Colo. App. 2006).

**Use of notices of lis pendens in will contests appropriate.** Pierce v. Francis, 194 P.3d 505 (Colo. App. 2008).

**Claims in underlying will contest sufficient to justify a notice of lis pendens.** Pierce v. Francis, 194 P.3d 505 (Colo. App. 2008).

**Likelihood of success at trial or on appeal not required** to rebuff a challenge to a lis pendens notice. Pierce v. Francis, 194 P.3d 505 (Colo. App. 2008).

**Because mechanic’s liens are provided for by statute, article 22 of title 38, they are excluded from definition of “spurious liens”** and cannot be invalidated on that basis. Moreover, mechanic’s liens cannot be challenged as “spurious documents”. Tuscany, LLC v. W. States Excavating Pipe & Boring, LLC, 128 P.3d 274 (Colo. App. 2005).

Courts of general jurisdiction have the authority to weigh the validity of a mechanic’s lien on other grounds and apply the spurious liens and documents’ statutes. SR Condos., LLC v. K.C. Constr., Inc., 176 P.3d 866 (Colo. App. 2007).

**Notice of lis pendens cannot be a spurious lien** because such notice is not a lien. A notice of lis pendens does not encumber property but merely informs third parties that litigation is pending that could affect title to the property. Pierce v. Francis, 194 P.3d 505 (Colo. App. 2008).

**38-35-202. Recording or filing.** (1) Any state or local official or employee, including the clerk and recorder of any county or city and county and the Colorado secretary of state, may accept or reject for recording or filing any document that the state or local official or employee reasonably believes in good faith may be a spurious lien or spurious document.

(2) No state or local official or employee, including the clerk and recorder of any county or city and county and the Colorado secretary of state, shall be liable to any person or claimant for either the acceptance or rejection for recording or filing of any document that the state or local official or employee reasonably believes in good faith may be a spurious lien or spurious document.

(3) No state or local official or employee, including the clerk and recorder of any county or city and county and the Colorado secretary of state, shall be obligated to accept for recording or filing any lien or claim of lien against a federal official or employee or a state or local official or employee based upon the performance or nonperformance of that official’s or employee’s duties unless such lien or claim of lien is accompanied by a specific order issued by a state court or federal court authorizing the recording or filing of such lien or claim of lien.

**Source:** L. 97: Entire part added, p. 36, § 1, effective March 20.

**38-35-203. Action to enforce.** (1) No spurious lien or spurious document shall hold or affect any real or personal property longer than thirty-five days after the lien or document has been recorded or filed in the office of any state or local official or employee, including the office of the clerk and recorder of any county or city and county or the office of the Colorado secretary of state, unless within the thirty-five days:

(a) An action has been commenced to enforce such lien or document in the state district



court for the county or city and county in which the lien or document was recorded or filed or the federal district court in Colorado; and

(b) A notice of lis pendens stating that such an action has been commenced is recorded or filed in the office where the lien or document was recorded or filed.

(2) The notice of lis pendens required by paragraph (b) of subsection (1) of this section must comply with the requirements of section 38-35-110 and rule 105 (f) of the Colorado rules of civil procedure and must include the civil action number of the action that has been commenced to enforce the lien or document. Failure to comply with the requirements of this subsection (2) shall render the notice of lis pendens invalid.

**Source:** L. 97: Entire part added, p. 37, § 1, effective March 20. L. 2012: IP(1) amended, (SB 12-175), ch. 208, p. 895, § 169, effective July 1.

**Editor's note:** Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending the introductory portion to subsection (1) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

**38-35-204. Order to show cause.** (1) Any person whose real or personal property is affected by a recorded or filed lien or document that the person believes is a spurious lien or spurious document may petition the district court in the county or city and county in which the lien or document was recorded or filed or the federal district court in Colorado for an order to show cause why the lien or document should not be declared invalid. The petition shall set forth a concise statement of the facts upon which the petition is based and shall be supported by an affidavit of the petitioner or the petitioner's attorney. The order to show cause may be granted ex parte and shall:

(a) Direct any lien claimant and any person who recorded or filed the lien or document to appear as respondent before the court at a time and place certain not less than fourteen days nor more than twenty-one days after service of the order to show cause why the lien or document should not be declared invalid and why such other relief provided for by this section should not be granted;

(b) State that, if the respondent fails to appear at the time and place specified, the spurious lien or spurious document will be declared invalid and released; and

(c) State that the court shall award costs, including reasonable attorney fees, to the prevailing party.

(2) If, following the hearing on the order to show cause, the court determines that the lien or document is a spurious lien or spurious document, the court shall make findings of fact and enter an order and decree declaring the spurious lien or spurious document and any related notice of lis pendens invalid, releasing the recorded or filed spurious lien or spurious document, and entering a monetary judgment in the amount of the petitioner's costs, including reasonable attorney fees, against any respondent and in favor of the petitioner. A certified copy of such order may be recorded or filed in the office of any state or local official or employee, including the clerk and recorder of any county or city and county and the Colorado secretary of state.

(3) If, following the hearing on the order to show cause, the court determines that the lien or document is not a spurious lien or spurious document, the court shall issue an order so finding and enter a monetary judgment in the amount of any respondent's costs, including reasonable attorney fees, against any petitioner and in favor of the respondent.

**Source:** L. 97: Entire part added, p. 37, § 1, effective March 20. L. 2012: (1)(a) amended, (SB 12-175), ch. 208, p. 895, § 170, effective July 1.

**Editor's note:** Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (1)(a) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

For purposes of satisfying the definition of “spurious document” under this section, a document is “groundless” for which a proponent can advance no rational argument based on evidence or the law to support the claim of a lien. Westar Holdings P’ship v. Reece, 991 P.2d 328 (Colo. App. 1999).

A hearing held pursuant to subsection (3) includes both the privilege to be present when the case is being considered and the right to present and support one’s contentions by evidence and argument, unless the parties agree to a waiver of the right to be present and have evidence considered. Accordingly, the court erred in limiting its review to the pleaded allegations and legal argument. Westar Holdings P’ship. v. Reece, 991 P.2d 328 (Colo. App. 1999).

Trial court had jurisdiction to award attorney fees and costs to defendants for a spurious lis pendens. Because plaintiff did not refute

that the lis pendens was spurious at the show cause hearing, and because a lis pendens can be a spurious document, trial court had jurisdiction to enter judgment in favor of defendants and against plaintiff for defendants’ costs and attorney fees. Shyanne Props., LLC v. Torp, 210 P.3d 490 (Colo. App. 2009).

Trial court abused its discretion in awarding attorney fees without holding an evidentiary hearing on the reasonableness and necessity of the attorney fees requested by defendants. If a party requests a hearing concerning an award of fees, the trial court must hold a hearing. Shyanne Props., LLC v. Torp, 210 P.3d 490 (Colo. App. 2009).

Release of contested liens or documents before the show cause hearing precludes an award of attorney fees under this section. Sifton v. Stewart Title Guar. Co., 259 P.3d 542 (Colo. App. 2011).

ARTICLE 35.5

Nondisclosure of Information Psychologically Impacting Real Property

38-35.5-101. Circumstances psychologically impacting real property - no duty for broker or salesperson to disclose.

**38-35.5-101. Circumstances psychologically impacting real property - no duty for broker or salesperson to disclose.** (1) Facts or suspicions regarding circumstances occurring on a parcel of property which could psychologically impact or stigmatize such property are not material facts subject to a disclosure requirement in a real estate transaction. Such facts or suspicions include, but are not limited to, the following:

(a) That an occupant of real property is, or was at any time suspected to be, infected or has been infected with human immunodeficiency virus (HIV) or diagnosed with acquired immune deficiency syndrome (AIDS), or any other disease which has been determined by medical evidence to be highly unlikely to be transmitted through the occupancy of a dwelling place; or

(b) That the property was the site of a homicide or other felony or of a suicide.

(2) No cause of action shall arise against a real estate broker or salesperson for failing to disclose such circumstance occurring on the property which might psychologically impact or stigmatize such property.

Source: L. 91: Entire article added, p. 1636, § 20, effective July 1.

ARTICLE 35.7

Disclosures Required in Connection with  
Conveyances of Residential Real Property

38-35.7-101.	Disclosure - special taxing districts - general obligation indebtedness.	pay assessments - requirement for architectural approval.
38-35.7-102.	Disclosure - common interest community - obligation to	38-35.7-103. Disclosure - methamphetamine laboratory.



38-35.7-104.	Disclosure of potable water source - rules.	38-35.7-106.	Solar prewire option - solar consultation.
38-35.7-105.	Disclosure of transportation projects - rules.	38-35.7-107.	Water-smart homes option.

**38-35.7-101. Disclosure - special taxing districts - general obligation indebtedness.**

(1) Every contract for the purchase and sale of residential real property shall contain a disclosure statement in bold-faced type which is clearly legible and in substantially the following form:

**SPECIAL TAXING DISTRICTS MAY BE SUBJECT TO GENERAL OBLIGATION INDEBTEDNESS THAT IS PAID BY REVENUES PRODUCED FROM ANNUAL TAX LEVIES ON THE TAXABLE PROPERTY WITHIN SUCH DISTRICTS. PROPERTY OWNERS IN SUCH DISTRICTS MAY BE PLACED AT RISK FOR INCREASED MILL LEVIES AND TAX TO SUPPORT THE SERVICING OF SUCH DEBT WHERE CIRCUMSTANCES ARISE RESULTING IN THE INABILITY OF SUCH A DISTRICT TO DISCHARGE SUCH INDEBTEDNESS WITHOUT SUCH AN INCREASE IN MILL LEVIES. BUYERS SHOULD INVESTIGATE THE SPECIAL TAXING DISTRICTS IN WHICH THE PROPERTY IS LOCATED BY CONTACTING THE COUNTY TREASURER, BY REVIEWING THE CERTIFICATE OF TAXES DUE FOR THE PROPERTY, AND BY OBTAINING FURTHER INFORMATION FROM THE BOARD OF COUNTY COMMISSIONERS, THE COUNTY CLERK AND RECORDER, OR THE COUNTY ASSESSOR.**

(2) The obligation to provide the disclosure set forth in subsection (1) of this section shall be upon the seller, and, in the event of the failure by the seller to provide the written disclosure described in subsection (1) of this section, the purchaser shall have a claim for relief against the seller for all damages to the purchaser resulting from such failure plus court costs.

**Source: L. 92:** Entire article added, p. 995, § 4, effective July 1. **L. 2009:** (1) amended, (SB 09-087), ch. 325, p. 1735, § 7, effective July 1.

**38-35.7-102. Disclosure - common interest community - obligation to pay assessments - requirement for architectural approval.** (1) On and after January 1, 2007, every contract for the purchase and sale of residential real property in a common interest community shall contain a disclosure statement in bold-faced type that is clearly legible and in substantially the following form:

**THE PROPERTY IS LOCATED WITHIN A COMMON INTEREST COMMUNITY AND IS SUBJECT TO THE DECLARATION FOR SUCH COMMUNITY. THE OWNER OF THE PROPERTY WILL BE REQUIRED TO BE A MEMBER OF THE OWNER'S ASSOCIATION FOR THE COMMUNITY AND WILL BE SUBJECT TO THE BYLAWS AND RULES AND REGULATIONS OF THE ASSOCIATION. THE DECLARATION, BYLAWS, AND RULES AND REGULATIONS WILL IMPOSE FINANCIAL OBLIGATIONS UPON THE OWNER OF THE PROPERTY, INCLUDING AN OBLIGATION TO PAY ASSESSMENTS OF THE ASSOCIATION. IF THE OWNER DOES NOT PAY THESE ASSESSMENTS, THE ASSOCIATION COULD PLACE A LIEN ON THE PROPERTY AND POSSIBLY SELL IT TO PAY THE DEBT. THE DECLARATION, BYLAWS, AND RULES AND REGULATIONS OF THE COMMUNITY MAY PROHIBIT THE OWNER FROM MAKING CHANGES TO THE PROPERTY WITHOUT AN ARCHITECTURAL REVIEW BY THE ASSOCIATION (OR A COMMITTEE OF THE ASSOCIATION) AND THE APPROVAL OF THE ASSOCIATION. PURCHASERS OF PROPERTY**

**WITHIN THE COMMON INTEREST COMMUNITY SHOULD INVESTIGATE THE FINANCIAL OBLIGATIONS OF MEMBERS OF THE ASSOCIATION. PURCHASERS SHOULD CAREFULLY READ THE DECLARATION FOR THE COMMUNITY AND THE BYLAWS AND RULES AND REGULATIONS OF THE ASSOCIATION.**

(2) (a) The obligation to provide the disclosure set forth in subsection (1) of this section shall be upon the seller, and, in the event of the failure by the seller to provide the written disclosure described in subsection (1) of this section, the purchaser shall have a claim for relief against the seller for actual damages directly and proximately caused by such failure plus court costs. It shall be an affirmative defense to any claim for damages brought under this section that the purchaser had actual or constructive knowledge of the facts and information required to be disclosed.

(b) Upon request, the seller shall either provide to the buyer or authorize the unit owners' association to provide to the buyer, upon payment of the association's usual fee pursuant to section 38-33.3-317 (3), all of the common interest community's governing documents and financial documents, as listed in the most recent available version of the contract to buy and sell real estate promulgated by the real estate commission as of the date of the contract.

**Editor's note:** This version of paragraph (b) is effective until January 1, 2013.

(b) Upon request, the seller shall either provide to the buyer or authorize the unit owners' association to provide to the buyer, upon payment of the association's usual fee pursuant to section 38-33.3-317 (4), all of the common interest community's governing documents and financial documents, as listed in the most recent available version of the contract to buy and sell real estate promulgated by the real estate commission as of the date of the contract.

**Editor's note:** This version of paragraph (b) is effective January 1, 2013.

(3) This section shall not apply to the sale of a unit that is a time share unit, as defined in section 38-33-110 (7).

**Source: L. 2005:** Entire section added, p. 1389, § 19, effective January 1, 2006. **L. 2006:** Entire section R&RE, p. 1225, § 15, effective May 26. **L. 2012:** (2)(b) amended, (HB 12-1237), ch. 232, p. 1019, § 2, effective January 1, 2013.

**38-35.7-103. Disclosure - methamphetamine laboratory.** (1) A buyer of residential real property has the right to test the property for the purpose of determining whether the property has ever been used as a methamphetamine laboratory.

(2) (a) Tests conducted pursuant to this section shall be performed by a certified industrial hygienist or industrial hygienist, as those terms are defined in section 24-30-1402, C.R.S., and in accordance with the procedures and standards established by rules of the state board of health promulgated pursuant to section 25-18.5-102, C.R.S. If the buyer's test results indicate that the property has been contaminated with methamphetamine or other contaminants for which standards have been established pursuant to section 25-18.5-102, C.R.S., and has not been remediated to meet the standards established by rules of the state board of health promulgated pursuant to section 25-18.5-102, C.R.S., the buyer shall promptly give written notice to the seller of the results of the test, and the buyer may terminate the contract. The contract shall not limit the rights to test the property or to cancel the contract based upon the result of the tests.

(b) The seller shall have thirty days after receipt of the notice to conduct a second independent test. If the seller's test results indicate that the property has been used as a methamphetamine laboratory but has not been remediated to meet the standards established by rules of the state board of health promulgated pursuant to section 25-18.5-102, C.R.S., then the second independent hygienist shall so notify the seller.



(c) If the seller receives the notice referred to in paragraph (b) of this subsection (2) or if the seller receives the notice referred to in paragraph (a) of this subsection (2) and does not elect to have the property retested pursuant to paragraph (b) of this subsection (2), then an illegal drug laboratory used to manufacture methamphetamine shall be deemed to have been discovered, and the owner shall be deemed to have received notice pursuant to section 25-18.5-103 (1) (a), C.R.S. Nothing in this section shall prohibit a buyer from purchasing the property and assuming liability pursuant to section 25-18.5-103, C.R.S., if, on the date of closing, the buyer provides notice to the department of public health and environment of the purchase and assumption of liability and if the remediation required by section 25-18.5-103, C.R.S., is completed within ninety days after the date of closing.

(3) (a) Except as specified in subsection (4) of this section, the seller shall disclose in writing to the buyer whether the seller knows that the property was previously used as a methamphetamine laboratory.

(b) A seller who fails to make a disclosure required by this section at or before the time of sale and who knew of methamphetamine production on the property is liable to the buyer for:

(I) Costs relating to remediation of the property according to the standards established by rules of the state board of health promulgated pursuant to section 25-18.5-102, C.R.S.;

(II) Costs relating to health-related injuries occurring after the sale to residents of the property caused by methamphetamine production on the property; and

(III) Reasonable attorney fees for collection of costs from the seller.

(c) A buyer shall commence an action under this subsection (3) within three years after the date on which the buyer closed the purchase of the property where the methamphetamine production occurred.

(4) If the seller became aware that the property was once used for the production of methamphetamine and the property was remediated in accordance with the standards established pursuant to section 25-18.5-102, C.R.S., and evidence of such remediation was received by the applicable governing body in compliance with the documentation requirements established pursuant to section 25-18.5-102, C.R.S., then the seller shall not be required to disclose that the property was used as a methamphetamine laboratory to a buyer, and the property shall be removed from any government-sponsored informational service listing properties that have been used for the production of methamphetamine.

(5) For purposes of this section, "residential real property" includes a: Manufactured home; mobile home; condominium; townhome; home sold by the owner, a financial institution, or the federal department of housing and urban development; rental property, including an apartment; and short-term residence such as a motel or hotel.

**Source: L. 2006:** Entire section added, p. 712, § 1, effective January 1, 2007. **L. 2009:** (2)(a) amended, (SB 09-060), ch. 140, p. 601, § 3, effective April 20.

**38-35.7-104. Disclosure of potable water source - rules.** (1) (a) (I) By January 1, 2008, the real estate commission created in section 12-61-105, C.R.S., shall, by rule, require each listing contract, contract of sale, or seller's property disclosure for residential real property that is subject to the commission's jurisdiction pursuant to article 61 of title 12, C.R.S., to disclose the source of potable water for the property, which disclosure shall include substantially the following information:

**THE SOURCE OF POTABLE WATER FOR THIS REAL ESTATE IS:**

☐ A WELL;

☐ A WATER PROVIDER, WHICH CAN BE CONTACTED AS FOLLOWS:

NAME: \_\_\_\_\_

ADDRESS: \_\_\_\_\_

WEB SITE: \_\_\_\_\_

**TELEPHONE:** \_\_\_\_\_☐ **NEITHER A WELL NOR A WATER PROVIDER. THE SOURCE IS [DESCRIBE]:** \_\_\_\_\_

**SOME WATER PROVIDERS RELY, TO VARYING DEGREES, ON NON-RENEWABLE GROUNDWATER. YOU MAY WISH TO CONTACT YOUR PROVIDER TO DETERMINE THE LONG-TERM SUFFICIENCY OF THE PROVIDER'S WATER SUPPLIES.**

(II) On and after January 1, 2008, each listing contract, contract of sale, or seller's property disclosure for residential real property that is not subject to the real estate commission's jurisdiction pursuant to article 61 of title 12, C.R.S., shall contain a disclosure statement in bold-faced type that is clearly legible in substantially the same form as is specified in subparagraph (I) of this paragraph (a).

(b) If the disclosure statement required by paragraph (a) of this subsection (1) indicates that the source of potable water is a well, the seller shall also provide with such disclosure a copy of the current well permit if one is available.

(2) The obligation to provide the disclosure set forth in subsection (1) of this section shall be upon the seller. If the seller complies with this section, the purchaser shall not have any claim under this section for relief against the seller or any person licensed pursuant to article 61 of title 12, C.R.S., for any damages to the purchaser resulting from an alleged inadequacy of the property's source of water. Nothing in this section shall affect any remedy that the purchaser may otherwise have against the seller.

(3) For purposes of this section, "residential real property" means residential land and residential improvements, as those terms are defined in section 39-1-102, C.R.S., but does not include hotels and motels, as those terms are defined in section 39-1-102, C.R.S.; except that a mobile home and a manufactured home, as those terms are defined in section 39-1-102, C.R.S., shall be deemed to be residential real property only if the mobile home or manufactured home is permanently affixed to a foundation.

**Source: L. 2007:** Entire section added, p. 853, § 1, effective August 3.

**38-35.7-105. Disclosure of transportation projects - rules.** No later than January 1, 2009, the real estate commission created in section 12-61-105, C.R.S., shall, by rule, require each seller's property disclosure for real property that is subject to the commission's jurisdiction pursuant to article 61 of title 12, C.R.S., to disclose the existence of any proposed or existing transportation project that affects or is expected to affect the real property.

**Source: L. 2008:** Entire section added, p. 1713, § 10, effective June 2.

**38-35.7-106. Solar prewire option - solar consultation.** (1) (a) Every person that builds a new single-family detached residence for which a buyer is under contract shall offer the buyer the opportunity to have the residence's electrical system or plumbing system, or both, include one of the following:

(I) A residential photovoltaic solar generation system or a residential solar thermal system, or both;

(II) Upgrades of wiring or plumbing, or both, planned by the builder to accommodate future installation of such systems; or

(III) A chase or conduit, or both, constructed to allow ease of future installation of the necessary wiring or plumbing for such systems.

(b) The offer required by paragraph (a) of this subsection (1) shall be made in accordance with the builder's construction schedule for the residence. In the case of prefabricated or manufactured homes, "construction schedule" shall include the schedule for completion of prefabricated walls or other subassemblies.

(2) Every person that builds a new single-family detached residence for sale, whether or not the residence has been prewired for a photovoltaic solar generation system, shall



provide to every buyer under contract a list of businesses in the area that offer residential solar installation services so that the buyer, if he or she so desires, can obtain expert help in assessing whether the residence is a good candidate for solar installation and how much of a cost savings a residential photovoltaic solar generation system could provide. The list of businesses shall be derived from a master list of Colorado solar installers maintained by the Colorado energy office.

(3) The Colorado energy office shall maintain and update, as appropriate, a master list of Colorado solar installers and shall make the master list available, upon request, to any person that requests a copy. The Colorado energy office may specify qualifications for businesses to be included in the master list and shall make the master list available on its official web site.

(4) Providing the master list of solar installers prepared by the Colorado energy office to a buyer under contract shall not constitute an endorsement of any installer or contractor listed. A person that builds a new single-family detached residence shall not be liable for any advice, labor, or materials provided to the buyer by a third-party solar installer.

(5) The Colorado energy office or its designees shall offer periodic training sessions on residential photovoltaic solar generation systems or solar thermal systems to persons that build new single-family detached residences. The Colorado energy office may assess and collect from participants a registration fee, not to exceed the actual costs of providing such training.

(6) Nothing in this section shall preclude a person that builds a new single-family detached residence from:

(a) Subjecting solar photovoltaic electrical system upgrades to the same terms and conditions as other upgrades, including but not limited to charges related to upgrades, deposits required for upgrades, deadlines, and construction timelines;

(b) Selecting the contractors that will complete the installation of solar photovoltaic electrical system upgrades;

(c) Stipulating in the purchase agreement or sales contract that solar photovoltaic electrical system upgrades are based on technology available at the time of installation and such upgrades may not support all solar photovoltaic systems or systems installed at a future date, and that the person that builds a new single-family detached residence shall not be liable for any additional upgrades, retrofits, or other alterations to the residence that may be necessary to accommodate a solar photovoltaic system installed at a future date.

(7) This section shall apply to contracts entered into on or after August 10, 2009, to purchase new single-family detached residences built on or after August 10, 2009; except that this section shall not apply to unoccupied homes serving as sales inventory or model homes.

**Source: L. 2009:** Entire section added, (HB 09-1149), ch. 235, p. 1073, § 1, effective August 5. **L. 2012:** (2), (3), (4), and (5) amended, (HB 12-1315), ch. 224, p. 977, § 43, effective July 1.

**38-35.7-107. Water-smart homes option.** (1) (a) Every person that builds a new single-family detached residence for which a buyer is under contract shall offer the buyer the opportunity to select one or more of the following water-smart home options for the residence:

(I) Installation of water-efficient toilets, lavatory faucets, and showerheads that meet or exceed the following water-efficient standards: Toilets shall use no more than one and twenty-eight one-hundredths of a gallon per flush, lavatory faucets no more than one and one-half gallons per minute, and showerheads no more than two gallons per minute;

(II) If dishwashers or clothes washers are financed, installed, or sold as upgrades through the home builder, the builder shall offer a model that is qualified pursuant to the federal environmental protection agency's energy star program at the time of offering. Clothes washers shall have a water factor of less than or equal to six gallons of water per cycle per cubic foot of capacity.

(III) If landscaping is financed, installed, or sold as upgrades through the home builder and will be maintained by the home owner, the home builder shall offer a landscape design

that follows the landscape practices specified in this subparagraph (III) to ensure both the professional design and installation of such landscaping and that water conservation will be accomplished. These best management practices are contained in the document titled "Green Industry Best Management Practices (BMPs) for the Conservation and Protection of Water Resources in Colorado: Moving Toward Sustainability", 3rd release, and appendix, released in May 2008, or this document's successors due to future inclusion of improved landscaping practices, water conservation advancements, and new irrigation technology. The best management practices specified in this subparagraph (III), through utilization of the proper landscape design, installation, and irrigation technology, accomplish substantial water savings compared to landscape designs, installation, and irrigation system utilization where these practices are not adhered to. The following best management practices and water budget calculator form the basis for the design and installation for the front yard landscaping option if selected by the homeowner as an upgrade:

(A) Xeriscape: To include the seven principles of xeriscape that provide a comprehensive approach for conserving water;

(B) Water budgeting: To include either a water allotment by the water utility for the property, if offered by the water utility, or a landscape water budget based on plant water requirements;

(C) Landscape design: To include a plan and design for the landscape to comprehensively conserve water and protect water quality;

(D) Landscape installation and erosion control: To minimize soil erosion and employ proper soil care and planting techniques during construction;

(E) Soil amendment and ground preparation: To include an evaluation of the soil and improve it, if necessary, to address water retention, permeability, water infiltration, aeration, and structure;

(F) Tree placement and tree planting: To include proper soil and space for root growth and to include proper planting of trees, shrubs, and other woody plants to promote long-term health of these plants;

(G) Irrigation design and installation: To include design of the irrigation system for the efficient and uniform distribution of water to plant material and the development of an irrigation schedule;

(H) Irrigation technology and scheduling: To include water conserving devices that stop water application during rain, high wind, and other weather events and incorporate evapotranspiration conditions. Irrigation scheduling should address frequency and duration of water application in the most efficient manner; and

(I) Mulching: To include the use of organic mulches to reduce water loss through evaporation, reduce soil loss, and suppress weeds.

(IV) Installation of a pressure-reducing valve that limits static service pressure in the residence to a maximum of sixty pounds per square inch. Piping for home fire sprinkler systems shall comply with state and local codes and regulations but are otherwise excluded from this subparagraph (IV).

(b) The offer required by paragraph (a) of this subsection (1) shall be made in accordance with the builder's construction schedule for the residence. In the case of prefabricated or manufactured homes, "construction schedule" includes the schedule for completion of prefabricated walls or other subassemblies.

(2) Nothing in this section precludes a person that builds a new single-family detached residence from:

(a) Subjecting water-efficient fixture and appliance upgrades to the same terms and conditions as other upgrades, including charges related to upgrades, deposits required for upgrades, deadlines, and construction timelines;

(b) Selecting the contractors that will complete the installation of the selected options; or

(c) Stipulating in the purchase agreement or sales contract that water-efficient fixtures and appliances are based on technology available at the time of installation, such upgrades may not support all water-efficient fixtures or appliances installed at a future date, and the person that builds a new single-family detached residence is not liable for any additional



upgrades, retrofits, or other alterations to the residence that may be necessary to accommodate water-efficient fixtures or appliances installed at a future date.

(3) This section does not apply to unoccupied homes serving as sales inventory or model homes.

(4) The upgrades described in paragraph (a) of subsection (1) of this section shall not contravene state or local codes, covenants, and requirements. All homes, landscapes, and irrigation systems shall meet all applicable national, state, and local regulations.

**Source: L. 2010:** Entire section added, (HB 10-1358), ch. 398, p. 1892, § 1, effective January 1, 2011. **L. 2011:** IP(1)(a)(III) amended, (HB 11-1303), ch. 264, p. 1174, § 89, effective August 10.

## ARTICLE 36

### Torrens Title Registration Act

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**38-36-101. Application to register title - by whom made.** The owner of any estate or interest in land, whether legal or equitable, except unpatented land, may apply as provided in this article to have the title of said land registered. The application may be made by the applicant personally, or by an agent thereunto lawfully authorized in writing, which authority shall be executed and acknowledged in the same manner and form as is now required as to a deed, and shall be recorded in the office of the county clerk and recorder in the county in which the land, or the major portion thereof, is situated before the making of the application by such agent. A corporation may apply by its authorized agent, and an



infant or any other person under disability by his legal guardian. Joint tenants and tenants in common shall join in the application. The person in whose behalf the application is made shall be named as applicant.

**Source:** L. 03: p. 311, § 1. R.S. 08: § 714. C.L. § 4924. CSA: C. 40, § 169. CRS 53: § 118-10-1. C.R.S. 1963: § 118-10-1.

### ANNOTATION

**Law reviews.** For article, "A Tax Title Quieted", see 6 Dicta 9 (Nov. 1928). For note, "A Survey of the Colorado Torrens Act", see 5 Rocky Mt. L. Rev. 149 (1933). For article, "Measure of Damages for the Breach of the Covenants of Quiet Enjoyment and Warranty", see 13 Dicta 278 (1936). For article, "A Legislative Pattern for Protection of Real Estate Titles", see 24 Dicta 9 (1947). For note, "A Survey of the Torrens Title in Colorado", see 23 Rocky Mt. L. Rev. 453 (1951). For article, "One Year Review of Property", see 37 Dicta 89 (1960). For article, "Current Practices in Examination of Titles to Colorado Lands", see 35 U. Colo. L. Rev. 1 (1962). For article, "Land Transfer Improvement: The Basic Facts and Two Hypotheses for Reform", see U. Colo. L. Rev. 431 (1966). For note, "Creditor's Rights in Colorado and the Federal Tax Lien Act of 1966", see 40 U. Colo. L. Rev. 433 (1968).

**A Torrens title judgment must satisfy procedural due process requirements** of the fourteenth amendment to have a preclusive effect on claims of an interest in real property. State law must provide parties with notice reasonably calculated, under all the circumstances, to apprise parties of the pendency of a Torrens title action and afford them an opportunity to present objections. *Lobato v. Taylor*, 70 P.3d 1152 (Colo. 2003), cert. denied, 540 U.S. 1073, 124 S. Ct. 922, 157 L. Ed. 2d 742 (2003).

**Purpose of this article is to escape from the old rules** governing the transfer of real estate.

*Sterling Nat'l Bank v. Fischer*, 75 Colo. 371, 226 P. 146 (1924).

**Article is not intended for the insurance of land titles** nor as compensation for land taken without owner's consent. *White v. Ainsworth*, 62 Colo. 513 (1917).

**Article does not contravene § 21 of art. V, Colo. Const.** This article does not contravene the purpose sought to be accomplished by § 21 of art. V, Colo. Const., which prohibits a bill from containing more than one subject expressed in its title. *People ex rel. Smith v. Crissman*, 41 Colo. 450, 92 P. 949 (1907).

**Legal effect of title registered deemed question of law.** The legal effect of a title registered under this article is a question of law. *Gaines v. City of Sterling*, 140 Colo. 63, 342 P.2d 651 (1959).

**Location of boundary line is usually question of fact.** *Gaines v. City of Sterling*, 140 Colo. 63, 342 P.2d 651 (1959).

**Title acquired by decree quieting tax title may be registered.** A title acquired by a decree quieting a tax title may be registered and the proceeding for the registration of the title. *White v. Ainsworth*, 62 Colo. 513, 163 P. 959 (1917).

**Applied** in *Mills v. Denver & R.G.R.R.*, 198 F. 137 (D. Colo. 1912); *Scott v. Brown*, 71 Colo. 275, 206 P. 572 (1922); *Langley v. Young*, 75 Colo. 44, 224 P. 231 (1924); *Sterling Nat'l Bank v. Fischer*, 75 Colo. 371, 226 P. 146 (1924); *First Mtg. Sec. Co. v. Fader*, 100 Colo. 22, 64 P.2d 1278 (1937).

**38-36-102. Lesser estates - when registered.** It shall not be an objection to bringing land under this article that the estate or interest of the applicant is subject to any outstanding lesser estate, mortgage, lien, or charge. No mortgage, lien, charge, or lesser estate than a fee simple shall be registered unless the estate in fee simple to the same land is registered. Every such lesser estate, mortgage, lien, or charge shall be noted upon the certificate of title and the duplicate thereof, and the title or interest certified shall be subject only to such estates, mortgages, liens, and charges as are so noted, except as provided in this article.

**Source:** L. 03: p. 312, § 2. R.S. 08: § 715. C.L. § 4925. CSA: C. 40, § 170. CRS 53: § 118-10-2. C.R.S. 1963: § 118-10-2.

### ANNOTATION

**Applied** in *Gerbig v. Spelts*, 89 Colo. 201, 300 P. 606 (1931).

**38-36-103. When tax title may be registered.** No title derived through sale for any tax or assessment or special assessment shall be entitled to be registered unless it appears that the title of the applicant, or those through whom he claims title, has been adjudicated by a court of competent jurisdiction, and a decree of such court duly made and recorded decreeing the title of the applicant, or that the applicant or those through whom he claims title have been in the actual and undisputed possession of the land under such title at least seven years immediately prior to the application, and has paid all taxes and assessments legally levied thereon during said time; unless the same is vacant and unoccupied lands or lots, in which case, where title is derived through sale for any tax or assessments or special assessment for any such vacant and unoccupied lands or lots and the applicant, or those through whom he claims title, have paid all taxes and assessments legally levied thereon for eight successive years immediately prior to the application, in which case such lands and lots shall be entitled to be registered as other lands provided for by this section.

**Source:** L. 03: p. 312, § 3. R.S. 08: § 716. C.L. § 4926. CSA: C. 40, § 171. CRS 53: § 118-10-3. C.R.S. 1963: § 118-10-3.

#### ANNOTATION

**Lands held by tax deed may be registered.** Lands held only by tax deed, the title having been quieted in an action instituted within one year of the execution of the deed, may be registered. *Held v. Houser*, 53 Colo. 363, 127 P. 139 (1912).

**38-36-104. Contents of application.** (1) The application shall be in writing and shall be signed and verified by the oath of the applicant or the person acting in his behalf. It shall set forth substantially:

(a) The name and place of residence of the applicant, and if the application is by one acting in behalf of another, the name and place of residence and capacity of the person so acting;

(b) Whether the applicant (except in the case of a corporation) is married or not, and if married, the name and residence of the husband or wife, and the age of the applicant;

(c) The description of the land and the valuation for assessment thereof, exclusive of improvements, according to the last official assessment, the same to be taken as a basis for the payments required under sections 38-36-186 and 38-36-198 (1) (a);

(d) The applicant's estate or interest in the same, and whether the same is subject to homestead exemption;

(e) The names of all persons or parties who appear of record to have any title, claim, estate, lien, or interest in the lands described in the application for registration;

(f) Whether the land is occupied or unoccupied, and if occupied by any other person than the applicant, the name and post-office address of each occupant and what estate or interest he has or claims in the land;

(g) Whether the land is subject to any lien or encumbrance, and, if any, the nature and amount of the same, and if recorded, the book and page of record, and the name and post-office address of each holder thereof;

(h) Whether any other person has any estate or claims any interest in the land, in law or equity, in possession, remainder, reversion, or expectancy, and, if any, the name and post-office address of every such person and the nature of his estate or claim;

(i) In case it is desired to settle or establish boundary lines, the names and post-office addresses of all the owners of the adjoining lands that may be affected thereby, so far as the applicant is able upon diligent inquiry to ascertain the same;

(j) If the application is on behalf of a minor, the age of such minor shall be stated;

(k) When the place of residence of any person whose residence is required to be given is unknown, it may be so stated if the applicant also states that upon diligent inquiry he has been unable to ascertain the same.

**Source:** L. 03: p. 312, § 4. R.S. 08: § 717. C.L. § 4927. CSA: C. 40, § 172. CRS 53: § 118-10-4. C.R.S. 1963: § 118-10-4.



ANNOTATION

**Law reviews.** For article, "The Torrens Title System in Colorado", see 39 Dicta 40 (1962).

**General assembly's intent under this section** was to require applicants under Torrens Act to exercise reasonable diligence in ascertaining the names and addresses of persons having any interest in the subject property. Rael v. Taylor, 876 P.2d 1210 (Colo. 1994).

**Test for reasonable diligence is objective test:** Is conduct that a reasonably prudent appli-

cant would undertake under all circumstances known or reasonably discoverable by the applicant at the time the application is filed to ensure that all interested parties are identified and served as named defendants? Rael v. Taylor, 876 P.2d 1210 (Colo. 1994).

**Applied in** McKibbin v. Paul, 25 Colo. App. 134, 136 P. 476 (1913).

**38-36-105. What lands may be joined in one application.** Any number of contiguous pieces of land in the same county and owned by the same person and in the same right, or any number of pieces of property in the same county having the same chain of title and belonging to the same person, may be included in one application.

**Source:** L. 03: p. 314, § 5. R.S. 08: § 718. C.L. § 4928. CSA: C. 40, § 173. CRS 53: § 118-10-5. C.R.S. 1963: § 118-10-5.

ANNOTATION

**"Pieces of property" and "pieces of land" synonymous.** The expressions, "pieces of property" and "pieces of land", are synonymous. Held v. Houser, 53 Colo. 363, 127 P. 139 (1912).

**Several tracts may be included in one application for registration.** Several tracts situ-

ated in the same county, claimed by the same party, and under the same chain of title, may be included in one application for the registration of the title under this section, even though not contiguous. Held v. Houser, 53 Colo. 363, 127 P. 139 (1912).

**38-36-106. Amendment of application.** The application may be amended only by supplemental statement in writing, signed and sworn to as in the case of the original application.

**Source:** L. 03: p. 314, § 6. R.S. 08: § 719. C.L. § 4929. CSA: C. 40, § 174. CRS 53: § 118-10-6. C.R.S. 1963: § 118-10-6.

**38-36-107. Form of application.** The form of application may, with appropriate changes, be substantially as follows:

FORM OF APPLICATION FOR INITIAL REGISTRATION  
OF TITLE TO LAND.

STATE OF COLORADO	)	
	)	ss.
County of .....	)	In the
In the matter of .....	)	District Court.
the application of .....	)	
.....	)	Petition.

to register the title to the land hereinafter described.

To the Honorable ....., judge of said court: I hereby make application to have registered the title to the land hereinafter described, and do solemnly swear that the answers to the questions herewith, and the statements herein contained, are true to the best of my knowledge, information and belief.

First - Name of applicant,..... age,.... years. Residence,..... (number and street, if any). Married to ..... (name of husband or wife).

Second - Application made by ....., acting as ..... (owner, agent or attorney). Residence,..... (number, street).

Third - Description of real estate is as follows:.....  
.....

estate or interest therein is ..... and ..... subject to homestead.

Fourth - The land is ..... occupied by ..... (names of occupants), whose address is ..... (number, street, and town or city). The estate, interest or claim of occupant is .....

Fifth - Liens and encumbrances on the land .....  
.....

Name of holder or owner thereof is ..... whose post-office address is .....  
Amount of claim, \$ ..... Recorded, Book ....., page ....., of the records of said county.

Sixth - Other persons, firms, or corporations, having or claiming any estate, interest, or claim in law or equity, in possession, remainder, reversion, or expectancy in said land are .....  
.....

whose addresses are .....  
respectively. Character of estate, interest, or claim is .....

Seventh - Other facts connected with said land and appropriate to be considered in this registration proceedings are .....  
.....

Eighth - Therefore, the applicant prays this honorable court to find and declare the title or interest of the applicant in said land and decree the same, and order the registrar of titles to register the same and to grant such other and further relief as may be proper in the premises.

By ....., agent, attorney, administrator, or guardian. (Applicant's signature.)

Subscribed and sworn to before me this ..... day of ....., A.D. 20....  
.....  
Notary Public.

Source: L. 03: p. 314, § 7. R.S. 08: § 720. C.L. § 4930. CSA: C. 40, § 175.  
CRS 53: § 118-10-7. C.R.S. 1963: § 118-10-7. L. 76: Entire section amended, p. 315, § 71, effective May 20.

ANNOTATION

Law reviews. For article, "The Torrens Title System in Colorado", see 39 Dicta 40 (1962).

**38-36-108. Application made to district court - powers of court.** The application for registration shall be made to the district court of the county wherein the land is situated. Said court has power to inquire into the condition of the title to and any interest in the land, and any lien or encumbrance thereon, and to make all orders, judgments, and decrees as may be necessary to determine, establish, and declare the title or interest, legal or equitable, as against all persons, known or unknown, and all liens and encumbrances existing thereon, whether by law, contract, judgment, mortgage, trust deed, or otherwise, and to declare the order, priority, and preference as between the same, and to remove all clouds from the title, and for that purpose the said court shall always be open.

Source: L. 03: p. 316, § 8. R.S. 08: § 721. C.L. § 4931. CSA: C. 40, § 176.  
CRS 53: § 118-10-8. C.R.S. 1963: § 118-10-8.

**38-36-109. Registrars of titles - rules.** The county clerks and recorders of the several counties of this state shall be registrars of titles in their respective counties, and their deputies shall be deputy registrars. All acts performed by registrars and deputy registrars under this article shall be performed under rules and instructions established and given by the district court having jurisdiction of the county in which they act.



**Source:** L. 03: p. 316, § 9. **R.S. 08:** § 722. **C.L.** § 4932. **CSA:** C. 40, § 177. **CRS 53:** § 118-10-9. **C.R.S. 1963:** § 118-10-9.

#### ANNOTATION

**Law reviews.** For article, "Oil and Gas Problems and the Torrens System", see 33 Dicta 194 (1956).

**Article does not confer judicial powers on the registrar.** See *People ex rel. Smith v. Crissman*, 41 Colo. 450, 92 P. 949 (1907); *White v. Ainsworth*, 62 Colo. 513, 163 P. 959 (1917).

**Article simply confers upon court certain judicial duties** incident to the plan of registering land titles provided by this article. *People ex rel. Smith v. Crissman*, 41 Colo. 450, 92 P. 949 (1907); *White v. Ainsworth*, 62 Colo. 513, 163 P. 959 (1917).

**Article does not create a new county office**, since only additional duties are imposed upon said clerk. *People ex rel. Smith v. Crissman*, 41 Colo. 450, 92 P. 949 (1907).

**Article does not devolve executive duties on the court**, in violation of art. III, Colo. Const., dividing the powers of government into three distinct departments and declaring that no person charged with the exercise of powers properly belonging to one department shall exercise any power properly belonging to either of the others. *People ex rel. Smith v. Crissman*, 41 Colo. 450, 92 P. 949 (1907).

**38-36-110. Bond of registrar.** (1) Except as provided in subsection (2) of this section, every county clerk and recorder shall, before entering upon the duties as registrar of titles, give a bond with sufficient sureties, to be approved by a judge of the district court of the county, payable to the people of the state of Colorado in such sum as is fixed by the said judge of the district court, conditioned for the faithful discharge of duties and to deliver up all papers, books, records, and other property belonging to the county or appertaining to the office as registrar of titles, whole, safe, and undefaced, when lawfully required to do so. The bond shall be filed in the office of the secretary of state and a copy thereof shall be filed and entered upon the records of the district court in the county wherein the county clerk and recorder holds office.

(2) In lieu of the bond required by subsection (1) of this section, a county may purchase crime insurance coverage on behalf of the county clerk and recorder to protect the people of the county from any malfeasance on the part of the county clerk and recorder while in office.

**Source:** L. 03: p. 316, § 10. **R.S. 08:** § 723. **C.L.** § 4933. **CSA:** C. 40, § 178. **CRS 53:** § 118-10-10. **C.R.S. 1963:** § 118-10-10. **L. 2010:** Entire section amended, (HB 10-1062), ch. 161, p. 565, § 31, effective August 11.

**38-36-111. Duties of deputy registrar - vacancies.** Deputy registrars shall perform all duties of the registrar in the name of the registrar, and the acts of such deputies shall be held to be the acts of the registrar, and in the case of the death of the registrar or his removal from office, the vacancy shall be filled in the same manner as is provided by law for filling such vacancy in the office of the county clerk and recorder. The person so appointed to fill such vacancy shall file a bond and be vested with the same powers as the registrar whose office he is appointed to fill.

**Source:** L. 03: p. 317, § 11. **R.S. 08:** § 724. **C.L.** § 4934. **CSA:** C. 40, § 179. **CRS 53:** § 118-10-11. **C.R.S. 1963:** § 118-10-11.

**Cross references:** For filling vacancy in the office of county clerk and recorder, see §§ 1-12-205 and 30-10-404.

**38-36-112. Registrar not to practice law - neglect of duty.** No registrar or deputy registrar shall practice as an attorney or counselor at law, nor prepare any papers in any proceeding provided for in this article, nor while in office be in partnership with any attorney or counselor at law so practicing. The registrar shall be liable for any neglect or omission of the duties of his office when occasioned by a deputy registrar in the same manner as for his own personal neglect or omission.

**Source:** L. 03: p. 317, § 12. R.S. 08: § 725. C.L. § 4935. CSA: C. 40, § 180. CRS 53: § 118-10-12. C.R.S. 1963: § 118-10-12.

**38-36-113. Examiner of titles - compensation - oath - bond.** The judges of the district court in and for the judicial districts for which they are elected or appointed shall appoint a competent attorney in each county within their district as examiner of titles and legal adviser of the registrar. The examiner of titles in each county shall be paid in each case by the applicant such compensation as the judge of the district court determines. Every examiner of titles shall, before entering upon the duties of his office, take and subscribe an oath of office to faithfully and impartially perform the duties of his office, and shall also give a bond in such amount and with such sureties as shall be approved by the judge of the district court, payable in like manner and with like conditions as required of the registrar. A copy of the bond shall be entered upon the records of said court and the original shall be filed with the registrar.

**Source:** L. 03: p. 317, § 13. R.S. 08: § 726. C.L. § 4936. CSA: C. 40, § 181. CRS 53: § 118-10-13. C.R.S. 1963: § 118-10-13.

#### ANNOTATION

**Applied** in *People ex rel. Smith v. Crissman*, 41 Colo. 450, 92 P. 949 (1907).

**38-36-114. Nonresident applicant to appoint process agent.** If the applicant is not a resident of the state of Colorado, he shall file with his application a paper, duly acknowledged, appointing an agent residing in this state, giving his name in full and his post-office address, and shall therein agree that the service of any legal process in proceedings under or growing out of the application shall be of the same legal effect when made on said agent as if made on the applicant within this state. If the agent so appointed dies or removes from the state, the applicant shall at once make another appointment in like manner, and if he fails to do so, the court may dismiss the application.

**Source:** L. 03: p. 318, § 14. R.S. 08: § 727. C.L. § 4937. CSA: C. 40, § 182. CRS 53: § 118-10-14. C.R.S. 1963: § 118-10-14.

**38-36-115. Filing and service of application - land registration docket.** The application shall be filed in the office of the clerk of the court to which the application is made, and in case of personal service a true copy thereof shall be served with the summons, and the clerk shall docket the case in a book to be kept for that purpose, which shall be known as the "land registration docket". The record entry of the application shall be entitled (name of applicant), plaintiff, against (here insert names of all persons named in the application as being in possession of the premises, or as having any lien, encumbrance, right, title, or interest in the land, and the names of all persons found by the report of the examiner provided for in section 38-36-118 to be in possession or to have any lien, encumbrance, right, title, or interest in the land), also all other persons or parties unknown, claiming any right, title, estate, lien, or interests in the real estate described in the application as defendants. All orders, judgments, and decrees of the court in the case shall be appropriately entered in such docket. All final orders or decrees shall be recorded, and proper reference made thereto in such docket.

**Source:** L. 03: p. 318, § 15. R.S. 08: § 728. C.L. § 4938. CSA: C. 40, § 183. CRS 53: § 118-10-15. C.R.S. 1963: § 118-10-15.



## ANNOTATION

**Law reviews.** For article, "The Torrens Title System in Colorado", see 39 Dicta 40 (1962).

**38-36-116. Abstract of title filed with application.** The applicant shall also file with the clerk, at the time the application is made, an abstract of title such as is now commonly used, prepared, and certified to by the county clerk and recorder of the county, or by a person, firm, or corporation regularly engaged in the abstract business, having satisfied the district court that they have a complete set of abstract books and are in existence and doing business at the time of the filing of the application under this article.

**Source:** L. 03: p. 318, § 15a. R.S. 08: § 729. C.L. § 4939. CSA: C. 40, § 184. CRS 53: § 118-10-16. C.R.S. 1963: § 118-10-16.

**38-36-117. Copy of application filed with county clerk and recorder - lis pendens.** At the time of the filing of the application in the office of the clerk of the court, a copy thereof, certified by the clerk, shall be filed, but need not be recorded, in the office of the county clerk and recorder and shall have the force and effect of a lis pendens.

**Source:** L. 03: p. 319, § 16. R.S. 08: § 730. C.L. § 4940. CSA: C. 40, § 185. CRS 53: § 118-10-17. C.R.S. 1963: § 118-10-17.

**Cross references:** For lis pendens, see § 38-35-110.

**38-36-118. Examination of application and abstract - report of examiner.** Immediately after the filing of the abstract of title, the court shall enter an order referring the application to an examiner of titles, who shall proceed to examine into the title and into the truth of the matters set forth in the application, and particularly whether the land is occupied, the nature of the occupation if occupied, and by what right, and, also as to all judgments against the applicant or those through whom he claims title, which may be a lien upon the lands described in the application. He shall search the records and investigate all the facts brought to his notice, and file in the case a report thereon, including a certificate of his opinion upon the title. The clerk of the court shall thereupon give notice to the applicant of the filing of such report. If the opinion of the examiner is adverse to the applicant, he shall be allowed by the court a reasonable time in which to elect to proceed further, or to withdraw his application. The election shall be made in writing and filed with the clerk of the court.

**Source:** L. 03: p. 319, § 17. R.S. 08: § 731. C.L. § 4941. CSA: C. 40, § 186. CRS 53: § 118-10-18. C.R.S. 1963: § 118-10-18.

## ANNOTATION

**Applied** in *People ex rel. Smith v. Crissman*, 41 Colo. 450, 92 P. 949 (1907).

**38-36-119. Issuance of summons.** If, in the opinion of the examiner, the applicant has a title as alleged, and proper registration, or if the applicant, after an adverse opinion of the examiner, elects to proceed further, the clerk of the court shall immediately upon the filing of the examiner's opinion or the applicant's election, as the case may be, issue a summons substantially in the form provided for in section 38-36-123. The summons shall be issued by the order of the court and attested by the clerk of the court.

**Source:** L. 03: p. 319, § 18. R.S. 08: § 732. C.L. § 4942. CSA: C. 40, § 187. CRS 53: § 118-10-19. C.R.S. 1963: § 118-10-19.

## ANNOTATION

**Law reviews.** For article, “The Torrens Title System in Colorado”, see 39 Dicta 40 (1962).

**Provisions of the Torrens Title Registration Act** govern service of process in case brought

under the Torrens Act. Rael v. Taylor, 876 P.2d 1210 (Colo. 1994).

**38-36-120. Parties plaintiff and defendant - unknown claimants.** The applicant shall be known in the summons as the plaintiff. All persons named in the application or found by the report of the examiner as being in possession of the premises or as having of record any lien, encumbrance, right, title, or interest in the land, and all other persons designated as follows: “All other persons or parties unknown claiming any right, title, estate, lien, or interest in, to, or upon the real estate described in the application herein”, shall be defendants.

**Source:** L. 03: p. 320, § 19. R.S. 08: § 733. C.L. § 4943. CSA: C. 40, § 188. CRS 53: § 118-10-20. C.R.S. 1963: § 118-10-20.

## ANNOTATION

**Law reviews.** For article, “The Torrens Title System in Colorado”, see 39 Dicta 40 (1962).

**Provisions of the Torrens Title Registration Act** govern service of process in case brought

under the Torrens Act. Rael v. Taylor, 876 P.2d 1210 (Colo. 1994).

**38-36-121. Contents of summons - service.** The summons shall be directed to the defendants and require them to appear and answer the application within twenty days after the service of the summons, exclusive of the day of service. The summons shall be served as is provided for the service of summons in civil actions in the district court in this state, except as otherwise provided in this article. The summons shall be served upon nonresident defendants and upon “all such unknown persons or parties”, defendant, by publishing said summons in a newspaper of general circulation printed and published in the county where the application is filed, once in each week for three consecutive weeks, and such service by publication shall be deemed complete at the end of the twenty-first day from and including the first publication. If any named defendant assents in writing to the registration as prayed for, which assent shall be endorsed upon the application or filed therewith and be duly witnessed and acknowledged, then in all such cases no service of summons upon said defendant shall be necessary.

**Source:** L. 03: p. 320, § 20. R.S. 08: § 734. C.L. § 4944. CSA: C. 40, § 189. CRS 53: § 118-10-21. C.R.S. 1963: § 118-10-21.

**Cross references:** For the competency of newspapers and the construction of publication periods, see § 24-70-106; for service of summons, see C.R.C.P. 4(e) to 4(h).

## ANNOTATION

**Law reviews.** For article, “The Torrens Title System in Colorado”, see 39 Dicta 40 (1962).

**Notice complies with due process.** Notice to unknown persons, as provided by this section, complies with due process of law. White v. Ainsworth, 62 Colo. 513, 163 P. 959, 1918E Ann. Cas. 179 (1917).

**Published notice is sufficient without notice by name to those outside the state.** White v.

Ainsworth, 62 Colo. 513, 163 P. 959, 1918E Ann. Cas. 179 (1917).

**Provisions of the Torrens Title Registration Act** govern service of process in case brought under the Torrens Act. Rael v. Taylor, 876 P.2d 1210 (Colo. 1994).

**Applied** in Gerbig v. Spelts, 89 Colo. 201, 300 P. 606 (1931).



**38-36-122. Clerk to mail copy of summons and other notices.** The clerk of the court shall also, on or before twenty days after the first publication, send a copy thereof by mail to such defendants who are not residents of the state whose place of address is known or stated in the application and whose appearance is not entered and who are not in person served with the summons. The certificate of the clerk that he has sent such notice in pursuance of this section shall be conclusive evidence thereof. Other or further notice of the application for registration may be given in such manner and to such persons as the court or any judge thereof may direct. The summons shall be served at the expense of the applicant, and proof of the service thereof shall be made as proof of service is now made in other civil actions.

**Source:** L. 03: p. 320, § 20a. R.S. 08: § 735. C.L. § 4945. CSA: C. 40, § 190. CRS 53: § 118-10-22. C.R.S. 1963: § 118-10-22.

ANNOTATION

**Provisions of the Torrens Title Registration Act** govern service of process in case brought under the Torrens Act. Rael v. Taylor, 876 P.2d 1210 (Colo. 1994). **Applied** in Gerbig v. Spelts, 89 Colo. 201, 300 P. 606 (1931).

**38-36-123. Form of summons.** The summons provided for in section 38-36-121 shall be in substance in the following form:

SUMMONS ON APPLICATION FOR REGISTRATION OF LAND.

STATE OF COLORADO )  
 ) ss.  
County of ..... )

In the District Court.

(Name of applicant), plaintiff .... versus .... (names of all defendants, and all other persons or parties unknown, claiming any right, title, estate, lien, or interest in the real estate described in the application herein) ..... defendants.

The People of the State of Colorado to the above-named defendants, Greetings:

You are hereby summoned and required to answer the application of the applicant plaintiff in the above entitled application for registration of the following land situate in ..... county, Colorado, to wit: (description of land), and to file your answer to the said application in the office of the clerk of said court, in said county, within twenty days after the service of this summons upon you, exclusive of the day of such service; and if you fail to answer the said application within the time aforesaid, the applicant plaintiff in this action will apply to the court for the relief demanded in the application.

Witness, ..... clerk of said court and the seal thereof, at ..... in said county, and state, this ..... day of ..... A.D. 20.... .

(Seal.) ..... Clerk.

**Source:** L. 03: p. 321, § 20b. R.S. 08: § 736. C.L. § 4946. CSA: C. 40, § 191. CRS 53: § 118-10-23. C.R.S. 1963: § 118-10-23.

**38-36-124. When guardian ad litem appointed - compensation.** The court shall appoint a disinterested person to act as guardian ad litem for minors and other persons under

disability and for all other persons not in being who appear to have an interest in the land. The compensation of the said guardian shall be determined by the court and paid as a part of the expense of the proceeding.

**Source:** L. 03: p. 322, § 21. R.S. 08: § 737. C.L. § 4947. CSA: C. 40, § 192. CRS 53: § 118-10-24. C.R.S. 1963: § 118-10-24.

#### ANNOTATION

**Law reviews.** For article, "The Torrens Title System in Colorado", see 39 Dicta 40 (1962). **Applied** in Gerbig v. Spelts, 89 Colo. 201, 300 P. 606 (1931).

**38-36-125. Who may answer - contents of answer.** Any person claiming an interest, whether named in the summons or not, may appear and file an answer within the time named in the summons, or within such further time as may be allowed by the court. The answer shall state all objections to the application, and shall set forth the interests claimed by the party filing the same, and shall be signed and sworn to by him or by some person in his behalf.

**Source:** L. 03: p. 322, § 22. R.S. 08: § 738. C.L. § 4948. CSA: C. 40, § 193. CRS 53: § 118-10-25. C.R.S. 1963: § 118-10-25.

#### ANNOTATION

**Law reviews.** For article, "The Torrens Title System in Colorado", see 39 Dicta 40 (1962).

**38-36-126. Decree, when no answer filed - binds unknown claimants.** If no person appears and answers within the time named in the summons or allowed by the court, the court may at once, upon the motion of the applicant, no reason to the contrary appearing and upon satisfactory proof of the applicant's right thereto, make its order and decree confirming the title of the applicant and ordering registration of the same. By the description in the summons, "all other persons unknown, claiming any right, title, estate, lien, or interest in, to, or upon the real estate described in the application herein", all the world are made parties defendant and shall be concluded by the default, order, and decree. The court shall not be bound by the report of the examiners of title but may require other or further proof.

**Source:** L. 03: p. 322, § 23. R.S. 08: § 739. C.L. § 4949. CSA: C. 40, § 194. CRS 53: § 118-10-26. C.R.S. 1963: § 118-10-26.

**38-36-127. Cause set for trial - default - referee appointed.** If, in any case, an appearance is entered and answer filed, the cause shall be set down for hearing on motion of either party, but a default and order shall first be entered against all persons who do not appear and answer in the manner provided in section 38-36-126. The court may refer the cause or any part thereof to one of the examiners of title, as referee, to hear the parties and their evidence, and make report thereon to the court. His report shall have the same force and effect as that of a magistrate appointed by the district court under the laws of this state, and relating to the appointment, duties, and powers of magistrates.

**Source:** L. 03: p. 322, § 24. R.S. 08: § 740. C.L. § 4950. CSA: C. 40, § 195. CRS 53: § 118-10-27. C.R.S. 1963: § 118-10-27. L. 91: Entire section amended, p. 366, § 43, effective April 9.

**Cross references:** For the appointment, duties, and powers of a referee, see C.R.C.P. 53.



## ANNOTATION

**Law reviews.** For article, "The Torrens Title System in Colorado", see 39 Dicta 40 (1962).

**Acts of examiners subject to review.** Examiners may act as referees on any pending appli-

cation, but all their acts are subject to review by the district court. *People ex rel. Smith v. Crissman*, 41 Colo. 450, 92 P. 949 (1907).

**38-36-128. Court may order further proof.** The court may order such other or further hearing of the cause before the court or before the examiner of titles after the filing of the report of the examiner referred to in section 38-36-127 and require such other or further proof by either of the parties to the cause as to the court seems proper.

**Source:** L. 03: p. 323, § 25. R.S. 08: § 741. C.L. § 4951. CSA: C. 40, § 196. CRS 53: § 118-10-28. C.R.S. 1963: § 118-10-28.

## ANNOTATION

**Applied** in *People ex rel. Smith v. Crissman*, 41 Colo. 450, 92 P. 949 (1907).

**38-36-129. Title not proper for registration dismissed - applicant may dismiss.** If, in any case, after hearing, the court finds that the applicant has no title proper for registration, a decree shall be entered dismissing the application, and such decree may be ordered to be without prejudice. The applicant may dismiss his application at any time before the final decree, upon such terms as may be fixed by the court, and upon motion to dismiss duly made to the court.

**Source:** L. 03: p. 323, § 26. R.S. 08: § 742. C.L. § 4952. CSA: C. 40, § 197. CRS 53: § 118-10-29. C.R.S. 1963: § 118-10-29.

## ANNOTATION

**Section is not in violation of § 25 of art. II, Colo. Const.,** or of the fourteenth amendment to the federal constitution, on the ground of not complying with due process of law in that it fails

to provide for an affirmative judgment for defendant. *People ex rel. Smith v. Crissman*, 41 Colo. 450, 92 P. 949 (1901).

**38-36-130. Decree of confirmation - effect - appeal.** If the court, after hearing, finds that the applicant has title, whether as stated in his application or otherwise, proper for registration, a decree of confirmation of title and registration shall be entered. Every decree of registration shall bind the land and quiet the title thereto, except as otherwise provided in this article, and shall be forever binding and conclusive upon all persons, whether mentioned by name in the application or included in "all other persons or parties unknown claiming any right, title, estate, lien, or interest in, to, or upon the real estate described in the application herein", and such decree shall not be opened by reason of the absence, infancy, or other disability of any person affected thereby, nor by any proceeding at law or in equity for reversing judgments or decrees, except as especially provided in section 38-36-131. An appeal may be taken as provided by law and the Colorado appellate rules within the same time and upon like notice, terms, and conditions as are provided for the taking of appeals from the district court to the appellate court in civil actions.

**Source:** L. 03: p. 323, § 27. R.S. 08: § 743. C.L. § 4953. CSA: C. 40, § 198. CRS 53: § 118-10-30. C.R.S. 1963: § 118-10-30.

## ANNOTATION

**Law reviews.** For article, "One Year Review of Property", see 37 Dicta 89 (1960). For article, "The Torrens Title System in Colorado", see 39 Dicta 40 (1962).

**Decree registering title is conclusive as against claimants** under a prior deed. *Gerbig v. Spelts*, 89 Colo. 201, 300 P. 606 (1931).

**Applied** in *White v. Ainsworth*, 62 Colo. 513, 163 P. 959, 1918E Ann. Cas. 179 (1917).

**38-36-131. When decree may be opened.** (1) Any person having an interest in or lien upon the land who has not been actually served with process or notified of the filing of the application or the pendency thereof may at any time within ninety days after the entry of such decree, and not afterwards, appear and file his sworn answer to such application in like manner as prescribed in section 38-36-125 for making answer if such person had no actual notice or information of the filing of such application or the pendency of the proceeding during the pendency thereof, or until within three months of the time of the filing of such answer, which facts shall be made to appear before answering by the affidavit of the person answering or the affidavit of someone in his behalf having knowledge of the facts; and also if no innocent purchaser for value has acquired an interest. If there is any such purchaser, the decree of registration shall not be opened but shall remain in full force and effect forever, subject only to the right of appeal provided for in section 38-36-130.

(2) Any person aggrieved by such decree in any case may pursue his remedy by suit in the nature of an action of tort against the applicant or any other person for fraud in procuring the decree and may also bring his action for indemnity as provided for in section 38-36-187.

(3) Upon the filing of such answer, and not less than ten days' notice having been given to the applicant and to such other interested parties as the court may order in such manner as directed by the court, the court shall proceed to review the case, and if the court is satisfied that the order or decree ought to be opened, an order shall be entered to that effect, and the court shall proceed to review the proceedings and shall make such order in the case as is equitable in the premises. An appeal may be allowed in this case, as well as from all other decrees affecting any registered title, within a like time and in a like manner as in the case of an original decree under this article, and not otherwise.

**Source:** L. 03: p. 324, § 28. R.S. 08: § 744. C.L. § 4954. CSA: C. 40, § 199. CRS 53: § 118-10-31. C.R.S. 1963: § 118-10-31.

## ANNOTATION

**Law reviews.** For article, "The Torrens Title System in Colorado", see 39 Dicta 40 (1962).

**Applied** in *White v. Ainsworth*, 62 Colo. 513, 163 P. 959, 1918E Ann. Cas. 179 (1917).

**38-36-132. Action to recover land - limitation.** No person shall commence any proceeding for the recovery of lands or any interest, right, lien, or demand therein or upon the same adverse to the title or interest as found or decreed in the decree of registration unless within ninety days after the entry of the order or decree. This section shall be construed as giving such right of action to such person only as shall not, because of some irregularity, insufficiency, or for some other cause, be bound and concluded by such order or decree.

**Source:** L. 03: p. 324, § 29. R.S. 08: § 745. C.L. § 4955. CSA: C. 40, § 200. CRS 53: § 118-10-32. C.R.S. 1963: § 118-10-32.

## ANNOTATION

**Applied** in *Gerbig v. Spelts*, 89 Colo. 201, 300 P. 606 (1931).



**38-36-133. Certificate of title insures freedom from encumbrance - exceptions.**

(1) Every person receiving a certificate of title in pursuance of a decree of registration and every subsequent purchaser of registered land who takes a certificate of title for value and in good faith shall hold the same free from all encumbrances, except only such estates, mortgages, liens, charges, and interests as may be noted in the last certificate of title in the registrar's office, and except any of the following rights or encumbrances subsisting, namely:

(a) Any existing lease for a period not exceeding three years, when there is actual occupation of the premises under the lease;

(b) All public highways embraced in the description of the land included in the certificates shall be deemed to be excluded from the certificate, and any subsisting right-of-way or other easement for ditches or water rights upon, over, or in respect to the land;

(c) Any tax or special assessment for which a sale of the land has not been had at the date of the certificate of title;

(d) Such right of appeal, or right to appear and contest the application, as is allowed by this article;

(e) Liens, claims, or rights, if any, arising or existing under the constitution or laws of the United States, and which the statutes of this state cannot or do not require to appear of record in the office of the county clerk and recorder.

**Source:** L. 03: p. 325, § 30. R.S. 08: § 746. C.L. § 4956. CSA: C. 40, § 201. CRS 53: § 118-10-33. C.R.S. 1963: § 118-10-33.

**ANNOTATION**

**Law reviews.** For article, "The Torrens Title System in Colorado", see 39 Dicta 40 (1962).

**Applied in** Dillinger v. North Sterling Irrigation Dist., 129 Colo. 17, 266 P.2d 776 (1954).

**38-36-134. Contents of decree - certified copy filed.** Every decree of registration shall bear the year, day, hour, and minute of its entry and shall be signed by one of the judges of the district court. It shall state whether the owner is married or unmarried and, if married, the name of the husband or wife. If the owner is under disability it shall state the nature of the disability, and, if a minor, shall state his age. It shall contain a description of the land as finally determined by the court and shall set forth the estate of the owner, and also, in such manner as to show their relative priority, all particular estates, mortgages, easements, liens, attachments, homesteads, and other encumbrances, including rights of husband and wife, if any, to which the land or the owner's estate is subject and shall contain any other matter or information properly to be determined by the court in pursuance of this article. The decree shall be stated in a convenient form for transcription upon the certificate of title, to be made as provided in section 38-36-139 by the registrar of titles. Immediately upon the filing of the decree of registration, the clerk shall file a certified copy thereof in the office of the registrar of titles.

**Source:** L. 03: p. 325, § 31. R.S. 08: § 747. C.L. § 4957. CSA: C. 40, § 202. CRS 53: § 118-10-34. C.R.S. 1963: § 118-10-34.

**ANNOTATION**

**Law reviews.** For article, "The Torrens Title System in Colorado", see 39 Dicta 40 (1962).

**38-36-135. Party acquiring interest after application filed made defendant.** Any person who takes by conveyance, attachment, judgment, lien, or otherwise any right, title, or interest in the land subsequent to the filing of a copy of the application for registration

in the office of the county clerk and recorder shall at once appear and answer as a party defendant in the proceeding for registration, and the right, title, or interest of such person shall be subject to the order or decree of the court.

**Source:** L. 03: p. 326, § 32. R.S. 08: § 748. C.L. § 4958. CSA: C. 40, § 203. CRS 53: § 118-10-35. C.R.S. 1963: § 118-10-35.

**38-36-136. Registered land to remain under this article unless removed from registration.** (1) Unless removed from registration in the manner stated in this section, the obtaining of a decree of registration and receiving of a certificate of title shall be deemed an agreement running with the land and binding upon the applicant and the successors in title that the land is and remains registered land and subject to the provisions of this article and of all amendments thereto. All dealings with the land or any estate or interest therein after the same has been brought under this article, and all liens, encumbrances, and charges upon the same shall be made only subject to the terms of this article. The owner, or his agent or attorney, of any real property registered under the terms of this article may, at any time, withdraw said real property registration from the operation of this article by surrendering to the registrar his duplicate certificate of ownership, duly endorsed with a signed and acknowledged request for such withdrawal.

(2) This request may be substantially in the following form, to wit:

To the Registrar of Titles in the County of ....., and State of Colorado: I, (or we), ....., the undersigned registered owner of the within described real property, do hereby request that said real property and the title thereto be forthwith withdrawn from registration under the terms of this article.

Witness my (or our) hand this ..... day of ....., A.D. 20.... .

STATE OF COLORADO )  
 ) ss.  
County of ..... )

The foregoing instrument was acknowledged before me this ..... day of ....., A.D. 20...., by .....

Witness my hand and official seal.  
My Commission expires:

.....  
Notary Public.

(3) Thereupon such registrar shall certify on said certificate that said real property has been withdrawn from the operation of this article and shall cause said certificate with all notations, certifications, memorials, and endorsements thereon to be recorded in the office of the county clerk and recorder of the county in which said real estate is situated. The fee to be paid to the county clerk and recorder for recording said certificate shall be the sum of five dollars. Such withdrawal shall not alter or affect any title, lien, encumbrance, or right pertaining to or fixed upon such real property at the time of such withdrawal.

**Source:** L. 03: p. 326, § 33. R.S. 08: § 749. C.L. § 4959. L. 43: p. 220, § 1. CSA: C. 40, § 204. CRS 53: § 118-10-36. C.R.S. 1963: § 118-10-36. L. 91: (3) amended, p. 710, § 9, effective July 1.

ANNOTATION

**Law reviews.** For article, “The Torrens Title System in Colorado”, see 39 Dicta 40 (1962).

**38-36-137. No title by prescription or adverse possession.** No title to registered land in derogation of that of the registered owner shall ever be acquired by prescription or adverse possession.



**Source:** L. 03: p. 326, § 34. R.S. 08: § 750. C.L. § 4960. CSA: C. 40, § 205. CRS 53: § 118-10-37. C.R.S. 1963: § 118-10-37.

## ANNOTATION

**Law reviews.** For article, "The Torrens Title System in Colorado", see 39 *Dicta* 40 (1962). For note, "A Survey of Colorado Water Law", see 47 *Den. L. J.* 226 (1970).

**Applied** in *Dillinger v. North Sterling Irrigation Dist.*, 129 Colo. 17, 266 P.2d 776 (1954).

**38-36-138. Title to be registered - register of titles.** Immediately upon the filing of the decree of registration in the office of the registrar of titles, the registrar shall proceed to register the title or interest pursuant to the terms of the decree in the manner provided in this section. The registrar shall keep a book known as the “register of titles”, wherein he shall enter all first and subsequent original certificates of title by binding or recording them therein in the order of their numbers, consecutively, beginning with number one, with appropriate blanks for entry of memorials and notations allowed by this article. Each certificate, with such blanks, shall constitute a separate page of such book. All memorials and notations that may be entered upon the register shall be entered upon the page whereon the last certificate of title of the land to which they relate is entered. The term “certificate” or “title” used in this article includes all memorials and notations thereon.

**Source:** L. 03: p. 327, § 35. R.S. 08: § 751. C.L. § 4961. CSA: C. 40, § 206. CRS 53: § 118-10-38. C.R.S. 1963: § 118-10-38.

## ANNOTATION

**Law reviews.** For article, "The Torrens Title System in Colorado", see 39 *Dicta* 40 (1962).

**38-36-139. Contents and form of certificate of registration.** The certificate of registration shall contain the name of the owner, a description of the land and of the estate of the owner, and shall by memorial or notation contain a description of all encumbrances, liens, and interest to which the estate of the owner is subject. It shall state the residence of the owner and, if a minor, give his age; if under disability, it shall state the nature of the disability; it shall state whether married or not, and if married, the name of the husband or wife. In case of a trust, condition, or limitation, it shall state the trust, condition, or limitation, as the case may be. It shall contain and conform in respect to all statements in the certified copy of the decree of registration filed with the registrar of titles as provided in section 38-36-134, and shall be in a form substantially as follows:

## FIRST CERTIFICATE OF TITLE.

Pursuant to order of district court of ..... county.

STATE OF COLORADO )  
 ) ss.  
County of ..... )

This is to certify that A ..... B ..... of ....., county of ....., state of ..... is now the owner of an estate (describe the estate) of, and in (describe the land), subject to the encumbrances, liens, and interests noted by the memorial underwritten or endorsed thereon, subject to the exceptions and qualifications mentioned in section 38-36-133. (Here note all statements provided herein to appear upon the certificate.)

In witness whereof, I have hereunto set my hand and affixed the official seal of my office this ..... day of ..... A.D. 20....

(Seal)

### Registrar of Titles.

**Source:** L. 03: p. 327, § 36. R.S. 08: § 752. C.L. § 4962. CSA: C. 40, § 207. CRS 53: § 118-10-39. C.R.S. 1963: § 118-10-39.

#### ANNOTATION

**Law reviews.** For article, "The Torrens Title System in Colorado", see 39 Dicta 40 (1962).

**38-36-140. Owner's duplicate certificate of ownership - signature of owner.** The registrar shall, at the time that he enters his original certificate of title, make an exact duplicate thereof, but putting on it the words, "Owner's duplicate certificate of ownership", and deliver the same to the owner or to his attorney duly authorized. For the purpose of preserving evidence of the signature and handwriting of the owner in his office, it is the duty of the registrar to take from the owner, in every case where it is practicable to do so, his receipt for the certificate of title, which shall be signed by the owner in person. Such receipt, when signed and delivered in the registrar's office, shall be witnessed by the registrar or deputy registrar. If such receipt is signed elsewhere, it shall be witnessed and acknowledged in the same manner as is now provided for the acknowledgment of deeds. When so signed, such receipt shall be prima facie evidence of the genuineness of such signature.

**Source:** L. 03: p. 328, § 37. R.S. 08: § 753. C.L. § 4963. CSA: C. 40, § 208. CRS 53: § 118-10-40. C.R.S. 1963: § 118-10-40.

**38-36-141. Two or more owners.** Where two or more persons are registered owners as tenants in common or otherwise, the owner's duplicate certificate can be issued for the entirety, or a separate duplicate owner's certificate may be issued to each owner for his undivided share.

**Source:** L. 03: p. 328, § 38. R.S. 08: § 754. C.L. § 4964. CSA: C. 40, § 209. CRS 53: § 118-10-41. C.R.S. 1963: § 118-10-41.

**38-36-142. Subsequent certificates.** All certificates subsequent to the first shall be in like form, except that they shall be entitled "Transfer from No. ...." (the number of the next previous certificate relating to the same land), and shall also contain the words "Originally registered on the ..... day of ....., 20...., and entered in book ....., at page ..... of register".

**Source:** L. 03: p. 328, § 39. R.S. 08: § 755. C.L. § 4965. CSA: C. 40, § 210. CRS 53: § 118-10-42. C.R.S. 1963: § 118-10-42.

**38-36-143. Exchange of certificates - platting land.** A registered owner holding one duplicate certificate for several distinct parcels of land may surrender it and take out several certificates for portions thereof. A registered owner holding several duplicate certificates for several distinct parcels of land may surrender them and take out a single duplicate certificate for all of said parcels, or several certificates for different portions thereof. Such exchange of certificates, however, shall only be made by the order of the court upon petition therefor duly made by the owner. An owner of registered land who subdivides such land into lots, blocks, or acre tracts shall file with the registrar of titles a plat of said land so subdivided, in the same manner and subject to the same rules of law and restrictions as is provided for platting land that is not registered.

**Source:** L. 03: p. 329, § 40. R.S. 08: § 756. C.L. § 4966. CSA: C. 40, § 211. CRS 53: § 118-10-43. C.R.S. 1963: § 118-10-43.

**38-36-144. When certificate takes effect.** The certificate of title shall relate back to and take effect as of the date of the decree of registration.



**Source:** L. 03: p. 329, § 41. R.S. 08: § 757. C.L. § 4967. CSA: C. 40, § 212. CRS 53: § 118-10-44. C.R.S. 1963: § 118-10-44.

#### ANNOTATION

**Law reviews.** For article, "The Torrens Title System in Colorado", see 39 Dicta 40 (1962).

**38-36-145. Certificates in evidence - variance.** The original certificate in the registration book, any copy thereof duly certified under the signature of the registrar of titles or his deputy and authenticated by his seal, and also the owner's duplicate certificate shall be received as evidence in all the courts of this state, and shall be conclusive as to all matters contained therein, except so far as is otherwise provided in this article. In case of a variance between the owner's duplicate certificate and the original certificate, the original shall prevail.

**Source:** L. 03: p. 329, § 42. R.S. 08: § 758. C.L. § 4968. CSA: C. 40, § 213. CRS 53: § 118-10-45. C.R.S. 1963: § 118-10-45.

#### ANNOTATION

**Exception must refer to § 38-36-133.** The exception mentioned in this section must refer to those exceptions in § 38-36-133. Sterling Nat'l

Bank v. Fischer, 75 Colo. 371, 226 P. 146 (1924).

**38-36-146. Indexes kept by registrar - adoption of forms.** The registrar of titles, under the direction of the court, shall make and keep indexes of all duplications and of all certified copies and decrees of registration and certificates of titles, and shall also index and file in classified order all papers and instruments filed in his office relating to applications and to registered titles. The registrar shall also, under the direction of the court, prepare and keep forms of indexes and registration and entry books. The court shall prepare and adopt convenient forms of certificates of titles, and also general forms of memorials or notations to be used by the registrars of titles in registering the common forms of conveyance and other instruments to express briefly their effect.

**Source:** L. 03: p. 330, § 43. R.S. 08: § 759. C.L. § 4969. CSA: C. 40, § 214. CRS 53: § 118-10-46. C.R.S. 1963: § 118-10-46.

**38-36-147. Tract and alphabetical indexes kept by registrar.** The registrar of titles shall keep tract indexes, in which shall be entered the lands registered in the numerical order of the townships, ranges, sections, and, in cases of subdivisions, the blocks and lots therein, and the names of the owners, with a reference to the volume and page of the register of titles in which the lands are registered. He shall also keep alphabetical indexes, in which shall be entered in alphabetical order the names of all registered owners and all other persons interested in or holding charges upon or any interest in the registered land, with a reference to the volume and page of the register of titles in which the land is registered.

**Source:** L. 03: p. 330, § 44. R.S. 08: § 760. C.L. § 4970. CSA: C. 40, § 215. CRS 53: § 118-10-47. C.R.S. 1963: § 118-10-47.

**38-36-148. Registered land may be conveyed or encumbered.** The owner of registered land may convey, mortgage, lease, charge, or otherwise encumber, dispose of, or deal with the same as fully as if it had not been registered. He may use forms of deeds, trust deeds, mortgages, and leases or voluntary instruments like those now in use and sufficient in law for the purpose intended. But no voluntary instrument of conveyance, except a will and a lease for a term not exceeding three years, purporting to convey or affect registered

land, shall take effect as a conveyance or bind the land but shall operate only as a contract between the parties and as evidence of the authority to the registrar of titles to make registration. The act of registration shall be the operative act to convey or affect the land.

**Source:** L. 03: p. 330, § 45. R.S. 08: § 761. C.L. § 4971. CSA: C. 40, § 216. CRS 53: § 118-10-48. C.R.S. 1963: § 118-10-48.

#### ANNOTATION

**Law reviews.** For article, "The Torrens Title System in Colorado", see 39 Dicta 40 (1962).

**38-36-149. Effect of recording instruments.** Every conveyance, lien, attachment, order, decree, judgment of a court of record, or instrument or entry which would under existing law, if recorded, filed, or entered in the office of the county clerk and recorder of the county in which the real estate is situate, affect the said real estate to which it relates, if the title thereto were not registered, shall, if recorded, filed, or entered in the office of the registrar of titles in the county where the real estate to which such instrument relates is situate, affect in like manner the title thereto if registered, and shall be notice to all persons from the time of such recording, filing, or entering.

**Source:** L. 03: p. 330, § 46. R.S. 08: § 762. C.L. § 4972. CSA: C. 40, § 217. CRS 53: § 118-10-49. C.R.S. 1963: § 118-10-49.

#### ANNOTATION

**Applied** in *Arapahoe Land Title, Inc. v. Contract Financing, Ltd.*, 28 Colo. App. 393, 472 P.2d 754 (1970).

**38-36-150. Records - open to inspection.** The registrar of titles shall number and note, in a proper book to be kept for that purpose, the year, month, day, hour, and minute of reception and number of all conveyances, orders or decrees, writs or other process, judgments, liens, and all other instruments or papers or orders affecting the title of land, the title to which is registered. Every instrument so filed shall be retained in the office of the registrar of titles and shall be regarded as registered from the time so noted, and the memorial of each instrument, when made on the certificate of title to which it refers, shall bear the same date. Every instrument so filed, whether voluntary or involuntary, shall be numbered and indexed, and endorsed with a reference to the proper certificate of title. All records and papers relating to registered land in the office of the registrar of titles shall be open to public inspection in the same manner as are the papers and records in the office of the county clerk and recorder.

**Source:** L. 03: p. 331, § 47. R.S. 08: § 763. C.L. § 4973. CSA: C. 40, § 218. CRS 53: § 118-10-50. C.R.S. 1963: § 118-10-50.

**Cross references:** For inspection of records of the county clerk and recorder, see § 30-10-101.

**38-36-151. Duplicates - certified copies.** Duplicates of all instruments, voluntary or involuntary, filed and registered in the office of the registrar of titles, may be presented with the originals, and shall be attested and sealed by the registrar of titles, and endorsed with the file number and other memoranda on the originals, and may be taken away by the person presenting the same. Certified copies of all instruments filed and registered may be obtained from the registrar of titles on the payment of a fee of the same amount as is allowed the county clerk and recorder for a like certified copy.



**Source:** L. 03: p. 331, § 48. **R.S. 08:** § 764. **C.L.** § 4974. **CSA:** C. 40, § 219. **CRS 53:** § 118-10-51. **C.R.S. 1963:** § 118-10-51.

**Cross references:** For fees of county clerk and recorders for certified copies, see § 30-1-103.

**38-36-152. Title not divested - interests less than freehold.** (1) No new certificate shall be entered or issued upon any transfer of registered land which does not divest the title in fee simple of said land or some part thereof from the owner or one of the registered owners. All interest in the registered land less than a freehold estate shall be registered by filing with the registrar of titles the instruments creating, transferring, or claiming such interest, and by a brief memorandum or memorial thereof made by a registrar of titles upon the certificate of title, and signed by him. A similar memorandum or memorial shall also be made on the owner's duplicate.

(2) The cancellation or extinguishment of such interests shall be registered in the same manner. When any party in interest does not agree as to the proper memorial to be made upon the filing of any instrument presented for registration, or where the registrar of titles is in doubt as to the form of such memorial, the question shall be referred to the court for decision, either on the certificate of the registrar of titles or upon the demand in writing of any party in interest.

(3) The registrar of titles shall bring before the court all the papers and evidence which may be necessary for the determination of the question by the court. The court, after notice to all parties in interest and a hearing, shall enter an order prescribing the form of the memorial, and the registrar of titles shall make registration in accordance therewith.

**Source:** L. 03: p. 331, § 49. **R.S. 08:** § 765. **C.L.** § 4975. **CSA:** C. 40, § 220. **CRS 53:** § 118-10-52. **C.R.S. 1963:** § 118-10-52.

#### ANNOTATION

**Law reviews.** For article, "The Torrens Title System in Colorado", see 39 Dicta 40 (1962).

**Act of registration is practically ministerial.** The registrar is presumed to exercise some sound judgment in complying with the provisions of this article, yet under this section, the act of registration is practically ministerial be-

cause, when there is a doubt in the registrar's mind, or in the mind of any person in interest, the matter can be referred to the court, and where a hearing is provided, the court determines the question, and the result is entered accordingly. *White v. Ainsworth*, 62 Colo. 513, 163 P. 959, 1918E Ann. Cas. 179 (1917).

**38-36-153. When owner's certificate must be presented - effect of presentation.** No new certificates of titles shall be entered, and no memorial shall be made upon any certificate of title in pursuance of any deed or other voluntary instrument unless the owner's duplicate certificate is presented with such instrument, except in cases provided for in this article, or upon the order of the court, for cause shown. Whenever such order is made, a memorial therefor shall be entered, or a new certificate issued, as directed by said order. The production of the owner's duplicate certificate, whenever any voluntary instrument is presented for registration, shall be conclusive authority from the registered owner to the registrar of titles to enter a new certificate or to make a memorial of registration in accordance with such instrument, and a new certificate or memorial shall be binding upon the registered owner and upon all persons claiming under him, in favor of every purchaser for value and in good faith.

**Source:** L. 03: p. 332, § 50. **R.S. 08:** § 766. **C.L.** § 4976. **CSA:** C. 40, § 221. **CRS 53:** § 118-10-53. **C.R.S. 1963:** § 118-10-53.

**38-36-154. Certified copy of owner's duplicate certificates.** (1) In the event that an owner's duplicate certificate of title is lost, mislaid, or destroyed, the owner may make affidavit of the fact before any officer authorized to administer oaths, stating, with particularity, the facts relating to such loss, mislaying, or destruction, and shall file the same

in the office of the registrar of titles.

(2) Any party in interest may thereupon apply to the court, and the court shall, upon proofs of the facts set forth in the affidavit, enter an order directing the registrar of titles to make and issue a new owner's duplicate certificate. Such new owner's duplicate certificate shall be printed or marked "certified copy of owner's duplicate certificate", and such certified copy shall stand in the place of and have like effect as the owner's duplicate certificate.

**Source:** L. 03: p. 333, § 51. R.S. 08: § 767. C.L. § 4977. CSA: C. 40, § 222. CRS 53: § 118-10-54. C.R.S. 1963: § 118-10-54.

**38-36-155. Mode of conveying registered land.** An owner of registered land conveying the same, or any portion thereof, in fee, shall execute a deed of conveyance which the grantor shall file with the registrar of titles in the county where the land lies. The owner's duplicate certificate shall be surrendered, at the same time, and shall be by the registrar marked "canceled". The original certificate of title shall also be marked "canceled". The registrar of titles shall thereupon enter in the register of titles a new certificate of title to the grantee, and shall prepare and deliver to such grantee an owner's duplicate certificate. All encumbrances, claims, or interests adverse to the title of the registered owner shall be stated upon the new certificate, except insofar as they may be simultaneously released or discharged. When only a part of the land described in a certificate is transferred, or some estate or interest in the land remains in the transferor, a new certificate shall be issued to him for the part, estate, or interest remaining to him.

**Source:** L. 03: p. 333, § 52. R.S. 08: § 768. C.L. § 4978. CSA: C. 40, § 223. CRS 53: § 118-10-55. C.R.S. 1963: § 118-10-55.

#### ANNOTATION

**Law reviews.** For article, "The Torrens Title System in Colorado", see 39 Dicta 40 (1962).

**38-36-156. Certificate that taxes have been paid.** Before any deed, plat, or other instrument affecting registered land is filed or registered in the office of the registrar of titles, the owner shall present a certificate from the county treasurer showing that all taxes then due thereon have been paid.

**Source:** L. 03: p. 334, § 53. R.S. 08: § 769. C.L. § 4979. CSA: C. 40, § 224. CRS 53: § 118-10-56. C.R.S. 1963: § 118-10-56.

**38-36-157. Registered land subject to same laws as unregistered land.** Registered land and ownership therein shall in all respects be subject to the same burdens and incidents which attach by law to unregistered land. Nothing in this article shall in any way be construed to relieve registered land or the owners thereof from any rights incident to the relation of husband and wife, or from liability to attachment on mesne process, or levy on execution, or from liability of any lien of any description established by law on land and the improvements thereon, or the interest of the owner in such land or improvements, or to change the laws of descent, or the rights of partition between cotenants, or the right to take the same by eminent domain, or to relieve such land from liability to be recovered by an assignee in insolvency or trustee in bankruptcy under the provisions of law relating thereto, or to change or affect in any way any other rights or liabilities created by law and applicable to unregistered land, except as otherwise expressly provided in this article.

**Source:** L. 03: p. 334, § 54. R.S. 08: § 770. C.L. § 4980. CSA: C. 40, § 225. CRS 53: § 118-10-57. C.R.S. 1963: § 118-10-57.



**38-36-158. Powers of attorney.** Any person may by attorney convey or otherwise deal with registered land, but the letters or power of attorney shall be acknowledged and filed with the registrar of titles and registered. Any instrument revoking such letters or power of attorney shall be acknowledged in like manner.

**Source:** L. 03: p. 334, § 55. R.S. 08: § 771. C.L. § 4981. CSA: C. 40, § 226. CRS 53: § 118-10-58. C.R.S. 1963: § 118-10-58.

**38-36-159. Encumbrances must be registered.** The owner of registered land may mortgage or encumber the same by executing a trust deed or other instrument sufficient in law for that purpose, and such instrument may be assigned, extended, discharged, released in whole or in part, or otherwise dealt with by the mortgagee by any form of instrument sufficient in law for the purpose. But such trust deed or other instrument, and all instruments assigning, extending, discharging, releasing, or otherwise dealing with the encumbrance, shall be registered and take effect upon the title only from the time of registration.

**Source:** L. 03: p. 334, § 56. R.S. 08: § 772. C.L. § 4982. CSA: C. 40, § 227. CRS 53: § 118-10-59. C.R.S. 1963: § 118-10-59.

**38-36-160. Trust deed deemed a mortgage - how registered.** (1) A trust deed shall be deemed to be a mortgage, and be subject to the same rules as a mortgage, excepting as to the manner of the foreclosure thereof. The registration of a mortgage shall be made in the following manner: The owner's duplicate certificate shall be presented to the registrar of titles with the mortgage deed or instrument to be registered, and the registrar shall enter upon the original certificate of title and also upon the owner's duplicate certificate a memorial of the purport of the instrument registered, the time of filing and the file number of the registered instrument. He shall also note upon the instrument registered the time of filing and a reference to the volume and page of the register of title wherein the same is registered.

(2) The registrar of titles shall also, at the request of the mortgagee, make out and deliver to him a duplicate certificate of title, like the owner's duplicate; except that the words "mortgagee's duplicate" shall be written or printed upon such certificate in large letters, diagonally across the face. A memorandum of the issuance of the mortgagee's duplicate shall be made upon the certificate of title.

**Source:** L. 03: p. 335, § 57. R.S. 08: § 773. C.L. § 4983. CSA: C. 40, § 228. CRS 53: § 118-10-60. C.R.S. 1963: § 118-10-60.

#### ANNOTATION

**Law reviews.** For article, "The Torrens Title System in Colorado", see 39 Dicta 40 (1962).

**38-36-161. Assignment, cancellation, and release of mortgage.** Whenever a mortgage upon which a mortgagee's duplicate has been issued is assigned, extended, or otherwise dealt with, the mortgagee's duplicate shall be presented with the instrument assigning, extending, or otherwise dealing with the mortgage, and a memorial of the instrument shall be made upon the mortgagee's duplicate and upon the original certificate of title. When the mortgage is discharged or otherwise extinguished, the mortgagee's duplicate shall be surrendered and stamped "canceled". In case only a part of the charge or of the land is intended to be released, discharged, or surrendered, the entry shall be made by a memorial accordingly in like manner as before provided for a release or discharge. The production of the mortgagee's duplicate certificate shall be conclusive authority to register the instrument therewith presented. A mortgage on registered land may be discharged in whole or in part by the mortgagee in person on the register of titles in the same manner as

a mortgage on unregistered land may be discharged by an entry on the margin of the record thereof in the county clerk and recorder's office, and such discharge shall be attested by the registrar of titles.

**Source:** L. 03: p. 335, § 58. R.S. 08: § 774. C.L. § 4984. CSA: C. 40, § 229. CRS 53: § 118-10-61. C.R.S. 1963: § 118-10-61.

**38-36-162. Foreclosure of mortgage.** All charges upon registered land, or any estate or interest in the same, and any right thereunder may be enforced as is permitted by law, and all laws relating to the foreclosure of mortgages shall apply to mortgages upon registered land or any estate or interest therein, except as otherwise provided in this section, and except that a notice of the pendency of any suit or of any proceeding to enforce or foreclose the mortgage or any charge shall be filed in the office of the registrar of titles, and a memorial thereof entered on the register at the time of or prior to the commencement of such suit or the beginning of any such proceeding. A notice so filed and registered shall be notice to the registrar of titles and all persons dealing with the land or any part thereof. When a mortgagee's duplicate has been issued, such duplicate shall, at the time of the registering of the notice, be presented, and a memorial of such notice shall be entered upon the mortgagee's duplicate.

**Source:** L. 03: p. 336, § 59. R.S. 08: § 775. C.L. § 4985. CSA: C. 40, § 230. CRS 53: § 118-10-62. C.R.S. 1963: § 118-10-62.

#### ANNOTATION

**Law reviews.** For article, "The Torrens Title System in Colorado", see 39 Dicta 40 (1962).

**38-36-163. Registration of final decree - new certificate issued.** In any action affecting registered land a judgment or final decree is entitled to registration on the presentation of a certified copy of the entry thereof from the clerk of the court where the action is pending to the registrar of titles. The registrar of titles shall enter a memorial thereof upon the original certificates of title and upon the owner's duplicate, and also upon the mortgagee's and lessee's duplicate, if any are outstanding. When the registered owner of such land is by such judgment or decree divested of his estate in fee to the land or any part thereof, the plaintiff or defendant shall be entitled to a new certificate of title for the land or that part thereof designated in the judgment or decree, and the registrar of titles shall enter such new certificate of title and issue a new owner's duplicate in such manner as is provided in the case of a voluntary conveyance. No such new certificate shall be entered except upon the application to the district court of the county and upon the filing in the office of the registrar of titles an order of the court directing the entry of such new certificate.

**Source:** L. 03: p. 336, § 60. R.S. 08: § 776. C.L. § 4986. CSA: C. 40, § 231. CRS 53: § 118-10-63. C.R.S. 1963: § 118-10-63.

#### ANNOTATION

**Law reviews.** For article, "The Torrens Title System in Colorado", see 39 Dicta 40 (1962).

**38-36-164. Title acquired by action registered - when certificate issues.** Any person who has, by any action or proceeding to enforce or foreclose any mortgage, lien, or charge upon registered land, become the owner in fee of the land or any part thereof shall be entitled to have his title registered, and the registrar of titles shall, upon application therefor, enter a new certificate of title for the land, or that part thereof of which the applicant is the



owner, and issue an owner's duplicate in such manner as in the case of a voluntary conveyance of registered land. No such new certificate of title shall be entered, except after the time to redeem from such foreclosure has expired and upon the filing in the office of the registrar of titles an order of the district court of the county directing the entry of such new certificates.

**Source:** L. 03: p. 337, § 61. R.S. 08: § 777. C.L. § 4987. CSA: C. 40, § 232. CRS 53: § 118-10-64. C.R.S. 1963: § 118-10-64.

**38-36-165. Petition to court for new certificate.** In all cases wherein by this article it is provided that a new certificate of title to registered land shall be entered by order of the court, a person applying for such new certificate shall apply to the court by petition, setting forth the facts, and the court shall, after notice given to all parties in interest, as the court may direct, and upon hearing, make an order or decree for the entry of a new certificate to such person as shall appear to be entitled thereto.

**Source:** L. 03: p. 337, § 62. R.S. 08: § 778. C.L. § 4988. CSA: C. 40, § 233. CRS 53: § 118-10-65. C.R.S. 1963: § 118-10-65.

**38-36-166. Registration of leases.** Leases for registered land for a term of three years or more shall be registered in like manner as a mortgage, and the provisions of section 38-36-160 relating to the registration of mortgages shall also apply to the registration of leases. The registrar shall, at the request of the lessee, make out and deliver to him a duplicate of the certificate of title like the owner's duplicate, except the words "lessee's duplicate" shall be written or printed upon it in large letters diagonally across its face.

**Source:** L. 03: p. 337, § 63. R.S. 08: § 779. C.L. § 4989. CSA: C. 40, § 234. CRS 53: § 118-10-66. C.R.S. 1963: § 118-10-66.

#### ANNOTATION

**Law reviews.** For article, "The Torrens Title System in Colorado", see 39 Dicta 40 (1962).

**38-36-167. How transfer in trust registered.** (1) Whenever a deed or other instrument is filed in the office of the registrar of titles for the purpose of effecting a transfer of, or a charge upon, the registered land or any estate or interest in the same, and it appears that the transfer or charge is to be in trust, or upon condition or limitation expressed in such deed or instrument, such deed or instrument shall be registered in the usual manner; except that the particulars of the trust, condition, limitation, or other equitable interest shall not be entered upon the certificate of title by memorial, but a memorandum or memorial shall be entered by the words "in trust" or "upon condition", or other apt words, and by reference by number to the instrument authorizing or creating the same. A similar memorial shall be made upon the owner's duplicate certificate.

(2) No transfer of or charge upon or dealing with the land or estate, or interest therein, shall thereafter be registered, except upon an order of the court first filed in the office of the registrar of titles directing such transfer, charge, or dealing in accordance with the true intent and meaning of the trust, condition, or limitation. Such registration shall be conclusive evidence in favor of the person taking such transfer, charge, or right, and those claiming under him, in good faith and for a valuable consideration, that such transfer, charge, or other dealing is in accordance with the true intent and meaning of the trust, condition, or limitation.

**Source:** L. 03: p. 338, § 64. R.S. 08: § 780. C.L. § 4990. CSA: C. 40, § 235. CRS 53: § 118-10-67. C.R.S. 1963: § 118-10-67.

**38-36-168. New trustee - new certificate.** When the title to registered land passes from a trustee to a new trustee, a new certificate shall be entered to him and shall be registered in like manner, as upon an original conveyance in trust.

**Source:** L. 03: p. 338, § 65. R.S. 08: § 781. C.L. § 4991. CSA: C. 40, § 236. CRS 53: § 118-10-68. C.R.S. 1963: § 118-10-68.

**38-36-169. Trustee may apply for registration of land.** Any trustee shall have authority to file an application for the registration of any land held in trust by him, unless expressly prohibited by the instrument creating the trust.

**Source:** L. 03: p. 338, § 66. R.S. 08: § 782. C.L. § 4992. CSA: C. 40, § 237. CRS 53: § 118-10-69. C.R.S. 1963: § 118-10-69.

**38-36-170. Certificate of title number on all filings and registrations.** In every case where a writing of any description, or a copy of any writ, order, or decree is required by law to be filed or recorded in order to create or preserve any lien, right, or attachment upon unregistered land, such writing or copy when intended to affect registered land, in lieu of recording, shall be filed and registered in the office of the registrar of titles in the county in which the land lies, and, in addition to any particulars required in such papers for the filing or recording, shall also contain a reference to the number of the certificate of title of the land to be affected, and also, if the attachment, right, or lien is not claimed on all the land in any certificate of title, a description sufficiently accurate for the identification of the land intended to be affected.

**Source:** L. 03: p. 339, § 67. R.S. 08: § 783. C.L. § 4993. CSA: C. 40, § 238. CRS 53: § 118-10-70. C.R.S. 1963: § 118-10-70.

**38-36-171. How attachments, liens, and other rights enforced.** All attachments, liens, and rights of every description shall be enforced, continued, reduced, discharged, and dissolved by any proceeding or method sufficient and proper in law to enforce, continue, reduce, discharge, or dissolve like liens on unregistered land. All certificates, writings, or other instruments permitted or required by law to be filed or recorded to give effect to the enforcement, continuance, reduction, discharge, or dissolution of attachment, liens, or other rights upon registered land, or to give notice of such enforcement, continuance, reduction, discharge, or dissolution, shall, in the case of like attachments, liens, or other rights upon registered land, be filed with the registrar of titles and registered in the register of titles, in lieu of filing or recording.

**Source:** L. 03: p. 339, § 68. R.S. 08: § 784. C.L. § 4994. CSA: C. 40, § 239. CRS 53: § 118-10-71. C.R.S. 1963: § 118-10-71.

#### ANNOTATION

**Law reviews.** For article, "The Torrens Title System in Colorado", see 39 Dicta 40 (1962).

**38-36-172. Name and address of plaintiff's attorney.** The name and address of the attorney for the plaintiff in every action affecting the title to registered land shall be endorsed upon the writ or other writing filed in the office of the registrar of titles, and he shall be deemed the attorney of the plaintiff until written notice that he has ceased to be such plaintiff's attorney shall be filed for registration by the plaintiff.

**Source:** L. 03: p. 339, § 69. R.S. 08: § 785. C.L. § 4995. CSA: C. 40, § 240. CRS 53: § 118-10-72. C.R.S. 1963: § 118-10-72.



## ANNOTATION

**Law reviews.** For article, "Oil and Gas Problems and the Torrens System", see 33 Dicta 194 (1956).

**38-36-173. When judgment becomes a lien.** A judgment, decree, or order of any court shall be a lien upon or affect registered land or any estate or interest therein only when a certificate under the hand and official seal of the clerk of the court in which the same is of record, stating the date and purport of the judgment, decree, or order, or a certified copy of such judgment, decree, or order, or transcript of the judgment docket, is filed in the office of the registrar of titles and a memorial of the same is entered upon the register of the last certificate of the title affected.

**Source:** L. 03: p. 339, § 70. R.S. 08: § 786. C.L. § 4996. CSA: C. 40, § 241. CRS 53: § 118-10-73. C.R.S. 1963: § 118-10-73.

## ANNOTATION

**Law reviews.** For article, "The Torrens Title System in Colorado", see 39 Dicta 40 (1962).

**38-36-174. Title acquired by execution - new certificate issued.** Any person who has acquired any right, title, interest, or estate in registered land by virtue of any execution, judgment, order, or decree of the court shall register his title so acquired by filing in the office of the registrar of titles all writings or instruments permitted or required to be recorded in the case of unregistered land. If the interest or estate so acquired is the fee in the registered land, or any part thereof, the person acquiring such interest shall be entitled to have a new certificate of title registered in him in the same manner as is provided in the case of persons acquiring title by action or proceeding in foreclosure of mortgages.

**Source:** L. 03: p. 340, § 71. R.S. 08: § 787. C.L. § 4997. CSA: C. 40, § 242. CRS 53: § 118-10-74. C.R.S. 1963: § 118-10-74.

**38-36-175. Action disposed of - memorial canceled.** The certificate of the clerk of the court, in which any action or proceeding has been pending, or any judgment or decree is of record, that such action or proceeding has been dismissed or otherwise disposed of, or that the judgment, decree, or order has been satisfied, released, reversed, or overruled, or of any sheriff or any other officer that the levy of any execution, attachment, or other process, certified by him, has been released, discharged, or otherwise disposed of, being filed in the office of the registrar of titles and noted upon the register, shall be sufficient to authorize the registrar to cancel or otherwise treat the memorial of such action, proceeding, judgment, decree, order, or levy, according to the purport of such certificate.

**Source:** L. 03: p. 340, § 72. R.S. 08: § 788. C.L. § 4998. CSA: C. 40, § 243. CRS 53: § 118-10-75. C.R.S. 1963: § 118-10-75.

**38-36-176. Petition and order for new certificate after redemption period.** Whenever registered land is sold, and the same is by law subject to redemption by the owner or any other person, the purchaser is not entitled to have a new certificate of title entered until the time within which the land may be redeemed has expired. At any time after the time to redeem has expired, the purchaser may petition the court for an order directing the entry of a new certificate of title to him, and the court shall, after such notice as it may order and hearing, grant and make an order directing the entry of such new certificate of title.

**Source:** L. 03: p. 340, § 73. R.S. 08: § 789. C.L. § 4999. CSA: C. 40, § 244. CRS 53: § 118-10-76. C.R.S. 1963: § 118-10-76.

**Cross references:** For redemption generally, see article 12 of title 39 and part 3 of article 38 of this title.

**38-36-177. When certificate will issue to heir or devisee.** The heirs at law and devisees, upon the death of an owner of lands, and any estate or interest therein, registered pursuant to this article, on the expiration of thirty days after the entry of a decree of the district or probate court granting letters testamentary or of administration, or in case of an appeal from such decree, at any time after the entry of a final decree, may file a certified copy of the final decree of the district or probate court and of the will, if any, with the clerk of the district court in the county in which the land lies, and make application to the court for an order for the entry of a new certificate of title. The court shall issue notice to the executor or administrator and all other persons in interest, and may also give notice by publication in such newspaper as it may deem proper, to all whom it may concern and, after hearing, may direct the entry of a new certificate to the person who appears to be entitled thereto as heir or devisee. Any new certificate so entered before the final settlement of the estate of the deceased owner in the district or probate court shall state expressly that it is entered by transfer from the last certificate by descent or devise, and that the estate is in process of settlement. After the final settlement of the estate in the district or probate court, or after the expiration of the time allowed by law for bringing an action against an executor or administrator by creditors of the deceased, the heirs at law or devisees may petition the court for an order to cancel the memorial upon their certificates stating that the estate is in course of settlement, and the court, after such notice as it may order and hearing, may grant the petition. The liability of registered land to be sold for claims against the estate of the deceased shall not in any way be diminished or changed.

**Source:** L. 03: p. 341, § 74. R.S. 08: § 790. C.L. § 5000. CSA: C. 40, § 245. CRS 53: § 118-10-77. C.R.S. 1963: § 118-10-77.

**Cross references:** For publication of legal notices, see part 1 of article 70 of title 24; for time limitations on presentation of claims against an executor or administrator, see § 15-12-803.

#### ANNOTATION

**Law reviews.** For article, "The Torrens Title System in Colorado", see 39 Dicta 40 (1962).

**38-36-178. Sale or mortgage of lands in probate.** Nothing in this article shall include, affect, or impair the jurisdiction of the district or probate court to order an executor, administrator, or guardian to sell or mortgage registered land for any purpose for which such order may be granted in the case of unregistered land. The purchaser or mortgagee taking a deed or mortgage executed in pursuance of such order of the district or probate court shall be entitled to register his title and to the entry of a new certificate of title or memorial of registration upon application to the district court and upon filing in the office of the registrar of titles an order of said court directing the entry of such certificates.

**Source:** L. 03: p. 342, § 75. R.S. 08: § 791. C.L. § 5001. CSA: C. 40, § 246. CRS 53: § 118-10-78. C.R.S. 1963: § 118-10-78.

**38-36-179. Trustees to file copy of authority - effect.** An assignee for the benefit of creditors, receiver, trustee in bankruptcy, master, special commissioner, or other person appointed by court shall file in the office of the registrar of titles the instrument by which he is vested with title, estate, or interest in any registered land, or a certified copy of an order of the court showing that such assignee, receiver, trustee in bankruptcy, master, special commissioner, or other person is authorized to deal with such land, estate, or interest. If it is in the power of such person, he shall at the same time present to the registrar of titles the owner's duplicate certificate of title; thereupon, the registrar shall enter upon the register of titles and the duplicate certificate, if presented, a memorial thereof, with a reference to such



order or deed by its file number. Such memorial having been entered, the assignee, receiver, trustee in bankruptcy, master, special commissioner, or other person may, subject to the direction of the court, deal with or transfer such land as if he were the registered owner.

**Source:** L. 03: p. 342, § 76. R.S. 08: § 792. C.L. § 5002. CSA: C. 40, § 247. CRS 53: § 118-10-79. C.R.S. 1963: § 118-10-79.

**38-36-180. Eminent domain - fees - reversion.** Whenever registered land, or any right or interest therein, is taken by eminent domain, the state or body politic, or corporate or other authority exercising such right, shall pay all fees on account of any memorial or registration or entry of new certificates or duplicate thereof, and fees for the filing of instruments required by this article to be filed. When for any reason, by operation of law, land which has been taken for public use reverts to the owner from whom it was taken, or his heirs or assigns, the court, upon petition of the person entitled to the benefit of the reversion, after such notice as it may order and hearing, may order the entry of a new certificate of title to him.

**Source:** L. 03: p. 342, § 77. R.S. 08: § 793. C.L. § 5003. CSA: C. 40, § 248. CRS 53: § 118-10-80. C.R.S. 1963: § 118-10-80.

**38-36-181. Issuance of new certificate - amendment of duplicates.** (1) In every case where the registrar of titles enters a memorial upon a certificate of title, or enters a new certificate of title, in pursuance of any instrument executed by the registered owner, or by reason of any instrument or proceeding which affects or devises the title of the registered owner against his consent, if the outstanding owner's duplicate certificate is not presented, the registrar of titles shall not enter a new certificate or make a memorial, but the person claiming to be entitled thereto may apply by petition to the court. The court may order the registered owner or any person withholding the duplicate certificate to present or surrender the same, and direct the entry of a memorial or new certificate upon such presentation or surrender. If in any case the person withholding the duplicate certificate is not amenable to the process of the court, or cannot be found, or if for any reason the outstanding owner's duplicate certificate cannot be presented or surrendered without delay, the court may, by decree, annul the same and order a new certificate of title to be entered. Such new certificate, and all duplicates thereof, shall contain a memorial of the annulment of the outstanding duplicate.

(2) If in any case an outstanding mortgagee's or lessee's duplicate certificate is withheld or otherwise dealt with, like proceedings may be had to obtain registration as in the case of the owner's withholding or refusal to deliver the duplicate receipt.

**Source:** L. 03: p. 343, § 78. R.S. 08: § 794. C.L. § 5004. CSA: C. 40, § 249. CRS 53: § 118-10-81. C.R.S. 1963: § 118-10-81.

**38-36-182. Court may refer application to examiner of titles.** In all cases where, under the provisions of this article, application is made to the court for any order or decree, the court may refer the matter to one of the examiners of title for hearing and report, in like manner as is provided in section 38-36-118 for the reference of the application for registration.

**Source:** L. 03: p. 343, § 79. R.S. 08: § 795. C.L. § 5005. CSA: C. 40, § 250. CRS 53: § 118-10-82. C.R.S. 1963: § 118-10-82.

**38-36-183. Examiner of titles to advise registrar - other powers.** Examiners of title shall, upon the request of the registrar of titles, advise him upon any act or duty pertaining to the conduct of his office and shall, upon request, prepare the form of any memorial to be made or entered by the registrar of titles. The examiner of titles has full power to administer oaths and examine witnesses involved in his investigation of titles.

**Source:** L. 03: p. 344, § 80. R.S. 08: § 796. C.L. § 5006. CSA: C. 40, § 251. CRS 53: § 118-10-83. C.R.S. 1963: § 118-10-83.

**38-36-184. Requirements of instruments filed for registration.** Every writing and instrument required or permitted by this article to be filed for registration shall contain or have endorsed upon it the full name, place of residence, and post-office address of the grantee or other person acquiring or claiming any right, title, or interest under such instrument. Any change in residence or post-office address of such person shall be endorsed by the registrar of titles in the original instrument on receiving a sworn statement of such change. All names and addresses shall also be entered on all certificates. All notices required by or given in pursuance of the provisions of this article by the registrar of titles or by the court, after original registration, shall be served on the person to be notified; if a resident of the state of Colorado, as summons in civil actions are served, and proof of such service shall be made as on the return of a summons. All such notices shall be sent by mail to the person to be notified, if not a resident of the state of Colorado, at his residence and post-office address, as stated in the certificate of title or in any registered instrument under which he claims an interest. The certificate of the registrar of titles, or clerk of court, that any notice has been served by mailing the same as provided in this section, shall be conclusive proof of such notice. The court may in any case order different or further service by publication or otherwise.

**Source:** L. 03: p. 344, § 81. R.S. 08: § 797. C.L. § 5007. CSA: C. 40, § 252. CRS 53: § 118-10-84. C.R.S. 1963: § 118-10-84.

**Cross references:** For service of summons on resident of state, see C.R.C.P. 4(e) to 4(g); for the manner of proof of service, see C.R.C.P. 4(h).

**38-36-185. Adverse claim - filed - hearing - costs.** (1) Any person claiming any right or interest in registered land, adverse to the registered owner, arising subsequent to the date of the original registration, if no other provision is made in this article for registering the same, may make a statement in writing, setting forth fully his alleged right or interest, and how or under whom acquired, and a reference to the volume and page of the certificate of title of the registered owner, and a description of the land to which the right or interest is claimed.

(2) The statement shall be signed and sworn to, and shall state the adverse claimant's residence, and designate a place at which all notices may be served upon him. This statement shall be entitled to registration as an adverse claim, and the court, upon the petition of any party in interest, shall grant a speedy hearing upon the question of the validity of such adverse claim and shall enter such decree thereon as equity and justice may require. If the claim is adjudged to be invalid, its registration shall be canceled. The court may award such costs and damages, including reasonable attorney's fees, as it may deem just in the premises.

**Source:** L. 03: p. 344, § 82. R.S. 08: § 798. C.L. § 5008. CSA: C. 40, § 253. CRS 53: § 118-10-85. C.R.S. 1963: § 118-10-85.

**38-36-186. Fees paid registrar upon registration - disposition.** (1) Upon the original registration of land under this article, and also upon the entry of a certificate showing title as registered owners in heirs or devisees, there shall be paid to the registrar of titles one-tenth of one percent of the valuation for assessment of the real estate on the basis of the last assessment for general taxation, as an assurance fund.

(2) All sums of money received by the registrar, as provided for in subsection (1) of this section, shall be forthwith paid by the registrar to the county treasurer of the county in which the land lies for the purpose of an assurance fund under the terms of this article. It is the duty of the county treasurer, whenever the amount on hand in said assurance fund is sufficient, to invest the same, principal and income, and report annually to the district court



the condition and income thereof. No investment of the funds, or any part thereof, shall be made without the approval of said court by order entered of record. Said fund shall be invested only in securities meeting the investment requirements established in part 6 of article 75 of title 24, C.R.S.

**Source:** L. 03: p. 345, §§ 83, 84. R.S. 08: §§ 799, 800. C.L. §§ 5009, 5010. CSA: C. 40, §§ 254, 255. CRS 53: §§ 118-10-86, 118-10-87. C.R.S. 1963: §§ 118-10-86, 118-10-87. L. 89: (2) amended, p. 1126, § 56, effective July 1.

#### ANNOTATION

**Law reviews.** For article, "Oil and Gas Problems and the Torrens System", see 33 Dicta 194 (1956). For article, "The Torrens Title System in Colorado", see 39 Dicta 40 (1962).

**38-36-187. Indemnity for loss due to mistake or misfeasance.** Any person sustaining loss or damage through any omission, mistake, or misfeasance of the registrar of titles, or of any examiner of titles, or of any deputy, or by the mistake or misfeasance of the clerk of the court or any deputy in the performance of their respective duties under the provisions of this article, and any person wrongfully deprived of any land or any interest therein through the bringing of the same under the provisions of this article, or by the registration of any other person as the owner of such land, or by any mistake, omission, or misdescription in any certificate or entry or memorial in the register of titles, or by any cancellation, and who by the provisions of this article is barred or precluded from bringing an action for the recovery of such land, or interest therein, or claim thereon, may bring an action against the treasurer of the county in which said land is situated for the recovery of damages to be paid out of the assurance fund.

**Source:** L. 03: p. 346, § 85. R.S. 08: § 801. C.L. § 5011. CSA: C. 40, § 256. CRS 53: § 118-10-88. C.R.S. 1963: § 118-10-88.

#### ANNOTATION

**Law reviews.** For article, "The Torrens Title System in Colorado", see 39 Dicta 40 (1962).

**38-36-188. Defendants to indemnity suit - judgment - how collected.** (1) If such action is for recovery for loss or damage arising only through any omission, mistake, or misfeasance of the registrar of titles, or his deputies, or of any examiner of titles, or any clerk of court, or his deputy in the performance of their respective duties under the provisions of this article, the county treasurer shall be the sole defendant to such action. If such action is brought for loss or damage arising only through the fraud or wrongful act of some person other than the registrar or his deputies, the examiners of title, the clerk of the court, or his deputies, or arising jointly through the fraud or wrongful act of such other persons, and the omission, mistakes, or misfeasance of the registrar of titles or his deputies, the examiners of titles, or the clerk of the court, or his deputies, such action shall be brought against both the county treasurer and such persons.

(2) In all such actions where there are defendants other than the county treasurer and damages have been recovered, no final judgment shall be entered against the county treasurer until execution against the other defendants shall be returned unsatisfied in whole or in part, and the officer returning the execution shall certify that the amount still due upon the execution cannot be collected except by application to the indemnity fund. Thereupon, the court, being satisfied as to the truth of such return, shall order final judgment against the treasurer for the amount of the execution and costs, or so much thereof as remains unpaid. The county treasurer shall, upon such order of the court and final judgment, pay the amount of such judgment out of the assurance fund. It is the duty of the county attorney to appear

and defend all such actions. If the funds in the assurance fund at any time are insufficient to pay any judgment in full, the balance unpaid shall draw interest at the legal rate of interest and be paid with such interest out of the first funds coming into said fund.

**Source:** L. 03: p. 346, § 86. R.S. 08: § 802. C.L. § 5012. CSA: C. 40, § 257. CRS 53: § 118-10-89. C.R.S. 1963: § 118-10-89.

#### ANNOTATION

**Law reviews.** For article, "The Torrens Title System in Colorado", see 39 Dicta 40 (1962).

**38-36-189. When assurance fund not liable - maximum judgment.** The assurance fund shall not be liable in any action to pay for any loss, damage, or deprivation occasioned by a breach of trust, whether express, implied, or constructive, by any registered owner who is a trustee, or by the improper exercise of any power of sale in a mortgage or trust deed. Final judgment shall not be entered against the county treasurer in any action in this article to recover from the assurance fund for more than a fair market value of the real estate at the time of the last payment to the assurance fund on account of the same real estate.

**Source:** L. 03: p. 347, § 87. R.S. 08: § 803. C.L. § 5013. CSA: C. 40, § 258. CRS 53: § 118-10-90. C.R.S. 1963: § 118-10-90.

#### ANNOTATION

**Law reviews.** For article, "The Torrens Title System in Colorado", see 39 Dicta 40 (1962).

**38-36-190. Action must be brought within six years - exception.** No action or proceeding for compensation for or by reason of any deprivation, loss, or damage occasioned or sustained as provided in this article shall be made, brought, or taken except within the period of six years from the time when the right to bring or take such action or proceeding first accrued. If at the time when such right of action first accrued the person entitled to bring such action or take such proceeding is under the age of eighteen years, insane, imprisoned, or absent from the United States in the service of the United States or of this state, then such person, or anyone claiming from, by, or under him, may bring the action or take the proceeding at any time within two years after such disability is removed, notwithstanding the time before limited in that behalf has expired.

**Source:** L. 03: p. 347, § 88. R.S. 08: § 804. C.L. § 5014. CSA: C. 40, § 259. CRS 53: § 118-10-91. C.R.S. 1963: § 118-10-91. L. 75: Entire section amended, p. 225, § 83, effective July 16.

**Cross references:** For limitations on actions by persons under disability, see article 81 of title 13.

#### ANNOTATION

**Law reviews.** For article, "The Torrens Title System in Colorado", see 39 Dicta 40 (1962).

**38-36-191. Alteration of certificate only on order of court.** (1) No erasure, alteration, or amendment shall be made upon the register of titles after the entry of a certificate of title or a memorial thereon and the attestation of the same by the registrar of titles, except by order of the court. Any registered owner or other person in interest may at any time apply by petition to the court, upon the ground that registered interests of any description, whether vested, contingent, expectant, or inchoate, have terminated and ceased; or that new interests



have arisen or been created which do not appear upon the certificate; or that an error, omission, or mistake was made in entering a certificate or any memorial thereon or any duplicate certificate; or that the name of any person on the certificate has been changed; or that the registered owner has been married, or if registered as married, that the marriage has been terminated; or that a corporation which owned registered land has been dissolved and has not conveyed the same within three years after its dissolution; or upon any other reasonable ground; and the court shall have jurisdiction to hear and determine the petition, after such notice as it may order to all parties in interest, and may order the entry of a new certificate or the entry or cancellation of a memorial upon a certificate, or grant any other relief upon such terms and conditions, requiring security if necessary, as it may deem proper.

(2) This section shall not be construed to give the court authority to open the original decree of registration, and nothing shall be done or ordered by the court which impairs the title or other interest of a purchaser holding a certificate for value and in good faith, or his heirs or assigns, without his or their written consent.

**Source:** L. 03: p. 348, § 89. R.S. 08: § 805. C.L. § 5015. CSA: C. 40, § 260. CRS 53: § 118-10-92. C.R.S. 1963: § 118-10-92.

**38-36-192. Theft of certificate.** Certificates of title and duplicate certificates entered or issued under this article shall be subjects of theft, and anyone stealing any such certificate commits a class 6 felony and shall be punished as provided in section 18-1.3-401, C.R.S.

**Source:** L. 03: p. 349, § 90. R.S. 08: § 806. C.L. § 5016. CSA: C. 40, § 261. CRS 53: § 118-10-93. C.R.S. 1963: § 118-10-93. L. 67: p. 578, § 18. L. 77: Entire section amended, p. 886, § 70, effective July 1, 1979. L. 89: Entire section amended, p. 851, § 140, effective July 1. L. 2002: Entire section amended, p. 1554, § 341, effective October 1.

**Editor's note:** The effective date for amendments made to this section by chapter 216, L. 77, was changed from July 1, 1978, to April 1, 1979, by chapter 1, First Extraordinary Session, L. 78, and was subsequently changed to July 1, 1979, by chapter 157, § 23, L. 79. See *People v. McKenna*, 199 Colo. 452, 611 P.2d 574 (1980).

**Cross references:** For the legislative declaration in the 2002 act amending this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

**38-36-193. Perjury.** Whoever knowingly swears falsely to any statement required by this article to be made under oath is guilty of perjury in the second degree and, upon conviction thereof, is liable to the statutory penalties therefor.

**Source:** L. 03: p. 349, § 91. R.S. 08: § 807. C.L. § 5017. CSA: C. 40, § 262. CRS 53: § 118-10-94. C.R.S. 1963: § 118-10-94. L. 72: p. 567, § 43.

**Cross references:** For perjury in the second degree and the penalty therefor, see §§ 18-8-503 and 18-1.3-501.

**38-36-194. Fraudulently procuring certificate a felony.** Whoever fraudulently procures, or assists in fraudulently procuring, or is privy to the fraudulent procurement of any certificate of title or other instrument, or of any entry in the register of titles or other book kept in the office of the registrar of titles, or of any erasure or alteration in any entry in any such book or in any instrument authorized by this article, or whoever knowingly defrauds or is privy to defrauding any person by means of a false or fraudulent instrument, certificate, statement, or affidavit affecting registered land, commits a class 6 felony and shall be punished as provided in section 18-1.3-401, C.R.S.

**Source:** L. 03: p. 349, § 92. R.S. 08: § 808. C.L. § 5018. CSA: C. 40, § 263. CRS 53: § 118-10-95. C.R.S. 1963: § 118-10-95. L. 77: Entire section amended, p. 886, § 71, effective July 1, 1979. L. 89: Entire section amended, p. 851, § 141, effective July 1. L. 2002: Entire section amended, p. 1555, § 342, effective October 1.

**Editor's note:** The effective date for amendments made to this section by chapter 216, L. 77, was changed from July 1, 1978, to April 1, 1979, by chapter 1, First Extraordinary Session, L. 78, and was subsequently changed to July 1, 1979, by chapter 157, § 23, L. 79. See *People v. McKenna*, 199 Colo. 452, 611 P.2d 574 (1980).

**Cross references:** For the legislative declaration in the 2002 act amending this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

**38-36-195. Forging seal or signature a felony.** Whoever forges, or procures to be forged, or assists in forging the seal of the registrar, or the name, signature, or handwriting of any officer of the registry office, in cases where such officer is expressly or impliedly authorized to affix his or her signature; or forges, or procures to be forged, or assists in forging the name, signature, or handwriting of any person whomsoever to any instrument which is expressly or impliedly authorized to be signed by such person; or uses any document upon which any impression or part of the impression of any seal of said registrar has been forged, knowing the same to have been forged, or any document the signature to which has been forged, commits a class 6 felony and shall be punished as provided in section 18-1.3-401, C.R.S.

**Source:** L. 03: p. 349, § 93. R.S. 08: § 809. C.L. § 5019. CSA: C. 40, § 264. CRS 53: § 118-10-96. C.R.S. 1963: § 118-10-96. L. 77: Entire section amended, p. 886, § 72, effective July 1, 1979. L. 89: Entire section amended, p. 852, § 142, effective July 1. L. 2002: Entire section amended, p. 1555, § 343, effective October 1.

**Editor's note:** The effective date for amendments made to this section by chapter 216, L. 77, was changed from July 1, 1978, to April 1, 1979, by chapter 1, First Extraordinary Session, L. 78, and was subsequently changed to July 1, 1979, by chapter 157, § 23, L. 79. See *People v. McKenna*, 199 Colo. 452, 611 P.2d 574 (1980).

**Cross references:** For the legislative declaration in the 2002 act amending this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

**38-36-196. Remedy against one criminally liable not affected.** No proceeding or conviction for any act declared to be a felony shall affect any remedy which any person aggrieved or injured by such act may be entitled to at law or in equity against the person who has committed such act or against his estate.

**Source:** L. 03: p. 350, § 94. R.S. 08: § 810. C.L. § 5020. CSA: C. 40, § 265. CRS 53: § 118-10-97. C.R.S. 1963: § 118-10-97.

**38-36-197. Docket fees - expenses of publication.** (1) On the filing of any application for registration the applicant shall pay to the clerk of the court such docket and clerk fees as are provided by law for civil actions and proceedings.

(2) Any defendant, on entering his appearance, shall pay to the clerk of the court such fees as are provided by law for costs in civil actions and proceedings.

(3) Every publication in a newspaper required by this article shall be paid for by the party on whose application the order of publication is made in addition to the fees prescribed in subsections (1) and (2) of this section. The party at whose request any notice is issued shall pay for the service of the same, except when sent by mail by the clerk of the court or registrar of titles.

(4) Any petitioner, respondent, or defendant, upon entering his appearance in any supplemental proceeding following the entry of the original decree of registration, shall pay such docket fee as is provided by law to be paid by a defendant in civil actions.



**Source:** L. 03: p. 350, § 95. R.S. 08: § 811. C.L. § 5021. CSA: C. 40, § 266. CRS 53: § 118-10-98. L. 63: p. 778, § 1. C.R.S. 1963: § 118-10-98.

**38-36-198. Fees to be paid registrar - application of fees.** (1) The fees to be paid to the registrar of titles shall be as follows:

(a) At or before the time of filing of the certified copy of the application with said registrar, the applicant shall pay to said registrar the fee prescribed by section 38-36-186;

(b) For granting certificates of title upon each application and registering the same, twenty dollars;

(c) For registering each transfer, including the filing of all instruments connected therewith, and the issuance and registration of the instruments connected therewith, and the issuance and registration of the new certificates of title, twenty dollars;

(d) When the land transferred is held upon any trust condition or limitation, an additional fee of five dollars;

(e) For entry of each memorial on the register of titles, including the filing of all instruments and papers connected therewith, and endorsements upon duplicate certificates, ten dollars;

(f) For issuing each additional owner's duplicate certificate, mortgagee's duplicate certificate, or lessee's duplicate certificate, ten dollars;

(g) For filing copy of will with letters testamentary, or filing copy of letters of administration and entering memorial thereof, ten dollars;

(h) For the cancellation of each memorial or charge, ten dollars;

(i) For each certificate showing condition of the register of titles, twenty dollars;

(j) For any certified copy of any instrument or writing on file in his office, the same fees now allowed by law to county clerks and recorders for like service;

(k) For any other service required or necessary to carry out this article, and not itemized in this section, such fee as the court determines and establishes.

(2) One-half of all fees provided for in subsection (1) of this section shall be collected by the registrar and paid to the county treasurer of the county in which the fees are paid, to be used for the current expenses of the county. All the remaining fees provided for in subsection (1) of this section shall be collected by said registrar and applied the same as the other fees of his office; but his salary as county clerk and recorder, as provided by law, shall not be increased on account of the additional duties, or by reason of the allowance of additional fees provided for in this article; and the said registrar, as such, shall receive no salary.

**Source:** L. 03: pp. 350, 351, §§ 96, 97. R.S. 08: §§ 812, 813. C.L. §§ 5022, 5023. CSA: C. 40, §§ 267, 268. CRS 53: §§ 118-10-99, 118-10-100. L. 63: p. 780, § 1. C.R.S. 1963: §§ 118-10-99, 118-10-100. L. 83: (1)(a) to (1)(c) and (1)(e) to (1)(i) amended, p. 1468, § 1, effective March 29. L. 91: (1)(b) to (1)(i) amended, p. 710, § 10, effective July 1.

**Cross references:** For fees allowed to county clerk and recorders, see § 30-1-103.

#### ANNOTATION

**Law reviews.** For article, "The Torrens Title System in Colorado", see 39 Dicta 40 (1962).

**38-36-199. Article liberally construed.** (1) This article shall be construed liberally, so far as may be necessary for the purpose of carrying out its general intent, which is that any owner of land may register his title and bring his land under the provisions of this article, but no one is required to do so.

(2) All laws and parts of laws, if any, necessarily in conflict with this article are repealed, but this article is not intended to interfere with the present system of recording, transferring, or dealing in any real estate, not brought under the provisions of this article.

**Source:** L. 03: p. 352, §§ 98, 99. R.S. 08: §§ 814, 815. C.L. §§ 5024, 5025. CSA: C. 40, §§ 269, 270. CRS 53: §§ 118-10-101, 118-10-102. C.R.S. 1963: §§ 118-10-101, 118-10-102.

**Editor's note:** The repeal provided for in subsection (2) was originally enacted in 1903.

## Mortgages and Trust Deeds

### ARTICLE 37

#### Office of Public Trustee

**Editor's note:** This article was numbered as article 3 of chapter 118, C.R.S. 1963. The substantive provisions of this article were repealed and reenacted in 1990, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this article prior to 1990, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume. Former C.R.S. section numbers are shown in editor's notes following those sections that were relocated. For a detailed comparison of this article, see the comparative tables located in the back of the index.

**Law reviews:** For article, "The Agricultural Credit Act of 1987", see 17 Colo. Law. 611 (1988); for article, "Foreclosure by Private Trustee: Now is the Time for Colorado", see 65 Den. U.L. Rev. 41 (1988); for article, "Partial Redemption in Colorado Foreclosures", see 67 Den. U.L. Rev. 61 (1990); for article, "Foreclosure of Deeds of Trust and Mortgages: 1990 Statutory Amendments — Parts I and II", see 19 Colo. Law. 1601 and 1843 (1990); for article, "Changes Relating to Public Trustee Foreclosures Implemented by Senate Bill 161", see 31 Colo. Law. 11 (November 2002).

38-37-100.5.	Definitions.	38-37-107.	Fees under successor trustee-
38-37-101.	Creation of the office of public trustee.		ship.
38-37-102.	Appointment - bond - office.	38-37-108.	Payments to public trustee.
38-37-103.	Deputy trustee - successor in office.	38-37-109.	Suits against public trustee.
38-37-104.	Duties of public trustees - fees, expenses, and salaries - reports.	38-37-110.	Public trustee forfeits fees for failure to meet statutory time requirements - validity of foreclosure unaffected.
38-37-105.	Classification of counties for purposes of regulating fees and salaries of public trustees.	38-37-111.	Public trustees authorized to cooperate and contract with one another and others.
38-37-106.	Public trustee to act as successor in trust - additional duties.	38-37-112.	Powers of public trustees when counties are formed or when county boundaries change.
		38-37-113.	Checking account - custodial funds.

**38-37-100.5. Definitions.** The definitions in section 38-38-100.3 apply to this article unless the context otherwise requires.

**Source:** L. 2007: Entire section added, p. 1830, § 2, effective January 1, 2008.

**38-37-101. Creation of the office of public trustee.** There is hereby created the office of public trustee in each county in this state, whose duties are as prescribed by law. In all counties of the first and second classes, such public trustee shall be appointed as provided in section 38-37-102, and, in counties of all other classes, the county treasurer of the county shall be such public trustee; except that, in the city and county of Broomfield, the public trustee shall be such equivalent officer as shall be provided by its charter or code.

**Source:** L. 90: Entire article R&RE, p. 1648, § 1, effective October 1. L. 2001: Entire section amended, p. 267, § 11, effective November 15.



## ANNOTATION

**Law reviews.** For article on the history and purpose of the public trustee act, see 9 Dicta 9 (1932). For note, "A Survey of the Colorado Torrens Act", see 5 Rocky Mt. L. Rev. 149 (1933). For article, "Foreclosure by Sale by Public Trustee of Deeds of Trust in Colorado", see 14 Dicta 5 (1936). For article, "Foreclosure by Sale by Public Trustee of Deeds of Trust in Colorado", see 28 Dicta 437 (1951). For article, "Enforcement of Security Interests in Colorado", see 25 Rocky Mt. L. Rev. 1 (1952). For article, "Marketable Title: What Certifiable Copies of Court Papers Should Appear of Record", see 34 Dicta 7 (1957). For article, "Limitation of Bank's Liabilities in Letters of Credit Agreements", see 15 Colo. Law. 1019 (1986).

**Annotator's note.** Since § 38-37-101 is similar to § 38-37-101 as it existed prior to the 1990 repeal and reenactment of this article, rel-

evant cases construing that provision have been included in the annotations to this section.

**Grantee sufficiently identified as public trustee.** A deed of trust to "the public trustee", executed by a resident of a particular county, conveying lands situate in that county, requiring notice of the sale, upon default, to be published in that county, sufficiently identifies the grantee as the public trustee of the same county. *Healey v. Zobel*, 45 Colo. 294, 101 P. 56 (1909).

**Public trustee is not peace officer;** he is no part of a statewide system, and he is uncontrolled by state authority, save for the power to remove those appointed by him which is lodged in the governor. *Chambers v. People ex rel. Storer*, 70 Colo. 496, 202 P. 1081 (1921).

**Applied** in *Brewer v. Harrison*, 27 Colo. 349, 62 P. 224 (1900); *Brown v. Denver Omnibus & Cab Co.*, 254 F. 560 (8th Cir. 1918).

**38-37-102. Appointment - bond - office.** (1) The governor shall appoint a public trustee in and for each of the counties of the first and second classes for the term of two years. However, the term of any public trustee in and for a county of the first or second class appointed on or after February 1, 1989, but before February 1, 1991, shall expire on February 1, 1991. All appointments of public trustees in and for counties of the first and second classes on or after February 1, 1991, shall be for terms of four years, with the first such term beginning on February 1, 1991. If the office of public trustee in and for any county of the first or second class should become vacant on or after February 1, 1991, the governor shall appoint a successor to complete the four-year term. The governor shall appoint as public trustees only those persons who have at least a four-year college degree and five years' administrative or business experience or, in the alternative, ten years' administrative or business experience. Any person so appointed public trustee shall serve at the pleasure of the governor. Every person so appointed public trustee in counties of the first and second classes shall, before entering upon the duties of such office, execute a surety bond issued by a company authorized to issue such bonds in the state of Colorado, in the sum of twenty-five thousand dollars, conditioned, in both classes of counties, that the person so appointed as public trustee will well and faithfully execute the duties of such office; and such public trustee shall promptly account for and pay over to such persons as are entitled thereto all moneys and other valuables that come into such person's hands as public trustee.

(2) The county treasurer shall be the public trustee in each of the counties other than those of the first and second classes, and each such county treasurer as public trustee shall execute a surety bond issued by a company authorized to issue such bonds in the state of Colorado in the sum of ten thousand dollars, to be approved by the county commissioners of the county, conditioned that such person will well and faithfully perform the duties of public trustee and properly account for and pay over to such persons as are entitled thereto all moneys and other valuables that come into such person's hands as public trustee. In counties wherein the county treasurer is the public trustee, as provided in this subsection (2), such person shall conduct the duties of public trustee at the office of the county treasurer; and, in counties of the first and second classes, the public trustee shall maintain an office and regular place of business for the performance of the public trustee's official duties; and, in all cases, the office of the public trustee shall be kept open for the transaction of business during ordinary business hours each day, except Saturdays, Sundays, and legal holidays.

(3) The board of county commissioners shall furnish, at the expense of the county, all office supplies, including books, forms, and stationery necessary for the use of the public trustee in carrying out the provisions of this section and sections 38-37-101 and 38-37-104, subject to the provisions of section 38-37-104 (3).

**Source:** L. 90: Entire article R&RE, p. 1648, § 1, effective October 1. L. 2009: (1) amended, (SB 09-140), ch. 64, p. 228, § 1, effective September 1.

**Editor's note:** The provisions of this section are similar to provisions of several former sections as they existed prior to 1990. For a detailed comparison, see the comparative tables located in the back of the index.

### ANNOTATION

**Public trustee is not appointive state officer** and is not subject to the provisions of the state personnel system, § 13 of art. XII, Colo. Const. *Chambers v. People ex rel. Storer*, 70 Colo. 496, 202 P. 1081 (1921).

**Public trustee is county officer** since the powers and duties of public trustees are all the same and are performed within his county and relate solely to property situated therein. *Dixon v. People ex rel. Elliott*, 53 Colo. 527, 127 P. 930 (1912); *Walsh v. People ex rel. McClenahan*, 72 Colo. 406, 211 P. 646 (1922); *People ex rel. Fairall v. Sabin*, 75 Colo. 545, 227 P. 565 (1924).

**Effect of complaint against county treasurer by that title only.** A complaint against the county treasurer, by that title only, with the

addition of "trustee", nowhere naming him as public trustee, does not make the public trustee party. *Watkins v. Perry*, 25 Colo. App. 425, 139 P. 551 (1914).

**Because the office of the public trustee is required to stay open during regular business hours and § 38-37-108 allows for payment by electronic transfer, the public trustee's bank must accept electronic transfers during regular business hours.** Thus, the trial court erred in refusing to grant an extension for redemption of property where the plaintiff attempted to pay by electronic transfer of funds, but was prevented by the public trustee's bank, which had closed early. *Buell v. White*, 908 P.2d 1175 (Colo. App. 1995).

**38-37-103. Deputy trustee - successor in office.** Each public trustee may appoint deputies who shall have the same power in all respects as the public trustee. All acts of a deputy public trustee shall have the same effect as though performed by the public trustee. If a public trustee dies, resigns, or is removed from office, or if a public trustee's term of office expires after selling any property under the term of a deed of trust and before executing a certificate of redemption or deed for the property, the public trustee's successor in office shall execute the certificate or deed in the same manner that the public trustee making such sale might have done.

**Source:** L. 90: Entire article R&RE, p. 1649, § 1, effective October 1. L. 2007: Entire section amended, p. 1830, § 3, effective June 1.

**Editor's note:** This section is similar to former § 38-37-103, as it existed prior to 1990.

**38-37-104. Duties of public trustees - fees, expenses, and salaries - reports.** (1) The public trustees of each county of this state shall perform the functions and exercise the powers conferred upon them by statute. They shall be entitled to receive as fees for such services the following sums and no other fees or perquisites whatever:

- (a) For executing a release of a deed of trust, the sum of fifteen dollars;
- (b) For performing a foreclosure under article 38 of this title, the following sums, which shall be cumulative:
  - (I) For opening and administering a foreclosure under the powers conferred upon them by a deed of trust pursuant to section 38-38-101 where the original principal amount of the debt secured by such deed of trust does not exceed four hundred eighty thousand dollars, a fee of one hundred fifty dollars and, where such amount exceeds four hundred eighty thousand dollars, a fee of one thirty-second of one percent of such original principal amount or the outstanding principal balance, whichever is less, but in no case less than one hundred fifty dollars;
  - (II) For accepting the filing of a notice of intent to redeem pursuant to section 38-38-302, the sum of fifty dollars per notice;
  - (III) For processing and executing a certificate of redemption pursuant to section 38-38-402, the sum of thirty dollars;



(IV) For executing a confirmation deed pursuant to section 38-38-501, the sum of thirty dollars;

(V) For processing withdrawals pursuant to section 38-38-109 (3) (a), the sum of thirty-five dollars;

(VI) For processing an administrative withdrawal pursuant to section 38-38-109 (3) (b), the sum of fifty dollars;

(VII) For recommencing the foreclosure after reinstatement where a sale was held in violation of the automatic stay provisions of the federal bankruptcy code of 1978, title 11 of the United States Code, as amended, pursuant to section 38-38-109 (2) (c) (II), the sum of fifty dollars;

(VIII) For recommencing the foreclosure after bankruptcy where publication was not completed pursuant to section 38-38-109 (2) (b) (I), the sum of seventy-five dollars;

(IX) For performing the actions described in section 38-38-101 (9), the sum of one hundred dollars;

(X) The sum of all amounts paid by the public trustee to third parties in connection with processing a foreclosure, including but not limited to all recording, filing, publication, and electronic transmission fees;

(XI) For processing a rescission of sale pursuant to section 38-38-113, the sum of one hundred dollars; and

(XII) For rescheduling a sale after a rescission of sale pursuant to section 38-38-113 (4), the additional sum of fifty dollars.

(c) For performing any duty of the public trustee pursuant to section 38-30-171 (3) (b), 38-30-173 (3) (b), or 38-34-104, the sum of twenty-five dollars or such greater amount as may be approved by a court of competent jurisdiction; and

(d) For performing duties pursuant to section 38-35-126 (1), an additional annual fee of seventy-five dollars, payable in advance, for each taxable year, or portion thereof, during which an escrow account is established.

(2) (a) The salary of the public trustee in the different counties of the state shall be fixed at the following amounts, to wit: In counties of the first class and second class, twenty-six thousand dollars per annum for full-time public trustees and, in counties of the third class, six thousand five hundred dollars per annum.

(b) For public trustees whose terms begin on or after July 1, 1998, but prior to January 1, 2003, the salary of the public trustee in the different counties of the state shall be fixed at the following amounts, to wit: In counties of the first and second class, thirty-two thousand dollars per annum for full-time public trustees and, in counties of the third class, eight thousand dollars per annum; except that, in the city and county of Broomfield, such salary shall be as set forth in its annual budget.

(b.3) (I) For public trustees whose terms begin on or after January 1, 2003, except as otherwise provided in subparagraph (II), (III), or (IV) of this paragraph (b.3), the salary of the public trustee in the different counties of the state shall be fixed at the following amounts, to wit: In counties of the first and second class, forty-eight thousand five hundred dollars per annum, and in counties of the third class, twelve thousand five hundred dollars per annum.

(II) For public trustees who are serving in office on or after March 13, 2008, the salary of the public trustee in the different counties of the state shall be fixed at the following amounts, to wit: In counties of the first class, forty-eight thousand five hundred dollars per annum; in counties of the second class, fifty-six thousand five hundred dollars per annum; and in counties of the third class, twelve thousand five hundred dollars per annum.

(III) For public trustees in counties of the second class who are serving in office on or after February 1, 2009, the salary shall be fixed at sixty-four thousand five hundred dollars per annum.

(IV) For public trustees in counties of the second class who are serving in office on or after February 1, 2010, the salary shall be fixed at seventy-two thousand five hundred dollars per annum.

(b.5) Public trustees in counties of the second class whose terms begin on or after January 1, 2003, may collect benefits in addition to their salary that do not exceed benefits received by other elected county officers within their county.

(c) Such salaries shall be paid from the fees collected by the public trustee as provided in this section and not otherwise.

(3) The public trustee of each county shall quarterly make and file with the board of county commissioners of the county a full and complete statement under oath of all transactions of the office of the public trustee and shall, upon the approval of said report, pay to the county treasurer all sums that the public trustee has received as fees in excess of the amount of salary then due to the public trustee and in excess of all necessary and reasonable expenses for staff wages and any benefits provided pursuant to county personnel policy and other expenses incidental to the conduct of the office of the public trustee for the quarter ending at the time of such report, which moneys shall, by the county treasurer, be placed to the credit of a fund to be known as the public trustee salary fund. The public trustee shall, before remitting such excess funds, retain such excess funds in a special reserve fund, which fund shall be maintained in a separate interest-bearing account as permitted under section 38-37-113, until such special reserve fund, including accrued interest, reaches an amount equal to the public trustee's total operating expenses and authorized salary for the previous fiscal year, as filed pursuant to this subsection (3). If, in any particular quarter, the public trustee's operating expenses and authorized salary exceed the fees collected in the quarter, the public trustee may draw on the special reserve fund to cover the public trustee's operating expenses and authorized salary for that quarter. At such time as the special reserve fund has reached the permitted amount, excess funds shall be paid to the county treasurer to be placed in the public trustee salary fund. At the expiration of each year, the county treasurer shall, out of any moneys in the public trustee salary fund and not otherwise, pay to the public trustee such an amount, if any, as may be still due to the public trustee on account of the public trustee's salary for that year just expired, such payment to be made only upon the certificate of the board stating the amount of such salary still remaining due and unpaid, and the balance of said fund shall thereupon be transferred to the general fund of the county.

(4) (Deleted by amendment, L. 2006, p. 1434, § 1; L. 2007, p. 1849, § 27, effective January 1, 2008.)

(5) Any person serving as a public trustee who has been appointed by the governor shall report to the governor at such times and on such matters as the governor may require.

(6) The public trustee of each county shall adopt a budget pursuant to the requirements of part 1 of article 1 of title 29, C.R.S., and shall submit the budget to the board of county commissioners of the county in which he or she serves for review by the board.

(7) The office of the public trustee is subject to annual audit pursuant to the "Colorado Local Government Audit Law", part 6 of article 1 of title 29, C.R.S.; except that the office of the public trustee of any trustee who is appointed by the governor shall instead be subject to an individual annual audit pursuant to section 29-1-603 (1.5), C.R.S.

(8) Each public trustee who is appointed by the governor shall be subject to the state "Procurement Code", articles 101 to 112 of title 24, C.R.S., for any purchase of twenty thousand dollars or more and for any multiple year purchase agreement; except that, if the procurement rules established for the county in which the public trustee serves require an open and competitive bidding process, the public trustee may apply the county procurement rules.

**Source:** L. 90: Entire article R&RE, p. 1649, § 1, effective October 1. L. 91: (1)(i) amended, p. 1921, § 49, effective June 1. L. 92: (1)(h) amended, p. 2095, § 7, effective July 1; (1)(h) and (1)(i) amended and (1)(j) added, p. 2101, § 2, effective July 1. L. 93: (1)(g) amended, p. 865, § 42, effective July 1, 1994. L. 96: (1)(g) amended, p. 1330, § 53, effective June 1. L. 98: (1) and (2) amended, p. 347, § 1, effective April 17; (1)(g) amended, p. 628, § 41, effective July 1. L. 2001: (1)(a), (1)(b), (1)(c), (1)(d), (1)(e), and (2)(b) amended and (2)(b.3) and (2)(b.5) added, p. 1066, § 1, effective September 1; (2)(b) amended, p. 268, § 12, effective November 15. L. 2005: (1)(b) amended, p. 397, § 2, effective August 8. L. 2006: (1), (3), and (4) amended, p. 1434, § 1, effective January 1, 2008. L. 2007: (1)(b)(VII) and (1)(b)(VIII) amended and (1)(b)(XI) and (1)(b)(XII) added, p. 1831, § 4, effective January 1, 2008. L. 2008: (2)(b.3) amended, p. 45, § 1, effective



March 13. **L. 2009:** (5) added, (SB 09-140), ch. 64, p. 229, § 2, effective September 1. **L. 2012:** (6), (7), and (8) added, (HB 12-1329), ch. 190, p. 763, § 1, effective August 8.

**Editor's note:** (1) This section is similar to former § 38-37-105, as it existed prior to 1990.

(2) Amendments to subsection (1)(h) by Senate Bill 92-43 and Senate Bill 92-149 were harmonized. Amendments to subsection (1)(g) by Senate Bill 98-45 and Senate Bill 98-102 were harmonized. Amendments to subsection (2)(b) by House Bill 01-1358 and Senate Bill 01-102 were harmonized.

(3) The effective date for amendments made to subsections (1), (3), and (4) by chapter 305, L. 2006, was changed from July 1, 2007, to January 1, 2008, by section 27 of chapter 404, L. 2007.

**Cross references:** For compensation and fees of county officers, see § 15 of art. XIV, Colo. Const.

## ANNOTATION

**Law reviews.** For article, "Foreclosure by Sale by Public Trustee of Deeds of Trust in Colorado", see 14 Dicta 5 (1936). For article, "Foreclosure by Sale by Public Trustee of Deeds of Trust in Colorado", see 28 Dicta 437 (1951). For article, "1987 Statutory Amendments Concerning Foreclosures of Deeds of Trust and Mortgages", see 16 Colo. Law. 1386 (1987). For article, "An Analysis of the Effect of S.B. 123 on Foreclosures", see 17 Colo. Law. 845 (1988).

**Annotator's note.** Since § 38-37-104 is similar to § 38-37-105 as it existed prior to the 1990 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

**This section and § 38-37-106 constitute general legislation.** Since this section and

§ 38-37-106 make a reasonable classification of counties and are equally applicable to all counties of a given class, they constitute general legislation, not special, within the prohibition of § 25 of art. V, Colo. Const. *Young v. Bd. of County Comm'rs*, 102 Colo. 342, 79 P.2d 654 (1938).

**Clerk and recorder not entitled to additional compensation as public trustee.** Where the clerk and recorder and ex officio clerk of the city and county of Denver was appointed public trustee, having accepted payment of the salary of clerk and recorder, he is not entitled to additional compensation for performing the duties of public trustee. *Lail v. City & County of Denver*, 88 Colo. 362, 297 P. 512 (1931).

**38-37-105. Classification of counties for purposes of regulating fees and salaries of public trustees.** (1) For the purpose of providing for and regulating the fees and salaries of public trustees, the said several counties of this state are classified with reference to population and divided into three classes, as follows:

(a) Class 1: City and county of Denver;

(b) Class 2: Adams, Arapahoe, Boulder, Douglas, El Paso, Jefferson, Larimer, Mesa, Pueblo, and Weld;

(c) Class 3: Alamosa, Archuleta, Baca, Bent, city and county of Broomfield, Chaffee, Cheyenne, Clear Creek, Conejos, Costilla, Crowley, Custer, Delta, Dolores, Eagle, Elbert, Fremont, Garfield, Gilpin, Grand, Gunnison, Hinsdale, Huerfano, Jackson, Kiowa, Kit Carson, Lake, La Plata, Las Animas, Lincoln, Logan, Mineral, Moffat, Montezuma, Montrose, Morgan, Otero, Ouray, Park, Phillips, Pitkin, Prowers, Rio Blanco, Rio Grande, Routt, Saguache, San Juan, San Miguel, Sedgwick, Summit, Teller, Washington, and Yuma.

**Source:** **L. 90:** Entire article R&RE, p. 1651, § 1, effective October 1. **L. 91:** (1)(c) amended, p. 1921, § 50, effective June 1. **L. 2001:** (1)(c) amended, p. 268, § 13, effective November 15; (1)(c) amended, p. 1067, § 2, effective November 15 and (1)(b) and (1)(c) amended, p. 1067, § 3, effective January 1, 2003.

**Editor's note:** (1) This section is similar to former § 38-37-106, as it existed prior to 1990.

(2) Amendments to subsection (1)(c) by House Bill 01-1358 and Senate Bill 01-102 were harmonized.

**38-37-106. Public trustee to act as successor in trust - additional duties.** (1) It is the duty of all public trustees of the several counties of the state of Colorado to accept and

discharge the duties of trustee or successor trustee in accordance with the provisions of section 38-34-104 and to accept and discharge those duties of the public trustee prescribed by sections 38-30-171 (3) (b) and 38-30-173 (3) (b).

(2) Whenever any deed of trust names the wrong public trustee or omits the name of the county of the public trustee in a deed of trust containing a grant to a public trustee and a provision for a power of sale, the public trustee of each county where the property or any portion thereof is located shall act as a successor public trustee or as if the public trustee and county were named in the deed of trust. A public trustee so acting shall have all powers, authority, and duties as if originally named in such deed of trust with respect to the portion of the property located in such county.

**Source:** L. 90: Entire article R&RE, p. 1651, § 1, effective October 1. L. 92: (2) amended, p. 2089, § 1, effective July 1. L. 93: (1) amended, p. 865, § 43, effective July 1, 1994. L. 96: (1) amended, p. 1330, § 54, effective June 1. L. 98: (1) amended, p. 628, § 42, effective July 1. L. 2006: (2) amended, p. 1436, § 2, effective July 1.

**Editor's note:** This section is similar to former § 38-37-111, as it existed prior to 1990.

#### ANNOTATION

**Law reviews.** For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 16 Dicta 71 (1940). For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 Dicta 321 (1949). For article, "Foreclosure by Sale by Public Trustee of Deeds of Trust in Colorado", see 28 Dicta 437

(1951). For article, "Standard Pleading Samples to Be Used in Quiet Title Litigation", see 30 Dicta 39 (1953). For article, "Statutory Redemption in Colorado", see 30 Dicta 79 (1953). For article, "1987 Statutory Amendments Concerning Foreclosures of Deeds of Trust and Mortgages", see 16 Colo. Law. 1386 (1987).

**38-37-107. Fees under successor trusteeship.** Said public trustees, for the performance of services in section 38-37-106, shall be allowed to charge and receive only such fees as are allowed by law for the performance of like services under deeds of trust wherein such public trustees are named as trustees.

**Source:** L. 90: Entire article R&RE, p. 1652, § 1, effective October 1.

**Editor's note:** This section is similar to former § 38-37-112, as it existed prior to 1990.

#### ANNOTATION

**Law reviews.** For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 16 Dicta 71 (1940). For article, "Curative Statutes of Colorado Respecting Titles to Real

Estate", see 26 Dicta 321 (1949). For article, "Statutory Redemption in Colorado", see 30 Dicta 79 (1953).

**38-37-108. Payments to public trustee.** All moneys payable to a public trustee at any foreclosure sale under the provisions of this article or upon redemption or cure pursuant to article 38 of this title shall be in the form of cash, electronic transfer to an account of the public trustee available for such purpose and in compliance with the conditions placed on the account by the public trustee for such electronic transfer, or certified check, cashier's check, teller's check, or draft denominated as an official check that is a teller's check or a cashier's check as those terms are defined in and governed by the "Uniform Commercial Code", title 4, C.R.S., made payable to the public trustee, and certified or issued by a state-chartered bank, savings and loan association, or credit union licensed to do business in the state of Colorado or a federally chartered bank, savings bank, or credit union.

**Source:** L. 90: Entire article R&RE, p. 1652, § 1, effective October 1; entire section amended, p. 1849, § 50, effective October 1. L. 91: Entire section amended, p. 1921, § 51,



effective June 1. **L. 2002:** Entire section amended, p. 1332, § 4, effective July 1. **L. 2006:** Entire section amended, p. 1437, § 3, effective July 1. **L. 2012:** Entire section amended, (SB 12-030), ch. 96, p. 314, § 2, effective September 1.

**Editor's note:** (1) This section is similar to former § 38-37-138, as it existed prior to 1990.

(2) Section 14 of chapter 96, Session Laws of Colorado 2012, provides that the act amending this section applies to the foreclosure of any deed of trust or other lien with respect to which a notice of election and demand or lis pendens is recorded in the office of the clerk and recorder of the county where the property or a portion of the property is located on or after September 1, 2012.

#### ANNOTATION

**Because this section authorizes payment by electronic transfer of funds and the office of the public trustee is required to stay open during regular business hours, the public trustee's bank must accept electronic transfers during regular business hours.** Thus, the

trial court erred in refusing to grant an extension for redemption of property where the plaintiff attempted to pay by electronic transfer of funds, but was prevented by the public trustee's bank, which had closed early. *Buell v. White*, 908 P.2d 1175 (Colo. App. 1995).

**38-37-109. Suits against public trustee.** When public trustees, or county treasurers acting as trustees, are sued in their official capacity, the district attorney shall provide legal representation for the public trustees serving in such district attorney's district, unless such legal representation is provided for otherwise.

**Source:** **L. 90:** Entire article R&RE, p. 1652, § 1, effective October 1.

**Editor's note:** This section is similar to former § 38-37-141, as it existed prior to 1990.

**38-37-110. Public trustee forfeits fees for failure to meet statutory time requirements - validity of foreclosure unaffected.** If the public trustee fails to meet the time requirements set forth in section 38-38-102 (1), 38-38-103 (1), or 38-38-501, the foreclosure sale and confirmation deed shall be valid notwithstanding such failure, and the public trustee shall forfeit five percent of the public trustee's fees provided for in section 38-37-104 (1) (b) (I) and (1) (b) (V) for each day the public trustee fails to meet the time requirements, and, if the fees have already been paid, the forfeited portion thereof shall be returned immediately to the person who paid them.

**Source:** **L. 90:** Entire article R&RE, p. 1652, § 1, effective October 1. **L. 2006:** Entire section amended, p. 1480, § 37, effective January 1, 2008.

**Editor's note:** (1) This section is similar to former § 38-37-143, as it existed prior to 1990.

(2) The effective date for amendments made to this section by chapter 305, Session Laws of Colorado 2006, was changed from July 1, 2007, to January 1, 2008, by section 27 of chapter 404, Session Laws of Colorado 2007. (See L. 2007, p. 1849.)

#### ANNOTATION

**Law reviews.** For article, "Foreclosure by Sale by Public Trustee of Deeds of Trust in Colorado", see 14 *Dicta* 5 (1936). For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 16 *Dicta* 71 (1940). For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 *Dicta* 321 (1949). For article, "Foreclosure by Sale by Public Trustee of Deeds of Trust in Colorado", see 28 *Dicta* 437 (1951). For article, "1987

Statutory Amendments Concerning Foreclosures of Deeds of Trust and Mortgages", see 16 *Colo. Law*. 1386 (1987).

**Change of advertised location to nearby location in view sufficient.** A sale advertised to be held at the front door of a courthouse but actually held at another door on the same side of the courthouse in full view of the place advertised is sufficient compliance. *Martin v. Barth*, 4 *Colo. App.* 346, 36 P. 72 (1894) (decided under

§ 38-37-108 as it existed prior to the 1990 repeal and reenactment of article 37 and this article.

**38-37-111. Public trustees authorized to cooperate and contract with one another and others.** One or more of the public trustees of the several counties of the state are hereby authorized and empowered to cooperate and contract with any other public trustee and with others for the purpose of providing any function, service, or facility, including legal services and representation, that are necessary and desirable to fulfill their lawful duties.

**Source:** L. 90: Entire article R&RE, p. 1652, § 1, effective October 1.

**Editor's note:** This section is similar to former § 38-37-144, as it existed prior to 1990.

**38-37-112. Powers of public trustees when counties are formed or when county boundaries change.** The public trustee of each county is declared to be the proper public trustee to issue public trustee's deeds, certificates of purchase, certificates of redemption, releases of deeds of trust, and all other documents required of a public trustee for all property located in that public trustee's county at the time of execution of such documents by the public trustee or at the time the deed of trust was recorded in that county. All such documents may be recorded in either county. Each public trustee is also authorized to make sales and perform all acts required of a public trustee in connection with property located in that public trustee's county at the time of performance of such acts by the public trustee or at the time the deed of trust was recorded in that county. All acts that have been performed and all documents that have been executed by any public trustee in compliance with this section are validated.

**Source:** L. 90: Entire article R&RE, p. 1652, § 1, effective October 1. L. 2002: Entire section amended, p. 1081, § 1, effective June 1.

**Editor's note:** This section is similar to former § 38-37-136, as it existed prior to 1990.

#### ANNOTATION

**Law reviews.** For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 16 Dicta 71 (1940). For article, "Curative Statutes of Colorado Respecting Titles to Real

Estate", see 26 Dicta 321 (1949). For article, "Statutory Redemption in Colorado", see 30 Dicta 79 (1953).

**38-37-113. Checking account - custodial funds.** (1) In the performance of his or her duties under this article and article 38 of this title, the public trustee of each county shall have the authority to establish and manage one or more of the following accounts: An automated clearing house account, checking account, escrow account, custodial account, similar banking services, or similar overnight depository account with a bank or savings and loan association that is an eligible public depository under the "Public Deposit Protection Act", article 10.5 of title 11, C.R.S., or the "Savings and Loan Association Public Deposit Protection Act", article 47 of title 11, C.R.S. A public trustee may also participate in local government investment pool trust funds as described in part 7 of article 75 of title 24, C.R.S., and invest public funds in eligible money market mutual funds described in part 6 of article 75 of title 24, C.R.S.

(2) Other than fees and costs, which shall be governed by section 38-37-104, all moneys received by a public trustee for the purposes of a cure, a bid, excess proceeds, or a redemption under article 38 of this title shall be held as custodial funds for the party entitled to receive such moneys. Any moneys that a holder of an evidence of debt is entitled to receive may be transmitted electronically to the attorney for the holder in the manner set forth in a memorandum of understanding between the attorney for the holder and the public



trustee. All electronic transmission fees and costs between the office of the public trustee and the attorney for the holder shall be an additional fee and cost of the foreclosure.

(3) Nothing in this section shall lessen or otherwise modify the immunities and protections extended by law to public trustees and any governmental entity with which public trustees are associated. No contractual relationship shall be deemed to exist between a public trustee and a party entitled to receive moneys as described under subsection (2) of this section.

**Source:** **L. 2002:** Entire section added, p. 1333, § 5, effective July 1. **L. 2006:** (1) amended, p. 560, § 4, effective August 7; (1) and (2) amended, p. 1437, § 5, effective January 1, 2008.

**Editor’s note:** The effective date for amendments made to subsections (1) and (2) by chapter 305, Session Laws of Colorado 2006, was changed from July 1, 2007, to January 1, 2008, by section 27 of chapter 404, Session Laws of Colorado 2007. (See L. 2007, p. 1849.)

ARTICLE 38

Foreclosure Sales

**Editor’s note:** This article was numbered as article 4 of chapter 118, C.R.S. 1963. The substantive provisions of this article were repealed and reenacted in 1990, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this article prior to 1990, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume. Former C.R.S. section numbers are shown in editor’s notes following those sections that were relocated. For a detailed comparison of this article, see the comparative tables located in the back of the index.

**Law reviews:** For article, “The Agricultural Credit Act of 1987”, see 17 Colo. Law. 611 (1988); for article “Foreclosure by Private Trustee: Now Is the Time for Colorado”, see 65 Den. U.L. Rev. 41 (1988); for article, “Foreclosures of Deeds of Trust and Mortgages: 1990 Statutory Amendments — Parts I and II”, see 19 Colo. Law. 1601 and 1843 (1990); for article, “Colorado’s New Fraudulent Transfer Statutes”, see 20 Colo. Law. 1815 (1991); for article, “Foreclosure Sale Excess Proceeds”, see 23 Colo. Law. 375 (1994); for article, “Recent Developments in Foreclosure Law”, see 23 Colo. Law. 599 (1994); for article, “Changes Relating to Public Trustee Foreclosures Implemented by Senate Bill 161”, see 31 Colo. Law. 11 (November 2002); for comment, “Closing the Door on Unfair Foreclosure Practices in Colorado”, see 74 U. Colo. L. Rev. 241 (2003); for article, “Public Trustee Foreclosures: Be Aware of What Remains”, see 40 Colo. Law. 61 (September 2011).

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38-38-100.3.	Definitions.	38-38-110.	Sales by officer - location - announcement - records.
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38-38-102.	Recording notice of election and demand - record of sale.	38-38-112.	Use of electronic documents authorized.
38-38-102.5.	Notice prior to residential foreclosure - hotline.	38-38-113.	Rescission of public trustee sale.
38-38-103.	Combined notice - publication - providing information.	38-38-114.	Unclaimed refunds - disposition under “Unclaimed Property Act”.
38-38-104.	Right to cure when default is nonpayment - right to cure for certain technical defaults.		
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- 38-38-501. Title vests upon expiration of redemption periods - confirmation deed.
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- 38-38-901. Definitions.
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- 38-38-907. Repeal of part.



## PART 1

## FORECLOSURE SALE

**38-38-100.3. Definitions.** As used in articles 37 to 39 of this title, unless the context otherwise requires:

(1) "Agricultural property" means property, none of which, on the date of recording of the deed of trust or other lien or at the time of the recording of the notice of election and demand or lis pendens, is:

- (a) Platted as a subdivision;
- (b) Located within an incorporated town, city, or city and county; or
- (c) Valued and assessed as other than agricultural property pursuant to sections 39-1-102 (1.6) (a) and 39-1-103 (5), C.R.S., by the assessor of the county where the property is located.

(1.5) "Amended mailing list" means the amended mailing list in accordance with section 38-38-103 (2) containing the names and addresses in the mailing list as defined in subsection (14) of this section and the names and addresses of the following persons:

(a) The owner of the property, if different than the grantor of the deed of trust, as of the date and time of the recording of the notice of election and demand or lis pendens as shown in the records at the address indicated in such recorded instrument; and

(b) Each person, except the public trustee, who appears to have an interest in the property described in the combined notice by an instrument recorded prior to the date and time of the recording of the notice of election and demand or lis pendens with the clerk and recorder of the county where the property or any portion thereof is located at the address of the person indicated on the instrument, if the person's interest in the property may be extinguished by the foreclosure.

(2) "Attorney for the holder" means an attorney licensed and in good standing in the state of Colorado to practice law and retained by the holder of an evidence of debt to process a foreclosure under this article.

(3) "Certified copy" means, with respect to a recorded document, a copy of the document certified by the clerk and recorder of the county where the document was recorded.

(4) "Combined notice" means the combined notice of sale, right to cure, and right to redeem described in section 38-38-103 (4) (a).

(5) "Confirmation deed" means the deed described in section 38-38-501 in the form specified in section 38-38-502 or 38-38-503.

(5.3) "Consensual lien" means a conveyance of an interest in real property, granted by the owner of the property after the recording of a notice of election and demand, that is not an absolute conveyance of fee title to the property. "Consensual lien" includes but is not limited to a deed of trust, mortgage or other assignment, encumbrance, option, lease, easement, contract, including an instrument specified in section 38-38-305, or conveyance as security for the performance of the grantor. "Consensual lien" does not include a lien described in section 38-38-306 or 38-33.3-316.

(5.7) "Corporate surety bond" means a bond issued by a person authorized to issue bonds in the state of Colorado with the public trustee as obligee, conditioned against the delivery of an original evidence of debt to the damage of the public trustee.

(6) "Cure statement" means the statement described in section 38-38-104 (2) (a).

(7) "Deed of trust" means a security instrument containing a grant to a public trustee together with a power of sale.

(8) "Evidence of debt" means a writing that evidences a promise to pay or a right to the payment of a monetary obligation, such as a promissory note, bond, negotiable instrument, a loan, credit, or similar agreement, or a monetary judgment entered by a court of competent jurisdiction.

(9) "Fees and costs" means all fees, charges, expenses, and costs described in section 38-38-107.

(10) "Holder of an evidence of debt" means the person in actual possession of or person entitled to enforce an evidence of debt; except that "holder of an evidence of debt"

does not include a person acting as a nominee solely for the purpose of holding the evidence of debt or deed of trust as an electronic registry without any authority to enforce the evidence of debt or deed of trust. For the purposes of articles 37 to 40 of this title, the following persons are presumed to be the holder of an evidence of debt:

(a) The person who is the obligee of and who is in possession of an original evidence of debt;

(b) The person in possession of an original evidence of debt together with the proper indorsement or assignment thereof to such person in accordance with section 38-38-101 (6);

(c) The person in possession of a negotiable instrument evidencing a debt, which has been duly negotiated to such person or to bearer or indorsed in blank; or

(d) The person in possession of an evidence of debt with authority, which may be granted by the original evidence of debt or deed of trust, to enforce the evidence of debt as agent, nominee, or trustee or in a similar capacity for the obligee of the evidence of debt.

(11) "Junior lien" means a deed of trust or other lien or encumbrance upon the property for which the amount due and owing thereunder is subordinate to the deed of trust or other lien being foreclosed.

(12) "Junior lienor" means a person who is a beneficiary, holder, or grantee of a junior lien.

(12.5) "Lienor" includes without limitation the holder of a certificate of purchase or certificate of redemption for property, issued upon the foreclosure of a deed of trust or other lien on the property.

(13) "Lis pendens" means a lis pendens in accordance with section 38-35-110 that is recorded with the clerk and recorder of the county where the property or any portion thereof is located and that refers to a judicial action in which one of the claims is for foreclosure and sale of the property by an officer or in which a claim or interest in the property is asserted.

(14) "Mailing list" means the mailing list in accordance with section 38-38-101 (1) (e) provided to the officer by the holder of the evidence of debt or the attorney for the holder containing the names and addresses of the following persons:

(a) The original grantor of the deed of trust or obligor under any other lien being foreclosed at the address shown in the recorded deed of trust or other lien being foreclosed and, if different, the last address, if any, shown in the records of the holder of the evidence of debt;

(b) Any person known or believed by the holder of the evidence of debt to be personally liable under the evidence of debt secured by the deed of trust or other lien being foreclosed at the last address, if any, shown in the records of the holder;

(c) The occupant of the property, addressed to "occupant" at the address of the property; and

(d) With respect to a public trustee sale, a lessee with an unrecorded possessory interest in the property at the address of the premises of the lessee and, if different, the address of the property, to the extent that the holder of the evidence of debt desires to terminate the possessory interest with the foreclosure.

(15) "Maintaining and repairing" means the act of caring for and preserving a property in its current condition or restoring a property to a sound or working condition after damage; except that "maintaining and repairing" shall not include, unless done pursuant to an order entered by a court of competent jurisdiction, any act of advancing a property to a better condition or any act that increases the quality of or adds to the improvements located on a property.

(16) "Notice of election and demand" means a notice of election and demand for sale related to a public trustee foreclosure under this article.

(17) "Officer" means the public trustee or sheriff conducting a foreclosure under this article.

(17.3) "Overbid" means the amount a property is sold for at a foreclosure sale that is in excess of the written or amended bid amount executed by the holder of the evidence of debt secured by the deed of trust or other lien being foreclosed.



(17.5) “Person” means any individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, limited liability company, partnership, association, or other legal entity.

(18) “Property” means the portion of the property encumbered by a deed of trust or other lien that is being foreclosed under this article or the portion of the property being released from a deed of trust or other lien under article 39 of this title.

(19) “Publish”, “publication”, “republish”, or “repubication” means the placement by an officer of a legal notice that meets the requirements set forth in section 24-70-103, C.R.S., containing a combined notice that complies with the requirements of section 24-70-109, C.R.S., in a newspaper in the county or counties where the property to be sold is located. Unless otherwise specified by the attorney for the holder, the officer shall select the newspaper.

(20) “Qualified holder” means a holder of an evidence of debt, certificate of purchase, certificate of redemption, or confirmation deed that is also one of the following:

(a) A bank as defined in section 11-101-401 (5), C.R.S.;

(b) An industrial bank as defined in section 11-108-101 (1), C.R.S.;

(c) A federally chartered savings and loan association doing business in Colorado or a savings and loan association chartered under the “Savings and Loan Association Law,” articles 40 to 46 of title 11, C.R.S.;

(d) A supervised lender as defined in section 5-1-301 (46), C.R.S., that is licensed to make supervised loans pursuant to section 5-2-302, C.R.S., and that is either:

(I) A public entity, which is an entity that has issued voting securities that are listed on a national security exchange registered under the federal “Securities Exchange Act of 1934”, as amended; or

(II) An entity in which all of the outstanding voting securities are held, directly or indirectly, by a public entity;

(e) An entity in which all of the outstanding voting securities are held, directly or indirectly, by a public entity that also owns, directly or indirectly, all of the voting securities of a supervised lender as defined in section 5-1-301 (46), C.R.S., that is licensed to make supervised loans pursuant to section 5-2-302, C.R.S.;

(f) A federal housing administration approved mortgagee;

(g) A federally chartered credit union doing business in Colorado or a state-chartered credit union as described in section 11-30-101, C.R.S.;

(h) An agency or department of the federal government;

(i) An entity created or sponsored by the federal or state government that originates, insures, guarantees, or purchases loans or a person acting on behalf of such an entity to enforce an evidence of debt or the deed of trust securing an evidence of debt; or

(j) Any entity listed in paragraphs (a) to (i) of this subsection (20) acting in the capacity of agent, nominee except as otherwise specified in subsection (10) of this section, or trustee for another person.

(21) “Records” means the records of the county clerk and recorder of the county where the property is located.

(22) “Sale” means a foreclosure sale conducted by an officer under this article.

(23) “Secured indebtedness” means the amount owed pursuant to the evidence of debt without regard to the value of the collateral.

(24) “Statement of redemption” means the signed and acknowledged statement of the holder of the evidence of debt or the signed statement of the attorney for the holder as required by section 38-38-302 (3) or the signed and acknowledged statement of the lienor or the signed statement of the attorney for the lienor as required by section 38-38-302 (1) (f).

**Source:** L. 2006: Entire section added, p. 1438, § 6, effective January 1, 2008. L. 2007: IP, IP(10), (18), and (19) amended and (5.3), (5.7), and (12.5) added, p. 1831, § 5, effective January 1, 2008. L. 2009: (1.5) and (17.5) added and IP(10), (11), (14), and (19) amended, (HB 09-1207), ch. 164, p. 703, § 1, effective January 1, 2010. L. 2012: (17.3) added, (SB 12-030), ch. 96, p. 315, § 3, effective September 1.

**Editor's note:** The effective date for the enactment of this section by chapter 305, Session Laws of Colorado 2006, was changed from July 1, 2007, to January 1, 2008, by section 27 of chapter 404, Session Laws of Colorado 2007. (See L. 2007, p. 1849.)

**38-38-101. Holder of evidence of debt may elect to foreclose. (1) Documents required.** Whenever a holder of an evidence of debt declares a violation of a covenant of a deed of trust and elects to publish all or a portion of the property therein described for sale, the holder or the attorney for the holder shall file the following with the public trustee of the county where the property is located:

(a) A notice of election and demand signed and acknowledged by the holder of the evidence of debt or signed by the attorney for the holder;

(b) The original evidence of debt, including any modifications to the original evidence of debt, together with the original indorsement or assignment thereof, if any, to the holder of the evidence of debt or other proper indorsement or assignment in accordance with subsection (6) of this section or, in lieu of the original evidence of debt, one of the following:

(I) A corporate surety bond in the amount of one and one-half times the face amount of the original evidence of debt;

(II) A copy of the evidence of debt and a certification signed and properly acknowledged by a holder of an evidence of debt acting for itself or as agent, nominee, or trustee under subsection (2) of this section or a statement signed by the attorney for such holder, citing the paragraph of section 38-38-100.3 (20) under which the holder claims to be a qualified holder and certifying or stating that the copy of the evidence of debt is true and correct and that the use of the copy is subject to the conditions described in paragraph (a) of subsection (2) of this section; or

(III) A certified copy of a monetary judgment entered by a court of competent jurisdiction;

(c) The original recorded deed of trust securing the evidence of debt and any original recorded modifications of the deed of trust or any recorded partial releases of the deed of trust, or in lieu thereof, one of the following:

(I) Certified copies of the recorded deed of trust and any recorded modifications of the deed of trust or recorded partial releases of the deed of trust; or

(II) Copies of the recorded deed of trust and any recorded modifications of the deed of trust or recorded partial releases of the deed of trust and a certification signed and properly acknowledged by a holder of an evidence of debt acting for itself or as an agent, nominee, or trustee under subsection (2) of this section or a signed statement by the attorney for such holder, citing the paragraph of section 38-38-100.3 (20) under which the holder claims to be a qualified holder and certifying or stating that the copies of the recorded deed of trust and any recorded modifications of the deed of trust or recorded partial releases of the deed of trust are true and correct and that the use of the copies is subject to the conditions described in paragraph (a) of subsection (2) of this section;

(d) A combined notice pursuant to section 38-38-103; except that the combined notice may be omitted with the prior approval of the officer because the officer will supply the combined notice;

(e) A mailing list;

(f) Any affidavit recorded pursuant to section 38-35-109 (5) affecting the deed of trust described in paragraph (c) of this subsection (1), which affidavit shall be accepted by the public trustee as modifying the deed of trust for all purposes under this article only if the affidavit is filed with the public trustee at the same time as the other documents required under this subsection (1);

(f.5) If there is a loan servicer of the evidence of debt described in the notice of election and demand and the loan servicer is not the holder, a statement executed by the holder of the evidence of debt or the attorney for such holder, identifying, to the best of such person's knowledge, the name of the loan servicer;

(g) A statement executed by the holder of an evidence of debt, or the attorney for such holder, identifying, to the best knowledge of the person executing such statement, the name



and address of the current owner of the property described in the notice of election and demand; and

(h) A separate document notifying the public trustee that the property referred to in the notice of election and demand is property that requires posting under section 38-38-802. If the document required by this paragraph (h) is not filed at the time the documents required by paragraphs (a) to (e) of this subsection (1) are filed with the public trustee, and the holder determines at a later date that the property requires posting, the holder shall request that the public trustee rerecord the notice of election and demand. Thereafter, all deadlines for the foreclosure action shall be determined according to the date of the rerecording of the notice of election and demand as though the foreclosure was commenced on such date, and the public trustee shall collect a fee of seventy-five dollars from the holder. If the document required by this paragraph (h) is filed in error, the holder may withdraw it by filing with the public trustee an affidavit signed by the holder or the attorney for the holder affirming both that the document required by this paragraph (h) was filed in error and that the property has not been posted pursuant to section 38-38-802. In order to be effective, and thereby notify the public trustee that the property is not eligible for posting, such affidavit shall be filed with the public trustee no later than fourteen days after the date of the determination of the public trustee that the filing is complete in accordance with section 38-38-102 (1).

**(2) Foreclosure by qualified holder without original evidence of debt, original or certified copy of deed of trust, or proper indorsement.** (a) A qualified holder, whether acting for itself or as agent, nominee, or trustee under section 38-38-100.3 (20) (j), that elects to foreclose without the original evidence of debt pursuant to subparagraph (II) of paragraph (b) of subsection (1) of this section, or without the original recorded deed of trust or a certified copy thereof pursuant to subparagraph (II) of paragraph (c) of subsection (1) of this section, or without the proper indorsement or assignment of an evidence of debt under paragraph (b) of subsection (1) of this section shall, by operation of law, be deemed to have agreed to indemnify and defend any person liable for repayment of any portion of the original evidence of debt in the event that the original evidence of debt is presented for payment to the extent of any amount, other than the amount of a deficiency remaining under the evidence of debt after deducting the amount bid at sale, and any person who sustains a loss due to any title defect that results from reliance upon a sale at which the original evidence of debt was not presented. The indemnity granted by this subsection (2) shall be limited to actual economic loss suffered together with any court costs and reasonable attorney fees and costs incurred in defending a claim brought as a direct and proximate cause of the failure to produce the original evidence of debt, but such indemnity shall not include, and no claimant shall be entitled to, any special, incidental, consequential, reliance, expectation, or punitive damages of any kind. A qualified holder acting as agent, nominee, or trustee shall be liable for the indemnity pursuant to this subsection (2).

(b) In the event that a qualified holder or the attorney for the holder commences a foreclosure without production of the original evidence of debt, proper indorsement or assignment, or the original recorded deed of trust or a certified copy thereof, the qualified holder or the attorney for the holder may submit the original evidence of debt, proper indorsement or assignment, or the original recorded deed of trust or a certified copy thereof to the officer prior to the sale. In such event, the sale shall be conducted and administered as if the original evidence of debt, proper indorsement or assignment, or the original recorded deed of trust or a certified copy thereof had been submitted at the time of commencement of such proceeding, and any indemnities deemed to have been given by the qualified holder under paragraph (a) of this subsection (2) shall be null and void as to the instrument produced under this paragraph (b).

(c) In the event that a foreclosure is conducted where the original evidence of debt, proper indorsement or assignment, or original recorded deed of trust or certified copy thereof has not been produced, the only claims shall be against the indemnitor as provided in paragraph (a) of this subsection (2) and not against the foreclosed property or the attorney for the holder of the evidence of debt. Nothing in this section shall preclude a person liable for repayment of the evidence of debt from pursuing remedies allowed by law.

**(3) Foreclosure on a portion of property.** A holder of an evidence of debt may elect to foreclose a deed of trust under this article against a portion of the property encumbered

by the deed of trust only if such portion is encumbered as a separate and distinct parcel or lot by the original or an amended deed of trust. Any foreclosure conducted by a public trustee against less than all of the property then encumbered by the deed of trust shall not affect the lien or the power of sale contained therein as to the remaining property. The amount bid at a sale of less than all of the property shall be deemed to have satisfied the secured indebtedness to the extent of the amount of the bid.

(4) **Notice of election and demand.** A notice of election and demand filed with the public trustee pursuant to this section shall contain the following:

(a) The names of the original grantors of the deed of trust being foreclosed and the original beneficiaries or grantees thereof;

(b) The name of the holder of the evidence of debt;

(c) The date of the deed of trust being foreclosed;

(d) The recording date, county, book, and page or reception number of the recording of the deed of trust being foreclosed;

(e) The amount of the original principal balance of the secured indebtedness;

(f) The amount of the outstanding principal balance of the secured indebtedness as of the date of the notice of election and demand;

(g) A legal description of the property to be foreclosed as set forth in the documents to be provided to the public trustee pursuant to paragraph (c) of subsection (1) of this section;

(h) A statement of whether the property described in the notice of election and demand is all or only a portion of the property then encumbered by the deed of trust being foreclosed;

(i) A statement of the violation of the covenant of the evidence of debt or deed of trust being foreclosed upon which the foreclosure is based, which statement shall not constitute a waiver of any right accruing on account of any violation of any covenant of the evidence of debt or deed of trust other than the violation specified in the notice of election and demand;

(j) The name, address, business telephone number, and bar registration number of the attorney for the holder of the evidence of debt, which may be indicated in the signature block of the notice of election and demand; and

(k) A description of any changes to the deed of trust described in the notice of election and demand that are based on an affidavit filed with the public trustee under paragraph (f) of subsection (1) of this section, together with the recording date and reception number or book and page number of the recording of that affidavit in the records.

(5) **Error in notice.** In the event that the amount of the outstanding principal balance due and owing upon the secured indebtedness is erroneously set forth in the notice of election and demand or the combined notice, the error shall not affect the validity of the notice of election and demand, the combined notice, the publication, the sale, the certificate of purchase described in section 38-38-401, the certificate of redemption described in section 38-38-402, the confirmation deed as defined in section 38-38-100.3 (5), or any other document executed in connection therewith.

(6) **Indorsement or assignment.** (a) Proper indorsement or assignment of an evidence of debt shall include the original indorsement or assignment or a certified copy of an indorsement or assignment recorded in the county where the property being foreclosed is located.

(b) Notwithstanding the provisions of paragraph (a) of this subsection (6), the original evidence of debt or a copy thereof without proper indorsement or assignment shall be deemed to be properly indorsed or assigned if a qualified holder presents the original evidence of debt or a copy thereof to the officer together with a statement in the certification of the qualified holder or in the statement of the attorney for the qualified holder pursuant to subparagraph (II) of paragraph (b) of subsection (1) of this section that the party on whose behalf the foreclosure was commenced is the holder of the evidence of debt.

(7) **Multiple instruments.** If the evidence of debt consists of multiple instruments, such as notes or bonds, the holder of the evidence of debt may elect to foreclose with respect to fewer than all of such instruments or documents by identifying in the notice of election and demand and the combined notice only those to be satisfied in whole or in part, in which case the requirements of this section shall apply only as to those instruments or documents.



(8) **Assignment or transfer of debt during foreclosure.** (a) The holder of the evidence of debt may assign or transfer the secured indebtedness at any time during the pendency of a foreclosure action without affecting the validity of the secured indebtedness. Upon receipt of written notice signed by the holder who commenced the foreclosure action or the attorney for the holder stating that the evidence of debt has been assigned and transferred and identifying the assignee or transferee, the public trustee shall complete the foreclosure as directed by the assignee or transferee or the attorney for the assignee or transferee. No holder of an evidence of debt, certificate of purchase, or certificate of redemption shall be liable to any third party for the acts or omissions of any assignee or transferee that occur after the date of the assignment or transfer.

(b) The assignment or transfer of the secured indebtedness during the pendency of a foreclosure shall be deemed made without recourse unless otherwise agreed in a written statement signed by the assignor or transferor. The holder of the evidence of debt, certificate of purchase, or certificate of redemption making the assignment or transfer and the attorney for the holder shall have no duty, obligation, or liability to the assignee or transferee or to any third party for any act or omission with respect to the foreclosure or the loan servicing of the secured indebtedness after the assignment or transfer. If an assignment or transfer is made by a qualified holder that commenced the foreclosure pursuant to subsection (2) of this section, the qualified holder's indemnity under said subsection (2) shall remain in effect with respect to all parties except to the assignee or transferee, unless otherwise agreed in a writing signed by the assignee or transferee if the assignee or transferee is a qualified holder.

(c) If an assignment or transfer is made to a holder of an evidence of debt other than a qualified holder, the holder must file with the officer the original evidence of debt and the original recorded deed of trust or, in lieu thereof, the documents required in paragraphs (b) and (c) of subsection (1) of this section. An assignee or transferee shall be presumed to not be a qualified holder, and as such, shall be subject to the provisions of this paragraph (c), unless a signed statement by the attorney for such assignee or transferee that cites the paragraph of section 38-38-100.3 (20) under which the assignee or transferee claims to be a qualified holder is filed with the officer.

(9) **Partial release from deed of trust.** At any time after the recording of the notice of election and demand but prior to the sale, a portion of the property may be released from the deed of trust being foreclosed pursuant to section 38-39-102 or as otherwise provided by order of a court of competent jurisdiction recorded in the county where the property being released is located. Upon recording of the release or court order, the holder of the evidence of debt or the attorney for the holder shall pay the fee described in section 38-37-104 (1) (b) (IX), amend the combined notice, and, in the case of a public trustee foreclosure, amend the notice of election and demand to describe the property that continues to be secured by the deed of trust or other lien being foreclosed as of the effective date of the release or court order. The public trustee shall record the amended notice of election and demand upon receipt. Upon receipt of the amended combined notice, the public trustee shall republish and mail the amended combined notice in the manner set forth in section 38-38-109 (1) (b).

(10) **Deposit.** The public trustee may require a deposit of up to six hundred fifty dollars or the amount of the fee permitted pursuant to section 38-37-104 (1) (b) (I), whichever is greater, at the time the notice of election and demand is filed, to be applied against the fees and costs of the public trustee. The public trustee may allow the attorney for the holder of the evidence of debt to establish one or more accounts with the public trustee, which the public trustee may use to pay the fees and costs of the public trustee in any foreclosure filed by the holder or the attorney for the holder, or through which the public trustee may transmit refunds or cures, overbids, or redemption proceeds.

**Source:** L. 90: Entire article R&RE, p. 1653, § 2, effective October 1; (7)(a) amended, p. 1685, § 5, effective October 1. L. 92: (7)(a) amended, p. 2089, § 2, effective July 1. L. 2002: (1)(b), (7)(a), and (11) amended and (1.5), (1.6), (1.7), and (1.8) added, p. 1333, § 6, effective July 1. L. 2003: (1.5)(a) and (1.5)(b) amended, p. 1211, § 25, effective July 1. L. 2006: Entire section R&RE, p. 1441, § 7, effective January 1, 2008. L. 2007: (1)(b)(I) amended, p. 1832, § 6, effective January 1, 2008. L. 2009: (1)(h) added, (HB

09-1276), ch. 404, p. 2220, § 2, effective June 2; (8)(c) added, (HB 09-1207), ch. 164, p. 707, § 3, effective September 1; (1), (4)(g), (4)(j), (6), (9), and (10) amended and (4)(k) added, (HB 09-1207), ch. 164, p. 704, § 2, effective January 1, 2010. **L. 2010:** (1)(h) amended, (HB 10-1240), ch. 200, p. 871, § 1, effective May 5. **L. 2012:** (1)(h) amended, (SB 12-175), ch. 208, p. 895, § 171, effective July 1; (1)(f.5) added and (10) amended, (SB 12-030), ch. 96, p. 315, § 4, effective September 1.

**Editor's note:** (1) The provisions of this section are similar to provisions of several former sections as they existed prior to 1990. For a detailed comparison, see the comparative tables located in the back of the index.

(2) The effective date for amendments made to this section by chapter 305, Session Laws of Colorado 2006, was changed from July 1, 2007, to January 1, 2008, by section 27 of chapter 404, Session Laws of Colorado 2007. (See L. 2007, p. 1849.)

(3) Amendments to subsection (1) by House Bill 09-1207 and House Bill 09-1276 were harmonized.

(4) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (1)(h) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

(5) Section 14 of chapter 96, Session Laws of Colorado 2012, provides that the act adding subsection (1)(f.5) applies to the foreclosure of any deed of trust or other lien with respect to which a notice of election and demand or *lis pendens* is recorded in the office of the clerk and recorder of the county where the property or a portion of the property is located on or after September 1, 2012.

## ANNOTATION

**Law reviews.** For article, "Foreclosure by Sale by Public Trustee of Deeds of Trust in Colorado", see 14 Dicta 5 (1936). For article, "Forms Committee Presents Standard Pleading Samples to Be Used in Foreclosures Through Public Trustee", see 28 Dicta 461 (1951). For article, "Statutory Redemption in Colorado", see 30 Dicta 79 (1953). For article, "Real Estate Foreclosures and Federal Tax Liens", see 17 Colo. Law. 35 (1988). For article, "An Analysis of the Effect of S.B. 123 on Foreclosures," see 17 Colo. Law. 845 (1988).

**Annotator's note.** The following annotations include cases decided under this section as it existed prior to its 2006 repeal and reenactment.

**Deed not invalidated by failure to designate advertising period.** The failure to designate what the period of advertising should be made does not invalidate the deed because, if the grantor did not designate the period in the deed, the trustee may advertise a reasonable time. *Healey v. Zobel*, 45 Colo. 294, 101 P. 56 (1909).

**Publication complied with section.** Where a deed of trust authorized a sale of the lands, after "four weeks public notice of the time and place of such sale by advertisement weekly, in some newspaper of general circulation", and the notice of sale thereunder, to take place on the 12th of December, was published on the 10th, 17th, and 24th days of November, and the 1st day of December, there was a compliance with the power contained in the deed of trust and with this section. *Gold Dirt Mining & Milling Co. v. Perigo Mines, Land & Townsite Corp.*, 48 Colo. 197, 109 P. 263 (1910).

**Notice at address given in deed complies with section.** Notice to subsequent encum-

brancer, at the address given in the deed of trust, is a compliance with this section. *Watkins v. Booth*, 55 Colo. 91, 132 P. 1141 (1913).

Where the mortgagee testified that he had actual notice of the foreclosure proceeding, but that there was no compliance with the statutory requirements of notice, and where the record reflected that the notices in question were mailed to him at the address given in the deed of trust, that is all that is required. *Motlong v. World Sav. & Loan Ass'n*, 168 Colo. 540, 452 P.2d 384 (1969).

**Homestead exemption applies in public trustee sales.** *Frank v. First Nat'l Bank*, 653 P.2d 748 (Colo. App. 1982).

**Not only homestead exemptions, but redemption rights as provided in sales on execution are incorporated in public trustee sales.** *Frank v. First Nat'l Bank*, 653 P.2d 748 (Colo. App. 1982).

**Sale of homesteaded property.** When a public trustee conducts a sale of homesteaded property upon a deed of trust with a waiver therein, the public trustee must limit the sale to the extent of the waiver or else require that the sale of the homestead conform to the safeguards in a forced sale of homestead by execution as set forth in § 38-41-206. *Frank v. First Nat'l Bank*, 653 P.2d 748 (Colo. App. 1982).

**When lender bank made election of remedy to proceed by public trustee foreclosure on separate deeds of trust to 17 parcels, bank surrendered remedy contained in agreement that the disputed parcel would not be released from deed of trust until the bank received \$50,000 toward the principal on promissory notes for 17 parcels.** *Colo. Nat'l Bank-Exchange v. Hammar*, 764 P.2d 359 (Colo. App. 1988).



**A collusive foreclosure under power of sale is a fraudulent conveyance.** The fundamental element of a fraudulent conveyance is whether the debtor's estate is unjustly diminished. *Megabank Fin. v. Alpha Gamma Rho*, 841 P.2d 318 (Colo. App. 1992).

A chattel mortgage is collusive if it is a transaction intended to delay creditors and to prevent the property of the debtor coming to their use. *Megabank Fin. v. Alpha Gamma Rho*, 841 P.2d 318 (Colo. App. 1992).

**A fraudulent conveyance results whether of real or personal property if**, as a result of the debtor's operations on the title to his property, the creditor loses by reason of finding less to seize and apply to his claim; however, no injury can result from a sale of an asset at its fair value since the estate does not abate as a result of what was done. *Megabank Fin. v. Alpha Gamma Rho*, 841 P.2d 318 (Colo. App. 1992).

**The foreclosure sale of less than all of the properties encumbered by a deed of trust** was valid where creditor's intent was clear, debtor suffered no prejudice, and there were no intervening rights of third parties. *Rolfes v. O'Connor*, 844 P.2d 1330 (Colo. App. 1992).

**Plaintiffs' due process rights not violated where claim of insufficient notice arises out of their own failure to comply with the change of address requirements in the deed of trust.** Plaintiffs failed to provide to defendant, in writing, a notice of change of address. Defendant thus utilized address specified in the deed of trust to serve its motion and notice under C.R.C.P. 120 and to provide the public trustee with plaintiffs' most current address. The plain language of the deed of trust expresses the parties' intentions concerning notice and changes of address. Defendant's adherence to the deed of trust's notice provision complied with the notice requirements of C.R.C.P. 120(a). Thus, the notice provision in the deed of trust and defendant's compliance with that provision comported with the requirements of C.R.C.P. 120(a). *Estates in Eagle Ridge, LLLP v. Valley Bank & Trust*, 141 P.3d 838 (Colo. App. 2005).

**Applied** in *Stark Lumber Co. v. Keystone Inv. Co.*, 92 Colo. 259, 20 P.2d 306 (1933); *Patterson v. Serafini*, 187 Colo. 209, 532 P.2d 965 (1974); *Valley Dev. at Vail, Inc. v. Warder*, 192 Colo. 316, 557 P.2d 1180 (1976); *Moreland v. Marwich, Ltd.*, 665 P.2d 613 (Colo. 1983).

**38-38-102. Recording notice of election and demand - record of sale.** (1) No later than ten business days following the receipt of the notice of election and demand, the public trustee shall review the documents filed pursuant to section 38-38-101 (1) and, if the filing is complete, cause the notice to be recorded in the office of the county clerk and recorder of the county where the property described in the notice is located.

(2) The public trustee shall retain in the public trustee's records a printed or electronic copy of the notice of election and demand and the combined notice, as published pursuant to section 38-38-103. Such records shall be available for inspection by the public at the public trustee's offices during the public trustee's normal business hours.

**Source:** **L. 90:** Entire article R&RE, p. 1656, § 2, effective October 1. **L. 2005:** Entire section amended, p. 398 § 3, effective August 8. **L. 2006:** Entire section R&RE, p. 1446, § 8, effective January 1, 2008. **L. 2009:** (1) amended, (HB 09-1207), ch. 164, p. 707, § 4, effective September 1.

**Editor's note:** (1) This section is similar to former § 38-37-137, as it existed prior to 1990.

(2) The effective date for amendments made to this section by chapter 305, Session Laws of Colorado 2006, was changed from July 1, 2007, to January 1, 2008, by section 27 of chapter 404, Session Laws of Colorado 2007. (See L. 2007, p. 1849.)

## ANNOTATION

**Law reviews.** For article, "An Analysis of the Effect of S.B. 123 on Foreclosures", see 17 Colo. Law. 845 (1988).

**38-38-102.5. Notice prior to residential foreclosure - hotline.** (1) As used in this section, "holder" means the holder of an evidence of debt constituting a residential mortgage loan, as defined in section 12-61-902, C.R.S., or that holder's loan servicer or other person acting on the holder's behalf. "Holder" shall not include a person whose only activity as a holder is as the seller in not more than three credit sales or loans per year.

(2) At least thirty days before filing a notice of election and demand and at least thirty

days after default, the holder shall mail a notice addressed to the original grantor of the deed of trust at the address in the recorded deed of trust or other lien being foreclosed and, if different, at the last address shown in the holder's records, containing the telephone number of the Colorado foreclosure hotline and the direct telephone number of the holder's loss mitigation representative or department.

(3) (a) This section shall apply only to a default consisting solely of the failure of the original grantor of the deed of trust to make one or more required payments.

(b) With respect to defaults on the same obligation, after the holder has once given the original grantor of the deed of trust a notice as specified in subsection (2) of this section, this section imposes no limitation on the holder's right to foreclose with respect to any subsequent default that occurs within twelve months after such notice.

**Source:** L. 2001: Entire section added, p. 447, § 1, effective January 1, 2002. L. 2006: Entire section repealed, p. 1481, § 39, effective July 1. L. 2008: Entire section RC&RE, p. 2258, § 1, effective June 5. L. 2009: (2) and (3) amended, (HB 09-1207), ch. 164, p. 708, § 5, effective January 1, 2010.

**38-38-103. Combined notice - publication - providing information.** (1) (a) No more than twenty calendar days after the recording of the notice of election and demand, the public trustee shall mail a combined notice as described in subsection (4) of this section to the persons set forth in the mailing list.

(b) No more than sixty calendar days nor less than forty-five calendar days prior to the first scheduled date of sale, the public trustee shall mail a combined notice as described in subsection (4) of this section to the persons as set forth in the most recent amended mailing list. If there is no amended mailing list, the public trustee shall mail a combined notice as described in subsection (4) of this section to the persons as set forth in the mailing list.

(c) If a recorded instrument does not specify the address of the party purporting to have an interest in the property under such recorded instrument, the party shall not be entitled to notice and any interest in the property under such instrument shall be extinguished upon the execution and delivery of a deed pursuant to section 38-38-501.

(2) (a) The holder of the evidence of debt or the attorney for the holder shall deliver an amended mailing list to the officer as needed. If an amended mailing list is received after the officer has sent the mailing described in paragraph (b) of subsection (1) of this section, the officer shall continue the sale to no less than sixty-five calendar days after receipt of the amended mailing list. The officer shall send the notice pursuant to subsection (4) of this section to the persons on the amended mailing list no less than forty-five calendar days prior to the actual date of sale.

(b) (Deleted by amendment, L. 2007, p. 1832, § 7, effective January 1, 2008.)

(3) The sheriff shall mail a combined notice as described in subsection (4) of this section to the persons named at the addresses indicated in the mailing list no less than sixteen nor more than thirty calendar days after the holder of the evidence of debt or the attorney for the holder delivers to the sheriff the mailing list and the original or a copy of a decree of foreclosure or a writ of execution directing the sheriff to sell property.

(4) (a) The combined notices required to be mailed pursuant to subsections (1), (2), and (3) of this section shall contain the following:

(I) The information required by section 38-38-101 (4);

(II) The statement: A notice of intent to cure filed pursuant to section 38-38-104 shall be filed with the officer at least fifteen calendar days prior to the first scheduled sale date or any date to which the sale is continued;

(II.5) The statement, which must be in bold: If the sale date is continued to a later date, the deadline to file a notice of intent to cure by those parties entitled to cure may also be extended;

(III) The statement: A notice of intent to redeem filed pursuant to section 38-38-302 shall be filed with the officer no later than eight business days after the sale;

(IV) The date to which the sale has been continued pursuant to paragraph (a) of subsection (2) of this section;

(V) The date of sale determined pursuant to section 38-38-108;



(VI) The place of sale determined pursuant to section 38-38-110; and

(VII) The statement as required by section 24-70-109, C.R.S.: The lien being foreclosed may not be a first lien.

(b) A legible copy of this section and sections 38-37-108, 38-38-104, 38-38-301, 38-38-302, 38-38-304, 38-38-305, and 38-38-306 shall be sent with all notices pursuant to this section.

(5) (a) No more than sixty calendar days nor less than forty-five calendar days prior to the first scheduled date of sale, unless a longer period of publication is specified in the deed of trust or other lien being foreclosed, a deed of trust or other lien being foreclosed shall be deemed to require the officer to commence publication of the combined notice, omitting both the statements under subparagraphs (II) and (III) of paragraph (a) of subsection (4) of this section and the copies of the statutes under paragraph (b) of subsection (4) of this section and adding the first and last publication dates if not already specified in the combined notice, for four weeks, which means publication once each week for five consecutive weeks.

(b) The officer shall review the publication of the combined notice for accuracy.

(c) The fees and costs to be allowed for publication of the combined notice shall be as provided by law for the publication of legal notices or advertising.

(d) Notwithstanding any other provision of law, the officer shall not begin publication or send the mailing required in subparagraph (II) of paragraph (a) of subsection (1) of this section unless the holder has provided the affidavit required by section 38-38-802, if applicable. If the affidavit has not been provided, the following shall occur:

(I) The officer shall notify the holder or the holder's attorney, in writing, that no affidavit was provided and indicate that the publications required pursuant to this section shall not be made until the holder provides the required affidavit. The officer is not obligated to provide more than one notice to the holder or the holder's attorney.

(II) After notice is made pursuant to subparagraph (I) of this paragraph (d) that no affidavit was provided and until the required affidavit is provided, the officer shall continue the sale of the property in accordance with section 38-38-109 an additional week for each week that the holder fails to provide the required affidavit.

**Source:** **L. 90:** Entire article R&RE, p. 1656, § 2, effective October 1. **L. 91:** (1) amended, p. 1921, § 52, effective June 1. **L. 2002:** (1) amended, p. 1336, § 7, effective July 1. **L. 2006:** Entire section R&RE, p. 1446, § 9, effective January 1, 2008. **L. 2007:** IP(1)(a)(II), (2), (4)(a)(III), and (5)(a) amended, p. 1832, § 7, effective January 1, 2008. **L. 2009:** (5)(d) added, (HB 09-1276), ch. 404, p. 2221, § 4, effective June 2; (1)(a), (1)(b), (2)(a), (3), (4)(a)(IV), (4)(b), (5)(a), and (5)(b) amended, (HB 09-1207), ch. 164, p. 708, § 6, effective January 1, 2010. **L. 2012:** (4)(a)(II.5) added, (SB 12-030), ch. 96, p. 315, § 5, effective September 1.

**Editor's note:** (1) The provisions of this section are similar to provisions of several former sections as they existed prior to 1990. For a detailed comparison, see the comparative tables located in the back of the index.

(2) The effective date for amendments made to this section by chapter 305, Session Laws of Colorado 2006, was changed from July 1, 2007, to January 1, 2008, by section 27 of chapter 404, Session Laws of Colorado 2007. (See L. 2007, p. 1849.)

(3) Section 14 of chapter 96, Session Laws of Colorado 2012, provides that the act adding subsection (4)(a)(II.5) applies to the foreclosure of any deed of trust or other lien with respect to which a notice of election and demand or lis pendens is recorded in the office of the clerk and recorder of the county where the property or a portion of the property is located on or after September 1, 2012.

## ANNOTATION

**Public trustee not required to send notice to consignor on promissory note** of his right to cure and of foreclosure proceedings on deed of trust securing the note, despite fact that cosignor had right to cure the default. *S.L.K. Testamen-*

*tary Trust v. Davids*, 692 P.2d 1147 (Colo. App. 1984), *aff'd*, 728 P.2d 1259 (Colo. 1987) (decided under § 38-39-118 as it existed prior to the 1990 repeal and reenactment of this article and article 39).

**38-38-104. Right to cure when default is nonpayment - right to cure for certain technical defaults.** (1) Unless the order authorizing the sale described in section 38-38-105 contains a determination that there is a reasonable probability that a default in the terms of the evidence of debt, deed of trust, or other lien being foreclosed other than nonpayment of sums due thereunder has occurred, any of the following persons is entitled to cure the default if the person files with the officer, no later than fifteen calendar days prior to the date of sale, a written notice of intent to cure together with evidence of the person's right to cure to the satisfaction of the officer:

(a) (I) The owner of the property as of the date and time of the recording of the notice of election and demand or *lis pendens* as evidenced in the records;

(II) If the owner of the property is dead or incapacitated on or after the date and time of the recording of the notice of election and demand or *lis pendens*, the owner's heirs, personal representative, legal guardian, or conservator as of the time of filing of the notice of intent to cure, whether or not such person's interest is shown in the records, or any co-owner of the property if the co-owner's ownership interest is evidenced in the records as of the date and time of the recording of the notice of election and demand or *lis pendens*;

(III) A transferee of the property as evidenced in the records as of the time of filing of the notice of intent to cure if the transferee was the property owner's spouse as of the date and time of the recording of the notice of election and demand or *lis pendens* or if the transferee is wholly owned or controlled by the property owner, is wholly owned or controlled by the controlling owner of the property owner, or is the controlling owner of the property owner;

(IV) A transferee or owner of the property by virtue of merger or other similar event or by operation of law occurring after the date and time of the recording of the notice of election and demand or *lis pendens*; or

(V) The holder of an order or judgment entered by a court of competent jurisdiction as evidenced in the records after the date and time of the recording of the notice of election and demand or *lis pendens* ordering title to the property to be vested in a person other than the owner;

(b) A person liable under the evidence of debt;

(c) A surety or guarantor of the evidence of debt; or

(d) A holder of an interest junior to the lien being foreclosed by virtue of being a lienor or lessee of, or a holder of an easement or license on, the property or a contract vendee of the property, if the instrument evidencing the interest was recorded in the records prior to the date and time of the recording of the notice of election and demand or *lis pendens*. If, prior to the date and time of the recording of the notice of election and demand or *lis pendens*, a lien is recorded in an incorrect county, the holder's rights under this section shall only be valid if the lien is rerecorded in the correct county at least fifteen calendar days prior to the actual date of sale.

(2) (a) (I) Promptly upon receipt of a notice of intent to cure by the officer, but no less than twelve calendar days prior to the date of sale, the officer shall transmit by mail, facsimile, or electronic means to the person executing the notice of election and demand a request for a statement of all sums necessary to cure the default. The cure statement shall be filed with the officer by the attorney for the holder or, if none, by the holder of the evidence of debt and shall set forth the amounts necessary to cure as identified in the cure statement. Upon receipt of the statement of the amounts needed to cure, the officer shall transmit the cure statement in writing to the person filing the notice of intent to cure the default.

(II) If a cure statement is required pursuant to subparagraph (I) of this paragraph (a), the holder of the evidence of debt shall submit a signed and acknowledged cure statement, or the office of the attorney for the holder shall submit a signed cure statement, specifying the following amounts, itemized in substantially the following categories and in substantially the following form:



CURE STATEMENT

To: \_\_\_\_\_

Public Trustee (or Sheriff) of the County (or City and County)  
of \_\_\_\_\_, State of Colorado (hereinafter the "officer").

Foreclosure sale number: \_\_\_\_\_

Grantor: \_\_\_\_\_

The date through which the  
cure statement is effective: \_\_\_\_\_

The following is an itemization of all sums necessary to cure the default (any amount that  
is based on a good faith estimate is indicated with an asterisk):

Payments due under the evidence of debt:

\_\_\_\_\_ payments of \$ \_\_\_\_\_ each

Accrued late charges \_\_\_\_\_

Other amounts due under the evidence of debt  
(specify)

\_\_\_\_\_  
\_\_\_\_\_

Property inspections \_\_\_\_\_

Property, general liability,  
and casualty insurance \_\_\_\_\_

Certificate of taxes due \_\_\_\_\_

Property taxes paid by the holder \_\_\_\_\_

Owner association  
assessment paid by the holder \_\_\_\_\_

Permitted amounts paid on  
prior liens \_\_\_\_\_

Less impound/escrow account credit \_\_\_\_\_

Plus impound/escrow account  
deficiency \_\_\_\_\_

Title costs \_\_\_\_\_

Rule 120 docket fee \_\_\_\_\_

Rule 120 posting costs \_\_\_\_\_

Court costs \_\_\_\_\_

Postage/delivery costs \_\_\_\_\_

Service/posting costs \_\_\_\_\_

Attorney fees \_\_\_\_\_

Other fees and costs (specify):  
\_\_\_\_\_  
\_\_\_\_\_

**Reinstatement total** \$ \_\_\_\_\_

**(Does not include officer's fees and costs)**

Officer's fees and costs \$ \_\_\_\_\_  
(To be added by officer)

Total to cure \$ \_\_\_\_\_  
(To be added by officer)

**IT MAY TAKE SEVERAL DAYS BEFORE THE CURE IS PROCESSED AND ENTERED INTO THE HOLDER'S RECORDS.**

The total to cure does not include any future monthly mortgage payments that may be due.

Name of the holder of the evidence of debt  
and the attorney for the holder:

Holder: \_\_\_\_\_

Attorney: \_\_\_\_\_

Printed name: \_\_\_\_\_

Signature: \_\_\_\_\_

Attorney address: \_\_\_\_\_

Attorney business telephone: \_\_\_\_\_

(b) No later than 12 noon on the day before the sale, the person desiring to cure the default shall pay to the officer all sums that are due and owing under the evidence of debt and deed of trust or other lien being foreclosed and all fees and costs of the holder of the evidence of debt allowable under the evidence of debt, deed of trust, or other lien being foreclosed through the effective date that are set forth in the cure statement; except that any principal that would not have been due in the absence of acceleration shall not be included in such sums due.

(c) If a cure is made, interest for the period of any continuance pursuant to section 38-38-109 (1) (c) shall be allowed only at the regular rate and not at the default rate as may be specified in the evidence of debt, deed of trust, or other lien being foreclosed. If a cure is not made, interest at the default rate, if specified in the evidence of debt, deed of trust, or other lien being foreclosed, for the period of the continuance shall be allowed.

(d) Upon receipt of the cure amount and a withdrawal or dismissal of the foreclosure from the holder of the evidence of debt or the attorney for the holder, the officer shall deliver the cure amount, less the fees and costs of the officer, to the attorney for the holder or, if none, to the holder, the foreclosure shall be withdrawn or dismissed as provided by law, and the evidence of debt shall be returned uncanceled to the attorney for the holder of the evidence of debt or, if none, to the holder by the public trustee or to the court by the sheriff.

(3) Where the default in the terms of the evidence of debt, deed of trust, or other lien on which the holder of the evidence of debt claims the right to foreclose is the failure of a party to furnish balance sheets or tax returns, any person entitled to cure pursuant to paragraph (a) of subsection (2) of this section may cure such default in the manner prescribed in this section by providing to the holder or the attorney for the holder the required balance sheets, tax returns, or other adequate evidence of the party's financial condition so long as all sums currently due under the evidence of debt have been paid and all amounts due under paragraph (b) of subsection (2) of this section, where applicable, have been paid.

(4) Any person liable on the debt and the grantor of the deed of trust or other lien being foreclosed shall be deemed to have given the necessary consent to allow the holder of the evidence of debt or the attorney for the holder to provide the information specified in paragraph (a) of subsection (2) of this section to the officer and all other persons who may assert a right to cure pursuant to this section.

(5) A cure statement pursuant to paragraph (a) of subsection (2) of this section shall state the period for which it is effective. The cure statement shall be effective for at least ten calendar days after the date the cure statement is received by the officer or until the last day



to cure under paragraph (b) of subsection (2) of this section, whichever occurs first. The cure statement shall be effective for no more than thirty calendar days after the date the cure statement is received by the officer or until the last day to cure under paragraph (b) of subsection (2) of this section, whichever occurs first. The use of good faith estimates in the cure statement with respect to interest and fees and costs is specifically authorized by this article, so long as the cure statement states that it is a good faith estimate effective through the last day to cure as indicated in the cure statement. The use of a good faith estimate in the cure statement shall not change or extend the period or effective date of a cure statement.

(6) Following expiration of the period for which the cure statement is effective, but no less than fifteen calendar days prior to the date of sale, the person who originally submitted the notice of intent to cure may make a written request to the public trustee for an update of the amount necessary to cure. Upon receipt by the public trustee of such written request for updated cure figures, subsection (2) of this section shall apply.

(7) If the holder of the evidence of debt or the attorney for the holder receives a request for a cure statement under paragraph (a) of subsection (2) of this section and does not file a cure statement with the officer by the earlier of ten business days after receipt of the request or the eighth calendar day before the date of the sale, the officer shall continue the sale for one week. Thereafter and until the cure statement is filed, the officer shall continue the sale an additional week for each week that the holder fails to file the cure statement; except that the sale shall not be continued beyond the period of continuance allowed under section 38-38-109 (1) (a). A cure statement must be received by 12 noon on the day it is due in order to meet a deadline set forth in this subsection (7).

**Source:** **L. 90:** Entire article R&RE, p. 1657, § 2, effective October 1. **L. 91:** (2) amended, p. 1922, § 53, effective June 1. **L. 92:** (1) amended, p. 2090, § 3, effective July 1. **L. 94:** (2.5) added, p. 1674, § 1, effective July 1. **L. 2002:** Entire section amended, p. 1336, § 8, effective July 1. **L. 2006:** Entire section R&RE amended, p. 1449, § 10, effective January 1, 2008. **L. 2007:** IP(1) and (5) amended, p. 1833, § 8, effective January 1, 2008. **L. 2009:** (1)(a)(V), (1)(d), and (2)(a) amended and (6) and (7) added, (HB 09-1207), ch. 164, p. 710, § 7, effective January 1, 2010. **L. 2012:** (2)(a), (2)(b), (5), and (7) amended, (SB 12-030), ch. 96, p. 315, § 6, effective September 1.

**Editor's note:** (1) This section is similar to former § 38-39-118, as it existed prior to 1990.

(2) The effective date for amendments made to this section by chapter 305, Session Laws of Colorado 2006, was changed from July 1, 2007, to January 1, 2008, by section 27 of chapter 404, Session Laws of Colorado 2007. (See L. 2007, p. 1849.)

(3) Section 14 of chapter 96, Session Laws of Colorado 2012, provides that the act amending subsections (2)(a), (2)(b), (5), and (7) applies to the foreclosure of any deed of trust or other lien with respect to which a notice of election and demand or lis pendens is recorded in the office of the clerk and recorder of the county where the property or a portion of the property is located on or after September 1, 2012.

## ANNOTATION

**Law reviews.** For article, "Foreclosure by Sale by Public Trustee of Deeds of Trust in Colorado", see 28 Dicta 437 (1951). For article, "Statutory Redemption in Colorado", see 30 Dicta 79 (1953). For comment discussing Colorado's curative default statute in light of *Foster Lumber Co. v. Weston Constructors*, 33 Colo. App. 436, 521 P.2d 1294 (1974), see 52 Den. L.J. 637 (1975). For comment, "The Effect of Certified Realty on Mortgage Foreclosure in Colorado", appearing below, see 52 U. Colo. L. Rev. 301 (1981). For comment, "The Effect of Certified Realty Corp. v. Smith on Mortgage Foreclosure in Colorado", see 52 U. Colo. L.

Rev. 301 (1981). For article, "Election to Sue on a Mortgage Note in Lieu of Foreclosure", see 13 Colo. Law. 621 (1984). For article, "Limitation of Bank's Liabilities in Letters of Credit Agreements", see 15 Colo. Law. 1019 (1986).

**Annotator's note.** Since § 38-38-104 is similar to § 38-39-118 as it existed prior to the 1990 repeal and reenactment of this article and article 39, relevant cases construing that provision have been included in the annotations to this section.

**Applicability of section.** This section applies only where foreclosure action has been initiated. *Certified Realty Corp. v. Smith*, 198 Colo. 222,

597 P.2d 1043 (1979).

This section applies to a situation where default in the terms of a note and deed of trust consists, not only of nonpayment of principal and interest, but also of failure to pay real property taxes. *Foster Lumber Co. v. Weston Constructors, Inc.*, 33 Colo. App. 436, 521 P.2d 1294 (1974).

**Section modified common law by limiting acceleration right.** This section has modified the common law by limiting right of acceleration. *Foster Lumber Co. v. Weston Constructors, Inc.*, 33 Colo. App. 436, 521 P.2d 1294 (1974).

When the action involves only a default of payment and the deed of trust or mortgage is being foreclosed, this section limits the effectiveness of an acceleration clause. *Smith v. Certified Realty Corp.*, 41 Colo. App. 170, 585 P.2d 293 (1978), *aff'd*, 198 Colo. 222, 597 P.2d 1043 (1979).

**Section prevents foreclosure if creditor's interests not jeopardized.** This section must be interpreted so as to carry out its general legislative intent which was to permit debtors to prevent foreclosure of mortgages or deeds of trust in instances in which the creditor's interests will not be jeopardized. *Foster Lumber Co. v. Weston Constructors, Inc.*, 33 Colo. App. 436, 521 P.2d 1294 (1974); *Jacobs Invs. v. PRD Holdings, Ltd.*, 44 Colo. App. 184, 612 P.2d 1149 (1980).

**And cures default on note, deed of trust, or mortgage.** This section specifically refers to defaults on "the note, deed of trust, or mortgage" and was obviously intended to permit a debtor to cure a default in the terms of either instrument. *Foster Lumber Co. v. Weston Constructors, Inc.*, 33 Colo. App. 436, 521 P.2d 1294 (1974).

**Section does not limit the number of times a debtor can cure defaults.** *Jacobs Invs. v. PRD Holdings, Ltd.*, 44 Colo. App. 184, 612 P.2d 1149 (1980).

Subsection (3) protects the creditor from the allegation that he has waived his future right to accelerate and to foreclose upon default because the debtor was able to cure defaults at an earlier time. *Jacobs Invs. v. PRD Holdings, Ltd.*, 44 Colo. App. 184, 612 P.2d 1149 (1980).

**No equitable right to cure default in action on promissory note.** There is no equitable right to cure default in action brought solely on promissory note. *Smith v. Certified Realty Corp.*, 41 Colo. App. 170, 585 P.2d 293 (1978), *aff'd*, 198 Colo. 222, 597 P.2d 1043 (1979).

**Postponement of sale also postpones deadline for curing default.** When the date of a foreclosure sale is postponed, the deadline for curing the default, notice to the public trustee of

intention to cure at least seven days prior to the sale, is correspondingly postponed. *Kirchner v. Sanchez*, 661 P.2d 1161 (Colo. 1983).

**Acceleration clause enforceable.** Where suit after default of payment is on the note only and the creditor does not bring an action to foreclose on the security, i.e., the deed of trust, the acceleration clause in the note is enforceable, and the debtor has no statutory or equitable right to cure the money default. *Smith v. Certified Realty Corp.*, 41 Colo. App. 170, 585 P.2d 293 (1978), *aff'd*, 198 Colo. 222, 597 P.2d 1043 (1979).

**Statutory coverage triggered by initiation of foreclosure proceedings.** Because by its terms this section applies only to deeds of trust or mortgages "being foreclosed" and the statutory mechanism for tender operates through the public trustees or other officers "conducting the sale", statutory coverage is triggered by initiation of foreclosure proceedings on the mortgage or deed of trust. *Foster Lumber Co. v. Weston Constructors, Inc.*, 33 Colo. App. 436, 521 P.2d 1294 (1974).

**Attorney fees.** When a deed of trust is foreclosed as a mortgage, the court may award attorney fees. *Bakers Park Mining & Milling Co. v. District Court*, 662 P.2d 483 (Colo. 1983).

**To cure default,** debtor is required to pay interest at the default rate on the entire balance of the debt for the period during which the note was in default plus all delinquent principal. *Foothills Apartments v. Fischer*, 693 P.2d 395 (Colo. App. 1984).

**No partial cure of default.** Default is either cured or not cured, and if "cured" then it is as if no default occurred. The effect of curing default under the foreclosure statute is to put parties in the same position as they would have been had no default occurred. *Foothills Apartments v. Fischer*, 693 P.2d 395 (Colo. App. 1984).

**Parties returned to original status following timely tender.** This section allows one liable, under a note and deed of trust or mortgage, whose only default is nonpayment, to cure the default by tender of the delinquent payments due plus costs, late charges, and attorneys' fees. If such a tender is made within five (now seven) days of the foreclosure sale, the foreclosure action is terminated and the parties are returned to their original status. *Ulander v. Allen*, 37 Colo. App. 279, 544 P.2d 1001 (1976).

**There is no statutorily prescribed remedy for failure to comply with this section.** *Burrell Registration Co. v. McKelvey*, 194 Colo. 157, 570 P.2d 248 (1977).

**Bankruptcy court lacks authority to extend statutory time to cure default after the certificate of purchase has been issued.** *Benford-Whiting Co. v. Robertson*, 4 B.R. 213 (Bankr. D. Colo. 1980).



**38-38-105. Court order authorizing sale mandatory - notice of hearing for residential properties - definition.**

(1) Repealed.

(2) (a) On and after January 1, 2008, whenever a public trustee forecloses upon a deed of trust under this article, the holder of the evidence of debt or the attorney for the holder shall obtain an order authorizing sale from a court of competent jurisdiction to issue the same pursuant to rule 120 or other rule of the Colorado rules of civil procedure. The order shall recite the date the hearing was scheduled if no hearing was held, or the date the hearing was completed if a hearing was held, which date in either case must be no later than the day prior to the last day on which an effective notice of intent to cure may be filed with the public trustee under section 38-38-104. A sale held without an order authorizing sale issued in compliance with this paragraph (a) shall be invalid.

(b) The public trustee shall postpone the sale, unless the holder or the attorney for the holder causes a copy of the order to be provided to the public trustee no later than 12 noon on the second business day prior to the date of sale. A sale held in violation of this paragraph (b) shall not be invalid if an order that complied with the provisions of paragraph (a) of this subsection (2) was entered.

(3) Not less than fourteen days before the date set for the hearing pursuant to rule 120 or other rule of the Colorado rules of civil procedure, the holder or the attorney for the holder seeking an order authorizing sale under this section for a residential property shall cause a notice of hearing as described in rule 120 (b) of the Colorado rules of civil procedure to be posted in a conspicuous place on the property that is the subject of the sale. If possible, the notice shall be posted on the front door of the residence, but if access to the door is not possible or is restricted, the notice shall be posted at an alternative conspicuous location, such as a gate or similar impediment. If a person at the residence is impeding posting at the residence at the time of the attempted posting, the notice may be handed to that person to satisfy this posting requirement. The notice required by this subsection (3) is sufficient if it complies with the requirements of this section without regard to any requirements for service of process in a civil action required by court rule.

(4) As used in this section, "residential property" means any real property upon which a dwelling, as defined in section 5-1-301 (18), C.R.S., is constructed and occupied.

**Source:** **L. 90:** Entire article R&RE, p. 1657, § 2, effective October 1. **L. 2006:** Entire section amended, p. 1452, § 11, effective July 1. **L. 2007:** Entire section amended, p. 1834, § 9, effective June 1. **L. 2009:** (2) amended, (HB 09-1207), ch. 164, p. 711, § 8, effective September 1. **L. 2010:** (3) added, (HB 10-1240), ch. 200, p. 872, § 2, effective May 5. **L. 2012:** (3) amended and (4) added, (SB 12-030), ch. 96, p. 318, § 7, effective September 1.

**Editor's note:** (1) This section is similar to former § 38-37-140 (1), as it existed prior to 1990. (2) Subsection (1)(b) provided for the repeal of subsection (1), effective January 1, 2008. (See L. 2007, p. 1834.)

(3) Section 14 of chapter 96, Session Laws of Colorado 2012, provides that the act amending subsection (3) and adding subsection (4) applies to the foreclosure of any deed of trust or other lien with respect to which a notice of election and demand or lis pendens is recorded in the office of the clerk and recorder of the county where the property or a portion of the property is located on or after September 1, 2012.

**Cross references:** For the nature and effect of mortgages, see § 38-35-117.

#### ANNOTATION

**Law reviews.** For article, "An Analysis of the Effect of S.B. 123 on Foreclosures", see 17 Colo. Law. 845 (1988). For article, "Rule 120: Relocation of the Meaningful Hearing", see 20

Colo. Law. 495 (1991).

**Annotator's note.** Since § 38-38-105 is similar to § 38-37-140 as it existed prior to the 1990 repeal and reenactment of article 37 and

this article, relevant cases construing that provision have been included in the annotations to this section.

**Applied** in *Moreland v. Marwich, Ltd.*, 665 P.2d 613 (Colo. 1983); *Kirschner v. Sanchez*, 661 P.2d 1161 (Colo. 1983).

**38-38-106. Bid required - form of bid.** (1) The holder of the evidence of debt or the attorney for the holder shall submit a bid that is received by the officer no later than 12 noon on the second business day prior to the date of sale as provided in this section. The holder or the attorney for the holder need not personally attend the sale. If the bid is not received by the officer by the deadline, the officer shall continue the sale for one week and shall announce or post a notice of the continuance at the time and place designated for the sale.

(2) The holder of the evidence of debt shall submit a signed and acknowledged bid, or the attorney for the holder shall submit a signed bid, which shall specify the following amounts, itemized in substantially the following categories and in substantially the following form:

BID

To: \_\_\_\_\_

Public Trustee (or Sheriff) of the County (or City and County) of \_\_\_\_\_, State of Colorado (hereinafter the "officer").

Date: \_\_\_\_\_

\_\_\_\_\_, whose mailing address is \_\_\_\_\_, bids the sum of \$ \_\_\_\_\_ in your Sale No. \_\_\_\_\_ to be held on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

The following is an itemization of all amounts due the holder of the evidence of debt secured by the deed of trust or other lien being foreclosed.

Street address of property being foreclosed, if known: \_\_\_\_\_  
Regular ☐ / default ☐ rate of interest as of the date of sale: \_\_\_\_\_

(Inapplicable items may be omitted):

Amounts due under the evidence of debt:		
Principal	\$	_____
Interest		_____
Late charges		_____
Allowable prepayment penalties or premiums		_____
Other amounts due under the evidence of debt (specify)		_____ _____ _____
Category subtotal:		\$ _____
Other fees and costs advanced by the holder of evidence of debt:		
Property, general liability, and casualty insurance		_____
Property inspections		_____
Appraisals		_____
Taxes and assessments		_____
Utility charges owed or incurred		_____



Owner association	_____	
assessment paid	_____	
Permitted amounts paid on	_____	
prior liens	_____	
Permitted lease payments	_____	
Less impound/escrow account credit	_____	
Plus impound/escrow account deficiency	_____	
Other (describe)	_____	
Category subtotal:		\$ _____
Attorney fees and advances:		
Attorney fees	_____	
Title commitments and insurances or abstractor	_____	
charges	_____	
Court docketing	_____	
Statutory notice	_____	
Postage	_____	
Electronic transmissions	_____	
Photocopies	_____	
Telephone	_____	
Other (describe)	_____	
Category subtotal:		\$ _____
Officer fees and costs:		
Officer statutory fee	_____	
Publication charges	_____	
Confirmation deed fee	_____	
Confirmation deed	_____	
recording fee	_____	
Other (describe)	_____	
Category subtotal:		\$ _____
Total due holder of the evidence of debt	_____	
	Bid	\$ _____
	Deficiency	\$ _____

I enclose herewith the following:

1. Order authorizing sale.
2. Check (if applicable) to your order in the sum of \$ \_\_\_\_\_ covering the balance of your fees and costs.
3. Other: \_\_\_\_\_.

Please send us the following:

1. Promissory note with the deficiency, if any, noted thereon
2. Refund for overpayment of officer's fees and costs, if any
3. Other: \_\_\_\_\_.

Name of the holder of the evidence of debt and the attorney for the holder:

Holder: \_\_\_\_\_

Attorney: \_\_\_\_\_

By: \_\_\_\_\_

Attorney registration number: \_\_\_\_\_

Attorney address: \_\_\_\_\_

Attorney business telephone: \_\_\_\_\_

(3) Upon receipt of the initial bid from the holder of the evidence of debt or the attorney for the holder, the officer shall make such information available to the general public.

(4) The officer shall enter the bid by reading the bid amount set forth on the bid and the name of the person that submitted the bid or by posting or providing such bid information at the time and place designated for sale.

(5) Bids submitted pursuant to this section may be amended by the holder of the evidence of debt or the attorney for the holder in writing or electronically, as determined by the officer pursuant to section 38-38-112, no later than 12 noon the day prior to the sale, or

orally at the time of sale if the person amending the bid is physically present at the sale. A bid submitted pursuant to this section may be modified orally at the time of sale if the person making the modification modifies and reexecutes the bid at the sale.

(6) The holder of the evidence of debt or the attorney for the holder shall bid at least the holder's good faith estimate of the fair market value of the property being sold, less the amount of unpaid real property taxes and all amounts secured by liens against the property being sold that are senior to the deed of trust or other lien being foreclosed and less the estimated reasonable costs and expenses of holding, marketing, and selling the property, net of income received; except that the holder or the attorney for the holder need not bid more than the total amount due to the holder as specified in the bid pursuant to subsection (2) of this section. The failure of the holder to bid the amount required by this subsection (6) shall not affect the validity of the sale but may be raised as a defense by any person sued on a deficiency.

(7) (a) Other than a bid by the holder of the evidence of debt not exceeding the total amount due shown on the bid pursuant to subsection (2) of this section, the payment of any bid amount at sale must be received by the officer no later than the date and time of the sale, or at an alternative time after the sale and on the day of the sale, as specified in writing by the officer. The payment shall be in the form specified in section 38-37-108. If the officer has not received full payment of the bid amount from the highest bidder at the sale pursuant to this subsection (7), the next highest bidder who has timely tendered the full amount of the bid under this subsection (7) shall be deemed the successful bidder at the sale.

(b) The officer may establish written policies relating to all aspects of the foreclosure sale that are consistent with the provisions of this article. The written policies shall be made available to the general public.

**Source:** **L. 90:** Entire article R&RE, p. 1658, § 2, effective October 1. **L. 91:** (1) and (2) amended, p. 1922, § 54, effective June 1. **L. 2002:** (2) amended, p. 1339, § 9, effective July 1. **L. 2006:** Entire section R&RE, p. 1452, § 12, effective January 1, 2008. **L. 2007:** (5) amended, p. 1834, § 10, effective January 1, 2008. **L. 2009:** (2) and (7) amended, (HB 09-1207), ch. 164, p. 712, § 9, effective September 1. **L. 2012:** (1) and (2) amended, (SB 12-030), ch. 96, p. 318, § 8, effective September 1.

**Editor's note:** (1) This section is similar to former § 38-37-142, as it existed prior to 1990.

(2) The effective date for amendments made to this section by chapter 305, Session Laws of Colorado 2006, was changed from July 1, 2007, to January 1, 2008, by section 27 of chapter 404, Session Laws of Colorado 2007. (See L. 2007, p. 1849.)

(3) Section 14 of chapter 96, Session Laws of Colorado 2012, provides that the act amending subsections (1) and (2) applies to the foreclosure of any deed of trust or other lien with respect to which a notice of election and demand or lis pendens is recorded in the office of the clerk and recorder of the county where the property or a portion of the property is located on or after September 1, 2012.

## ANNOTATION

**Law reviews.** For article, "Recent Statutory Amendments to the Public Trustee and Sheriff Foreclosure Process", see 15 Colo. Law. 794 (1986). For article, "1987 Statutory Amendments Concerning Foreclosures of Deeds of Trust and Mortgages", see 16 Colo. Law. 1386 (1987). For article, "An Analysis of the Effect of S.B. 123 on Foreclosures", see 17 Colo. Law. 845 (1988). For article, "Recent Developments in Foreclosure Law", see 23 Colo. Law. 599 (1994).

**Annotator's note.** The following annotations include cases decided under this section as it existed prior to its 2006 repeal and reenactment.

**A deficiency bid that is not a good faith estimate of the fair market value of the prop-**

**erty does not invalidate the foreclosure sale;** instead, the debtor's deficiency liability is adjusted to reflect what the deficiency should have been had a good faith bid been made at the time of the sale. *First Nat. Bank v. Blanding*, 885 P.2d 324 (Colo. App. 1994).

**Inadequate foreclosure bid, or bid not in "good faith", does not bar recovery of a deficiency judgment rather inadequacy should be considered only to adjust amount of deficiency claim.** *Bank of Am. v. Kosovich*, 878 P.2d 65 (Colo. App. 1994).

**Trial court properly concluded that no formal notice of acceleration was required under the terms of the note, and commencement of a foreclosure action was sufficient to accel-**



ate the obligation secured by the deed of trust. Kirk v. Kitchens, 49 P.3d 1189 (Colo. App. 2002).

**Trial court erred in allowing defendants to include in their foreclosure bids as “amounts due” future interest amounts.** Upon defendants’ acceleration of the entire loan obligation,

defendants had waived or were no longer entitled to recover the contested amounts, which would constitute an impermissible prepayment penalty not authorized by the note and deed of trust in the event of foreclosure. Kirk v. Kitchens, 49 P.3d 1189 (Colo. App. 2002).

**38-38-107. Fees and costs - definitions.** (1) All fees and costs of every kind and nature incurred under the provisions of articles 37 to 39 of this title shall be fees and costs of the sale chargeable as additional amounts owing under the deed of trust or other lien being foreclosed. The amounts shall be deducted from the proceeds of any sale, or, if there are not cash proceeds from a sale adequate to pay such amounts, to the extent of the inadequacy, the amounts shall be paid by the holder of the evidence of debt. The officer may decline to issue the confirmation deed pursuant to section 38-38-501 until all sums due to the officer have been paid.

(2) (Deleted by amendment, L. 2006, p. 1455, § 13; L. 2007, p. 1849, § 27, effective January 1, 2008.)

(3) Fees and costs include but are not limited to the following amounts that have been paid or incurred:

(a) Costs and expenses allowable under the evidence of debt, deed of trust, or other lien being foreclosed; and

(b) Reasonable attorney fees and the costs incurred by the holder or the attorney for the holder in enforcing the evidence of debt, the deed of trust, or other lien being foreclosed or in defending, protecting, and insuring the holder’s interest in the foreclosed property or any improvements on the property, including but not limited to:

(I) All expenses actually incurred by the officer conducting the sale, publication costs, statutory notice costs and postage, and appraisal fees;

(II) Any general or special taxes or ditch or water assessments levied or accruing against the property and any governmental or quasi-governmental lien, fine, penalty, or assessment against the property;

(III) The premiums on any property, casualty, general liability, or title insurance acquired to protect the holder’s interest in the property or improvements on the property;

(IV) Sums due on any prior lien or encumbrance on the property, including the portion of an assessment by a homeowners’ association that constitutes a lien prior to the lien being foreclosed; except that any principal that would not have been due in the absence of acceleration shall not be included in the sum due unless paid after the expiration of the time to cure the indebtedness pursuant to this article;

(V) If the property is subject to a lease, all sums due under the lease;

(VI) The reasonable costs and expenses of defending, protecting, securing, and maintaining and repairing the property and the holder’s interest in the property or the improvements on the property, receiver’s fees and expenses, inspection fees, court costs, attorney fees, and fees and costs of the attorney in the employment of the owner of the evidence of debt;

(VII) Costs and expenses made pursuant to a valid order from a court of competent jurisdiction to bring the property and the improvements on the property into compliance with the federal, state, county, and local laws, ordinances, and regulations affecting the property, the improvements on the property, or the use of the property; and

(VIII) Other costs and expenses that may be permitted by the deed of trust, mortgage, or other lien securing the debt or that may be authorized by a court of competent jurisdiction.

(c) As used in this subsection (3), “holder” means the holder of the certificate of purchase, the holder of the certificate of redemption, or the holder of the evidence of debt.

(4) In the case of a redemption, the fees and costs listed in subsection (3) of this section that the holder of the certificate of purchase or certificate of redemption has paid or incurred as of the time of filing of the statement for redemption are allowable and shall be included

in the statement of redemption if such amounts have not been included in a prior bid or statement of redemption.

(5) Notwithstanding the provisions of subsections (1), (3), and (4) of this section, a holder of an evidence of debt, certificate of purchase, or certificate of redemption shall not accept from a provider of services or products related to property inspection, broker's price opinion, title report, appraisal, insurance, repair, or maintenance or from an agent or affiliate of the provider any payment, benefit, or remuneration of any kind, whether in the form of cash, employee, advertising, computer program or service, bank deposit, or other good or service in connection with a foreclosure in which a property inspection, broker's price opinion, title report, appraisal, insurance, repair, or maintenance service or product of the provider or an agent or affiliate of the provider was used, unless the total value of all payment, benefit, or remuneration received by the holder from the provider of the service or product is shown and credited against amounts owed to the holder in each bid, cure statement, or redemption statement.

**Source:** **L. 90:** Entire article R&RE, p. 1659, § 2, effective October 1. **L. 2001:** (2) amended, p. 1068, § 4, effective September 1. **L. 2005:** (2) amended, p. 398, § 4, effective August 8. **L. 2006:** Entire section amended, p. 1455, § 13, effective January 1, 2008.

**Editor's note:** (1) This section is similar to former § 38-37-119, as it existed prior to 1990.

(2) The effective date for amendments made to this section by chapter 305, Session Laws of Colorado 2006, was changed from July 1, 2007, to January 1, 2008, by section 27 of chapter 404, Session Laws of Colorado 2007. (See L. 2007, p. 1849.)

## ANNOTATION

**Law reviews.** For article, "Statutory Redemption in Colorado", see 30 Dicta 79 (1953). For article, "An Analysis of the Effect of S.B. 123 on Foreclosures", see 17 Colo. Law. 845 (1988).

**Annotator's note.** Since § 38-38-107 is similar to § 38-37-119 as it existed prior to the 1990 repeal and reenactment of article 37 and

this article, a relevant case construing that provision has been included in the annotations to this section.

**Expenses of sale, but not appraisal costs, are to be included in the sum for which a property is foreclosed.** San Miguel Basin State Bank v. Oliver, 748 P.2d 1342 (Colo. App. 1987).

**38-38-108. Date of sale.** (1) Whenever property is to be sold following the foreclosure of any deed of trust or other lien by the officer, the initial date of sale shall be:

(a) In the case of a sale of property by the public trustee that is not agricultural property, no less than one hundred ten calendar days nor more than one hundred twenty-five calendar days after the date of recording of the notice of election and demand;

(b) In the case of a sale of property by the sheriff that is not agricultural property, no less than one hundred ten calendar days after the date of the recording of the lis pendens;

(c) In the case of a sale of property by the public trustee, all of which is agricultural property, no less than two hundred fifteen calendar days nor more than two hundred thirty calendar days after the date of recording of the notice of election and demand; or

(d) In the case of a sale of property by the sheriff, all of which is agricultural property, no less than two hundred fifteen calendar days after the date of the recording of the lis pendens.

(2) (a) (I) If it is not evident from the legal description contained in the deed of trust or other lien being foreclosed whether the property described therein is agricultural property, the officer shall make that determination no less than ten calendar days nor more than twenty calendar days after the recording of the notice of election and demand; except that the officer may make the determination at any earlier time upon presentation of acceptable evidence that the property is not agricultural property. The officer shall accept the following as evidence that the property is not agricultural property:

(A) A certified copy of the subdivision plat containing the property or any portion thereof recorded in the office of the clerk and recorder of the county where the property or any portion thereof is located;



(B) A written statement by the clerk of the city, town, or city and county, dated no more than six months prior to the date of filing of the notice of election and demand or *lis pendens* with the officer, that all or a portion of the property was located within the incorporated limits of the city, town, or city and county as of the date of recording of the deed of trust or other lien or as of the date of the statement; or

(C) A written statement by the assessor of the county where the property is located, dated no more than six months prior to the date of filing of the notice of election and demand or *lis pendens* with the officer, that any portion of the property was valued and assessed as other than agricultural property after the date of the recording of the deed of trust or as of the date of the statement.

(II) The officer's determination of whether the property is agricultural or nonagricultural property shall be binding and may be relied upon by all parties.

(b) The statements described in sub-subparagraphs (B) and (C) of subparagraph (I) of paragraph (a) of this subsection (2) may be obtained and furnished at the expense of the person seeking the determination of whether the property is agricultural or nonagricultural property, which expense may be included as a portion of the fees and costs of the foreclosure.

(3) The provisions of this section shall not apply to sales following an execution and levy.

**Source:** L. 90: Entire article R&RE, p. 1660, § 2, effective October 1. L. 2006: Entire section amended, p. 1457, § 14, effective January 1, 2008. L. 2007: (2)(a)(I)(C) amended, p. 1835, § 11, effective January 1, 2008. L. 2009: IP(2)(a)(I) amended, (HB 09-1207), ch. 164, p. 714, § 10, effective September 1.

**Editor's note:** (1) This section is similar to former § 38-39-117, as it existed prior to 1990.

(2) The effective date for amendments made to this section by chapter 305, Session Laws of Colorado 2006, was changed from July 1, 2007, to January 1, 2008, by section 27 of chapter 404, Session Laws of Colorado 2007. (See L. 2007, p. 1849.)

## ANNOTATION

**Law reviews.** For article, "Foreclosure by Sale by Public Trustee of Deeds of Trust in Colorado", see 28 Dicta 437 (1951). For note, "Statutory Redemption in Colorado: 1965 Amendments", see 39 U. Colo. L. Rev. 127 (1966). For comment, "The Effect of Certified Realty on Mortgage Foreclosure in Colorado", see 52 U. Colo. L. Rev. 301 (1981). For comment, "The Effect of Certified Realty Corp. v. Smith on Mortgage Foreclosure in Colorado", see 52 U. Colo. L. Rev. 301 (1981). For article, "Real Estate Foreclosures and Federal Tax Liens", see 17 Colo. Law. 35 (1988).

**Annotator's note.** Since § 38-38-108 is similar to § 38-39-117 as it existed prior to the

1990 repeal and reenactment of this article and article 39, relevant cases construing that provision have been included in the annotations to this section.

**Within seven days of Rule 120 hearing.** When a creditor seeks to foreclose a deed of trust or mortgage, the foreclosure sale must be scheduled not less than seven days after the hearing conducted under C.R.C.P. 120. *Kirchner v. Sanchez*, 661 P.2d 1161 (Colo. 1983).

**Applied** in *Williams v. Vestman*, 668 P.2d 957 (Colo. App. 1983).

## 38-38-109. Continuance of sale - effect of bankruptcy - withdrawal of sale.

(1) **Continuance.** (a) For any reason deemed by the officer to be good cause or upon written request by the holder of the evidence of debt or by the attorney for the holder, at any time before commencement of the sale, the officer may continue the sale to a later date by making, at the time and place designated for the sale, an oral announcement of the time and place of such continuance, or by posting or providing a notice of the continuance at the time and place designated for the sale, which shall include the time and place to which the sale is continued. Except as provided in subparagraph (I) of paragraph (b) of subsection (2) of this section, a sale that is not held on the then-scheduled date of sale and is not continued from the then-scheduled date of sale pursuant to this paragraph (a) shall be deemed to have

been continued for a period of one week, and from week to week thereafter in like manner, until the sale is held or otherwise continued pursuant to this paragraph (a). No sale shall be continued to a date later than twelve months from the originally designated date in the combined notice, except as provided in subsection (2) of this section.

(b) At the request of the holder of the evidence of debt or the attorney for the holder or upon the officer's own initiative, the officer shall correct any errors in a published combined notice and shall continue the then-scheduled date of sale to a future date within the period of continuance allowed by paragraph (a) of this subsection (1) to permit a corrected combined notice to be published or the original combined notice to be republished pursuant to section 38-38-103 (5). If the officer failed to publish the combined notice as required by section 38-38-103 (5), the officer shall continue the then-scheduled date of sale to a future date within the period of continuance allowed by paragraph (a) of this subsection (1). The future date of sale to which the sale is continued pursuant to this paragraph (b) shall be no later than thirty calendar days after the fifth publication of the corrected combined notice or republished combined notice. The officer shall mail a copy of the combined notice, or corrected combined notice if the original combined notice was erroneous, to the persons and addresses on the most recent amended mailing list no later than ten calendar days after the first correct publication or republication and no less than forty-five calendar days prior to the actual date of sale in the same manner as set forth in section 38-38-103. If there is no amended mailing list, the officer shall mail a copy of the combined notice, or corrected combined notice if the original combined notice was erroneous, to the persons as set forth in the mailing list.

(c) (I) (A) If a cure statement is not timely filed, the sale will be continued pursuant to section 38-38-104 (7).

(B) (Deleted by amendment, L. 2009, (HB 09-1207), ch. 164, p. 715, § 11, effective January 1, 2010.)

(C) During a foreclosure deferment pursuant to part 8 of this article, any continuance described by sub-subparagraph (A) of this subparagraph (I) shall run concurrently with the foreclosure deferment.

(II) (Deleted by amendment, L. 2009, (HB 09-1207), ch. 164, p. 715, § 11, effective January 1, 2010.)

(III) When the property is to be sold by the sheriff, if the cure statement is not filed with the sheriff by 12 noon on the seventh calendar day before the last date of sale permitted under paragraph (a) of this subsection (1), the foreclosure action shall be deemed dismissed, and the holder of the evidence of debt or the attorney for the holder shall file a motion to dismiss with the court. Upon good cause shown, the holder or the attorney for the holder may file a motion with the court requesting further relief as the court may deem necessary or appropriate in the circumstances. The sheriff shall record the order of dismissal or other order of the court and collect all fees and costs actually incurred by the sheriff.

(2) **Effect of bankruptcy proceedings.** (a) If all publications of the combined notice prescribed by section 38-38-103 (5) or 13-56-201 (1), C.R.S., have been completed before a bankruptcy petition has been filed that automatically stays the officer from conducting the sale, the officer shall announce, post, or provide notice of that fact on the then-scheduled date of sale, take no action at the then-scheduled sale, and allow the sale to be automatically continued from week to week in accordance with paragraph (a) of subsection (1) of this section unless otherwise requested in writing prior to any such date of sale by the holder of the evidence of debt or the attorney for the holder.

(b) (I) If the publications of the combined notice prescribed by section 38-38-103 (5) or 13-56-201 (1), C.R.S., have not been started or if all the publications have not been completed before the day a bankruptcy petition has been filed that automatically stays the officer from conducting the sale, the officer shall immediately cancel any remaining publications of the combined notice and, on the date set for the sale, announce, post, or provide a notice that the sale has been enjoined or has been stayed by the automatic stay provisions of the federal bankruptcy code of 1978, title 11 of the United States Code, as amended. The sale shall not be continued under paragraph (a) of subsection (1) of this section.



(II) When the property is to be sold by the public trustee, the public trustee shall rerecord the notice of election and demand and proceed with all additional foreclosure procedures provided by this article, as though the foreclosure had just been commenced, upon:

(A) The termination of any injunction or upon the entry of a bankruptcy court order dismissing the bankruptcy case, abandoning the property being foreclosed, closing the bankruptcy case, or granting relief from the automatic stay provisions of the federal bankruptcy code of 1978, title 11 of the United States Code, as amended; and

(B) Receipt of a request from the holder of the evidence of debt or the attorney for the holder to restart the action. The public trustee shall rerecord the notice within ten business days of the request.

(III) When the property is to be sold by the sheriff under any statutory or judicial foreclosure or upon execution and levy made pursuant to any court order or decree, upon the notification of termination of any injunction or upon the entry of a bankruptcy court order dismissing the bankruptcy case, abandoning the property being foreclosed, closing the bankruptcy case, or granting relief from the automatic stay provisions of the federal bankruptcy code of 1978, title 11 of the United States Code, as amended, the sheriff shall forthwith establish a new date of sale and republish a new combined notice pursuant to section 13-56-201 (1), C.R.S.

(c) (I) If a sale is held in violation of the automatic stay provisions of the federal bankruptcy code of 1978, title 11 of the United States Code, as amended, and an order is subsequently entered by a bankruptcy court of competent jurisdiction dismissing the bankruptcy, abandoning the property being foreclosed, or closing the bankruptcy case, or an order is subsequently entered granting relief from the automatic stay provided by the federal bankruptcy code, then the evidence of debt, deed of trust, or other lien being foreclosed shall immediately be deemed reinstated, and the deed of trust or other lien shall have the same priority as if the sale had not occurred. The reinstatement shall be confirmed by the officer's indorsement on the original evidence of debt and deed of trust or other lien, if deposited with the officer, or on the copy thereof if one has been submitted pursuant to section 38-38-101 (1), although the failure to so indorse shall not affect the validity of the reinstatement. Immediately upon reinstatement, the power of sale provided therein, if any, shall be deemed revived. The indorsement shall be in substantially the following form:

The undersigned, as \_\_\_\_\_ (Public Trustee) (Sheriff) \_\_\_\_\_ for the \_\_\_\_\_, county of \_\_\_\_\_, state of Colorado, by this indorsement, hereby confirms the reinstatement of this \_\_\_\_\_ (evidence of debt) (deed of trust) (lien) \_\_\_\_\_ in accordance with the requirements of section 38-38-109 (2) (c) (I), Colorado Revised Statutes.

Date: \_\_\_\_\_

\_\_\_\_\_  
Signature  
(Public Trustee) (Sheriff)  
\_\_\_\_\_  
For the \_\_\_\_\_,  
County of \_\_\_\_\_,  
State of Colorado.

(II) If the holder of the evidence of debt, deed of trust, or other lien reinstated pursuant to this paragraph (c) or the attorney for the holder notifies the officer in writing of the entry of an order dismissing the bankruptcy case, abandoning the property being foreclosed, closing the bankruptcy case, or granting relief from the automatic stay provided by the federal bankruptcy code of 1978, title 11 of the United States Code, as amended, within sixty calendar days of the date on which the foreclosed property is no longer subject to the automatic stay, the officer shall set a new date of sale at least twenty-four calendar days but not more than forty-nine calendar days after the date on which the official receives such notice. No later than ten business days after receiving such notice, the officer shall mail an amended combined notice containing the date of the rescheduled sale to each person appearing on the most recent mailing list. No later than twenty calendar days after receiving such notice, but no less than ten calendar days prior to the new date of sale, the officer shall

publish the amended combined notice, omitting the copies of the statutes, one time only in a newspaper of general circulation in the county where the property is located.

(III) All fees and costs of providing and publishing the amended combined notice and publication shall be part of the foreclosure costs.

(d) If a sale is enjoined or set aside by court order, the same procedures as set forth in paragraphs (a), (b), and (c) of this subsection (2) shall apply unless the court order specifies otherwise. The fees prescribed in section 38-37-104 (1) (b) (VII) and (1) (b) (VIII) shall apply to the procedures described in this subsection (2).

(e) The periods for which a sale may be continued under this subsection (2) shall be in addition to the twelve-month period of continuance provided by subsection (1) of this section.

(3) **Withdrawal.** (a) If the holder of the evidence of debt or the attorney for the holder files with the public trustee, prior to sale, a written withdrawal of the notice of election and demand, the foreclosure proceedings shall terminate. The public trustee shall record the withdrawal and collect all fees and costs owed and incurred, including a withdrawal fee in the amount authorized by section 38-37-104 (1) (b) (V).

(b) If there is no sale and if a withdrawal is not filed within forty-five calendar days after the last date of sale permitted by law, the public trustee may transmit by mail or electronic transmission to the attorney for the holder of the evidence of debt, or if no attorney then to the holder, a notice that a withdrawal of the notice of election and demand may be recorded by the public trustee unless a response requesting that such withdrawal be delayed for ninety calendar days is received by the public trustee within thirty calendar days after the date the public trustee's notice is transmitted. If such response is received by the public trustee and there is no sale nor is a withdrawal filed within the ninety-day delay, the public trustee may record a withdrawal of the notice of election and demand. If no such response is received by the public trustee within thirty calendar days after the notice is transmitted, the public trustee may record a withdrawal of the notice of election and demand at any time after the expiration of such thirty-day notice period. If a withdrawal is recorded during the pendency of an automatic stay imposed on the sale based on any proceeding filed under the federal bankruptcy code of 1978, title 11 of the United States Code, as amended, the withdrawal shall be void and of no force and effect, and the public trustee shall mail to all persons on the mailing list a notice that the withdrawal of the notice of election and demand occurred during the pendency of an injunction or bankruptcy stay and is void and of no force and effect. The public trustee shall cause the notice to be recorded in the office of the county clerk and recorder of the county where the property described in the notice is located. All unpaid fees and costs owed and incurred by the public trustee, as well as a withdrawal fee in the amount authorized by section 38-37-104 (1) (b) (VI), shall be paid by the holder. The amount due shall accrue interest at the rate provided by law. Until all amounts due and owing are paid, the public trustee shall be entitled to hold all documentation in the public trustee's possession and to withhold all other services requested by the holder or the attorney for the holder with respect to the deed of trust or other lien being foreclosed.

**Source:** L. 90: Entire article R&RE, p. 1660, § 2, effective October 1. L. 92: (2) and (4) amended and (5) added, p. 2091, § 4, effective July 1. L. 95: (1) amended, p. 1108, § 53, effective May 31. L. 2002: (4)(a) and IP(4)(b)(I) amended, p. 1341, § 10, effective July 1. L. 2004: (3)(b) and (3)(c) amended, p. 1206, § 84, effective August 4. L. 2005: (1), (2), and (3)(a) amended, p. 398, § 5, effective August 8. L. 2006: Entire section amended, p. 1458, § 15, effective January 1, 2008. L. 2007: (1)(a), (1)(b), (1)(c)(I)(B), and (2) amended, p. 1835, § 12, effective January 1, 2008. L. 2009: (1)(c)(I)(C) added, (HB 09-1276), ch. 404, p. 2221, § 3, effective June 2; (1)(b), (1)(c), (2)(b)(I), (2)(d), and (3)(b) amended, (HB 09-1207), ch. 164, p. 715, § 11, effective January 1, 2010; (1)(c)(I)(C) amended, (SB 09-292), ch. 369, p. 1986, § 132, effective January 1, 2010. L. 2012: (2)(b) amended, (SB 12-030), ch. 96, p. 321, § 9, effective September 1.

**Editor's note:** (1) This section is similar to former § 38-39-115, as it existed prior to 1990.



(2) The effective date for amendments made to this section by chapter 305, Session Laws of Colorado 2006, was changed from July 1, 2007, to January 1, 2008, by section 27 of chapter 404, Session Laws of Colorado 2007. (See L. 2007, p. 1849.)

(3) Amendments to subsection (1)(c) by House Bill 09-1207, House Bill 09-1276, and Senate Bill 09-292 were harmonized.

(4) The third sentence in subsection (3)(b) was inadvertently omitted from section 11 of House Bill 09-1207; however, it has been restored in the statutes in order to reflect the intent of the general assembly.

(5) Section 14 of chapter 96, Session Laws of Colorado 2012, provides that the act amending subsection (2)(b) applies to the foreclosure of any deed of trust or other lien with respect to which a notice of election and demand or lis pendens is recorded in the office of the clerk and recorder of the county where the property or a portion of the property is located on or after September 1, 2012.

## ANNOTATION

**Law reviews.** For article, "Foreclosure by Sale by Public Trustee of Deeds of Trust in Colorado", see 14 Dicta 5 (1936). For article, "Foreclosure by Sale by Public Trustee of Deeds of Trust in Colorado", see 28 Dicta 437 (1951). For article, "Statutory Redemption in Colorado", see 30 Dicta 79 (1953). For comment, "The Effect of Certified Realty on Mort-

gage Foreclosure in Colorado", see 52 U. Colo. L. Rev. 301 (1981). For comment, "The Effect of Certified Realty Corp. v. Smith on Mortgage Foreclosure in Colorado", see 52 U. Colo. L. Rev. 301 (1981). For article, "Public Trustee's Deeds and Redemption Under Section 362 of the Bankruptcy Code", see 12 Colo. Law. 229 (1983).

**38-38-110. Sales by officer - location - announcement - records.** (1) Notwithstanding the provisions of any deed of trust or other lien being foreclosed, the officer shall conduct the sale at any door or entrance to, or in any room in any building temporarily or permanently used as, a courthouse or at or within any building where the office of the county clerk and recorder or the office of the officer is located, which place shall be specifically designated in the combined notice. The combined notice shall designate the actual place of sale.

(2) At a sale, the officer shall read only the public trustee's sale number for a sale by the public trustee or the court case number for a sale by the sheriff, the name of the original grantor, the street address or, if none, the legal description of the property, the name of the holder of the evidence of debt, the date of sale, the first and last publication dates of the combined notice, and, in accordance with section 38-38-106 (4), the amount of the bid and the name of the person that submitted the bid. In lieu of reading the information listed above, the officer may post the information or provide a written copy of the information to all persons present at the sale.

(3) Whenever a public trustee sells property described in a deed of trust, the public trustee shall enter in the records of the office of the public trustee the name of the person executing the deed of trust, the book and page or reception number of the recorded deed of trust, a brief description of the property therein described, the date of sale, the publisher of the combined notice, a list of the names and addresses of the persons to whom the combined notice was mailed, the name and last mailing address of the purchaser at the sale, and the amount at which the property was sold in separate parcels, if so sold, or en masse.

**Source:** **L. 90:** Entire article R&RE, p. 1662, § 2, effective October 1. **L. 2006:** Entire section amended, p. 1463, § 16, effective January 1, 2008. **L. 2007:** (2) amended, p. 1838, § 13, effective January 1, 2008.

**Editor's note:** (1) This section is similar to former § 38-37-108, as it existed prior to 1990.

(2) The effective date for amendments made to this section by chapter 305, Session Laws of Colorado 2006, was changed from July 1, 2007, to January 1, 2008, by section 27 of chapter 404, Session Laws of Colorado 2007. (See L. 2007, p. 1849.)

**38-38-111. Treatment of an overbid - definition.** (1) An overbid shall be first applied to any deficiency as indicated in the holder's bid, and then paid to the officer to be held in escrow until the end of all redemption periods as provided in section 38-38-302.

(2) Upon the expiration of all redemption periods provided in section 38-38-302, any remaining overbid shall be paid in order of recording priority to junior lienors, determined as of the recording date of the notice of election and demand or *lis pendens* according to the records, who have duly filed a notice of intent to redeem and whose liens have not been redeemed pursuant to section 38-38-302, in each case up to the unpaid amount of each such lienor's lien plus fees and costs. A lienor holding a lien that is not entitled to redeem by virtue of being recorded after the notice of election and demand, a lienor that has not timely filed a notice of intent to redeem pursuant to section 38-38-302, or a lienor who accepts less than a full redemption pursuant to section 38-38-302 (4) (c) shall not have any claim to any portion of the overbid. After payment to all lienors and the holder entitled to receive a portion of the overbid pursuant to this section, any remaining overbid shall be paid to the owner.

(2.5) (a) If a public trustee maintains a web site for his or her office, the public trustee shall include the following statement on such web site:

**NOTICE TO AN OWNER IN FORECLOSURE:** If your property goes to foreclosure auction sale and is purchased for more than the total owed to the lender and to all other lien holders, please contact the public trustee's office after the sale because you may have funds due to you.

(b) In order to pay the owner of the property as required pursuant to subsection (2) of this section, a public trustee shall send a notice to the owner. If the amount of remaining overbid is equal to or greater than twenty-five dollars, the public trustee shall make reasonable efforts to identify the owner's current address. The public trustee shall mail the owner a notice regarding the remaining overbid to the best available address no later than thirty days after the expiration of all redemption periods as provided in section 38-38-302.

(3) (a) Unless the property is sold by the sheriff and all the proceeds of the sale are deposited into the registry of the court, any unclaimed remaining overbid from a foreclosure sale held prior to September 1, 2012, shall be transferred by the officer to the county treasurer within ninety calendar days after the expiration of all redemption periods as provided in section 38-38-302 and held in escrow, and any unclaimed remaining overbid from a foreclosure sale held on or after September 1, 2012, shall be held by the officer in escrow. In either case, the remaining overbid shall be held for five years from the date of the sale. The county treasurer or officer, whomever holds the remaining overbid in escrow, shall be answerable for the funds without interest at any time within the five-year period to such persons as shall be legally entitled to the funds. Any interest earned on the escrowed funds shall be paid to the county at least annually. Unclaimed remaining overbids that are less than twenty-five dollars and that are not claimed within five years from the date of sale shall be paid to the general fund of the county, and such moneys paid to the general fund of the county shall become the property of the county. Unclaimed remaining overbids that are equal to or greater than twenty-five dollars and that are not claimed within five years from the date of the sale shall be presumed to be unclaimed property for purposes of the "Unclaimed Property Act" and transferred to the administrator in accordance with such act. After the unclaimed remaining overbids are transferred to the administrator or to the general fund of the county, the county treasurer and officer shall be discharged from any further liability or responsibility for the moneys.

(b) If the unclaimed remaining overbids exceed five hundred dollars and have not been claimed by any person entitled thereto within sixty calendar days from the expiration of all redemption periods as provided by section 38-38-302, the county treasurer or officer shall, within ninety calendar days from the expiration of all redemption periods, commence publication of a notice for four weeks, which means publication once each week for five successive weeks in some newspaper of general circulation in the county where the subject property is located. The county treasurer is responsible for the notice of an overbid from a foreclosure sale held prior to September 1, 2012, and the officer is responsible for the notice of an overbid from a foreclosure sale held on or after September 1, 2012. The notice shall contain the name of the owner, the owner's address as given in the recorded instrument evidencing the owner's interest, and the legal description and street address, if any, of the property sold at the sale and shall state that an overbid was realized from the sale and that,



unless the funds are claimed by the owner or other person entitled thereto within five years from the date of sale, the funds shall be transferred to the state treasurer as part of the "Unclaimed Property Act". The county treasurer or officer, whomever holds the remaining overbid in escrow, shall also mail a copy of the notice to the owner at the best available address.

(c) The fees and costs of publication and mailing required pursuant to this subsection (3) shall be paid from the moneys escrowed by the county treasurer or officer, whomever holds the remaining overbid in escrow.

(4) A lienor who accepts a redemption amount less than the full amount of a lien or a holder of an evidence of debt who accepts a redemption amount less than the amount bid at a sale prior to the expiration of all applicable redemption periods under this article shall not be entitled to receive a portion of any excess proceeds pursuant to this section.

(5) As used in this section, unless the context otherwise requires, "owner" means the record owner of the property as of the recording of the notice of election and demand or lis pendens.

**Source:** L. 90: Entire article R&RE, p. 1662, § 2, effective October 1. L. 2002: Entire section amended, p. 1341, § 11, effective July 1. L. 2004: (2) amended, p. 1207, § 85, effective August 4. L. 2006: Entire section amended, p. 1464, § 17, effective January 1, 2008. L. 2007: (2) amended and (4) added, p. 1838, § 14, effective January 1, 2008. L. 2009: (1) and (2) amended, (HB 09-1207), ch. 164, p. 716, § 12, effective September 1. L. 2012: (1), (2), and (3) amended and (2.5) and (5) added, (SB 12-030), ch. 96, p. 322, § 10, effective September 1.

**Editor's note:** (1) This section is similar to former § 38-37-113, as it existed prior to 1990.

(2) The effective date for amendments made to this section by chapter 305, Session Laws of Colorado 2006, was changed from July 1, 2007, to January 1, 2008, by section 27 of chapter 404, Session Laws of Colorado 2007. (See L. 2007, p. 1849.)

#### ANNOTATION

**Law reviews.** For article, "Foreclosure Sale Excess Proceeds", see 23 Colo. Law. 375 (1994).

#### **38-38-112. Use of electronic documents authorized.**

(1) Repealed.

(2) (a) Consistent with the provisions of the "Uniform Electronic Transactions Act", article 71.3 of title 24, C.R.S., any document or record related to a foreclosure may be accepted by the officer in an electronic format or may be made available to the public by the officer in an electronic format. The officer shall establish and uniformly apply written policies for determining whether and the extent to which the officer shall accept documents or records in electronic form; except that the officer shall not require the use of an electronic format for any purpose under this article.

(b) This subsection (2) shall take effect July 1, 2007.

**Source:** L. 2005: Entire section added, p. 399, § 6, effective August 8. L. 2006: Entire section amended, p. 1465, § 18, effective July 1. L. 2007: (1)(a) and (2)(a) amended, p. 1839, § 15, effective June 1.

**Editor's note:** (1) Subsection (1)(b) provided for the repeal of subsection (1), effective July 1, 2007. (See L. 2006, p. 1465.)

(2) For amendments to subsection (1)(a) by House Bill 07-1157 in effect from June 1, 2007, to July 1, 2007, see L. 2007, p. 1839.

**38-38-113. Rescission of public trustee sale.** (1) If the successful bidder at a foreclosure sale is the holder of the evidence of debt foreclosing the deed of trust or other lien, then such successful bidder, the bidder's attorney, the assignee of the successful bidder pursuant to section 38-38-403, or the assignee's attorney may rescind the sale without obtaining a court order by filing with the public trustee no later than eight business days after the date of the sale a notice of rescission of sale stating that the sale is being rescinded, the number and date of the sale, the name of the person to whom the certificate of purchase was issued, the name of the assignee, if any, the recording date and reception number or book and page number for the recorded certificate of purchase, and the legal description of the property foreclosed. The notice shall be signed and properly acknowledged by the successful bidder or assignee, or signed by the bidder or assignee's attorney. Upon receipt of the notice of rescission of sale, any assignment of the certificate of purchase, the public trustee's fee for the rescission specified in section 38-37-104, and the costs of recording the notice of rescission of the sale, the public trustee shall record the notice of rescission of sale in the county records.

(2) Upon recording of the notice of rescission of sale by the public trustee, the certificate of purchase shall be deemed canceled as if the sale had not occurred, and the evidence of debt and deed of trust shall be deemed fully reinstated with the same lien priority as if the sale had not occurred. The public trustee shall confirm the reinstatement by indorsement on the evidence of debt and deed of trust or copy thereof submitted pursuant to section 38-38-101.

(3) Within ten calendar days after receipt of all documents and fees and costs specified in subsection (1) of this section, the public trustee shall mail a copy of the notice of rescission of sale to each person who was entitled to receive the combined notice pursuant to section 38-38-103. The person rescinding the sale shall provide addressed and stamped envelopes to the public trustee for mailing the copies.

(4) (a) After the recording of the notice of rescission of sale, the holder of the evidence of debt or the holder's assignee, or the attorney for the holder or the assignee, may notify the public trustee in writing to reschedule the sale. The public trustee shall set a new date of sale at least thirty calendar days but not more than forty-five calendar days after the date on which the public trustee receives notice to schedule a new date of sale, subject to the requirements of section 38-38-109 (2).

(b) No later than ten calendar days after receiving notice to schedule a new date of sale, the public trustee shall mail a combined notice setting forth the rescheduled date of sale to each person who was entitled to receive the combined notice pursuant to section 38-38-103.

(c) No later than twenty calendar days after receiving notice to schedule a new date of sale, but no less than ten calendar days prior to the new date of sale, the public trustee shall publish the sale one time only.

(d) All fees and costs of the public trustee for actions performed under this section and the cost of recording the notice of rescission of sale shall be part of the foreclosure costs.

(e) After a sale has been rescinded and rescheduled pursuant to this subsection (4), the sale may be continued in accordance with section 38-38-109 (1) (a).

(5) Nothing in this section shall prevent any person from seeking a rescission of a sale through a court of competent jurisdiction.

(6) Claims for damages by any person arising out of a rescission of a sale pursuant to this section shall be limited to the reasonable actual expenses of the person and shall not include any speculative or expectation damages, awards, or claims of any kind, whether legal or equitable.

(7) The indorsement of the public trustee pursuant to subsection (2) of this section shall be in substantially the following form:

The undersigned, as Public Trustee for the county of \_\_\_\_\_, state of Colorado, by this indorsement, hereby confirms the reinstatement of this (evidence of debt) (deed of trust) (lien) in accordance with the requirements of section 38-38-113, Colorado Revised Statutes.

Date: \_\_\_\_\_



Signature: \_\_\_\_\_

Public Trustee \_\_\_\_\_

For the county of \_\_\_\_\_,

State of Colorado.

**Source: L. 2007:** Entire section added, p. 1839, § 16, effective January 1, 2008.  
**L. 2009:** (1) amended, (HB 09-1207), ch. 164, p. 717, § 13, effective September 1.

**38-38-114. Unclaimed refunds - disposition under “Unclaimed Property Act”.** Moneys payable as a refund for overpayment of a cure of default pursuant to section 38-38-104 or for overpayment of a redemption pursuant to part 3 of this article that remain unclaimed by the owner one year after the moneys became payable are presumed abandoned and shall be reported and paid to the state treasurer in accordance with sections 38-13-110 and 38-13-112.

**Source: L. 2007:** Entire section added, p. 1839, § 16, effective January 1, 2008.

## PART 2

### FORECLOSURE BY INSTALLMENTS

**38-38-201. Foreclosure of installments without acceleration.** (1) Any mortgage or deed of trust securing an evidence of debt payable by installments giving the right to declare the whole indebtedness due and payable on default of the payment of any part thereof may, at the election of the holder of the evidence of debt, be foreclosed as to any one or more past due installments of principal or interest as if the mortgage or deed of trust separately secured each of the past due installments, and, in the event of such election, the officer conducting the foreclosure shall apply the following provisions:

(a) Attorney fees allowed for the attorney for the holder of the evidence of debt shall not exceed ten percent of the amount of principal, interest, and late charges included in the bid prepared in accordance with section 38-38-106.

(b) Fees and costs allowable under section 38-38-107 may be included in the bid.

(c) The amount for which the property is foreclosed shall include past due installments and all sums advanced for fees and costs by the holder of the evidence of debt pursuant to the terms of the mortgage or deed of trust securing the debt.

(d) Not more than one foreclosure proceeding may be commenced pursuant to this section in a period of twelve months.

(e) The notice of election and demand or complaint filed to commence the foreclosure shall contain the following statement: “This is a foreclosure on one or more installments, without acceleration, as authorized by section 38-38-201, Colorado Revised Statutes.”

(f) No deficiency bid shall be made by the holder of the evidence of debt or accepted by the officer conducting the foreclosure sale. Upon the sale and the expiration of all redemption periods, the maker of the secured indebtedness and all parties who may be personally liable thereon shall be released from personal liability on the indebtedness, unless the property is redeemed under section 38-38-302.

(g) The foreclosure shall not affect the continuance of the lien of the mortgage or deed of trust as to any remaining obligation secured by it but not covered by the foreclosure, whether the remaining obligation is due before or after the foreclosure, and the title acquired as a result of the foreclosure shall be subject to the lien securing the remaining obligation.

(2) Nothing in this section shall be construed to prevent the holder of an evidence of debt secured by any mortgage or deed of trust from exercising any option contained therein to declare the whole indebtedness due and payable, nor shall any of the provisions of this section be applicable to a foreclosure in which the whole indebtedness has been declared due and payable.

**Source:** **L. 90:** Entire article R&RE, p. 1663, § 2, effective October 1. **L. 2006:** Entire section amended, p. 1466, § 19, effective January 1, 2008.

**Editor's note:** (1) The provisions of this section are similar to provisions of several former sections as they existed prior to 1990. For a detailed comparison, see the comparative tables located in the back of the index.

(2) The effective date for amendments made to this section by chapter 305, Session Laws of Colorado 2006, was changed from July 1, 2007, to January 1, 2008, by section 27 of chapter 404, Session Laws of Colorado 2007. (See L. 2007, p. 1849.)

## ANNOTATION

**Law reviews.** For article, "Real Estate Potpourri: Attorney's Fees in Foreclosure — Are They Limited to 10 Percent?", see 13 Colo. Law. 226 (1984). For article, "1987 Statutory Amendments Concerning Foreclosures of Deeds of Trust and Mortgages", see 16 Colo. Law. 1386 (1987).

**Annotator's note.** Since § 38-38-201 is similar to §§ 38-38-105 and 38-38-106 as they existed prior to the 1990 repeal and reenactment of this article and article 39, relevant cases construing those provisions have been included in the annotations to this section.

**Application of section limited.** This section applies only to the situation where there is a foreclosure for nonpayment of an installment without any attempt to accelerate. *Jacobs Invs. v. PRD Holdings, Ltd.*, 44 Colo. App. 184, 612 P.2d 1149 (1980).

**Obligee has reasonable time to elect to declare indebtedness due.** Under an ordinary acceleration clause in a mortgage or trust deed, the obligee has a reasonable time after the default or

the event which gives rise to the right to accelerate in which to elect to declare the indebtedness due. *Malouff v. Midland Fed. Sav. & Loan Ass'n*, 181 Colo. 294, 509 P.2d 1240 (1973).

**Attorney fees in foreclosures cannot exceed ten percent of the sum for which the property is foreclosed and must be shown to be reasonable.** *San Miguel Basin State Bank v. Oliver*, 748 P.2d 1342 (Colo. App. 1987).

**Limitation on attorney fees** is applicable both to foreclosures based on default in one or more installments and to foreclosures for the whole amount of accelerated indebtedness. *Kern v. Gebhardt*, 717 P.2d 998 (Colo. App. 1985), *aff'd*, 746 P.2d 1340 (Colo. 1987) (decided under law in effect prior to 1987 amendment).

**Attorney fees on foreclosed deed of trust.** When a deed of trust is foreclosed as a mortgage, the court may award attorney fees. *Bakers Park Mining & Milling Co. v. District Court*, 662 P.2d 483 (Colo. 1983), *aff'd*, 746 P.2d 1340 (Colo. 1987) (decided under law in effect prior to 1987 amendment).

## PART 3

## REDEMPTION

**Cross references:** For tax sale redemptions, see article 12 of title 39.

**38-38-301. Holder of certificate of purchase paying charges - redemption.** The holder of a certificate of purchase may pay at any time after the sale and during the redemption period described in section 38-38-302 the fees and costs that the holder may pay pursuant to section 38-38-107 and may include any such amounts as part of the amount to be paid upon redemption.

**Source:** **L. 90:** Entire article R&RE, p. 1664, § 2, effective October 1. **L. 2002:** (1) amended, p. 1342, § 12, effective July 1. **L. 2006:** Entire section R&RE, p. 1467, § 20, effective January 1, 2008.

**Editor's note:** (1) This section is similar to former § 38-39-101, as it existed prior to 1990.

(2) The effective date for amendments made to this section by chapter 305, Session Laws of Colorado 2006, was changed from July 1, 2007, to January 1, 2008, by section 27 of chapter 404, Session Laws of Colorado 2007. (See L. 2007, p. 1849.)



## ANNOTATION

**Law reviews.** For article, "Executions and Levies on Tangible Property", see 27 Dicta 143 (1950). For note, "Statutory Redemption in Colorado: 1965 Amendments", see 39 U. Colo. L. Rev. 127 (1966). For article, "1987 Statutory Amendments Concerning Foreclosures of Deeds of Trust and Mortgages", see 16 Colo. Law. 1386 (1987).

**Annotator's note.** Since § 38-38-301 is similar to § 38-39-101 as it existed prior to the 1990 repeal and reenactment of this article and article 39, relevant cases construing that provision have been included in the annotations to this section. For additional cases, see the annotations under former § 38-39-101 in the 1982 replacement volume.

**Owner's title and interest vested in grantee of sheriff's deed.** Where real property was levied upon and sold under execution, and owners failed to redeem pursuant to this article, and the trustee in bankruptcy disclaimed all title and interest in property, whatever title and interest owners had therein vested in grantee of sheriff's

deed upon delivery thereof and such grantee was then entitled to possession. *Garcia v. Adjustment Bureau, Inc.*, 148 Colo. 270, 365 P.2d 687 (1961).

**Deed issued prematurely by public trustee not void.** A deed issued prematurely by the public trustee following a foreclosure sale is not void, but carries the naked title held by the trustee and does not divest the mortgagor of his redemption rights. *Graham v. Alcoves, Inc.*, 148 Colo. 379, 366 P.2d 375 (1961).

**Expenses not incurred in connection with foreclosure are not allowable upon redemption.** *Rowe v. Tucker*, 38 Colo. App. 532, 560 P.2d 843 (1977).

There is no provision for payment of the purchaser's attorney's fees or any other expenses not incident to protecting the property. *Davis Mfg. & Supply Co. v. Coonskin Props., Inc.*, 646 P.2d 940 (Colo. App. 1982).

**Applied** in *Alexander Dawson, Inc. v. Sage Creek Canyon Co.*, 37 Colo. App. 339, 546 P.2d 969 (1976).

### **38-38-302. Redemption by lienor - procedure. (1) Requirements for redemption.**

A lienor or assignee of a lien is entitled to redeem if the following requirements are met to the satisfaction of the officer:

(a) The lienor's lien is a deed of trust or other lien that is created or recognized by state or federal statute or by judgment of a court of competent jurisdiction;

(b) The lien is a junior lien as defined in section 38-38-100.3 (11);

(c) The lienor's lien appears by instruments that were duly recorded in the office of the clerk and recorder of the county prior to the recording of the notice of election and demand or lis pendens and the lienor is one of the persons who would be entitled to cure pursuant to section 38-38-104 (1), regardless of whether such lienor filed a notice of intent to cure. If, prior to the date and time of the recording of the notice of election and demand or lis pendens, a lien was recorded in an incorrect county, the holder's rights under this section shall be valid only if the lien is rerecorded in the correct county at least fifteen calendar days prior to the actual date of sale.

(d) The lienor has, within eight business days after the sale, filed a notice with the officer of the lienor's intent to redeem. A lienor may file a notice of intent to redeem more than eight business days after sale if:

(I) No lienor junior to the lienor seeking to file the late intent to redeem has redeemed;

(II) The redemption period for the lienor seeking to file the late intent to redeem has not expired;

(III) A redemption period has been created by the timely filing of a notice of intent to redeem; and

(IV) The notice of intent to redeem is accompanied by a written authorization from the attorney for the holder of the certificate of purchase according to the records of the officer conducting the sale, or, if no attorney is shown, then the holder of the certificate of purchase, or, if a redemption has occurred, from the immediately prior redeeming lienor, or the attorney for the immediately prior redeeming lienor, authorizing the officer to accept such notice of intent to redeem.

(e) The lienor has attached to the notice of intent to redeem the original instrument and any assignment of the lien to the person attempting to redeem, or certified copies thereof, or in the case of a qualified holder, a copy of the instrument evidencing the lien and any assignment of the lien to the person attempting to redeem. If the original instrument is delivered to the officer, the officer shall return the instrument to the lienor and retain a copy.

(f) The lienor has attached to the notice of intent to redeem a signed and properly acknowledged statement of the lienor, or a signed statement by the lienor's attorney, setting forth the amount required to redeem the lienor's lien, including per diem interest, through the end of the nineteenth business day after the sale with the same specificity and itemization as required in section 38-38-106. If the amount required to redeem the lienor's lien shown on the statement is zero, the lienor has no right to redeem unless section 38-38-305 applies.

(2) **Request for redemption amount.** Upon receipt by the officer of the notice of intent to redeem filed by a person entitled to redeem under this section, the officer shall within one business day transmit by mail, facsimile, or other electronic means to the attorney for the holder of the certificate of purchase, or if no attorney, then to the holder, a written request for a written or electronic statement of all sums necessary to redeem the sale. The statement shall include the amounts required to redeem in accordance with this section.

(3) **Statement of redemption.** (a) Upon receipt of notice that an intent to redeem was filed, the holder of a certificate of purchase shall submit a signed and acknowledged statement, or the attorney for the holder shall submit a signed statement, to the officer, no later than thirteen business days following the sale, specifying all sums necessary to redeem as of the date of the statement, the amount of per diem interest accruing thereafter, and the interest rate on which the amount is based. A holder of the certificate of purchase that is not a qualified holder, or the attorney for the holder, shall also submit to the officer receipts, invoices, evidence of electronic account-to-account transfers, or copies of loan servicing computer screens evidencing the fees and costs and verifying that the fees and costs were actually incurred as of the date of the statement, along with the per diem amounts that accrue after the date of sale. The holder or the attorney for the holder may amend the statement from time to time to reflect additional sums advanced as allowed by law, but the statement shall not be amended later than two business days prior to the commencement of the redemption period pursuant to paragraph (a) of subsection (4) of this section or each subsequent redemption period pursuant to paragraph (b) of subsection (4) of this section.

(b) If the holder of the certificate of purchase or the attorney for the holder fails to submit the initial written statement to the officer within thirteen business days after the sale, the officer may calculate the amount necessary to redeem by adding to the successful bid the accrued interest from the sale through the redemption date. The accrued interest shall be calculated by multiplying the amount of the bid by the regular rate of annual interest specified in the evidence of debt, deed of trust, or other lien being foreclosed, divided by three hundred sixty-five and then multiplied by the number of days from the date of sale through the redemption date. The officer shall transmit by mail, facsimile, or other electronic means to the party filing the notice of intent to redeem, promptly upon receipt, the statement filed by the holder, or if no such statement is filed, the officer's estimate of the redemption figure, which shall be transmitted no later than the commencement of the redemption period pursuant to paragraph (a) of subsection (4) of this section or each subsequent redemption period pursuant to paragraph (b) of subsection (4) of this section.

(4) **Redemption period.** (a) No sooner than fifteen business days nor later than nineteen business days after a sale under this article, the junior lienor having the most senior recorded lien on the sold property or any portion thereof, according to the records, having first complied with the requirements of subsection (1) of this section, may redeem the property sold by paying to the officer, no later than 12 noon on the last day of the lienor's redemption period, in the form specified in section 38-37-108, the amount for which the property was sold with interest from the date of sale, together with all sums allowed under section 38-38-301. Interest on the amount for which the property was sold shall be charged at the default rate specified in the evidence of debt, deed of trust, or other lien being foreclosed or, if not so specified, at the regular rate specified in the evidence of debt, deed of trust, or other lien being foreclosed. If different interest rates are specified in the evidence of debt, deed of trust, or other lien being foreclosed, the interest rate specified in the evidence of debt shall prevail. If the evidence of debt does not specify an interest rate, including a default interest rate, applicable interest rate as specified in the deed of trust or other lien being foreclosed shall apply.



(b) (I) Each subsequent lienor entitled to redeem shall, in succession, have an additional period of five business days to redeem. The right to redeem shall be in priority of such liens according to the records. The redeeming lienor shall redeem by paying to the officer, on or before 12 noon of the last day of the lienor's redemption period:

(A) The redemption amount paid by the prior redeeming lienor, with interest at the rate specified in paragraph (a) of this subsection (4), plus the amount claimed in the statement delivered by the immediately prior redeeming lienor pursuant to subsection (6) of this section, including the per diem amounts through the date on which the payment is made; or

(B) If no prior lienor has redeemed, the redemption amount determined pursuant to paragraph (a) of this subsection (4).

(II) If the redeeming lienor is the same person as the holder of the certificate of purchase or the prior redeeming lienor as evidenced by the instruments referred to in subsection (1) of this section, regardless of the number of consecutive liens held by the redeeming lienor, the redeeming lienor shall not pay to the officer the redemption amount indicated in the certificate of purchase or certificate of redemption held by such person, but shall only pay to the officer the unpaid fees and costs required by the redemption and provide the statement described in paragraph (f) of subsection (1) of this section.

(c) If the statement described in paragraph (f) of subsection (1) of this section so states, or upon other written authorization from the holder of the certificate of purchase or the then-current holder of the certificate of redemption or the attorney for either such holder, the officer may accept as a full redemption an amount less than the amount specified in paragraph (a) of subsection (3) of this section. Notwithstanding the first sentence of this paragraph (c), the amount bid at sale shall determine the amount and extent of any deficiency remaining on the debt represented by the evidence of debt that is the subject of the foreclosure as stated in the bid pursuant to section 38-38-106 (2). Any redemption under this section shall constitute a full redemption and shall be deemed to be payment of all sums to which the holder of the certificate of purchase is entitled.

(d) On the ninth business day after the date of sale, the officer shall set the dates of the redemption period of each lienor in accordance with this subsection (4). The redemption period of a lienor shall not be shortened or altered by the fact that a prior lienor redeemed before the expiration of his or her redemption period.

(5) **Certificate of redemption.** Upon receipt of the redemption payment pursuant to subsection (4) of this section, the officer shall execute and record a certificate of redemption pursuant to section 38-38-402. Upon the expiration of each redemption period under this section, the officer shall disburse all redemption proceeds to the persons entitled to receive them.

(6) **Certificate of lienor.** A redeeming lienor shall pay to the officer the amount required to redeem and shall deliver to the officer a signed and properly acknowledged statement by the lienor or a signed statement by the lienor's attorney showing the amount owing on such lien, including per diem interest and fees and costs actually incurred that are permitted by subsection (7) of this section and for which the lienor has submitted to the officer receipts, invoices, evidence of electronic account-to-account transfers, or copies of loan servicing computer screens evidencing the fees and costs and verifying that the fees and costs were actually incurred as of the date of the statement of redemption with the per diem amounts that accrue thereafter. At any time before the expiration of a redeeming lienor's redemption period, the redeeming lienor may submit a revised or corrected certificate, or the attorney for the lienor may submit a revised or corrected statement.

(7) **Payment of fees and costs.** A redeeming lienor may, during such lienor's redemption period described in subsection (4) of this section, pay the fees and costs that the holder of the evidence of debt may pay pursuant to section 38-38-107.

(8) **Misstatement of redemption amount.** If an aggrieved person contests the amount set forth in the statement filed by a redeeming lienor pursuant to paragraph (f) of subsection (1) of this section or by a holder of a certificate of purchase pursuant to paragraph (a) of subsection (3) of this section and a court determines that the redeeming lienor or holder of the certificate of purchase has made a material misstatement on the statement with respect to the amount due and owing to the redeeming lienor or the holder of the certificate of

purchase, the court shall, in addition to other relief, award to the aggrieved person the aggrieved person's court costs and reasonable attorney fees and costs.

(9) **No partial redemption.** A lienor holding a lien on less than all of, or a partial interest in, the property sold at sale shall redeem the entire property. No partial redemption shall be permitted under this part 3. The priority of liens for purposes of this section shall be determined without consideration of the fact that the lien relates to only a portion of the property or to a partial interest therein.

(10) **Federal redemption rights.** Any redemption rights granted under federal law are separate and distinct from the redemption rights granted under this part 3. All liens that are junior to the deed of trust or other lien being foreclosed pursuant to this article shall be divested by the sale under this article, subject to the redemption rights provided in this part 3. The officer conducting a foreclosure under this article is not designated to receive redemptions under federal law.

**Source:** **L. 90:** Entire article R&RE, p. 1664, § 2, effective October 1. **L. 98:** (4) amended, p. 221, § 1, effective August 5. **L. 2002:** (1), IP(4)(b)(I), and (4)(d) amended and (1.5), (1.6), and (4.5) added, p. 1343, § 13, effective July 1. **L. 2006:** Entire section R&RE, p. 1467, § 21, effective January 1, 2008. **L. 2007:** IP(1)(d), (1)(e), (3), (4)(a), (4)(c), and (4)(d) amended, p. 1841, § 17, effective January 1, 2008. **L. 2009:** IP(1), (1)(c), (1)(d)(III), (1)(d)(IV), (1)(f), (3)(a), (6), and (8) amended, (HB 09-1207), ch. 164, p. 717, § 14, effective January 1, 2010. **L. 2012:** (1)(e) amended, (SB 12-030), ch. 96, p. 324, § 11, effective September 1.

**Editor's note:** (1) This section is similar to former § 38-39-102, as it existed prior to 1990.

(2) The effective date for amendments made to this section by chapter 305, Session Laws of Colorado 2006, was changed from July 1, 2007, to January 1, 2008, by section 27 of chapter 404, Session Laws of Colorado 2007. (See L. 2007, p. 1849.)

(3) Section 14 of chapter 96, Session Laws of Colorado 2012, provides that the act amending subsections (1), (2), and (3) and adding subsections (2.5) and (5) applies to the foreclosure of any deed of trust or other lien with respect to which a notice of election and demand or lis pendens is recorded in the office of the clerk and recorder of the county where the property or a portion of the property is located on or after September 1, 2012.

## ANNOTATION

- I. General Consideration.
- II. Right of Redemption.
  - A. In General.
  - B. Rights and Liabilities of Parties.
- III. Agricultural Real Estate.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "Revising Redemptions", see 6 Dicta 16 (1929). For article, "Foreclosure by Sale by Public Trustee of Deeds of Trust in Colorado", see 14 Dicta 5 (1936). For article, "Foreclosure by Sale by Public Trustee of Deeds of Trust in Colorado", see 28 Dicta 437 (1951). For article, "Forms Committee Presents Standard Pleading Samples to Be Used in Foreclosures Through Public Trustee", see 28 Dicta 461 (1951). For article, "Forms Committee Presents Additional Standard Pleading Samples for Use in Foreclosures Through Public Trustee", see 29 Dicta 1 (1952). For article, "Enforcement of Security Interests in Colorado", see 25 Rocky Mt. L. Rev. 1 (1952). For article, "Statutory Redemption in Colorado", see 30 Dicta 79 (1953). For note,

"Statutory Redemption in Colorado: 1965 Amendments", see 39 U. Colo. L. Rev. 127 (1966). For comment, "The Effect of Certified Realty on Mortgage Foreclosure in Colorado", see 52 U. Colo. L. Rev. 301 (1981). For comment, "The Effect of Certified Realty Corp. v. Smith, 198 Colo. 222, 597 P.2d 1043 (1979), on Mortgage Foreclosure in Colorado", see 52 U. Colo. L. Rev. 301 (1981). For article, "Public Trustee's Deeds and Redemption Under Section 362 of the Bankruptcy Code", see 12 Colo. Law. 229 (1983). For article, "A Review of Agricultural Law: Hard Times and Hard Choices", see 15 Colo. Law. 629 (1986). For article, "Recent Statutory Amendments to the Public Trustee and Sheriff Foreclosure Process", see 15 Colo. Law. 794 (1986). For article, "The Colorado Farm Homestead Protection Act", see 15 Colo. Law. 1642 (1986). For article, "1987 Statutory Amendments Concerning Foreclosures of Deeds of Trust and Mortgages", see 16 Colo. Law. 1386 (1987). For article, "Real Estate Foreclosures and Federal Tax Liens", see 17 Colo. Law. 35 (1988). For article, "Recent Developments in Foreclosure Law",



see 23 Colo. Law. 599 (1994). For article, "Artificial Redemption Rights: A Tool of Foreclosure Investing", see 28 Colo. Law. 99 (October 1999).

**Annotator's note.** The following annotations include cases decided under this section as it existed prior to its 2006 repeal and reenactment.

**Section encompasses foreclosure of any lien.** This section encompasses foreclosure by deed of trust or of any other lien. *Frank v. First Nat'l Bank*, 653 P.2d 748 (Colo. App. 1982).

**In determining whether foreclosure sale and issuance of certificate of purchase was an avoidable transfer** under 11 U.S.C. § 548, full amount of junior liens must be subtracted from fair market value of property sold before determining whether reasonably equivalent value was paid for certificate of purchase. In re *Garrison*, 56 Bankr. 528 (Bankr. D. Colo. 1986).

**Requirement that a certificate of redemption be issued only after the expiration of the proper redemption period does not apply to judgment lienors.** Limitation on the execution and delivery of a certificate of redemption pursuant to subsection (2) only applies to owners and other persons liable for deficiencies after the foreclosure sale. *Nat'l Real Estate Inv., LLC v. WYSE Fin. Servs., Inc.*, 66 P.3d 111 (Colo. App. 2002), *aff'd*, 92 P.3d 918 (Colo. 2004).

**Applied** in *Ryan v. Staples*, 76 F. 721 (8th Cir. 1896); *Blitz v. Moran*, 17 Colo. App. 253, 67 P. 1020 (1902); *Roose v. Gove*, 32 Colo. 522, 77 P. 246 (1904); *McKee v. Elwell*, 69 Colo. 316, 194 P. 616 (1920); *Stryker v. Dunn*, 72 Colo. 45, 209 P. 644 (1922); *Bailey v. Merritt*, 90 Colo. 338, 9 P.2d 485 (1932); *Maxwell v. District Court*, 641 P.2d 931 (Colo. 1982); *Jenkins v. Peet*, 19 Bankr. 105 (Bankr. D. Colo. 1982); *Moreland v. Marwich, Ltd.*, 665 P.2d 613 (Colo. 1983); *Flett v. Turgeon*, 699 P.2d 10 (Colo. App. 1984); *Cole v. Farner*, 749 P.2d 970 (Colo. App. 1987).

## II. RIGHT OF REDEMPTION.

### A. In General.

**Right to redeem from execution sale is statutory.** The right to redeem from an execution sale is a purely statutory one. *Paddock v. Staley*, 13 Colo. App. 363, 58 P. 363 (1899); *Davis Mfg. amp; Supply Co. v. Coonskin Props., Inc.*, 646 P.2d 940 (Colo. App. 1982).

Without the statutes of redemption, neither judgment debtors nor judgment creditors, nor grantees of the judgment debtor, taking his title, could redeem from an execution sale. *Jenkins v. Gold Dollar Mining & Milling Co.*, 27 Colo. App. 247, 149 P. 269 (1915); *Paddock v. Staley*, 13 Colo. App. 363, 58 P. 363 (1899).

**Redemption period tolled by federal statute.** The automatic stay provision of 11 U.S.C. § 362(a) tolls the redemption period provided

for in this section. *Eaton Land & Cattle Co. v. Rocky Mt. Invs.*, 28 Bankr. 890 (Bankr. D. Colo. 1983).

**Redemption period not tolled by federal statute.** 11 U.S.C. § 362 does not "toll" or "suspend" the running of the redemption period in Colorado as provided for in this section. In re *Murphy*, 22 Bankr. 663 (Bankr. D. Colo. 1982).

**Or sale set aside.** A court is not justified in invoking its equity powers to set aside a sale or extend the redemption period unless there have been circumstances such as fraud, deceit, or collusion by the purchaser, or unless a holder of a right of redemption has been misled by erroneous information as to the applicable redemption period. *Davis Mfg. & Supply Co. v. Coonskin Props., Inc.*, 646 P.2d 940 (Colo. App. 1982).

**Extension of redemption period.** Where, on the date the redemption period expires, the debtor files a chapter 11 bankruptcy petition, pursuant to 11 U.S.C. § 108(b), the period of redemption is extended only for an additional 60 days, the federal automatic stay provision being inapplicable. *Westergaard v. Cucumber Creek Dev., Inc.*, 33 Bankr. 820 (Bankr. D. Colo. 1983).

**Debtor's right to redeem generally provides adequate remedy** to safeguard him against an inadequate sale price. *Gale v. Rice*, 636 P.2d 1280 (Colo. App. 1981).

**Redemption annuls sale.** *White v. Crow*, 110 U.S. 183, 4 S. Ct. 71, 28 L. Ed. 113 (1884).

Upon a redemption from a sale of real estate under execution, the certificate of sale becomes void, and a sheriff's deed issued thereon is a nullity. *Floyd v. Sellers*, 7 Colo. App. 491, 44 P. 371 (1896).

The payment of the money by defendant, with the purpose of redemption, to the sheriff who sold the land on execution, and its receipt by the latter without objection, nullifies and abrogates the sale as between defendant and the purchaser, though the sheriff has not formally canceled the certificate of purchase, nor directed the execution of a certificate of redemption and though he has subsequently executed a deed of the land to the purchaser. *Colo. Mfg. Co. v. McDonald*, 15 Colo. 516, 25 P. 712 (1890).

**General rule as to payment.** The general rule is that redemption requires payment of the full purchase price received at the foreclosure sale together with incidental expenses. *Rowe v. Tucker*, 38 Colo. App. 532, 560 P.2d 843 (1977).

**Test of right of redemption.** Actual ownership was not intended to be the test of the right of redemption. *Floyd v. Sellers*, 7 Colo. App. 491, 44 P. 371 (1896).

**Character of property material factor in ascertaining redemption period.** The character of the property rather than its use is the material factor in ascertaining the period for redemption.

Rowe v. Tucker, 38 Colo. App. 532, 560 P.2d 843 (1977).

**Period of redemption begins to run** from the date a judgment of foreclosure is entered. Oman v. Morris, 28 Colo. App. 124, 471 P.2d 430 (1970).

**Where equitable extension of redemption period appropriate.** Where holders of right of redemption relied on the public trustee's mistake as to whether the six-month period of redemption for agricultural property or the 75-day period for nonagricultural property applied and where there was an inadequate sales price at foreclosure sale, equitable extension of the period of redemption was an appropriate remedy. Arnold v. Gebhardt, 43 Colo. App. 387, 604 P.2d 1192 (1979); Johnson v. Smith, 651 P.2d 422 (Colo. App. 1982).

**Redemption period may not be extended, absent wrongdoing.** The bankruptcy court cannot exercise its equity power to extend the redemption period established by subsection (2), absent guilt of wrongdoing by the party seeking the foreclosure, which adversely affects the debtor's right of redemption. In re Headley, 13 B.R. 295 (Bankr. D. Colo. 1981).

**Inadequacy of sale price not enough to set aside sale.** Inadequacy of sales price at foreclosure sale, standing alone, does not warrant setting aside the sale but it may be considered as one of the factors which requires the court to employ an equitable remedy for the holders of the right of redemption. Arnold v. Gebhardt, 43 Colo. App. 387, 604 P.2d 1192 (1979).

A disparity between the market value and the price paid at sale is not controlling and, standing alone, is not sufficient cause for setting aside a sale or extending a redemption period. Davis Mfg. & Supply Co. v. Coonskin Props., Inc., 646 P.2d 940 (Colo. App. 1982).

**Effect of sheriff's deed executed after six months.** As to a judgment debtor or his grantee, a sheriff's deed was valid if executed and delivered after six months and before nine months from the date of sale, providing there had been no redemption. Finch v. Turner, 21 Colo. 287, 40 P. 565 (1895); McLaughlin v. Wilson, 23 Colo. App. 59, 127 P. 242 (1912).

**"Months".** There is no dispute that the word "months", in the context of subsection (2), means calendar months, rather than some arbitrarily established number of days. Rowe v. Tucker, 38 Colo. App. 532, 560 P.2d 843 (1977).

## B. Rights and Liabilities of Parties.

**Owner of premises and lienholders of record may redeem.** The owner of the premises and the lienholders of record have a right to redeem from the sale on foreclosure by the sheriff. Lane v. Morris, 77 Colo. 343, 237 P. 154 (1925); Baber v. Baber, 28 Colo. App. 530, 474

P.2d 630 (1970); Jenkins v. Peet, 13 B.R. 721 (D. Colo. 1981).

A redemption may be made by a judgment debtor where the judgment was against him and another, and the land sold under an execution issued thereon as the land of both defendants, notwithstanding that he may have had no interest in the property at the time of the levy or sale. Floyd v. Sellers, 7 Colo. App. 491, 44 P. 371 (1896).

**Owner has possessory rights until expiration of redemption period.** On sale under foreclosure of a trust deed, the owner thereafter has merely the statutory right to redeem and the right to possession of the premises until the expiration of the redemption period. Lane v. Morris, 77 Colo. 343, 237 P. 154 (1925); Bankers Bldg. & Loan Ass'n v. Fleming Bros. Lumber Co., 83 Colo. 335, 264 P. 1087 (1928); Union Mut. Protective Ass'n v. San Luis State Bank, 86 Colo. 293, 281 P. 366 (1929).

**Owner retain equitable title after giving trust deed on property.** When the owner of property gives a trust deed thereon, his legal title is vested in the trustee and the equitable title or equity of redemption remains in the owner. Bankers Bldg. & Loan Ass'n v. Fleming Bros. Lumber Co., 83 Colo. 335, 264 P. 1087 (1928).

**Redemption of interest of one joint tenant.** A judgment creditor with a lien against the property interest of one joint tenant may redeem that interest without redeeming the interest of the other joint tenant. First Nat'l Bank v. Energy Fuels Corp., 200 Colo. 540, 618 P.2d 1115 (1980).

**Right to rents and reversion of leased premises.** Where premises are leased, the landlord is entitled to both the rents and the reversion, and when the reversion of the landlord is transferred, the rights to rents accruing after the transfer of the reversion pass to the transferee; therefore, when the landlord's interest in the demised premises are transferred to a purchaser on a sheriff's sale on foreclosure, the rights to the rents reserved in the lease pass to the purchaser and, after the sheriff's sale and the failure to redeem by either the owner or the mortgagee, the purchasers acquired the rights to the rents, profits accruing after the right of redemption expired. Baber v. Baber, 28 Colo. App. 530, 474 P.2d 630 (1970).

**When owner's right of redemption expires,** all of his right, title, and interest in and to the land is extinguished; this same rule applies to the interest of lienholders who have a right to redeem. Lane v. Morris, 77 Colo. 343, 237 P. 154 (1925); Baber v. Baber, 28 Colo. App. 530, 474 P.2d 630 (1970); Jenkins v. Peet, 13 B.R. 721 (D. Colo. 1981).

**Plaintiff liable on note for entire indebtedness.** Where plaintiff purchased property consisting of three parcels, secured by deed of trust, assuming to pay note secured by deed of trust,



and where he then sold two of the parcels, but there was no evidence that the purchasers agreed to pay any part of the indebtedness, and where plaintiff thereafter defaulted making payments leading to loss of all the parcels by foreclosure and public trustee's sale, plaintiff is still liable on the note for the entire indebtedness. *Ellickson v. Dull*, 34 Colo. App. 25, 521 P.2d 1282 (1974).

**Proper parties to maintain action to set aside foreclosure.** Where the grantor in a deed of trust conveyed his equity of redemption before foreclosure and, at the foreclosure sale, the property did not sell for enough to pay off his note, both he and his grantee of the equity of redemption have sufficient interest and are proper parties to maintain an action to set aside the foreclosure sale on the ground that it was illegal and void. *Brewer v. Harrison*, 27 Colo. 349, 62 P. 224 (1900).

**Right to redemption notice.** To be entitled to notice that a deed of trust is being foreclosed, party who has right to redeem and who claims the right to a redemption notice must make his interest in the property known by recording that interest after the deed of trust has been recorded. *S.L.K. Testamentary Trust v. Davids*, 692 P.2d 1147 (Colo. App. 1984), *aff'd*, 728 P.2d 1259 (Colo. 1987).

**Right of redemption is based on surety's potential liability for a deficiency.** Therefore, if an inchoate right of redemption is extinguished by a foreclosure sale resulting in the satisfaction of the deficiency, surety is no longer potentially liable and has no right to notice. *S.L.K. Testamentary Trust v. Davids*, 728 P.2d 1259 (Colo. 1987).

**Junior lien creditor may redeem from a public trustee's sale without complying with**

**the homestead exemption statute.** *Howell v. Farrish*, 725 P.2d 9 (Colo. App. 1986).

**Right to redeem of junior lienor with partial interest in property.** A junior lienor, who is the beneficiary of a deed of trust upon only part of the property that has been foreclosed upon by a senior lienor, may not redeem only that part of the property that is subject to his deed of trust. *Pheney v. W. Nat. Bank*, 762 P.2d 693 (Colo. App. 1988); *Indep. Trust v. Stan Miller, Inc.*, 796 P.2d 483 (Colo. 1990).

**A right of redemption may not be severed from the property interest it serves.** *Backhart v. HTS Props., LLC*, 981 P.2d 208 (Colo. App. 1998).

### III. AGRICULTURAL REAL ESTATE.

**Application of agricultural real estate exception.** The "agricultural real estate" exception to the otherwise applicable 75-day period, provided for in subsection (1), applies only to foreclosures under mortgages and deeds of trust, and is not applicable to sales upon foreclosure of mechanics' liens or upon sale under execution. *Kimtruss Corp. v. Westland Manor Nursing Home N., Inc.*, 39 Colo. App. 542, 568 P.2d 105 (1977).

**Mining property is "agricultural real estate"** for the purposes of this section. *Rowe v. Tucker*, 38 Colo. App. 532, 560 P.2d 843 (1977).

Mining property is not ordinarily considered to be agricultural. However, since it is apparent that for redemption purposes the general assembly sought only to distinguish undeveloped rural lands from developed urbanized property, the statutory definition here places both agricultural and mining property in the same category. *Rowe v. Tucker*, 38 Colo. App. 532, 560 P.2d 843 (1977).

### 38-38-303. Time of redemption by lienor - repeal. (Repealed)

**Source:** L. 90: Entire article R&RE, p. 1666, § 2, effective October 1. L. 2002: (1), (2), and (4) amended and (1.5), (5), (6), (7), and (8) added, p. 1345, § 14, effective July 1. L. 2006: (9) added by revision, p. 1481, §§ 40, 41.

**Editor's note:** (1) Prior to its repeal in 2007, this section was similar to former § 38-39-103, as it existed prior to 1990.

(2) Subsection (9) provided for the repeal of this section, effective July 1, 2007. The effective date for amendments made to this section by chapter 305, Session Laws of Colorado 2006, was changed from July 1, 2007, to January 1, 2008, by section 27 of chapter 404, Session Laws of Colorado 2007. (See L. 2007, p. 1849.)

### 38-38-304. Effect of redemption.

(1) and (2) (Deleted by amendment, L. 2006, p. 1471, § 22; L. 2007, p. 1849, § 27, effective January 1, 2008.)

(3) If redemption is made by a lienor, the certificate of redemption, duly recorded, operates as an assignment to the lienor of the estate and interest acquired by the purchaser at the sale, subject to the rights of omitted parties as defined in section 38-38-506 (1) and persons who may be entitled subsequently to redeem.

**Source:** L. 90: Entire article R&RE, p. 1666, § 2, effective October 1. L. 2006: Entire section amended, p. 1471, § 22, effective January 1, 2008.

**Editor's note:** (1) This section is similar to former § 38-39-105, as it existed prior to 1990.

(2) The effective date for amendments made to this section by chapter 305, Session Laws of Colorado 2006, was changed from July 1, 2007, to January 1, 2008, by section 27 of chapter 404, Session Laws of Colorado 2007. (See L. 2007, p. 1849.)

## ANNOTATION

**Law reviews.** For article, "Foreclosure by Sale by Public Trustee of Deeds of Trust in Colorado", see 14 Dicta 5 (1936). For note on the act original which inserted this section, see 28 Dicta 176 (1951). For article, "Foreclosure by Sale by Public Trustee of Deeds of Trust in Colorado", see 28 Dicta 437 (1951). For article, "Forms Committee Presents Additional Standard Pleading Samples for Use in Foreclosures Through Public Trustee", see 29 Dicta 1 (1952). For article, "Statutory Redemption in Colorado", see 30 Dicta 79 (1953).

**Annotator's note.** Since § 38-38-304 is similar to § 38-39-105 as it existed prior to the 1990 repeal and reenactment of this article and article 39, relevant cases construing that provi-

sion have been included in the annotations to this section.

**Lienor cannot be divested of the rights that flow from redemption** once payment of the redemption amount has been lawfully made to the public trustee or sheriff in accordance with the statute. Accordingly, the redemption rights of the assignee of a judgment creditor could not be extinguished by a subsequent satisfaction of the judgment. *WYSE Fin. Servs., Inc. v. Nat'l Real Estate Inv., LLC*, 92 P.3d 918 (Colo. 2004).

**Applied** in *Norman, Inc. v. Holman*, 105 Colo. 294, 97 P.2d 739 (1939); *Home Owners' Loan Corp. v. Meyer*, 110 Colo. 501, 136 P.2d 282 (1943).

**38-38-305. Lessee, easement holder, and installment land contract vendor considered as lienors - installment land contract vendee considered as an owner.** (1) For the purposes of this article, a lessee of, or the holder of an easement encumbering, property shall be considered as a lienor, but without any lien amount, and shall be subject to all requirements in this article with respect to lienors. If a subsequent lienor redeems from the redemption of a lessee or easement holder, such subsequent lienor in acquiring said property takes the same subject to such lease or easement.

(1.5) (a) The notice to the lessee or lessees who have unrecorded possessory interests in the property being foreclosed as provided for by this article and article 37 of this title by virtue of any foreclosure of a mortgage, trust deed, or other lien or by virtue of an execution and levy shall be mailed to the lessee or lessees of a single-family residence or a multiple-unit residential dwelling. Such notice shall be in writing and shall be sent by regular mail. Notice is complete upon mailing to the lessee at the address of the premises or by addressing such notice to "Occupant" followed by the address.

(b) Nothing in this section shall affect any rights under this article of a lessee whose residential lease is recorded.

(2) For the purposes of this article, an installment land contract vendor of property shall be considered as a lienor for the unpaid portion of the purchase price, interest, and other amounts provided under the installment land contract and shall be subject to all requirements in this article with respect to lienors; but such installment land contract vendor shall not be considered as an owner as to any portion of such property.

(3) For the purposes of this article, an installment land contract vendee of property shall be considered as an owner except as to any portion of such property that such vendee may thereafter have transferred, as evidenced by a recorded instrument, and such vendee shall be subject to all requirements in this article with respect to owners.

(4) Repealed.

**Source:** L. 90: Entire article R&RE, p. 1667, § 2, effective October 1; (1.5) added, p. 1684, § 4, effective October 1. L. 2007: (4)(b) added by revision, pp. 1848, 1849, §§ 26, 28.



**Editor's note:** (1) This section is similar to former § 38-39-106, as it existed prior to 1990.

(2) Subsection (4)(b) provided for the repeal of subsection (4), effective January 1, 2008. (See L. 2007, pp. 1848, 1849.)

## ANNOTATION

**Law reviews.** For article, "Foreclosure by Sale by Public Trustee of Deeds of Trust in Colorado", see 14 Dicta 5 (1936). For article, "Foreclosure by Sale by Public Trustee of Deeds of Trust in Colorado", see 28 Dicta 437 (1951). For article, "Forms Committee Presents Additional Standard Pleading Samples for Use in Foreclosure Through Public Trustee", see 29 Dicta 1 (1952).

**Annotator's note.** Since § 38-38-305 is similar to § 38-39-106 as it existed prior to the 1990 repeal and reenactment of this article and article 39, relevant cases construing that provision have been included in the annotations to this section.

**An implied lease based on the terms of an earlier pre-foreclosure lease was created** since the property owner/landlord accepted monthly payments from the tenant and did not renounce the prior agreement. *Tanktech, Inc. v. First Interstate Bank*, 851 P.2d 174 (Colo. App. 1992).

**Because a property lessee is considered a lienor under this section**, upon foreclosure of a senior security interest, any subordinate leases, liens, or encumbrances are extinguished once the applicable redemption period has expired. *First Interstate Bank v. Tanktech, Inc.*, 864 P.2d 116 (Colo. 1993).

**A right of redemption may not be severed from the property interest it serves.** *Backhart v. HTS Props., LLC*, 981 P.2d 208 (Colo. App. 1998).

**This section does not require an installment land contract vendor to foreclose upon default as a matter of law.** Instead, the section describes when certain redemption rights and rights to cure a default exist. The section simply codifies previously existing equitable rights of redemption that were recognized by courts of equity. *Paraguay Place-View Trust v. Gray*, 981 P.2d 681 (Colo. App. 1999).

However, this does not mean that the provisions of this section have no application when there is a default in an installment land contract. When a default occurs in such a contract and the vendor seeks to obtain possession, the vendor may initiate a forcible entry and detainer (FED) action. Thereafter, a court may determine whether the vendor can proceed by way of FED action or, instead, must proceed by way of foreclosure. If the court requires foreclosure, the vendor must foreclose under the terms of article 38 and, under this section, the vendee has a right to cure and a right of redemption. *Paraguay Place-View Trust v. Gray*, 981 P.2d 681 (Colo. App. 1999).

**38-38-306. Rights of other lienors to redeem.** (1) A judgment creditor whose judgment has been made a lien of record and who has complied with the other conditions of a lienor required by this article may redeem as a lienor.

(2) A mechanic's lien claimant or any other person claiming the right to a statutory lien on real property shall have the right to redeem as a lienor despite the fact that the claim has not been reduced to judgment, if the lien or lien claim has been recorded as required or permitted by statute and the holder thereof has complied with the other conditions required of a lienor by this article. If another lienor redeems after such lien claimant, that portion of the redemption amount attributable to the claim of such lien claimant, as evidenced by such claimant's recorded lien, shall be held in escrow by the officer until a final judgment has been entered in favor of such claimant confirming the claimant's right to a lien and all periods for appeal have expired, whereupon there shall be paid to such claimant from the escrow the amount of the lien claim as established by the judgment, with any interest earned thereon, and the balance, if any, shall be refunded to the owner of the property as of the date of the sale, so long as the last redeeming lienor has otherwise been satisfied. If the claimant releases the lien or fails to establish a right to the lien, the entire escrow shall be paid to the owner of the property as of the date of the sale, so long as the last redeeming lienor has otherwise been satisfied. Lien claimants of equal priority, for the purposes of this subsection (2), may act in concert and be deemed to represent one claim in which they share pro rata. The right of the owner of the property as of the date of the sale to excess sale proceeds pursuant to a homestead exemption under section 38-41-201 is subordinate to the right of a subsequent deed of trust beneficiary for whose benefit the owner waived the homestead exemption.

**Source: L. 90:** Entire article R&RE, p. 1667, § 2, effective October 1. **L. 2006:** (2) amended, p. 1471, § 23, effective January 1, 2008.

**Editor's note:** (1) This section is similar to former § 38-39-114, as it existed prior to 1990.

(2) The effective date for amendments made to subsection (2) by chapter 305, Session Laws of Colorado 2006, was changed from July 1, 2007, to January 1, 2008, by section 27 of chapter 404, Session Laws of Colorado 2007. (See L. 2007, p. 1849.)

## ANNOTATION

**Law reviews.** For article, "Foreclosure by Sale by Public Trustee of Deeds of Trust in Colorado", see 14 Dicta 5 (1936). For article, "Foreclosure by Sale by Public Trustee of Deeds of Trust in Colorado", see 28 Dicta 437 (1951).

**Annotator's note.** Since § 38-38-306 is similar to § 38-39-114 as it existed prior to the 1990 repeal and reenactment of this article and article 39, relevant cases construing that provision have been included in the annotations to this section.

**Redemption is purely statutory remedy for lienholders,** which orders rights separate and apart from those already obtained by judgment creditors. *Chatfield Bank v. Energy Fuels Corp.*, 42 Colo. App. 233, 599 P.2d 923 (1979), rev'd on other grounds, 200 Colo. 540, 618 P.2d 1115 (1980).

The right to redeem from an execution sale is purely statutory and is not to be enlarged by judicial interpretation. *Marty v. Paul*, 75 Colo. 446, 226 P. 150 (1924); *Walker v. Wallace*, 79 Colo. 380, 246 P. 553 (1926); *Thomas v. Oken*, 699 P.2d 7 (Colo. App. 1984).

**Right to redeem is liberally construed** to the end that all the property of the debtor may pay as many debts as possible. *Walker v. Wallace*, 79 Colo. 380, 246 P. 553 (1926).

**"Judgment creditor" defined.** The term "judgment creditor" means the judgment creditor or creditors of the person or persons whose lands shall be sold under execution. *Leach v. Torbert*, 71 Colo. 85, 204 P. 334 (1922).

**Applied in** *Maloney v. Grimes*, 1 Colo. 111 (1868); *Paddack v. Staley*, 13 Colo. App. 363, 58 P. 363 (1899); *Levitt v. Continental Trust Co.*, 71 Colo. 3, 203 P. 666 (1922).

## PART 4

### CERTIFICATES OF PURCHASE AND REDEMPTION

**38-38-401. Certificate of purchase - issuance.** (1) No later than five business days after the sale, the officer shall execute and record in each county where the property or a portion thereof is located a certificate of purchase containing:

- (a) The names of the original grantors of the deed of trust being foreclosed;
- (a.5) The description of the property;
- (b) The sum paid for the property;
- (c) The name and address of the purchaser;
- (d) A statement that the purchaser or assignee of the certificate of purchase shall be entitled to a confirmation deed at the expiration of all redemption periods provided under part 3 of this article unless a redemption is made;
- (e) The deficiency under the evidence of debt, if any, as a result of the successful bid at sale;
- (f) The public trustee's sale number or, in the case of a sale by the sheriff, the district court civil action number;
- (g) The date of sale;
- (h) An attached exhibit containing a copy of the executed order authorizing the sale that bears the public trustee sale number or civil docket number in the case of a judicial foreclosure; and
- (i) An attached exhibit containing a copy of the mailing list and all amended mailing lists bearing the public trustee sale number or civil docket number in the case of a judicial foreclosure.

(2) The officer shall retain the recorded certificate of purchase in the officer's records.

(3) The failure of the officer to comply with the provisions of this section shall not affect the validity of the sale or the vesting of title in the name of the holder of the certificate of purchase or certificate of redemption.



**Source:** **L. 90:** Entire article R&RE, p. 1668, § 2, effective October 1. **L. 2006:** Entire section amended, p. 1472, § 24, effective January 1, 2008. **L. 2007:** (1)(h) and (1)(i) added, p.1843, § 18, effective January 1, 2008. **L. 2009:** (1)(a) and (1)(i) amended and (1)(a.5) added, (HB 09-1207), ch. 164, p. 719, § 15, effective January 1, 2010.

**Editor's note:** (1) This section is similar to former § 38-39-115, as it existed prior to 1990.

(2) The effective date for amendments made to this section by chapter 305, Session Laws of Colorado 2006, was changed from July 1, 2007, to January 1, 2008, by section 27 of chapter 404, Session Laws of Colorado 2007. (See L. 2007, p. 1849.)

#### ANNOTATION

**Law reviews.** For article, "Foreclosure by Sale by Public Trustee of Deeds of Trust in Colorado", see 14 Dicta 5 (1936). For article, "Foreclosure by Sale by Public Trustee of Deeds of Trust in Colorado", see 28 Dicta 437 (1951). For article, "Statutory Redemption in Colorado", see 30 Dicta 79 (1953). For comment, "The Effect of Certified Realty on Mortgage Foreclosure in Colorado", see 52 U. Colo. L. Rev. 301 (1981).

**Purchaser only takes title described in certificate of purchase.** The purchaser at a trustee's sale who accepts a certificate of purchase reciting that it is subject to another deed of trust, takes only the title described in the certificate, notwithstanding the trustee's deed based thereon shows a clear title. *Bray v. Trower*, 87 Colo. 240, 286 P. 275 (1930) (decided under § 38-39-115 as it existed prior to the 1990 repeal and reenactment of this article and article 39).

**38-38-401.5. Certificate - priority of lien.** The lien represented by a certificate of purchase shall have the same priority as the deed of trust or other lien foreclosed.

**Source:** **L. 2007:** Entire section added, p. 1844, § 20, effective January 1, 2008.

**38-38-402. Certificate of redemption - issuance.** (1) No sooner than fifteen business days following a sale but no later than five business days following an officer's receipt of redemption money paid under section 38-38-302, the officer shall execute and record in each county where the property or a portion thereof is located a certificate of redemption containing:

- (a) The names of the original grantors of the deed of trust being foreclosed;
  - (a.5) The name and address of the person redeeming;
  - (b) The redemption amount paid;
  - (c) The date of sale;
  - (d) The description of the property redeemed; and
  - (e) The public trustee's sale number or, in the case of a sale by the sheriff, the district court civil action number.
- (2) The officer shall retain the recorded certificate of redemption in the officer's records.
- (3) The failure of the officer to comply with the provisions of this section shall not affect the validity of the sale or the rights of the grantee of the confirmation deed.

**Source:** **L. 90:** Entire article R&RE, p. 1668, § 2, effective October 1. **L. 2002:** IP(1) amended, p. 1348, § 15, effective July 1. **L. 2006:** Entire section amended, p. 1473, § 25, effective January 1, 2008. **L. 2009:** (1)(a) amended and (1)(a.5) added, (HB 09-1207), ch. 164, p. 719, § 16, effective January 1, 2010.

**Editor's note:** (1) This section is similar to former § 38-39-104, as it existed prior to 1990.

(2) The effective date for amendments made to this section by chapter 305, Session Laws of Colorado 2006, was changed from July 1, 2007, to January 1, 2008, by section 27 of chapter 404, Session Laws of Colorado 2007. (See L. 2007, p. 1849.)

## ANNOTATION

**Law reviews.** For article, "Revising Redemptions", see 6 Dicta 16 (Feb. 1929). For article, "Did You Know?", see 12 Dicta 132 (1935). For article, "Foreclosure by Sale by Public Trustee of Deeds of Trust in Colorado", see 14 Dicta 5 (1936). For article, "Foreclosure by Sale by Public Trustee of Deeds of Trust in Colorado", see 28 Dicta 437 (1951). For article, "Forms Committee Presents Additional Standard Pleading Samples for Use in Foreclosures

Through Public Trustee", see 29 Dicta 1 (1952). For article, "Statutory Redemption in Colorado", see 30 Dicta 79 (1953).

**Lienor becomes entitled to the execution and delivery of a certificate of redemption** upon the payment of redemption money in the manner prescribed by § 38-38-303. WYSE Fin. Servs., Inc. v. Nat'l Real Estate Inv., LLC, 92 P.3d 918 (Colo. 2004).

**38-38-403. Certificates assignable.** (1) Every certificate of purchase or certificate of redemption that is issued to any person under this part 4 shall be assignable by indorsement thereon or by separate assignment, and the assignee shall be treated for all purposes as the original holder of the certificate of purchase or certificate of redemption. A separate assignment of a certificate of purchase or a certificate of redemption shall contain:

- (a) The name and address of the assignee;
- (b) The name and address of the assignor;
- (c) A description of the property;
- (d) The name of the foreclosing holder of the evidence of debt; and
- (e) The number of the foreclosure sale held by the public trustee or the case number of the judicial foreclosure.

**Source:** **L. 90:** Entire article R&RE, p. 1668, § 2, effective October 1. **L. 2005:** Entire section amended, p. 399, § 7, effective August 8. **L. 2006:** Entire section amended, p. 1473, § 26, effective July 1. **L. 2007:** Entire section amended, p. 1843, § 19, effective January 1, 2008.

**Editor's note:** This section is similar to former § 38-39-116, as it existed prior to 1990.

## ANNOTATION

**Law reviews.** For note on the act which inserted this section, see 28 Dicta 176 (1951). For article, "Foreclosure by Sale by Public Trustee of Deeds of Trust in Colorado", see 28 Dicta 437 (1951). For article, "Recent Statutory Amendments to the Public Trustee and Sheriff Foreclosure Process", see 15 Colo. Law. 794 (1986). For article, "1987 Statutory Amendments Concerning Foreclosures of Deeds of Trust and Mortgages", see 16 Colo. Law. 1386 (1987).

**Interest acquired at foreclosure sale is assignable.** The interest acquired by a purchaser at foreclosure sale under a trust deed is assignable and transferable. Bankers Bldg. & Loan Ass'n v. Fleming Bros. Lumber Co., 83 Colo. 335, 264 P. 1087 (1928) (decided under § 38-39-116 as it existed prior to the 1990 repeal and reenactment of this article and article 39).

**38-38-404. Replacement certificate issued in case of loss of original - repeal. (Repealed)**

**Source:** **L. 90:** Entire article R&RE, p. 1669, § 2, effective October 1. **L. 2006:** (4) added by revision, p. 1481, §§ 40, 41.

**Editor's note:** (1) Prior to its repeal in 2007, this section was similar to former § 38-37-121, as it existed prior to 1990.

(2) Subsection (4) provided for the repeal of this section, effective July 1, 2007. The effective date for amendments made to this section by chapter 305, Session Laws of Colorado 2006, was changed from July 1, 2007, to January 1, 2008, by section 27 of chapter 404, Session Laws of Colorado 2007. (See L. 2007, p. 1849.)



**38-38-405. Certificate as prima facie evidence.** A certificate of purchase, certificate of redemption, confirmation deed, or a certified copy thereof shall be deemed to be prima facie evidence of all statements or recitals contained therein.

**Source: L. 2006:** Entire section added, p. 1473, § 27, effective January 1, 2008.

**Editor's note:** The effective date for the enactment of this section by chapter 305, Session Laws of Colorado 2006, was changed from July 1, 2007, to January 1, 2008, by section 27 of chapter 404, Session Laws of Colorado 2007. (See L. 2007, p. 1849.)

## PART 5

### ISSUANCE OF PUBLIC TRUSTEE'S DEED, SHERIFF'S DEED, AND THE NATURE OF TITLE

#### **38-38-501. Title vests upon expiration of redemption periods - confirmation deed.**

(1) Upon the expiration of all redemption periods allowed to all lienors entitled to redeem under part 3 of this article or, if there are no redemption periods, upon the close of the officer's business day eight business days after the sale, title to the property sold shall vest in the holder of the certificate of purchase or in the holder of the last certificate of redemption in the case of redemption. Subject to the right to cure and the right to redeem provisions of section 38-38-506 and subject to the provisions of section 38-41-212 (2), such title shall be free and clear of all liens and encumbrances junior to the lien foreclosed. No earlier than ten business days nor later than fifteen business days after both the title vests and the officer has received all statutory fees and costs, the officer shall execute and record a confirmation deed pursuant to section 38-38-502 or 38-38-503 to the holder of the certificate of purchase or, in the case of redemption, to the holder of the last certificate of redemption confirming the transfer of title to the property; except that the officer shall execute and record a confirmation deed prior to the tenth business day after title vests, if the officer has received all statutory fees and costs and notice from the appropriate holder that the certificate will not be assigned. But under no circumstances shall the officer be required to issue a confirmation deed unless the officer has received an order authorizing the sale that meets the requirements of section 38-38-105 (2) (a). Failure of the officer to execute and record such deed or to record the deed within the time specified shall not affect the validity of the deed or the vesting of title.

(2) Notwithstanding any provision of law to the contrary, an officer may not include an assignee as a grantee in a confirmation deed, unless:

(a) The officer has received a copy of the assignment executed in accordance with section 38-38-403 within ten business days after title vests; and

(b) The assignment was dated, signed, and notarized or recorded prior to the time title vests.

**Source: L. 90:** Entire article R&RE, p. 1669, § 2, effective October 1. **L. 2006:** Entire section amended, p. 1474, § 28, effective January 1, 2008. **L. 2007:** Entire section amended, p. 1844, § 21, effective January 1, 2008. **L. 2009:** Entire section amended, (HB 09-1207), ch. 164, p. 720, § 17, effective January 1, 2010. **L. 2012:** Entire section amended, (SB 12-030), ch. 96, p. 324, § 12, effective September 1.

**Editor's note:** (1) This section is similar to former § 38-39-110, as it existed prior to 1990.

(2) The effective date for amendments made to this section by chapter 305, Session Laws of Colorado 2006, was changed from July 1, 2007, to January 1, 2008, by section 27 of chapter 404, Session Laws of Colorado 2007. (See L. 2007, p. 1849.)

(3) Section 14 of chapter 96, Session Laws of Colorado 2012, provides that the act amending this section applies to the foreclosure of any deed of trust or other lien with respect to which a notice of election and demand or lis pendens is recorded in the office of the clerk and recorder of the county where the property or a portion of the property is located on or after September 1, 2012.

## ANNOTATION

**Law reviews.** For article, "Foreclosure by Sale by Public Trustee of Deeds of Trust in Colorado", see 14 Dicta 5 (1936). For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 16 Dicta 71 (1940). For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 Dicta 321 (1949). For article, "Foreclosure by Sale by Public Trustee of Deeds of Trust in Colorado", see 28 Dicta 437 (1951). For article, "Enforcement of Security Interests in Colorado", see 25 Rocky Mt. L. Rev. 1 (1952). For article, "Statutory Redemption in Colorado", see 30 Dicta 79 (1953). For article, "Public Trustee's Deeds and Redemption Under Section 362 of the Bankruptcy Code", see 12 Colo. Law. 229 (1983). For article, "Deeds in Lieu of Foreclosure", see 15 Colo. Law. 394 (1986). For article, "Recent Statutory Amendments to the Public Trustee and Sheriff Foreclosure Process", see 15 Colo. Law. 794 (1986). For article, "1987 Statutory Amendments Concerning Foreclosures of Deeds of Trust and Mortgages", see 16 Colo. Law. 1386 (1987).

**Annotator's note.** Since § 38-38-501 is similar to § 38-39-110 as it existed prior to the 1990 repeal and reenactment of this article and article 39, relevant cases construing that provision have been included in the annotations to this section.

**The purpose of this section** is to render titles to real property absolute and free of technical defects so that a subsequent purchaser of a public trustee's deed may rely on the record title, but a purchaser is bound to investigate when the record indicates the existence of an outside interest by which the title may be affected and is charged with knowledge of the facts to which the investigation would have led. *Ragsdale Bros. Roofing v. United Bank*, 744 P.2d 750 (Colo. App. 1987).

**Rights acquired by certificate holder.** The holder of a certificate of purchase on an execution sale acquires only the alternative rights to receive the redemption money, in case of a redemption, or a deed for the land after the time for redemption has expired. *Davis Mfg. & Supply Co. v. Coonskin Props., Inc.*, 646 P.2d 940 (Colo. App. 1982).

**Accordingly, plaintiff who holds certificate of purchase cannot challenge validity of lien** after plaintiff accepts redemption funds. *Kellum v. RE Serv., LLC*, 30 P.3d 875 (Colo. App. 2001).

**Plaintiff held no redemption right upon expiration of the redemption period** because title vested at that time and the judgment was then satisfied. *Craft v. Storey*, 942 P.2d 1211 (Colo. App. 1996).

**Effect of federal statute.** Title remains in the mortgagors unless and until the holder of the

certificate of purchase takes the affirmative act of applying for a deed, and the public trustee issues a deed. These affirmative acts are what 11 U.S.C. § 362 stays. *In re Murphy*, 22 Bankr. 663 (Bankr. D. Colo. 1982).

11 U.S.C. § 362(a)(4) stays the public trustee from issuing a public trustee's deed under this section. *In re Murphy*, 22 Bankr. 663 (Bankr. D. Colo. 1982).

**Mechanics' liens which are filed after a deed of trust**, but superior to the deed of trust, cause the title acquired pursuant to this section to be subject to the superior lien. *Ragsdale Bros. Roofing v. United Bank*, 744 P.2d 750 (Colo. App. 1987).

**The language "liens or encumbrances recorded or filed subsequent"** means liens or encumbrances junior in fact to the lien on which the sale is based. *Ragsdale Bros. Roofing v. United Bank*, 744 P.2d 750 (Colo. App. 1987).

**An implied lease based on the terms of an earlier pre-foreclosure lease was created** since the property owner/landlord accepted monthly payments from the tenant and did not renounce the prior agreement. *Tanktech, Inc. v. First Interstate Bank*, 851 P.2d 174 (Colo. App. 1992).

**"Free and clear" voids prior agreements respecting use of property.** Where former owner had executed a parking agreement with the city, agreement did not survive the foreclosure and was not binding on new owner despite new owner's actual knowledge of the agreement. *Town of Grand Lake v. Lanzi*, 937 P.2d 785 (Colo. App. 1996).

**The language "free and clear" means free of any subordinate leases** as well as of other types of liens or encumbrances. *First Interstate Bank v. Tanktech, Inc.*, 864 P.2d 116 (Colo. 1993).

Court of appeals' opinion, which was unclear as to whether the court regarded a subordinate, pre-foreclosure lease as having been extinguished under this section, reversed to the extent the opinion held the lease was extended. *First Interstate Bank v. Tanktech, Inc.*, 864 P.2d 116 (Colo. 1993).

**Holdover doctrine does not bind a foreclosure-sale purchaser to the terms of a pre-foreclosure lease** to which it was not a party, although nothing would preclude the purchaser from entering into a new lease with the tenant on identical terms. *First Interstate Bank v. Tanktech, Inc.*, 864 P.2d 116 (Colo. 1993).

**Subordination agreements enforceable.** This section does not govern or affect the priority of liens established by subordination agreements. Such agreements are enforceable. *Peoples Bank & Trust Co. v. Rocky Mt. Dist. Council*, 620 P.2d 58 (Colo. App. 1980).

**Effect of bankruptcy of debtor.** Where a debtor commences a bankruptcy action before a



deed is executed to the holder of a certificate of purchase, the debtor retains title to the property and the bankruptcy court has jurisdiction over it. *Benford-Whiting Co. v. Robertson*, 4 B.R. 213 (D. Colo. 1980).

**With the exception of defective notice to municipality, under version of section in effect at the time of subject foreclosure, foreclosure was proper.** Therefore, title vested in partnership as grantee of the public trustee's deed, free and clear of the other plaintiffs' judgment liens. Based on this conclusion, trial court's order attaching other plaintiffs' original judgment liens to the ranch must be reversed except as to the municipality. *Park County Bd. of County Comm'rs v. Park County Sportsmen's*

*Ranch, LLP*, 271 P.3d 562 (Colo. App. 2011) (decided under law in effect prior to 2006 amendment).

Because municipality did not receive notice of foreclosure, partnership took title to ranch subject to municipality's judgment lien. That conclusion is supported by former version of this section. *Park County Bd. of County Comm'rs v. Park County Sportsmen's Ranch, LLP*, 271 P.3d 562 (Colo. App. 2011) (decided under law in effect prior to 2006 amendment).

**Applied** in *Fish v. East*, 114 F.2d 177 (10th Cir. 1940); *Mount Carbon Metro. Dist. v. Lake George Co.*, 847 P.2d 254 (Colo. App. 1993); *Nationsbank of Georgia v. Conifer Asset Management Ltd.*, 928 P.2d 760 (Colo. App. 1996).

**38-38-502. Form of confirmation deed for public trustee's sale.** The confirmation deed executed by the public trustee in a foreclosure sale may be in substantially the following form:

THIS DEED is made \_\_\_\_\_, 20\_\_\_\_, between \_\_\_\_\_ as the public trustee of the \_\_\_\_\_ County of \_\_\_\_\_, Colorado, and \_\_\_\_\_, grantee, (the holder of the certificate of purchase) (the holder of the certificate of redemption issued to the lienor last redeeming), whose legal address is \_\_\_\_\_.

WHEREAS, \_\_\_\_\_ did, by deed of trust dated \_\_\_\_\_, 20\_\_\_\_, and recorded in the office of the clerk and recorder of the \_\_\_\_\_ County of \_\_\_\_\_, Colorado, on \_\_\_\_\_, 20\_\_\_\_, in Book \_\_\_\_\_, Page \_\_\_\_\_, (Film no. \_\_\_\_\_, Reception no. \_\_\_\_\_) convey to the public trustee, in trust, the property hereinafter described to secure the payment of the indebtedness provided in said deed of trust; and

WHEREAS, a violation was made in certain of the terms and covenants of said deed of trust as shown by the notice of election and demand for sale filed with the public trustee; the said property was advertised for public sale at the place and in the manner provided by law and by said deed of trust; combined notice of sale and right to cure and redeem was given as required by law; said property was sold according to said combined notice; and a certificate of purchase thereof was made and recorded in the office of said county clerk and recorder; and

WHEREAS, all periods of redemption have expired.

NOW, THEREFORE, the public trustee, pursuant to the power and authority vested by law and by the said deed of trust, confirms the foreclosure sale and sells and conveys to grantee the following described property located in the \_\_\_\_\_ County of \_\_\_\_\_, State of Colorado, to-wit:

(describe property)

also known by street and number as \_\_\_\_\_ to have and to hold the same, with all appurtenances, forever.

**Source:** **L. 90:** Entire article R&RE, p. 1669, § 2, effective October 1. **L. 91:** Entire section amended, p. 1924, § 55, effective June 1. **L. 2006:** Entire section amended, p. 1474, § 29, effective January 1, 2008. **L. 2007:** Entire section amended, p. 1844, § 22, effective January 1, 2008.

**Editor's note:** The effective date for amendments made to this section by chapter 305, Session Laws of Colorado 2006, was changed from July 1, 2007, to January 1, 2008, by section 27 of chapter 404, Session Laws of Colorado 2007. (See L. 2007, p. 1849.)

**38-38-503. Form of confirmation deed for sheriff's sale.** The confirmation deed executed by the sheriff in case of a sale by virtue of an execution and levy or judgment and decree shall state the judgment under which the property described was sold and the execution or decree date and may be in substantially the following form:

THIS DEED is made \_\_\_\_\_, 20\_\_\_\_, between \_\_\_\_\_ as sheriff of the \_\_\_\_\_ County of \_\_\_\_\_, Colorado, and \_\_\_\_\_, grantee, (the holder of the certificate of purchase) (the holder of the certificate of redemption issued to the lienor last redeeming), whose legal address is \_\_\_\_\_.

WHEREAS, \_\_\_\_\_ did, in the \_\_\_\_\_ court for \_\_\_\_\_ and County of \_\_\_\_\_, Colorado, (recover a judgment against \_\_\_\_\_ for the sum of \_\_\_\_\_ dollars and costs of suit and upon which judgment an execution was issued) (obtain a judgment and decree against \_\_\_\_\_) dated \_\_\_\_\_, 20\_\_\_\_, directed to the sheriff of the \_\_\_\_\_ County of \_\_\_\_\_, Colorado; and

WHEREAS, by virtue of said (execution) (judgment and decree), the sheriff levied upon the property hereinafter described and, after public notice had been given of the time and place of sale as required by law, said property was offered for sale and sold according to said notice, and a certificate of purchase was made and recorded in the office of the county clerk and recorder; and

WHEREAS, all periods of redemption have expired.

NOW, THEREFORE, I, \_\_\_\_\_, sheriff of the \_\_\_\_\_ County of \_\_\_\_\_, Colorado, in consideration of the premises, confirm the sale and sell and convey to grantee the following described property, located in the \_\_\_\_\_ County of \_\_\_\_\_, Colorado:

(describe property)

also known by street and number as \_\_\_\_\_.

TO HAVE AND TO HOLD the same, with all appurtenances thereunto, forever.

**Source: L. 90:** Entire article R&RE, p. 1670, § 2, effective October 1. **L. 2006:** Entire section amended, p. 1475, § 30, effective January 1, 2008.

**Editor's note:** (1) This section is similar to former § 38-39-108, as it existed prior to 1990.

(2) The effective date for amendments made to this section by chapter 305, Session Laws of Colorado 2006, was changed from July 1, 2007, to January 1, 2008, by section 27 of chapter 404, Session Laws of Colorado 2007. (See L. 2007, p. 1849.)

**38-38-504. Deed evidence of compliance.** Any deed executed by an officer or other official under this article shall be prima facie evidence of compliance with all statutory requirements for the sale and execution of the deed and evidence of the truth of the recitals contained in the deed.

**Source: L. 90:** Entire article R&RE, p. 1672, § 2, effective October 1. **L. 2007:** Entire section amended, p. 1845, § 23, effective January 1, 2008.

**Editor's note:** This section is similar to former § 38-39-109, as it existed prior to 1990.



## ANNOTATION

**Law reviews.** For note on the act which inserted this section, see 28 Dicta 176 (1951). For article, "Foreclosure by Sale by Public Trustee of Deeds of Trust in Colorado", see 28 Dicta 437 (1951).

**Annotator's note.** Since § 38-38-504 is similar to § 38-39-109 as it existed prior to the 1990 repeal and reenactment of this article and article 39, relevant cases construing that provision have been included in the annotations to this section.

**In determining whether purchaser had notice of outstanding equities or unrecorded interests** so as to preclude him from being entitled to protection as a bona fide purchaser, if he has knowledge of circumstances which, in the exercise of common reason and prudence, ought to put a man upon particular inquiry, he will be presumed to have made that inquiry, and he will be charged with notice of every fact which would in all probability have been revealed had such investigation been undertaken. *Jaramillo v. McLoy*, 263 F. Supp. 870 (D. Colo. 1967).

**Purchaser at execution sale succeeds to rights of defendant in execution.** The purchaser at the execution sale succeeds to all the rights of the defendant in execution, and where the defendant in execution holds under an uncompleted executory agreement of purchase, the purchaser at the execution sale acquires the right to proceed with the contract of purchase of which he has so become the involuntary assignee, to make the payments stipulated for in such agreement of purchase, and perform the covenants of the execution defendant therein. *Salisbury v. LaFitte*, 57 Colo. 358, 141 P. 484 (1914).

**Applied in** *Bay State Mining & Town-Site Co. v. Jackson*, 27 Colo. 139, 60 P. 573 (1900); *Victor Inv. Co. v. Roerig*, 22 Colo. App. 257, 124 P. 349 (1912); *Empire Ranch & Cattle Co. v. Gibson*, 22 Colo. App. 617, 126 P. 1103 (1912); *Terry v. Gibson*, 23 Colo. App. 273, 128 P. 1127 (1913); *McCracken v. Citizens' Nat'l Bank*, 80 Colo. 164, 249 P. 652 (1926).

**38-38-505. Effect of foreclosures as to certain classes of persons.** (1) All deeds of trust executed to a public trustee may be foreclosed by such public trustee in the manner provided by section 38-38-101, notwithstanding the fact that the indebtedness secured may constitute a claim against the estate of a deceased person, a mental incompetent, or an incapacitated person and notwithstanding the death, mental incompetency, or incapacity of one or more of the owners of the property covered by the deed of trust.

(2) Any such foreclosure shall be good against a mental incompetent or incapacitated person and against the heirs-at-law, legatees, devisees, creditors, conservators, guardians, personal representatives, executors, and administrators of any decedent or mental incompetent or incapacitated person and all persons claiming by, through, or under such decedent or mental incompetent or incapacitated person. The public trustee shall give notice of such foreclosure proceedings, as provided by law, to the grantor in the deed of trust foreclosed at the address stated therein, as though living and mentally competent, to all persons having interests then of record, and to the lessee or lessees of the premises as provided in section 38-38-305 (1.5). The public trustee shall not be required to give notice of such foreclosure proceedings to any heir-at-law, legatee, devisee, creditor, conservator, guardian, personal representative, executor, or administrator of any decedent or mental incompetent or incapacitated person or to any person claiming by, through, or under any decedent or mental incompetent or incapacitated person unless the claim or interest of such person then appears of record.

(3) The interest and claim in and to such real estate of all mental incompetents or incapacitated persons and of all persons claiming by, through, or under any mental incompetent, incapacitated person, or decedent, including minors and incapacitated persons, shall be terminated and concluded by such foreclosure unless they redeem from the foreclosure sale within the time prescribed by law.

**Source: L. 90:** Entire article R&RE, p. 1672, § 2, effective October 1; (2) amended, p. 1685, § 6, effective October 1.

**Editor's note:** The provisions of this section are similar to provisions of several former sections as they existed prior to 1990. For a detailed comparison, see the comparative tables located in the back of the index.

## ANNOTATION

**Law reviews.** For article, "Foreclosure by Sale by Public Trustee of Deeds of Trust in Colorado", see 14 Dicta 5 (1936). For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 16 Dicta 35 (1939). For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 Dicta 281 (1949). For article, "Standard Pleading Samples to be used in Quiet Title Litigation", see 30 Dicta 39 (1953). For article, "Statutory Redemption in Colorado", see 30 Dicta 79 (1953).

**Terms of sale must be fixed in accordance with provisions of trust deed** in ordering a sale under the foreclosure of a trust deed. *Cosmopolitan Hotel v. Colo. Nat'l Bank*, 96 Colo. 62, 40 P.2d 245 (1934) (decided under § 38-37-114 as it existed prior to the 1990 repeal and reenactment of article 37 and this article).

**This section does not supplant the notice requirement** contained in C.R.C.P. 120. *Amos v. Aspen Alps 123, LLC*, \_\_ P.3d \_\_ (Colo. App. 2010).

**38-38-506. Omitted parties - definitions.** (1) As used in this section, "omitted party" means any person who:

(a) Prior to the recording of the notice of election and demand or *lis pendens*, has either acquired a record interest in the property or has obtained a valid possessory interest and is in actual possession of the property, which interest is junior to the deed of trust or other lien being foreclosed and would otherwise be extinguished by the foreclosure; and

(b) Is not included as a party defendant in a judicial foreclosure action or, if included, is not served with process, or is not served with notice of levy or seizure pursuant to section 13-55-102, C.R.S., or is not notified pursuant to section 38-38-103 of a sale, or is not notified in connection with the legal proceedings contemplated by section 38-38-105.

(2) (a) The interest of an omitted party in the property that is the subject of a sale may be terminated if the omitted party, or anyone claiming by, through, or under an omitted party, in a civil action commenced at any time by any interested person as defined in paragraph (c) of this subsection (2), by an omitted party, or by anyone claiming by, through, or under an omitted party, is afforded rights of cure if the omitted party would have been entitled to cure pursuant to section 38-38-104, or is afforded redemption rights if the omitted party would have been entitled to redeem pursuant to section 38-38-302, upon such terms as the court may deem equitable under the circumstances, which terms shall not, however, be more favorable than the person's statutory rights. The court shall give full consideration to whether the omitted party or anyone claiming by, through, or under an omitted party was given or had actual notice or knowledge of the foreclosure and was given an opportunity to exercise statutory rights to cure or redeem.

(b) For purposes of this section, the lien that is the subject of the sale shall not be extinguished by merger with the title to the property acquired pursuant to section 38-38-501 until the interest of any omitted party has been affirmed pursuant to subsection (3) of this section or has been terminated as provided in paragraph (a) of this subsection (2), or by operation of law. The omitted party, or anyone claiming by, through, or under an omitted party, cannot extinguish the lien that is subject to the sale by enforcement of the lien of the omitted party.

(c) As used in this section, "interested person" means the holder of the evidence of debt being foreclosed, a holder of a certificate of purchase or certificate of redemption issued pursuant to section 38-38-401 or 38-38-402, or an owner of the property pursuant to section 38-38-501 or a person claiming by, through, or under such holder or owner.

(d) An omitted party, or anyone claiming by, through, or under an omitted party, shall not have a remedy to cure or redeem, except as set forth in this subsection (2). An interested party shall not be able to extinguish an omitted party's interest except as set forth in this subsection (2) or by written waiver or agreement signed by the omitted party or anyone claiming by, through, or under an omitted party.

(3) If an interested person files with the officer at any time a document affirming an omitted party's interest in the property, subject to the terms, conditions, and provisions of the recorded instrument from which such omitted party's interest is derived, or in the case of an omitted party that is a lessee, subject to the terms and conditions of the lease, whether written or oral, the interest of such omitted party in the property shall not be affected by the foreclosure, and such omitted party shall have no right to cure or redeem.



(4) (Deleted by amendment, L. 2006, p. 1476, § 31; L. 2007, p. 1849, § 27, effective January 1, 2008.)

**Source:** **L. 90:** Entire article R&RE, p. 1672, § 2, effective October 1. **L. 2006:** Entire section amended, p. 1476, § 31, effective January 1, 2008. **L. 2009:** (2)(a) and (2)(b) amended and (2)(d) added, (HB 09-1207), ch. 164, p. 720, § 18, effective January 1, 2010.

**Editor's note:** The effective date for amendments made to this section by chapter 305, Session Laws of Colorado 2006, was changed from July 1, 2007, to January 1, 2008, by section 27 of chapter 404, Session Laws of Colorado 2007. (See L. 2007, p. 1849.)

## ANNOTATION

**26 U.S.C. § 7425(b)(1), a provision of the Internal Revenue Code, preempts this section.** *Russell v. United States*, 551 F.3d 1174 (10th Cir. 2008), cert. denied, \_\_\_ U.S. \_\_\_, 130 S. Ct. 95, 175 L. Ed. 2d 30 (2009).

**Lease not saved from extinguishment by omitted party status where neither the foreclosing lienor nor the certificate of purchase holders filed a document with the public trustee affirming the lessees' interest in the crop harvested after the redemption period**

*expired.* *Elrick v. Merrill*, 10 P.3d 689 (Colo. App. 2000).

**Because municipality did not receive notice of foreclosure, it is an "omitted party" under subsection (1).** Because municipality did not receive notice of foreclosure, partnership took title to ranch subject to municipality's judgment lien. This conclusion is supported by the former version of § 38-38-501. *Park County Bd. of County Comm'rs v. Park County Sportsmen's Ranch, LLP*, 271 P.3d 562 (Colo. App. 2011).

## PART 6

## RECEIVERS

**38-38-601. Receiver appointed upon application.** (1) When an action or proceeding has been commenced to foreclose a mortgage, trust deed, or other instrument securing an indebtedness, a receiver of the property affected shall be appointed upon application at any time prior to the sale, if it appears that the security is clearly inadequate or that the premises are in danger of being materially injured or reduced in value as security by removal, destruction, deterioration, accumulation of prior liens, or otherwise so as to render the security inadequate.

(2) If the facts would justify the appointment of a receiver under this section but one is not applied for and if the premises are abandoned by the owner thereof, the holder of the lien may take possession until the sale and shall be subject to the same duties and liabilities for the care of the premises and for the application of the rents and profits as would a receiver.

**Source:** **L. 90:** Entire article R&RE, p. 1673, § 2, effective October 1.

**Editor's note:** This section is similar to former § 38-39-112, as it existed prior to 1990.

## ANNOTATION

**Law reviews.** For article, "Foreclosure by Sale by Public Trustee of Deeds of Trust in Colorado", see 14 *Dicta* 5 (1936). For article, "Foreclosure by Sale by Public Trustee of Deeds of Trust in Colorado", see 28 *Dicta* 437 (1951). For article, "A Decade of Colorado Law: Conflict of Laws, Security, Contracts and Equity", see 23 *Rocky Mt. L. Rev.* 247 (1951). For article, "Deeds in Lieu of Foreclosure", see 15 *Colo. Law.* 394 (1986). For article, "Limita-

tion of Bank's Liabilities in Letters of Credit Agreements", see 15 *Colo. Law.* 1019 (1986). For article, "Use of Receivers in Real Estate Foreclosures", see 16 *Colo. Law.* 988 (1987).

**Annotator's note.** Since § 38-38-601 is similar to § 38-39-112 as it existed prior to the 1990 repeal and reenactment of this article and article 39, relevant cases construing that provision have been included in the annotations to this section.

**Ex parte appointments.** While the ex parte appointment of a receiver may be permissible under emergency circumstances or where notice is impractical, a case must be pending at the time of the appointment. *Johnson v. McCaughan, Carter & Scharrer*, 672 P.2d 221 (Colo. App. 1983).

**Common law governs claims against receivers appointed pursuant to this section.** *Four Strong Winds, Inc. v. Lyngholm*, 826 P.2d 414 (Colo. App. 1992) (decided under former § 38-39-112).

**Claim based upon receiver's alleged breach of fiduciary obligation may be asserted in the receivership proceedings** and supervising court retains jurisdiction until receiver is discharged. *Four Strong Winds, Inc. v. Lyngholm*, 826 P.2d 414 (Colo. App. 1992) (decided under former § 38-39-112).

**Court's order discharging receiver is a final judgment** subject to appellate review, and any claim based on misfeasance or malfeasance of the receiver must be presented prior to discharge, if at all, unless grounds exist for relief from judgment under C.R.C.P. Rule 60. *Four Strong Winds, Inc. v. Lyngholm*, 826 P.2d 414 (Colo. App. 1992) (decided under former § 38-39-112).

**Court did not abuse its discretion** by appointing a receiver pursuant to a written agreement between the parties permitting such appointment in the event of default without regard to the adequacy or value of the property or the solvency of any party bound for its payment. *Bank of Am. v. Denver Hotel Ass'n*, 830 P.2d 1138 (Colo. App. 1992).

**However, where a deed of trust permits the appointment of a receiver but does not expressly allow the appointment of a receiver without notice**, the trial court abused its discretion when it appointed a receiver on an ex parte

motion. *GE Life & Annuity Assur. Co. v. Ft. Collins Assemblage, Ltd.*, 53 P.3d 703 (Colo. App. 2001).

**Holder's possession permitted without applying for appointment of receiver.** This section and § 38-39-113, permit the holder of a certificate of purchase to take possession of the property sold without applying for the appointment of a receiver by the court where the property has been abandoned by the owner. *Graham v. Alcoves, Inc.*, 148 Colo. 379, 366 P.2d 375 (1961).

**Mortgagee may take possession of mortgaged property only after a foreclosure proceeding has been commenced.** *Martinez v. Cont'l Enters.*, 730 P.2d 308 (Colo. 1986).

**Mortgagees entitled to appointment of receiver.** Where the owner not only defaulted in an installment payment but also in the performance of many of the obligations assumed by her in the deed of trust, the mortgagees were clearly entitled to the appointment of a receiver under the terms of the instrument. *Phillips v. Webster*, 162 Colo. 315, 426 P.2d 774 (1967).

**Mortgagee not entitled to rents from the mortgaged property during period of possession** because inchoate right granted by deed of trust to collect rents incident to rightful possession of property never became a vested right because mortgagee did not initiate a foreclosure action prior to taking possession of the mortgaged property. *Martinez v. Cont'l Enters.*, 730 P.2d 308 (Colo. 1986).

**Court may appoint a receiver in the event of default without regard to the adequacy or value of collateral property or the solvency of any party liable on the debt** where the parties have agreed by contract for such appointment. *Bank of Am. Nat'l Trust & Sav. Ass'n v. Denver Hotel Ass'n Ltd. P'ship*, 830 P.2d 1138 (Colo. App. 1992).

**38-38-602. Appointment of receiver to prevent waste.** (1) During the period of redemption, the owner of the premises or the person in possession shall not commit waste, and the purchaser shall have such action or remedy for waste, including injunction, as he would have as owner of the premises. During such period, the owner of the premises shall keep the premises in repair, shall use reasonable diligence to continue to keep the premises yielding an adequate income, and shall pay current taxes before a penalty accrues and interest becomes due on any prior encumbrance, keep the premises insured for the protection of the holder of the certificate of purchase, and, in case of a leasehold, pay the rent and other sums due under the lease, and failure to do so shall constitute waste. In case of waste committed or danger of waste or an actual probability of the security being rendered inadequate, a receiver may be appointed to take possession and preserve the property at any time after the sale under such foreclosure. A receiver appointed before the sale shall continue after sale unless otherwise directed by the court.

(2) If the facts would justify the appointment of a receiver under this section but one is not applied for and if the premises are abandoned by the owner thereof, the purchaser may take possession and shall be subject to the same duties and liabilities for the care of the premises and for the application of the rents and profits as would a receiver.

(3) Nothing in this article shall restrict the power of the court in the appointment of a receiver pursuant to existing law or pursuant to agreement between the parties.



**Source:** L. 90: Entire article R&RE, p. 1674, § 2, effective October 1.

**Editor's note:** This section is similar to former § 38-39-113, as it existed prior to 1990.

## ANNOTATION

**Law reviews.** For article, "Foreclosure by Sale by Public Trustee of Deeds of Trust in Colorado", see 14 Dicta 5 (1936). For article, "Foreclosure by Sale by Public Trustee of Deeds of Trust in Colorado", see 28 Dicta 437 (1951). For article, "Public Trustee's Deeds and Redemption Under Section 362 of the Bankruptcy Code", see 12 Colo. Law. 229 (1983). For article, "Use of Receivers in Real Estate Foreclosures", see 16 Colo. Law. 988 (1987).

**Annotator's note.** Since § 38-38-602 is similar to § 38-39-113 as it existed prior to the 1990 repeal and reenactment of this article and article 39, relevant cases construing that provision have been included in the annotations to this section.

**Applicability of section.** The section applies primarily to the obligation of the owner of the premises while in possession and the rights of the holder of the certificate of purchase, where the owner abandons possession. *Ginsberg v. Bennett*, 101 Colo. 121, 71 P.2d 419 (1937).

**Section puts affirmative duty on the mortgagor in possession during the redemption period** to keep the premises in repair, use reasonable diligence to keep the premises yielding an adequate income, and to pay current taxes before penalties accrue. *Schwab v. Martin*, 165 Colo. 547, 441 P.2d 17 (1968).

**Although the owners had a right to remain on the property during the redemption period, they also had a duty to prevent waste, including paying the taxes, insurance, and interest on prior encumbrances on the property.** However, because the purchasers did not pay any insurance premiums on the property and because the owners' obligations to pay interest under the first and second deeds of trust were extinguished in bankruptcy, the purchasers are not entitled to recover for these items. *Elrick v. Merrill*, 10 P.3d 689 (Colo. App. 2000).

**Purchasers entitled to appointment of receiver.** The purchasers who had surrendered their notes and deeds of trust to the public trustee were entitled to appointment of a receiver after sale, both under the terms of their deeds of trust and under this section which specifically authorizes appointment of a receiver after sale where there is danger of waste. *Schwab v. Martin*, 165 Colo. 547, 441 P.2d 17 (1968).

**Receivership for property's protection inures to owner's benefit.** Where the receivership was necessary for the protection of the real property, the subject matter of the receivership inures to the benefit of the record owner and not for the benefit of the purchasers. *Phillips v. Webster*, 162 Colo. 315, 426 P.2d 774 (1967).

**Sections permit holder's possession without applying for appointment of receiver.** This section and § 38-39-112 permit the holder of a certificate of purchase to take possession of the property sold without applying for the appointment of a receiver by the court where the property was abandoned by the owner. *Graham v. Alcoves, Inc.*, 148 Colo. 379, 366 P.2d 375 (1961).

**Mortgagee has but inchoate lien on rentals.** Under this section and the general law as announced both prior, and subsequent, to the enactment of this section, a mortgagee, even though the rents are pledged as security, until he takes some effectual step to subject them to the payment of his debt, has but an inchoate or passive lien on such rentals. *Moncreiff v. Hare*, 38 Colo. 221, 87 P. 1082 (1906); *Fisher v. Norman Apts., Inc.*, 101 Colo. 173, 72 P.2d 1092 (1937); *Meggins v. Hall*, 111 Colo. 104, 137 P.2d 411 (1943).

**Mortgagor entitled to rentals absent pledge of rentals in trust deed.** Where a trust deed does not expressly pledge rents and profits of the mortgaged premises in payment of the debt, and where the mortgagor is in possession, no receiver appointed, and no foreclosure decree entered, the mortgagor is entitled to the rentals. *Erwin v. West*, 105 Colo. 71, 99 P.2d 201 (1939).

**Court may appoint a receiver in the event of default without regard to the adequacy or value of collateral property or the solvency of any party liable on the debt** where the parties have agreed by contract for such appointment. *Bank of Am. Nat'l Trust & Sav. Ass'n v. Denver Hotel Ass'n Ltd. P'ship*, 830 P.2d 1138 (Colo. App. 1992).

**Applied in** *Friedrichs v. Midland Sav. & Loan Co.*, 94 Colo. 563, 31 P.2d 493 (1934); *Rowe v. Tucker*, 38 Colo. App. 532, 560 P.2d 843 (1977); *Jenkins v. Peet*, 13 B.R. 721 (D. Colo. 1981); *Valley Fed. S & L v. Aspen Accommodations*, 716 P.2d 483 (Colo. App. 1986); *Bank of Am. v. Denver Hotel Ass'n*, 830 P.2d 1138 (Colo. App. 1992).

## PART 7

## GENERAL PROVISIONS AND APPLICATION

**38-38-701. Application - use of term “foreclosure”.** (1) Except as otherwise provided for in subsection (2) of this section, the provisions of this article shall apply:

(a) To proceedings for the foreclosure of deeds of trust through the public trustee commenced on or after July 1, 2007; and

(b) In the case of proceedings and actions for enforcement or foreclosure of any other types of liens upon real property and in the case of sales by virtue of execution and levy, where the particular proceeding or action under which the sale is performed is commenced on or after July 1, 2007.

(2) On and after October 1, 1990, in all proceedings for the foreclosure of deeds of trust and mortgages executed before July 1, 1965:

(a) The provisions of sections 118-9-2 and 118-9-3, Colorado Revised Statutes 1963, as said sections existed prior to July 1, 1965, shall apply in lieu of section 38-38-302 and section 38-38-303 (1) to (3) as it existed prior to January 1, 2008; and

(b) The provisions of section 118-9-18, Colorado Revised Statutes 1963, as in effect on July 1, 1965, and numbered as sections 38-38-103 and 38-38-104 on and after October 1, 1990, shall not apply.

(3) Wherever the term “foreclosure”, or variations thereof, or the concept of “foreclosure” is used in or referred to in article 37, 38, or 39 of this title, it shall be deemed to include sales of real estate upon execution, unless the context otherwise requires.

(4) If a deed of trust grants a power of sale to the public trustee but contains no provision on the manner in which the power of sale is to be exercised, the deed of trust shall not be void or voidable, and the holder of the evidence of debt may foreclose the deed of trust in accordance with the provisions of this article on the foreclosure of deeds of trust through the office of the public trustee or in the manner of a mortgage through the courts.

**Source: L. 90:** Entire article R&RE, p. 1674, § 2, effective October 1. **L. 2006:** (1) and (2)(a) amended and (4) added, p. 1480, § 38, effective January 1, 2008.

**Editor’s note:** (1) This section is similar to former § 38-39-119, as it existed prior to 1990.

(2) The effective date for amendments made to subsections (1) and (2)(a) and for the enactment of subsection (4) by chapter 305, Session Laws of Colorado 2006, was changed from July 1, 2007, to January 1, 2008, by section 27 of chapter 404, Session Laws of Colorado 2007. (See L. 2007, p. 1849.)

**38-38-702. Limitation of officer’s liability.** (1) An officer shall not have responsibility or liability for determining:

(a) The amount or reasonableness of a bid at a sale under section 38-38-106, the amount required to cure under section 38-38-104, or the amount required to redeem under section 38-38-302;

(b) The accuracy of the legal description of property in a full or partial release of a deed of trust;

(c) The accuracy or completeness of a mailing list submitted to the officer; or

(d) The legal sufficiency of the description of the property contained in the notice of election and demand.

(2) Nothing in this article shall lessen or otherwise modify the immunities and protections extended by law to an officer or to a governmental entity with which an officer is associated.

(3) An officer shall not have responsibility or liability for unknown damage, debt, or liens when a third party seeks a judicial foreclosure and sale.

**Source: L. 2006:** Entire section added, p. 1477, § 32, effective January 1, 2008. **L. 2009:** (3) added, (HB 09-1207), ch. 164, p. 721, § 19, effective September 1.



**Editor's note:** The effective date for the enactment of this section by chapter 305, Session Laws of Colorado 2006, was changed from July 1, 2007, to January 1, 2008, by section 27 of chapter 404, Session Laws of Colorado 2007. (See L. 2007, p. 1849.)

**38-38-703. No waiver of or agreement to shorten right to cure.** A waiver of or agreement to shorten the time period to exercise the right to cure a default granted by the provisions of this article that is made before the date of the default as to which the waiver is granted under a deed of trust, mortgage, or other instrument evidencing a lien or an evidence of debt secured thereby shall be void as against public policy.

**Source:** L. 2006: Entire section added, p. 1477, § 32, effective January 1, 2008.  
L. 2009: Entire section amended, (HB 09-1207), ch. 164, p. 721, § 20, effective September 1.

**Editor's note:** The effective date for the enactment of this section by chapter 305, Session Laws of Colorado 2006, was changed from July 1, 2007, to January 1, 2008, by section 27 of chapter 404, Session Laws of Colorado 2007. (See L. 2007, p. 1849.)

**38-38-704. Providing information to homeowner and public.**

(1) Repealed.

(2) (a) Notwithstanding any provision of the deed of trust or other lien being foreclosed or any provision of law to the contrary, an officer may, at his or her discretion, provide to an owner of the property or to any person liable on the secured indebtedness or other lien being foreclosed, or otherwise make available to the general public, any educational or other information or material concerning foreclosures under this article, including available community resources and foreclosure prevention information, that has been approved by the office of the attorney general, by an agency of the state of Colorado or the federal government, or by an attorney currently licensed to practice and in good standing in the state of Colorado and retained by a public trustee for such purpose. The officer may charge the fees and costs of providing such information or materials to the property owner or person liable on the debt as foreclosure fees and costs; except that the amount of such fees and costs charged shall not exceed twenty-five dollars.

(b) This subsection (2) shall take effect July 1, 2007.

**Source:** L. 2006: Entire section added, p. 1478, § 33, effective July 1.

**Editor's note:** Subsection (1)(b) provided for the repeal of subsection (1), effective July 1, 2007. (See L. 2006, p. 1478.)

**38-38-705. Curative provisions.** (1) If the public trustee fails to comply with any of the notice deadlines set forth in this article, unless the foreclosure has already been withdrawn by the holder of the evidence of debt or the holder's attorney, following written notice to the holder of the evidence of debt or the holder's attorney, the public trustee may rerecord the notice of election and demand, and the public trustee shall thereafter comply with all such notice deadlines from the last recording date as set forth on the rerecorded notice of election and demand as though such foreclosure had been commenced on such date.

(2) In the event of an error contained in any certificate of purchase, certificate of redemption, public trustee's deed, or other recorded document prepared by the office of the public trustee, the public trustee may correct such error by executing and recording a scrivener's error affidavit as set forth in section 38-35-109 (5).

**Source:** L. 2007: Entire section added, p. 1728, § 7, effective June 1.

## PART 8

## FORECLOSURE DEFERMENT

**38-38-801. Definitions.** As used in this part 8, unless the context otherwise requires:

(1) “Eligible borrower” means a grantor under a deed of trust securing an evidence of debt that meets the description in section 38-38-102.5 (1), and that is a first lien upon the property. The eligible borrower shall:

(a) Reside at the property that is subject to a notice of election and demand that was filed with the public trustee in the county in which all or a portion of the property is located on the date when the notice of election and demand is filed;

(b) Occupy the property as the grantor’s primary residence as of the date when the notice of election and demand was filed with the public trustee;

(c) Have occupied the property as the borrower’s primary residence within ninety days after the date of the deed of trust;

(d) Intend to continue to reside at the property; and

(e) Be personally obligated on the debt, which was incurred primarily for personal, family, or household purposes, had an original principal amount of five hundred thousand dollars or less, and is secured by the deed of trust in the notice of election and demand.

(2) “Foreclosure counselor” means a housing counselor employed by an agency approved by the United States department of housing and urban development. Foreclosure counselors include housing counselors affiliated with the Colorado foreclosure hotline and the hope now alliance, or its successor organization.

(3) “Foreclosure deferment” means a period, not to exceed ninety calendar days or not to extend past the next scheduled sale date after ninety days, except as may be extended pursuant to section 38-38-103 (5) (d), during which the public trustee of the county in which the property is located continues the scheduled sale of a property subject to a notice of election and demand.

**Source: L. 2009:** Entire part added, (HB 09-1276), ch. 404, p. 2221, § 5, effective June 2.

**38-38-802. Notice of the opportunity for foreclosure deferment.** (1) No later than fifteen calendar days following the filing of the complete and accurate documents required by and in accordance with section 38-38-101 (1) and the determination of the public trustee that the filing is complete in accordance with section 38-38-102 (1), and no earlier than the date the determination is made by the public trustee, the holder or the attorney for the holder who filed the notice of election and demand shall cause a notice as described in this section to be personally served on the eligible borrower or to be posted in a conspicuous place on the property that is the subject of the notice of election and demand. The notice shall be in a form and manner as determined by uniform standards of the division of housing. If possible, the notice shall be posted on the front door of the residence, but if access to the door is not possible or is restricted, then the notice shall be posted at an alternative conspicuous location, such as a guard gate or similar impediment.

(2) The notice shall contain:

(a) A description of the foreclosure deferment opportunity described in this part 8 and the procedures an eligible borrower may follow to seek a foreclosure deferment;

(b) The number of the Colorado foreclosure hotline and the address of the United States housing and urban development web site identifying approved housing counselor agencies in Colorado;

(c) The date that the notice was posted and the deadline by which an eligible borrower seeking a foreclosure deferment shall contact a foreclosure counselor, which deadline shall be twenty days after the posting of the notice;

(d) A telephone number for the holder and, if applicable, a telephone number for the attorney for the holder who filed the notice of election and demand;

(e) The public trustee foreclosure number.



(3) The notice shall be in both English and Spanish on a single piece of paper, in at least fourteen-point, bold-faced type.

(4) No later than thirty calendar days after June 2, 2009, the division of housing in the department of local government shall make available a standard form in English and Spanish that meets the requirements of this section.

(5) (a) No later than twenty calendar days after the filing of the documents required by and in accordance with section 38-38-101 (1), the holder shall provide to the public trustee an affidavit stating that the posting required by this section was made.

(b) If the holder does not provide the affidavit required by this subsection (5) to the public trustee within the twenty-day period, the sale of the property shall be continued in accordance with section 38-38-103 (5) (d).

(c) The affidavit required by paragraph (a) of this subsection (5) shall contain at least the following information:

(I) The foreclosure case number;

(II) The borrower's name or names;

(III) The address of the property at which the posting was made; and

(IV) The date of the posting.

(d) An affidavit filed by a qualified holder shall be signed by either the holder or the attorney for the holder. An affidavit filed by a nonqualified holder shall be signed by the holder and properly acknowledged by a notary public.

**Source: L. 2009:** Entire part added, (HB 09-1276), ch. 404, p. 2222, § 5, effective June 2. **L. 2010:** (1) amended and (2)(d) and (2)(e) added, (HB 10-1240), ch. 200, p. 872, §§ 4, 5, effective May 5.

**38-38-803. Procedures for foreclosure deferment - notification - process.** (1) An eligible borrower shall be granted the opportunity for a foreclosure deferment if the borrower meets the requirements of this part 8.

(2) To qualify for a foreclosure deferment, an eligible borrower shall contact a foreclosure counselor within twenty days after the posting of the notice required by section 38-38-802 for the purpose of obtaining a qualification decision as set forth in subsection (5) of this section. The initial contact may take place by telephone, electronically, or in person.

(3) The foreclosure counselor shall notify the holder promptly that he or she has been contacted by an eligible borrower and specify the date of the contact. Upon initial contact from an eligible borrower, the foreclosure counselor shall provide information to the eligible borrower regarding the federal government's "Making Home Affordable" program and advise the eligible borrower whether he or she would benefit from the federal program.

(4) Within ten calendar days after receiving notice that the eligible borrower has contacted a foreclosure counselor, the holder shall notify the counselor and the eligible borrower in writing of the address to which payments required by section 38-38-805 (2) shall be sent if the borrower qualifies for a foreclosure deferment and information on how payments can be made electronically.

(5) No later than thirty calendar days after an eligible borrower's initial contact with the foreclosure counselor, the counselor shall:

(a) Determine whether the borrower is qualified for a foreclosure deferment; and

(b) Certify the determination to the eligible borrower and the holder. If the foreclosure counselor determines that the eligible borrower qualifies for a foreclosure deferment, the counselor shall also notify the public trustee within the same thirty-day period.

(5.5) The foreclosure counselor shall notify the holder or the attorney for the holder if an eligible borrower who has qualified for a foreclosure deferment opts not to take part in the foreclosure deferment process.

(6) Notwithstanding any other provision of law, if the public trustee receives certification from the foreclosure counselor that the eligible borrower qualifies for a foreclosure deferment, the public trustee shall cancel any remaining publications of the combined notice, shall not mail the notice required by section 38-38-103 (1) (a), and shall continue the sale of the property in accordance with section 38-38-109 (1) (a). The sale shall be continued from week to week until receipt of certification pursuant to section 38-38-805 (4)

that the deferment has been terminated or, if no certification is received, for ninety calendar days or until the next scheduled sale date after the end of the ninety-day period. When the deferment has been terminated or has ended, the public trustee shall collect a fee of seventy-five dollars and thereafter shall begin publication of the combined notice as required in section 38-38-103 (5) (a), as to the deferred sale, and send the notice required by section 38-38-103 (1) (a), as soon as possible and no more than twenty calendar days after the completion of the deferment.

**Source:** L. 2009: Entire part added, (HB 09-1276), ch. 404, p. 2223, § 5, effective June 2. L. 2010: (5.5) added and (6) amended, (HB 10-1240), ch. 200, p. 873, § 6, effective May 5. L. 2011: (6) amended, (HB 11-1303), ch. 264, p. 1174, § 90, effective August 10.

**38-38-804. Foreclosure deferment assessment standards - ineligible borrowers.**

(1) A foreclosure counselor shall determine whether an eligible borrower qualifies for a foreclosure deferment by calculating whether, considering the eligible borrower's household expenses and gross monthly income, the nature of the loan, any written loan modification agreement between the eligible borrower and the holder entered into during the preceding twelve months, and any other relevant factors, there is a reasonable likelihood that the holder and eligible borrower can achieve a mutually acceptable agreement to avoid foreclosure. In making his or her determination, the counselor shall use analytical tools designed to indicate both:

(a) What the eligible borrower is able to pay in monthly housing expenses, including principal, interest, taxes, insurance, and any applicable homeowners association dues on a sustainable basis; and

(b) Whether the holder would be likely to receive greater revenue from the modification necessary to achieve such a monthly payment than the holder would be likely to receive from a completed foreclosure.

(2) The analytical tools used in subsection (1) of this section shall be consistent with the net present value test set out in the federal deposit insurance corporation loan modification program guidelines, effective October 2008, or any successor program.

(3) An eligible borrower shall not qualify for a foreclosure deferment if:

(a) The eligible borrower has abandoned the property;

(b) The borrower provided materially false information to obtain credit. The fact that the debt obligation reflects a stated-income loan is not sufficient to establish that the eligible borrower submitted materially false information.

(c) The eligible borrower has engaged in gross waste of the property, has been cited for major code violations, or has used the property for illegal purposes;

(d) The borrower is currently in a bankruptcy proceeding in which the property subject to the notice of election and demand is property of the bankruptcy estate or within the preceding twenty-four months has been discharged from a chapter seven bankruptcy in which the property subject to the notice of election and demand was property of the bankruptcy estate;

(e) Within the immediately preceding twenty-four months, the eligible borrower has been discharged from a chapter thirteen bankruptcy with a modified loan agreement for which the property subject to the notice of election and demand is the security; or

(f) The eligible borrower has transferred title to the property to another party.

(4) If the eligible borrower has received a foreclosure deferment, the eligible borrower shall not qualify for a subsequent foreclosure deferment in connection with the same debt obligation, including any modification of the debt.

**Source:** L. 2009: Entire part added, (HB 09-1276), ch. 404, p. 2224, § 5, effective June 2. L. 2010: (3)(f) added, (HB 10-1240), ch. 200, p. 873, § 7, effective May 5.

**38-38-805. Foreclosure deferment.** (1) If a holder has received notice from an eligible borrower's foreclosure counselor that the eligible borrower qualifies for a foreclosure deferment, the holder and the eligible borrower shall negotiate the terms of the debt



obligation secured by the deed of trust, subject to the terms of any agreement applicable to the debt obligation or any applicable government-supported enterprise servicing guidelines.

(2) (a) During the foreclosure deferment, the eligible borrower shall make monthly loan payments to the holder or the holder's designated representative that equal sixty-six and two-thirds percent of the monthly payment due prior to delinquency, less any portion of the monthly payment that represents taxes and insurance. If the eligible borrower has an obligation to make monthly payments for taxes and insurance to the holder, the eligible borrower shall pay the holder, on the same schedule, one-twelfth of the annual amount due for taxes and insurance prior to delinquency.

(b) The first payment shall be due to the address provided by the holder pursuant to section 38-38-803 (4) by the fifth day following the foreclosure counselor's certificate of qualification for the foreclosure deferment. Subsequent payments shall be due every thirty calendar days thereafter until the conclusion of the foreclosure deferment.

(c) In order to preserve evidence of the date of the payment, the eligible borrower may make the payments electronically or by certified funds delivered by a method that provides evidence of the date of payment.

(3) Acceptance of payments made during the foreclosure deferment period shall not constitute a waiver of default or modification of any amounts due on the original debt or any other rights of the holder. The payments shall be applied by the holder pursuant to the applicable provisions of the note and deed of trust or, if there are no such applicable provisions, in the following order: Payment of the holder's costs and expenses incurred in the foreclosure, payment for preservation of the property, escrow advances or shortages, late charges and interest, and principal.

(4) The foreclosure deferment shall terminate early upon certification by the foreclosure counselor to the public trustee. If the holder seeks early termination, the holder shall demonstrate to the foreclosure counselor that adequate grounds for early termination exist. The foreclosure counselor shall make a determination within ten calendar days after a holder's request and issue a certification of early termination if he or she determines:

- (a) That the eligible borrower has abandoned the property;
- (b) That the eligible borrower has failed to comply with the conditions of foreclosure deferment, including failure to make payments on time and in accordance with this section;
- (c) That the eligible borrower has conveyed, transferred, or further encumbered the property in violation of the deed of trust;
- (d) That a foreclosure has been initiated by a different party on another lien encumbering the property; or
- (e) That the eligible borrower has filed bankruptcy during the foreclosure deferment.

**Source: L. 2009:** Entire part added, (HB 09-1276), ch. 404, p. 2226, § 5, effective June 2.

**38-38-806. Foreclosure counselor immunity.** A foreclosure counselor acting in good faith shall not be liable to any person for approving or failing to approve a borrower for a foreclosure deferment or for certifying or declining to certify an early termination.

**Source: L. 2009:** Entire part added, (HB 09-1276), ch. 404, p. 2227, § 5, effective June 2.

**38-38-807. Remedies.** If the holder fails to post the notice required by section 38-38-802 within the time specified, the eligible borrower shall have twenty calendar days after the date of actual posting to contact a foreclosure counselor. The holder is responsible for all fees incurred between the deadline for posting and twenty calendar days after the date of the actual posting. Interest for the period between the deadline for posting and the date of actual posting shall be allowed only at the regular rate and not at the default rate as may be specified in the deed of trust.

**Source: L. 2009:** Entire part added, (HB 09-1276), ch. 404, p. 2227, § 5, effective June 2.

**38-38-807.5. Uniform standards - division of housing.** (1) The division of housing in the department of local affairs created in section 24-32-704, C.R.S., shall establish and may update uniform standards as necessary for the implementation of this part 8. The uniform standards shall include:

- (a) Standard forms and notices as determined necessary by the division;
- (b) Acceptable forms of payment for foreclosure deferment payments; and
- (c) A mechanism for a foreclosure counselor to notify the holder and public trustee when a qualified eligible borrower opts not to participate in the foreclosure deferment process.

**Source: L. 2010:** Entire section added, (HB 10-1240), ch. 200, p. 873, § 8, effective May 5.

**38-38-808. Repeal.** This part 8 is repealed, effective June 30, 2014.

**Source: L. 2009:** Entire part added, (HB 09-1276), ch. 404, p. 2227, § 5, effective June 2.  
**L. 2011:** Entire section amended, (HB 11-1023), ch. 1, p. 1, § 1, effective March 1.

## PART 9

### EXPEDITED SALE OF RESIDENTIAL PROPERTY

**38-38-901. Definitions.** As used in this part 9, unless the context otherwise requires:

- (1) “Eligible evidence of debt” means an evidence of debt that:
  - (a) Constitutes a residential mortgage loan, as defined in section 12-61-902, C.R.S.; and
  - (b) Is a first lien upon the property.
- (2) “Eligible holder” means the holder of an eligible evidence of debt that is secured by a deed of trust that does not specify a longer period of publication than set forth in section 38-38-904 (2) (g) (I).
- (3) “Expedited mailing list” means the initial mailing list in accordance with section 38-38-904 (2) (a) provided to the public trustee by the holder that includes the names and addresses of all persons who are included in an amended mailing list.
- (4) “Order for expedited sale” or “order” means the order issued by a court of competent jurisdiction pursuant to section 38-38-903.

**Source: L. 2010:** Entire part added, (HB 10-1249), ch. 181, p. 649, § 1, effective April 29.

**38-38-902. Expedited sale - how commenced - failure to file order.** (1) (a) For a notice of election and demand recorded on or after August 1, 2010, but prior to August 1, 2013, an eligible holder may elect to require the public trustee to hold an expedited sale by filing with the public trustee either:

- (I) A copy of the order for expedited sale; or
- (II) A separate document notifying the public trustee of the election for an expedited sale.

(b) Except as set forth in section 38-38-904 (2) (b), the order or separate document required pursuant to paragraph (a) of this subsection (1) shall be filed together with the documents required pursuant to section 38-38-101 (1).

(c) If an eligible holder files a separate document with the public trustee pursuant to section 38-38-101 (1) (h), the provisions of subsection (2) of this section shall not apply.

(2) Notwithstanding the provisions of section 38-38-108 (1) (a), if an eligible holder files the order or separate document required pursuant to paragraph (a) of subsection (1) of this section, the public trustee shall set an initial date of sale of the property that is no less than forty-five calendar days nor more than sixty-five calendar days after the date of recording of the notice of election and demand.



(3) An eligible holder who files the separate document identified in subparagraph (II) of paragraph (a) of subsection (1) of this section shall be required to file a copy of the order for expedited sale with the public trustee no later than thirty calendar days after the date of recording of the notice of election and demand.

**Source: L. 2010:** Entire part added, (HB 10-1249), ch. 181, p. 650, § 1, effective April 29.

**38-38-903. Court order for expedited sale.** (1) On and after August 1, 2010, whenever a public trustee forecloses upon a deed of trust under this article, an eligible holder may file a motion for an order for expedited sale with a court of competent jurisdiction to issue the same pursuant to rule 120 or other rule of the Colorado rules of civil procedure. The motion shall state that:

- (a) The holder of the evidence of debt is an eligible holder;
- (b) The deed of trust secures an eligible evidence of debt; and
- (c) The property has been abandoned or, in the alternative, the grantor of the deed of trust requests the order for expedited sale.

(2) The hearing related to the motion for an order for expedited sale shall be combined with the proceeding required pursuant to section 38-38-105 (2). The clerk of the court shall fix a time not less than twenty nor more than thirty calendar days after the filing of the motion and a place for the hearing of the combined proceeding. At least fifteen calendar days prior to the hearing, notice of the proceeding in English and in Spanish shall be personally served on the grantor of the deed of trust or posted in a conspicuous place on the property. If notice is given through posting, the notice shall be posted on the front door of the residence, but if access to the door is not possible or is restricted, then the notice shall be posted at an alternative conspicuous location, such as a guard gate or similar impediment. Notice provided pursuant to this subsection (2) shall be in addition to any other service required by the Colorado rules of civil procedure.

(3) The court shall enter an order for expedited sale if clear and convincing evidence is presented proving the allegations in the motion and no appearance is made to oppose the motion.

(4) (a) An affidavit that meets the requirements set forth in paragraph (b) of this subsection (4) is prima facie evidence of abandonment.

(b) (I) The affidavit shall be signed by and based on the personal knowledge of the eligible holder, an agent of the eligible holder, the sheriff of the county in which the property is located, or a building inspector or other municipal or county official having jurisdiction over the property, and shall state that the property is not actually occupied and that the signer has inspected the property on more than one occasion and on each occasion has determined that the property is abandoned. The affidavit shall further set forth at least two of the following supporting facts:

(A) Windows or entrances to the property are boarded up or closed off, or multiple window panes are broken and unrepaired;

(B) Doors to the property are smashed through, broken off, unhinged, or continuously unlocked;

(C) Gas, electric, and water service to the property have been terminated for a period of at least thirty days;

(D) The police or sheriff's office has received at least two reports of trespassers on the property or of vandalism or other illegal acts being committed on the property; or

(E) The property is deteriorating and is either below or is in imminent danger of falling below minimum local government standards for public safety and sanitation.

(II) Photographic or other documentary evidence that demonstrates the supporting facts set forth in the affidavit shall be attached to the affidavit.

(c) A signed affidavit by the grantor of the deed of trust that secures an eligible evidence of debt requesting an order for expedited sale is prima facie evidence of the same.

(d) Nothing in sub-subparagraph (C) of subparagraph (I) of paragraph (b) of this subsection (4) shall be construed to require a public utility to disclose any information about a customer.

**Source: L. 2010:** Entire part added, (HB 10-1249), ch. 181, p. 650, § 1, effective April 29.

**38-38-904. Modification of foreclosure proceedings.** (1) If the public trustee sets an expedited sale pursuant to section 38-38-902 (2), the provisions of parts 1 and 8 of this article shall be modified as set forth in subsection (2) of this section.

(2) (a) The eligible holder shall not be required to file a mailing list pursuant to section 38-38-101 (1) (e). The eligible holder shall file an expedited mailing list no later than fifteen calendar days after the recording of the notice of election and demand.

(b) The eligible holder shall not be required to file the separate document pursuant to section 38-38-101 (1) (h).

(c) The public trustee shall not be required to mail the combined notice pursuant to section 38-38-103 (1) (a).

(d) The public trustee shall mail the combined notice required pursuant to section 38-38-103 (1) (b) to the persons shown on the expedited mailing list no more than twenty-five calendar days after recording of the notice of election and demand.

(e) The deadline for delivering an amended mailing list pursuant to section 38-38-103 (2) (a) shall be no later than thirty calendar days after the recording of the notice of election and demand. The public trustee shall send the notice pursuant to section 38-38-103 (4) to the persons on the amended mailing list no later than five business days from the receipt of the amended mailing list. If the notice is sent less than twenty-one calendar days prior to the actual date of sale, the public trustee shall continue the sale for one week. If a sale is continued pursuant to this paragraph (e), the maximum number of weeks that a sale may be continued pursuant to paragraph (h) of this subsection (2) shall be three.

(f) A legible copy of this section shall be added to the sections that are sent pursuant to section 38-38-103 (4) (b).

(g) The requirements related to the publication of the combined notice set forth in section 38-38-103 (5) shall be modified as follows:

(I) The notice shall be published once each week for four consecutive weeks;

(II) The last date that the notice is published shall be more than five calendar days prior to the first scheduled date of sale; and

(III) The provisions of section 38-38-103 (5) (d) shall not apply.

(h) A sale may not be continued more than four weeks pursuant to section 38-38-109 (1) (a). This paragraph (h) shall not affect the allowable period for a continuance pursuant to section 38-38-104 (7) or 38-38-109 (1) (b).

(i) The eligible holder shall not be required to post the notice required pursuant to section 38-38-802.

**Source: L. 2010:** Entire part added, (HB 10-1249), ch. 181, p. 652, § 1, effective April 29.

**38-38-905. Withdrawal of notice of election and demand.** (1) (a) A foreclosure shall be deemed withdrawn and the eligible holder shall have forty-five calendar days within which to file a written withdrawal of the notice of election and demand, if the eligible holder:

(I) Fails to file a copy of the order for expedited sale with the public trustee as required by section 38-38-902 (3);

(II) Fails to file an expedited mailing list as required by section 38-38-904 (2) (a); or

(III) Delivers an amended mailing list after the deadline set forth in section 38-38-904 (2) (e).

(b) The public trustee shall record a written withdrawal of the notice of election and demand filed pursuant to paragraph (a) of this subsection (1).



(2) If the public trustee does not receive a written withdrawal of the notice of election and demand as required by paragraph (a) of subsection (1) of this section, the public trustee shall transmit by mail or electronic transmission to the eligible holder a notice requesting the holder to file the written withdrawal. If the written withdrawal is not filed within thirty calendar days after the notice is transmitted, the public trustee may record at any time a withdrawal of the notice of election and demand.

(3) If a foreclosure is deemed withdrawn pursuant to this section, the public trustee shall collect from the eligible holder all fees and costs actually incurred by the public trustee together with a withdrawal fee in the amount authorized under section 38-37-104 (1) (b) (V).

**Source: L. 2010:** Entire part added, (HB 10-1249), ch. 181, p. 653, § 1, effective April 29.

**38-38-906. Nonapplicability to judicial foreclosures.** The provisions of this part 9 shall not apply to a judicial foreclosure.

**Source: L. 2010:** Entire part added, (HB 10-1249), ch. 181, p. 653, § 1, effective April 29.

**38-38-907. Repeal of part.** This part 9 is repealed, effective July 1, 2014.

**Source: L. 2010:** Entire part added, (HB 10-1249), ch. 181, p. 653, § 1, effective April 29.

## ARTICLE 39

### Mortgages, Deeds of Trust, and Other Liens

**Editor's note:** This article was numbered as article 9 of chapter 118, C.R.S. 1963. The substantive provisions of this article were repealed and reenacted in 1990, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this article prior to 1990, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume. Former C.R.S. section numbers are shown in editor's notes following those sections that were relocated. For a detailed comparison of this article, see the comparative tables located in the back of the index.

**Law reviews:** For article, "The Statutory Right of Redemption from Foreclosures", see 13 Colo. Law. 793 (1984); for article, "Marshalling in Judicial or Nonjudicial Foreclosure in Colorado", see 13 Colo. Law. 1809 (1984); for article, "Real Estate Potpourri — Avoiding Sister State Anti-deficiency Laws", see 14 Colo. Law. 775 (1985); for article, "Deeds in Lieu of Foreclosure", see 15 Colo. Law. 394 (1986); for article, "The Agricultural Credit Act of 1987", see 17 Colo. Law. 611 (1988); for article, "Foreclosure by Private Trustee: Now Is the Time for Colorado", see 65 Den. U.L. Rev. 41 (1988); for article, "An Analysis of the Effect of S.B. 123 on Foreclosures", see 17 Colo. Law. 845 (1988); for article, "Foreclosure of Deeds of Trust and Mortgages: 1990 Statutory Amendments — Parts I and II" see 19 Colo. Law. 1601 and 1843 (1990).

#### PART 1

##### GENERAL PROVISIONS

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## PART 1

### GENERAL PROVISIONS

**38-39-100.5. Definitions.** The definitions in section 38-38-100.3 apply to this article unless the context otherwise requires.

**Source:** L. 2007: Entire section added, p. 1845, § 24, effective January 1, 2008.

**38-39-101. Effect of deed of trust to private trustee - nature of obligation secured.** Any deed of trust that names any person other than a public trustee as trustee therein or that secures an obligation other than an evidence of debt shall be deemed and taken to be a mortgage for all purposes and foreclosed only as mortgages are foreclosed in and through the courts; except that any deed of trust that names a public trustee as trustee therein and secures an obligation other than an instrument evidencing a debt shall be released as provided in section 38-39-102 (5).

**Source:** L. 90: Entire article R&RE, p. 1675, § 3, effective October 1.

**Editor's note:** This section is similar to former § 38-37-101, as it existed prior to 1990.

### ANNOTATION

**Annotator's note.** Since § 38-39-101 is similar to § 38-37-101 as it existed prior to the 1990 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

**Article deemed inapplicable to deeds of trust executed prior to its adoption** and in which the time of payment had been extended so that they mature after it took effect. *Smissaert v. Prudential Ins. Co.*, 15 Colo. App. 442, 62 P. 967 (1900).

**Deeds of trust may sometimes be treated as mortgages.** In some circumstances, deeds of trust executed to the public trustee may be treated as mortgages and foreclosed by judicial proceedings. *Bakers Park Mining & Milling Co. v. District Court*, 662 P.2d 483 (Colo. 1983).

**Attorney fees.** When a deed of trust is foreclosed as mortgage, the court may award attorney fees. *Bakers Park Mining & Milling Co. v. District Court*, 662 P.2d 483 (Colo. 1983).

**38-39-102. When deed of trust shall be released - definitions.** (1) (a) Except as otherwise provided in paragraph (a) of subsection (3) of this section, a deed of trust to the public trustee, upon compliance with the provisions of the deed of trust, shall be released by the public trustee upon the:

(I) Receipt of a written request from the holder of the evidence of debt secured by the deed of trust, the holder's agent or attorney, or a title insurance company providing an indemnification agreement and affidavit described in paragraph (c) of subsection (3) of this section, which request shall be duly executed and acknowledged;

(II) Production of the original cancelled evidence of debt such as a note or bond as evidence that the indebtedness secured by such deed of trust has been paid; except that such



production may be omitted in the circumstances contemplated in subsection (3) of this section;

(III) Receipt by the public trustee of the fee prescribed by section 38-37-104 (1) (a) and the fee for recording the release;

(IV) Receipt by the public trustee of a current address for the original grantor, assuming party, or current owner or either a notation on the request for release of the deed of trust or a written statement from the holder of the evidence of debt secured by the deed of trust, the title insurance company licensed and qualified in Colorado, or the holder of the original evidence of debt that is a qualified holder, as defined in section 38-38-100.3 (20), that they have no record of a current address that is different from the address of the property encumbered by the deed of trust being released; except that it shall be within the public trustee's discretion to release a deed of trust, upon compliance with the provisions of the deed of trust, if the public trustee has not received the information required pursuant to this subparagraph (IV); and

(V) Production of the original recorded deed of trust securing the evidence of debt or a legible copy thereof.

(b) Immediately upon execution of the release of the deed of trust by the public trustee, the public trustee shall cause the release to be recorded in the records of the county clerk and recorder.

(2) If the purpose of the deed of trust has been fully or partially satisfied and the indebtedness secured by such deed of trust has not been paid, the public trustee shall release the deed of trust as to all or portions of the property encumbered by the deed of trust pursuant to the provisions of subsection (1) of this section if the request to release certifies that the purpose of the deed of trust has been fully or partially satisfied and if either the original evidence of debt is exhibited or the holder of the evidence of debt is a qualified holder.

(3) (a) (I) Subject to the provisions of subparagraph (II) of this paragraph (a), with respect to either subsection (1) or (2) of this section, a holder of the original evidence of debt that is a qualified holder, as defined in section 38-38-100.3 (20), may request the release of a deed of trust without producing or exhibiting the original evidence of debt. A holder that requests the release of a deed of trust pursuant to this paragraph (a) shall be deemed to have agreed to indemnify and defend the public trustee against any claim made within the period described in subsection (7) of this section for damages resulting from the action of the public trustee taken in accordance with the request. The indemnity granted by this paragraph (a) is limited to actual economic loss suffered and any court costs and reasonable attorney fees and costs incurred in defending a claim brought as a direct and proximate result of the failure to produce the original evidence of debt, but the indemnity does not include and no claimant is entitled to any special, incidental, consequential, reliance, expectation, or punitive damages. No separate indemnification agreement shall be necessary for the agreement to indemnify to be effective.

(II) A holder of the original evidence of debt that is a qualified holder, as defined in section 38-38-100.3 (20), shall provide the public trustee with a current address for the original grantor, assuming party, or current owner when requesting a release of a deed of trust pursuant to this paragraph (a).

(b) (I) Subject to the provisions of subparagraph (II) of this paragraph (b), with respect to either subsection (1) or (2) of this section, the holder of the evidence of debt may request the release of a deed of trust without producing or exhibiting the original evidence of debt. A holder that requests the release of a deed of trust pursuant to this paragraph (b) shall deliver to the public trustee a corporate surety bond in an amount equal to one and one-half times the original principal amount recited in the deed of trust, which corporate surety bond shall remain in full force and effect for the period described in subsection (7) of this section.

(II) A holder of the evidence of debt shall provide the public trustee with a current address for the original grantor, assuming party, or current owner when requesting a release of a deed of trust pursuant to this paragraph (b).

(c) (I) Subject to the provisions of subparagraph (II) of this paragraph (c), with respect to either subsection (1) or (2) of this section, a title insurance company licensed and qualified in Colorado may request the release of a deed of trust without producing or

exhibiting the original evidence of debt. A company that requests the release of a deed of trust pursuant to this paragraph (c) shall be deemed to have agreed to indemnify and defend the public trustee against any claim made within the period described in subsection (7) of this section for damages resulting from the action taken by the public trustee in accordance with the request. The indemnity granted by this paragraph (c) is limited to actual economic loss suffered and any court costs and reasonable attorney fees and costs incurred in defending a claim brought as a direct and proximate result of the failure to produce the original evidence of debt, but the indemnity does not include and no claimant is entitled to any special, incidental, consequential, reliance, expectation, or punitive damages. No separate indemnification agreement shall be necessary for the agreement to indemnify to be effective; however, the company shall provide to the public trustee an affidavit executed by an officer of the company stating that the company has caused the indebtedness secured by the deed of trust to be satisfied in full or, in the case of a partial release, to the extent required by the holder of the indebtedness.

(II) A title insurance company licensed and qualified in Colorado shall provide the public trustee with a current address for the original grantor, assuming party, or current owner when requesting a release of a deed of trust pursuant to this paragraph (c).

(3.5) Venue for any action based upon the indemnification agreement specified in paragraph (a) of subsection (3) of this section shall be proper only in the county in which the public trustee receiving the certification is located.

(4) A public trustee shall have no duty to retain the original cancelled evidence of debt or deed of trust upon a release granted pursuant to this section.

(5) The lien represented by a deed of trust to the public trustee that secures an obligation other than an evidence of debt shall be released by the public trustee pursuant to the provisions of subsection (1) of this section as to all or portions of the property encumbered by the deed of trust upon the:

(a) Receipt of a written request of the beneficiary or assignee of such deed of trust, which request shall be duly executed and acknowledged;

(b) Presentation to the public trustee of an affidavit of such beneficiary or assignee stating that the purpose of the deed of trust has been fully or partially satisfied; and

(c) Receipt by the public trustee of the fee prescribed by section 38-37-104 (1) (a) and the fee for recording the release.

(6) The public trustee shall have no liability to any person, and no action may be commenced against the public trustee, as a result of issuing a release or partial release of a deed of trust under subsection (3) of this section, unless such action is commenced within six years from the date of the recording of such release or partial release or within the period of time prescribed by any statute of limitation of this state in which a suit to enforce payment of the indebtedness or performance of the obligation secured by said deed of trust may be commenced, whichever is less. Nothing in this article shall be construed to waive immunity of a public trustee that is provided in sections 24-10-101 to 24-10-120, C.R.S.

(7) The indemnification agreements or the corporate surety bond described in this section shall, in each case, remain effective for the time period described in subsection (6) of this section or until such time as any claim made against the public trustee within such time period has been finally resolved, whichever is longer.

(8) If the written request to release the lien of any deed of trust is a fraudulent request, the release by the public trustee based upon such request shall be void.

(8.5) If a deed of trust is improperly recorded in the office of the clerk and recorder of a county other than the county in which the real property is located, the deed of trust must be recorded in the correct county before the public trustee may release the deed of trust. The public trustee of a county other than the county wherein the real property is located shall not release the deed of trust.

(9) For purposes of this section, unless the context otherwise requires:

(a) "Assuming party" means a person other than the original grantor who paid off the indebtedness on behalf of the original grantor.

(b) "Current address" means the most recent address reflected in the records of a holder of the evidence of debt, a title insurance company licensed and qualified in Colorado, or a holder of the original evidence of debt that is a qualified holder, as defined in section



38-38-100.3 (20). If a holder of the evidence of debt, a title insurance company licensed and qualified in Colorado, or a holder of the original evidence of debt that is a qualified holder, as defined in section 38-38-100.3 (20), has no record of a current address, any requirement that a current address be provided shall be deemed satisfied by indicating that fact.

(c) "Current owner" means a person other than the original grantor who currently owns the property and has either paid off or taken over the indebtedness on behalf of the original grantor.

**Source:** L. 90: Entire article R&RE, p. 1675, § 3, effective October 1. L. 92: (1) to (3) and (5) amended and (6) to (8) added, p. 2093, § 5, effective July 1. L. 93: (1)(a)(I) amended, p. 254, § 1, effective July 1. L. 97: (1)(a), (2), (6), and (7) amended and (3.5) added, p. 1420, § 1, effective September 1. L. 2000: IP(3.5)(b)(IV) and (3.5)(b)(V) amended, p. 1874, § 113, effective August 2. L. 2002: (3)(c) amended, p. 1348, § 16, effective July 1. L. 2003: (3)(a), (3.5)(b)(I), and (3.5)(b)(II) amended, p. 1212, § 26, effective July 1. L. 2007: (1), (2), (3), (3.5), and IP(5) amended, p. 1845, § 25, effective January 1, 2008. L. 2008: (1)(a), (2), and (3) amended and (9) added, p. 566, § 1, effective April 21. L. 2009: (1)(a)(III) and (1)(a)(IV) amended and (1)(a)(V) added, (HB 09-1207), ch. 164, p. 721, § 21, effective September 1. L. 2012: (8.5) added, (SB 12-030), ch. 96, p. 325, § 13, effective September 1.

**Editor's note:** (1) This section is similar to former § 38-37-123, as it existed prior to 1990.

(2) Section 14 of chapter 96, Session Laws of Colorado 2012, provides that the act adding subsection (8.5) applies to the foreclosure of any deed of trust or other lien with respect to which a notice of election and demand or lis pendens is recorded in the office of the clerk and recorder of the county where the property or a portion of the property is located on or after September 1, 2012.

## ANNOTATION

**Law reviews.** For article, "Discharge of Security Transactions", see 26 Rocky Mt. L. Rev. 115 (1954).

**Annotator's note.** Since § 38-39-102 is similar to § 38-37-123 as it existed prior to the 1990 repeal and reenactment of article 37 and this article, relevant cases construing that provision have been included in the annotations to this section.

**Compliance with this section is necessary to effect a release or partial release of a deed of trust.** Himes v. Schiro, 711 P.2d 1281 (Colo. App. 1985).

And thus the attempt by a manager of a title company to amend the legal description in a recorded deed of trust to exclude a particular parcel of land by adding a statement that the trust deed was being re-recorded "to correct" the legal description did not remove encumbrance created by deed nor effect a partial release of such land. Himes v. Schiro, 711 P.2d 1281 (Colo. App. 1985); In re Hampden Center, Ltd., 123 Bankr. 892 (Bankr. D. Colo. 1991).

**Release of lien of deed of trust was void under subsection (8).** Release of deed was fraudulent and therefore void, notwithstanding lack of actual intent to deceive, where an attorney made material misrepresentations in a request for release of the deed that he was the attorney for the lender and that the purpose of the deed had been satisfied. The legislative intent of subsection (8) requires the term fraudu-

lent to be interpreted in a manner that includes a material misrepresentation as to statutory requirements in a request for release of a deed. 17 W. Mill St., LLC v. Smith, \_\_ P.3d \_\_ (Colo. App. 2011).

**Unauthorized release deed ineffectual to discharge encumbrance.** A release deed made by a trustee in a deed of trust without authority from the holder of the notes secured thereby is ineffectual to discharge the encumbrance. Harker v. Scudder, 15 Colo. App. 69, 61 P. 197 (1900).

**When trustee may reconvey title discharged of encumbrance.** It is only after the trust is carried out and the power to sell is extinguished by payment that it is possible for a trustee in a deed of trust to reconvey the title discharged of the encumbrance. Harker v. Scudder, 15 Colo. App. 69, 61 P. 197 (1900).

**Subsequent encumbrancer has duty to inquire** of the holder of the notes secured whether the release made by the trustee is authorized. Harker v. Scudder, 15 Colo. App. 69, 61 P. 197 (1900).

**Parties to a note secured by a mortgage may substitute a new note for the original without impairing the security,** although the terms of the two notes are not identical, so long as the original secured debt remains unpaid and there is no increase in the debt. A lien established by a mortgage secures an indebtedness, and a mere change in the form of the evidence of

indebtedness as in the mode or time of payment does not in itself operate to discharge the mortgage. *United Bank of Lakewood v. Jefferson Ind. Bk.*, 791 P.2d 1250 (Colo. App. 1990).

**The lien on the deed of trust was extended to secure the same obligation by an amended**

**promissory note**, which is distinguishable from situation where a promissory note secured by a deed of trust was fully satisfied and discharged, thus extinguishing the lien on the property. *United Bk. of Lakewood v. Jefferson Ind. Bk.*, 791 P.2d 1250 (Colo. App. 1990).

**38-39-103. Effect of release or partial release before maturity of evidence of debt - release is good as to recitals.** (1) In any executed and recorded release or partial release of any deed of trust affecting the title to real estate in this state, whether or not such release is executed before the maturity of the indebtedness so secured, the recital of the following shall constitute evidence thereof, so as to give full effect to such release:

(a) That the indebtedness secured by such deed of trust has been fully or partially paid; or

(b) That the purpose of the deed of trust has been fully or partially satisfied.

(2) Any release of deed of trust shall be good and valid as to the recitals therein, whether made to the original grantor of said deed of trust or to a subsequent purchaser of the property described in such release of deed of trust.

**Source:** L. 90: Entire article R&RE, p. 1676, § 3, effective October 1. L. 92: (1) amended, p. 2095, § 6, effective July 1.

**Editor's note:** This section is similar to former §§ 38-37-124 and 38-37-125, as they existed prior to 1990.

#### ANNOTATION

**Law reviews.** For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 16 Dicta 71 (1940). For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 Dicta 321 (1949). For article, "Standard Pleading Samples to Be Used in Quiet Title Litigation", see 30 Dicta 39 (1953).

**Annotator's note.** Since § 38-39-103 is similar to § 38-37-124 as it existed prior to the 1990 repeal and reenactment of article 37 and this article, relevant cases construing that provision have been included in the annotations to this section.

**Section has no retroactive effect.** *Harker v. Scudder*, 15 Colo. App. 69, 61 P. 197 (1900).

**Compliance with this section is necessary to effect a release or partial release of a deed of trust.** *Himes v. Schiro*, 711 P.2d 1281 (Colo. App. 1985); *In re Hampden Center, Ltd.*, 123 Bankr. 892 (Bankr. D. Colo. 1991).

And thus the attempt by a manager of a title company to amend the legal description on a recorded deed of trust to exclude a particular parcel of land by adding a statement that the trust deed was being re-recorded "to correct" the legal description did not remove encumbrance created by deed nor effect a partial release of such land. *Himes v. Schiro*, 711 P.2d 1281 (Colo. App. 1985); *In re Hampden Center, Ltd.*, 123 Bankr. 892 (Bankr. D. Colo. 1991).

**38-39-104. Satisfaction of mortgage.** The lien of any mortgage encumbering property within the state of Colorado can be released only by the mortgagee executing a separate instrument of release executed under the formalities prescribed by the law regulating conveyances. All releases made prior to July 1, 1973, either on the mortgage or on the record of the mortgage, and signed by the mortgagee, shall have the same effect as a separate instrument of release legally executed by the mortgagee.

**Source:** L. 90: Entire article R&RE, p. 1676, § 3, effective October 1.

**Editor's note:** This section is similar to former § 38-38-101, as it existed prior to 1990.



## ANNOTATION

**Law reviews.** For note, "A Survey of the Colorado Torrens Act", see 5 Rocky Mt. L. Rev. 149 (1933).

**Annotator's note.** Since § 38-39-104 is similar to § 38-38-101 as it existed prior to the 1990 repeal and reenactment of article 38 and this article, relevant cases construing that provision have been included in the annotations to this section.

**Presumption of satisfaction overcome by showing of late interest payment.** The produc-

tion of a note by the plaintiff at the trial, showing payment of interest months after the date of alleged payment, is sufficient to overcome any presumption arising from the record of a satisfaction of a mortgage securing a note of like description. *Smith v. Stark*, 3 Colo. App. 453, 34 P. 258 (1893).

**Applied in** *Barth v. Deuel*, 11 Colo. 494, 19 P. 471 (1888).

**38-39-105. Removal of improvements from encumbered property.** (1) An owner of real property shall not remove any improvement therefrom without first obtaining the written consent of the holder of any lien recorded prior to October 1, 1990, and the holder of the indebtedness secured by the deed of trust or mortgage having the most senior lien which encumbers such real property. This section shall not apply where any such improvement is expressly excepted from such lien.

(2) Any person who violates the provisions of subsection (1) of this section commits a class 2 misdemeanor and shall be punished as provided in section 18-1.3-501, C.R.S.

**Source:** L. 90: Entire article R&RE, p. 1676, § 3, effective October 1. L. 2002: (2) amended, p. 1555, § 344, effective October 1.

**Editor's note:** This section is similar to former §§ 38-38-103 and 38-38-104, as they existed prior to 1990.

**Cross references:** For the legislative declaration in the 2002 act amending subsection (2), see section 1 of chapter 318, Session Laws of Colorado 2002.

## ANNOTATION

**Public trustee not required to send notice to cosignor on promissory note** of his right to cure and of foreclosure proceedings on deed of trust securing the note, despite fact that cosignor had right to cure the default. *S.L.K. Testamen-*

*tary Trust v. Davids*, 692 P.2d 1147 (Colo. App. 1984), *aff'd*, 728 P.2d 1259 (Colo. 1987) (decided under § 38-39-118 as it existed prior to the 1990 repeal and reenactment of this article and article 39).

**38-39-106. Future advances.** (1) Any mortgage may, by its terms, secure future advances up to a total maximum principal amount expressly set forth in such mortgage. Such mortgage shall be effective to secure payment of all advances, both obligatory and optional, up to the stated maximum principal amount to the same extent and with the same effect and priority as if such total maximum principal amount had been fully disbursed on or before the date such mortgage was recorded.

(2) Such mortgage shall also secure, to the same extent and with the same effect and priority, the following additional amounts regardless of whether such additional amounts, when added to the principal amount of the indebtedness, exceed the maximum principal amount stated in the mortgage:

(a) All increases in the principal amount that result from negative amortization or the addition of deferred interest;

(b) All disbursements made for the payment of taxes, levies, or insurance with respect to the property subject to the mortgage or made to protect such property from waste, damage, or abuse;

(c) If the mortgage or evidence of debt secured by the mortgage so provides, all reasonable expenses associated with collection of the indebtedness or foreclosure of the mortgage; and

- (d) Interest on any of the items specified in paragraphs (a) to (c) of this subsection (2) in accordance with the terms of the mortgage or the evidence of debt secured by the mortgage.
- (3) Subsection (1) of this section shall not apply to any subsequent advance against a mortgage instrument after a mortgagee has initially advanced principal up to the maximum amount stated in the mortgage, unless the mortgage instrument clearly states that it was made pursuant to a revolving credit arrangement.
- (4) This section shall have no application to the priority of general mechanics' liens arising pursuant to article 22 of this title, and the priority of such general mechanics' liens with respect to a mortgage which secures future advances shall be determined without reference to this section.
- (5) As used in this section, unless the context otherwise requires, "mortgage" means a mortgage, deed of trust, or other instrument creating a lien on real property to secure the payment of an indebtedness.

**Source:** L. 2002: Entire section added, p. 377, § 1, effective August 7.

**38-39-107. Form of written request for release of a deed of trust with production of the evidence of debt.** A written request to a public trustee made pursuant to section 38-39-102 (1) (a) to release a deed of trust with production of the original canceled evidence of debt may be in substantially the following form:

Original Note and Deed of Trust Returned to:

When recorded return to:

Prepared/Received by:

REQUEST FOR FULL [ ] / PARTIAL [ ]  
RELEASE OF DEED OF TRUST AND RELEASE  
BY HOLDER OF THE EVIDENCE OF DEBT WITH  
PRODUCTION OF EVIDENCE OF DEBT PURSUANT  
TO § 38-39-102 (1) (a), COLORADO REVISED STATUTES

_____	Date
_____	Original Grantor (Borrower)
_____	
_____	Current Address of Original Grantor,
_____	Assuming Party, or Current Owner
[ ] Check here if current address is unknown.	
_____	Original Beneficiary (Lender)
_____	
_____	Date of Deed of Trust
_____	Date of Recording and/or
	Re-Recording of Deed of Trust
_____	Recording Information

County Rcpt. No. and/or Film No. and/or Book/Page No. and/or Torrens Reg. No.  
TO THE PUBLIC TRUSTEE OF \_\_\_\_\_ COUNTY  
(The County of the Public Trustee who is the appropriate grantee to whom the above Deed of Trust should grant an interest in the property described in the Deed of Trust)



PLEASE EXECUTE AND RECORD A RELEASE OF THE DEED OF TRUST DESCRIBED ABOVE. The indebtedness secured by the Deed of Trust has been fully or partially paid and/or the purpose of the Deed of Trust has been fully or partially satisfied in regard to the property encumbered by the Deed of Trust as described therein as to a full release or, in the event of a partial release, only that portion of the real property described as:

(IF NO LEGAL DESCRIPTION IS LISTED THIS WILL BE DEEMED A FULL RELEASE.)

Name and address of current holder of the evidence of debt secured by deed of trust (lender)

Name, title, and address of officer, agent, or attorney of current holder

Signature                      Signature  
State of                      , County of

The foregoing Request for Release was acknowledged before me on

(Date) by\*                      (Notary Seal)  
Date Commission Expires

\*If applicable, insert title of officer and name of current holder

Notary Public  
Witness my hand and official seal

RELEASE OF DEED OF TRUST

WHEREAS, the Grantor(s) named above, by Deed of Trust, granted certain real property described in the Deed of Trust to the Public Trustee of the County referenced above, in the State of Colorado, to be held in trust to secure the payment of the indebtedness referred to therein; and

WHEREAS, the indebtedness secured by the Deed of Trust has been fully or partially paid and/or the purpose of the Deed of Trust has been fully or partially satisfied according to the written request of the current holder of the evidence of debt;

NOW THEREFORE, in consideration of the premises and the payment of the statutory sum, receipt of which is hereby acknowledged, I, as the Public Trustee in the County named above, do hereby fully and absolutely release, cancel, and forever discharge the Deed of Trust or that portion of the real property described above in the Deed of Trust, together with all privileges and appurtenances thereto belonging.

Public Trustee  
  
Deputy Public Trustee  
(Public Trustee use only; use appropriate label)  
(Public Trustee's seal)  
(If applicable: Notary Seal)

(If applicable, name and address of person creating new legal description as required by § 38-35-106.5, Colorado Revised Statutes.)

**Source: L. 2007:** Entire section added, p. 403, § 1, effective July 1. **L. 2008:** Entire section amended, p. 569, § 2, effective April 21. **L. 2009:** Entire section amended, (HB 09-1207), ch. 164, p. 722, § 22, effective September 1.

**38-39-108. Form of written request for release of a deed of trust without production of the evidence of debt.** A written request to a public trustee made pursuant to section 38-39-102 (1) (a) and (3) to release a deed of trust without production of the original canceled evidence of debt may be in substantially the following form:

Original Note and Deed of Trust Returned to:

When recorded return to:

Prepared/Received by:

REQUEST FOR FULL ☐ / PARTIAL ☐  
RELEASE OF DEED OF TRUST AND RELEASE BY  
HOLDER OF THE EVIDENCE OF DEBT WITHOUT  
PRODUCTION OF EVIDENCE OF DEBT PURSUANT TO  
§ 38-39-102 (1) (a) and (3), COLORADO REVISED STATUTES

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_ Date  
\_\_\_\_\_  
\_\_\_\_\_ Original Grantor (Borrower)  
\_\_\_\_\_  
\_\_\_\_\_ Current Address of Original Grantor,  
\_\_\_\_\_ Assuming Party, or Current Owner  
☐ ☐ Check here if current address is unknown.  
\_\_\_\_\_  
\_\_\_\_\_ Original Beneficiary (Lender)  
\_\_\_\_\_  
\_\_\_\_\_ Date of Deed of Trust  
\_\_\_\_\_  
\_\_\_\_\_ Date of Recording and/or  
\_\_\_\_\_ Re-Recording of Deed of Trust  
\_\_\_\_\_  
\_\_\_\_\_ Recording Information

County Rcpt. No. and/or Film No. and/or Book/Page No. and/or Torrens Reg. No.

TO THE PUBLIC TRUSTEE OF \_\_\_\_\_ COUNTY

(The County of the Public Trustee who is the appropriate grantee to whom the above Deed of Trust should grant an interest in the property described in the Deed of Trust)

PLEASE EXECUTE AND RECORD A RELEASE OF THE DEED OF TRUST DESCRIBED ABOVE. The indebtedness secured by the Deed of Trust has been fully or partially paid and/or the purpose of the Deed of Trust has been fully or partially satisfied in regard to the property encumbered by the Deed of Trust as described therein as to a full release or, in the event of a partial release, only that portion of the real property described as:

(IF NO LEGAL DESCRIPTION IS LISTED THIS WILL BE DEEMED A FULL RELEASE.)

Pursuant to § 38-39-102 (3), Colorado Revised Statutes, in support of this Request for Release of Deed of Trust, the undersigned, as the holder of the evidence of debt secured by the Deed of Trust described above, or as a title insurance company authorized to request the



release of a deed of trust pursuant to § 38-39-102 (3) (c), Colorado Revised Statutes, in lieu of the production or exhibition of the original evidence of debt with this Request for Release, certifies as follows:

- 1. The purpose of the Deed of Trust has been fully or partially satisfied.
- 2. The original evidence of debt is not being exhibited or produced herewith.
- 3. It is one of the following entities (check applicable box):
  - a. ☐ The holder of the original evidence of debt that is a qualified holder, as specified in § 38-39-102 (3) (a), Colorado Revised Statutes, that agrees that it is obligated to indemnify the Public Trustee for any and all damages, costs, liabilities, and reasonable attorney fees incurred as a result of the action of the Public Trustee taken in accordance with this Request for Release;
  - b. ☐ The holder of the evidence of debt requesting the release of a deed of trust without producing or exhibiting the original evidence of debt that delivers to the Public Trustee a corporate surety bond as specified in § 38-39-102 (3) (b), Colorado Revised Statutes; or
  - c. ☐ A title insurance company licensed and qualified in Colorado, as specified in § 38-39-102 (3) (c), Colorado Revised Statutes, that agrees that it is obligated to indemnify the Public Trustee pursuant to statute as a result of the action of the Public Trustee taken in accordance with this Request for Release and that has caused the indebtedness secured by the deed of trust to be satisfied in full, or in the case of a partial release, to the extent required by the holder of the indebtedness.

Name and address of the holder of the evidence of debt secured by Deed of Trust (lender) or name and address of the title insurance company authorized to request the release of a Deed of Trust.

Name, title, and address of officer, agent, or attorney of the holder of the evidence of debt secured by Deed of Trust (lender).

Signature	Signature
State of	, County of
The foregoing Request for Release was acknowledged before me	
on	(Date) by* (Notary Seal)
	Date Commission Expires

\*If applicable, insert title of officer and name of current holder

Notary Public  
Witness my hand and official seal

RELEASE OF DEED OF TRUST

WHEREAS, the Grantor(s) named above, by Deed of Trust, granted certain real property described in the Deed of Trust to the Public Trustee of the County referenced above, in the State of Colorado, to be held in trust to secure the payment of the indebtedness referred to therein; and  
WHEREAS, the indebtedness secured by the Deed of Trust has been fully or partially paid and/or the purpose of the Deed of Trust has been fully or partially satisfied according to the written request of the holder of the evidence of debt or title insurance company authorized to request the release of the Deed of Trust;  
NOW THEREFORE, in consideration of the premises and the payment of the statutory sum, receipt of which is hereby acknowledged, I, as the Public Trustee in the County named above, do hereby fully and absolutely release, cancel, and forever discharge the Deed of Trust or that portion of the real property described above in the Deed of Trust, together with all privileges and appurtenances thereto belonging.

Public Trustee  
Deputy Public Trustee

(Public Trustee use only; use appropriate label)

(Public Trustee's seal)

(If applicable: Notary Seal)

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(If applicable, name and address of person creating new legal description as required by § 38-35-106.5, Colorado Revised Statutes.)

**Source: L. 2007:** Entire section added, p. 405, § 1, effective July 1. **L. 2008:** Entire section amended, p. 570, § 3, effective April 21. **L. 2009:** Entire section amended, (HB 09-1207), ch. 164, p. 724, § 23, effective September 1.

**38-39-109. When release of deed of trust is recorded.** (1) (a) Except as provided in paragraph (b) of this subsection (1), when a release of a deed of trust is presented to the county clerk and recorder for recording, the county clerk and recorder shall return the original release of a deed of trust to the original grantor, assuming party, or current owner using the current address for the original grantor, assuming party, or current owner provided to the public trustee pursuant to section 38-39-102 (1) (a) (IV), (3) (a) (II), (3) (b) (II), or (3) (c) (II).

(b) The county clerk and recorder shall not be required to return the original release of a deed of trust as specified in paragraph (a) of this subsection (1) if the public trustee, in his or her discretion, has released the deed of trust as specified in section 38-39-102 (1) (a) (IV) or if a current address is not provided as specified in section 38-39-102 (9) (b).

(2) If the original release is returned to the county clerk and recorder as undeliverable or unable to forward, the county clerk and recorder shall maintain the original release pursuant to the policy of the office of the clerk and recorder.

(3) Any original grantor, assuming party, or current owner seeking a copy of a release of a deed of trust after recording shall be subject to appropriate copy fees pursuant to section 30-1-103, C.R.S.

**Source: L. 2008:** Entire section added, p. 573, § 4, effective April 21. **L. 2010:** (1)(a) amended, (HB 10-1422), ch. 419, p. 2121, § 173, effective August 11.

## PART 2

### LIMITATIONS

**38-39-201. Liens not to run over fifteen years.** (1) Except as provided in sections 38-39-202 and 38-39-204, any lien upon property created by a mortgage or deed of trust shall cease to be a lien fifteen years after the date on which the final payment or performance of the obligation secured thereby is due as shown by such mortgage or deed of trust recorded in the office of the county clerk and recorder of the county wherein the property is located.

(2) If the date on which the final payment or performance is due cannot be determined from the information contained in the recorded mortgage or deed of trust, such date shall, for the purpose of this article, be considered to be the date of the recorded instrument or, if the instrument is undated, the date the instrument was first recorded, notwithstanding anything in any other instrument or any unrecorded instrument to the contrary.

**Source: L. 90:** Entire article R&RE, p. 1677, § 3, effective October 1.

**Editor's note:** This section is similar to former §§ 38-40-101 and 38-40-106, as they existed prior to 1990.



## ANNOTATION

**Law reviews.** For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 16 Dicta 71 (1940). For article, "Colorado Bar Association Acts on Important Matters", see 19 Dicta 37 (1942). For article, "Bar Association Warns Holders of Encumbrances", see 19 Dicta 65 (1942). For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 Dicta 281 (1949). For article, "Summary of Denver Bar-Sponsored Bills Passed by General Assembly", see 28 Dicta 173 (1951). For article, "Foreclosure by Sale by Public Trustee of Deeds of Trust in Colorado", see 28 Dicta 437 (1951). For article, "Discharge of Security Transactions", see 26 Rocky Mt. L. Rev. 115 (1954).

**Annotator's note.** Since § 38-39-201 is similar to § 38-40-101 as it existed prior to the 1990 repeal and reenactment of this article and article 40, relevant cases construing that provision have been included in the annotations to this section.

**Reformation of foreclosed mortgage to correct mistake.** This section and § 38-39-205 do not impose a limitation on the right to have a mortgage, already foreclosed, reformed to correct a mistake therein. *Stubbs v. Standard Life Ass'n*, 125 Colo. 278, 242 P.2d 819 (1952).

**Applied in** *Birkby v. Wilson*, 92 Colo. 281, 19 P.2d 490 (1933).

**38-39-202. Lien extended - method.** (1) The lien of a recorded mortgage or deed of trust may be extended without the written agreement of the owner of the property encumbered by such lien by an instrument in writing, signed by the owner of the obligation secured by such lien or by the person, firm, or corporation designated in such mortgage or deed of trust as the trustee for the owner of the obligation, such as a note or bond secured by such lien or by the successor in office of such named trustee. Such instrument shall clearly describe the mortgage or deed of trust, shall state the date to which the lien has been extended, and shall be recorded before the expiration of the fifteen-year period described in section 38-39-201 (1) in the office of the county clerk and recorder of the county wherein the property is located. The date to which such lien is extended by such instrument shall in no event be later than fifteen years after the recording date of such instrument.

(2) Additional and further extensions may be recorded from time to time in accordance with the provisions of this section in order to extend the lien of such mortgage or deed of trust. The original extension and all additional and further extensions shall, in no event, extend the lien of the original mortgage or trust deed beyond a total of thirty years without the written agreement of the owner of the property encumbered by such lien. Each successive extension must be recorded during the time that such mortgage or deed of trust constitutes a lien under the terms of this article and before the expiration of the respective period for which the lien of such mortgage or deed of trust may have been extended in accordance with the terms of this article.

(3) The lien of a recorded mortgage or deed of trust may be extended for so long as agreed, by an instrument in writing, signed by the owner of the obligation secured by such lien and the owner of the property encumbered by such lien and recorded in the office of the county clerk and recorder of the county in which such property is located.

(4) The term "thirty years", as used in this section, means thirty years after the original maturity date of such mortgage or deed of trust.

**Source:** L. 90: Entire article R&RE, p. 1677, § 3, effective October 1.

**Editor's note:** This section is similar to former § 38-40-102, as it existed prior to 1990.

## ANNOTATION

**Law reviews.** For note on the 1951 amendment, see 28 Dicta 174 (1951). For article, "Foreclosure by Sale by Public Trustee of Deeds of Trust in Colorado", see 28 Dicta 437

(1951). For article, "Discharge of Security Transactions", see 26 Rocky Mt. L. Rev. 115 (1954).

**38-39-203. No release necessary.** No release or other instrument shall be necessary to discharge the lien of any recorded mortgage or deed of trust which has expired or ceased to be a lien as provided in sections 38-39-201 and 38-39-202, but nothing in this section shall be construed as affecting or preventing the execution of a release at any time.

**Source: L. 90:** Entire article R&RE, p. 1678, § 3, effective October 1.

**Editor's note:** This section is similar to former § 38-40-104, as it existed prior to 1990.

#### ANNOTATION

**Law reviews.** For article, "Foreclosure by Sale by Public Trustee of Deeds of Trust in Colorado", see 28 Dicta 437 (1951). For article,

"Discharge of Security Transactions", see 26 Rocky Mt. L. Rev. 115 (1954).

**38-39-204. Effect of notice of action on lien.** If, prior to the expiration of the period as defined in sections 38-39-201 and 38-39-202 during which any recorded mortgage or deed of trust constitutes a lien, there shall be filed in the office of the county clerk and recorder of the proper county a notice of an action pending to foreclose such lien or a notice of election and demand for sale, the lien created by such instrument shall continue until final disposition of the action or foreclosure proceeding.

**Source: L. 90:** Entire article R&RE, p. 1678, § 3, effective October 1.

**Editor's note:** This section is similar to former § 38-40-110, as it existed prior to 1990.

#### ANNOTATION

**Law reviews.** For article, "Foreclosure by Sale by Public Trustee of Deeds of Trust in Colorado", see 28 Dicta 437 (1951). For article, "Discharge of Security Transactions", see 26 Rocky Mt. L. Rev. 115 (1954).

**Applied** in *Broadway Roofing & Supply, Inc. v. District Court*, 140 Colo. 154, 342 P.2d 1022 (1959) (decided under § 38-40-110 as it existed prior to the 1990 repeal and reenactment of this article and article 40).

**38-39-205. Action to be brought within fifteen years.** No action shall be commenced to foreclose the lien of any mortgage or deed of trust, unless such action is commenced prior to the date on which such mortgage or deed of trust ceases to be a lien pursuant to sections 38-39-201 and 38-39-202.

**Source: L. 90:** Entire article R&RE, p. 1677, § 3, effective October 1.

**Editor's note:** This section is similar to former § 38-40-105, as it existed prior to 1990.

#### ANNOTATION

**Law reviews.** For article, "Foreclosure by Sale by Public Trustee of Deeds of Trust in Colorado", see 28 Dicta 437 (1951). For article, "Discharge of Security Transactions", see 26 Rocky Mt. L. Rev. 115 (1954).

**This section provides for a statute of limitations not a statute of repose.** Unlike a statute of repose, which bars a claim after a certain period of time regardless of whether an actual injury has occurred or a claim has arisen, this section takes effect when a claim arises and determines how soon thereafter an action on the

claim must commence. *Mortgage Invs. Corp. v. Battle Mountain Corp.*, 70 P.3d 1176 (Colo. 2003).

**This section governs an action to foreclose on a deed of trust** when a party has commenced suit for default on an original promissory note within the applicable six-year statute of limitations and thereafter has reduced the note to judgment. *Mortgage Invs. Corp. v. Battle Mountain Corp.*, 70 P.3d 1176 (Colo. 2003).

**A creditor may enforce payment of a debt evidenced by the reduction of a promissory**



**note to judgment in two ways.** The creditor may commence an action to execute the judgment lien within the six-year limitations period established by § 13-52-102 or may commence an action to foreclose on the original deed of

trust within the 15-year limitations period established by this section. *Mortgage Invs. Corp. v. Battle Mountain Corp.*, 70 P.3d 1176 (Colo. 2003).

**38-39-206. Does not extend any lien.** This article shall not be construed as extending any lien or the right to bring or maintain any action for which a shorter period may be provided by law.

**Source:** L. 90: Entire article R&RE, p. 1678, § 3, effective October 1.

**Editor's note:** This section is similar to former § 38-40-111, as it existed prior to 1990.

#### ANNOTATION

**Law reviews.** For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 16 Dicta 71 (1940). For article, "Foreclosure by Sale by Public Trustee of Deeds of Trust

in Colorado", see 28 Dicta 437 (1951). For article, "Discharge of Security Transactions", see 26 Rocky Mt. L. Rev. 115 (1954).

**38-39-207. Lien extinguished when action barred.** The lien created by any instrument shall be extinguished, regardless of any other provision in this article to the contrary, at the same time that the right to commence a suit to enforce payment of the indebtedness or performance of the obligation secured by the lien is barred by any statute of limitation of this state.

**Source:** L. 90: Entire article R&RE, p. 1678, § 3, effective October 1.

**Editor's note:** This section is similar to former § 38-40-112, as it existed prior to 1990.

#### ANNOTATION

**Law reviews.** For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 16 Dicta 71 (1940). For article, "Foreclosure by Sale by Public Trustee of Deeds of Trust in Colorado", see 28 Dicta 437 (1951). For article, "Discharge of Security Transactions", see 26 Rocky Mt. L. Rev. 115 (1954). For article, "When do Deeds of Trust Bite the Dust?", see 27 Colo. Law. 61 (December 1998).

**Annotator's note.** Since § 38-39-207 is similar to § 38-40-112 as it existed prior to the 1990 repeal and reenactment of this article and article 40, relevant cases construing that provision have been included in the annotations to this section.

**The statute of limitations applies to each installment due on a note separately and does not begin to run on any one installment until that installment is due.** Right to foreclose on note is not extinguished because certain payments are more than 6 years overdue and foreclosure proceedings are just begun. *Application of Church*, 833 P.2d 813 (Colo. App. 1992).

**Section is of limited applicability and does not apply to nonclaim statutes.** *Willis v. Neilson*, 32 Colo. App. 129, 507 P.2d 1106 (1973).

**Section does not apply to the United States or its assignees.** The United States is not bound by state statutes of limitations in enforcing its rights. *LPP Mortg. Ltd. v. Hotaling*, 497 F. Supp. 2d 1217 (D. Colo. 2007).

**Construction of section.** It would appear reasonable to construe this section as meaning that, unless a mortgagee keeps his lien alive and also keeps his indebtedness alive, his lien is extinguished under this section when "the right to commence a suit to enforce payment of the indebtedness secured by the lien is barred by any statute of limitation of this state". *Birkby v. Wilson*, 92 Colo. 281, 19 P.2d 490 (1933).

**Note and deed of trust securing the note are not extinguished** where statute of limitations has not run on all installments under a money obligation payable in installments. *Application of Church*, 833 P.2d 813 (Colo. App. 1992).

**A lien, once extinguished by this section, cannot be revived.** *Rossi v. Osage Highland Dev., LLC*, 219 P.3d 319 (Colo. App. 2009).

**Applied** in *Martinez v. Continental Enterprises*, 697 P.2d 789 (Colo. App. 1984), *aff'd* in part, *rev'd* in part on other grounds, 730 P.2d 308 (Colo. 1986).

**38-39-208. Action within seven years when in possession.** No action shall be commenced for any reason whatsoever to question or to set aside any foreclosure of any deed of trust, mortgage, or other lien, unless such action is commenced within seven years after the date of the vesting of title pursuant to such foreclosure.

**Source:** L. 90: Entire article R&RE, p. 1678, § 3, effective October 1.

**Editor's note:** This section is similar to former § 38-40-114, as it existed prior to 1990.

#### ANNOTATION

**Law reviews.** For note, "Adverse Possession in Colorado", see 27 Rocky Mt. L. Rev. 88 (1954). For article, "An Analysis of the Effect of S.B. 123 on Foreclosures," see 17 Colo. Law. 845 (1988).

**Section is inapplicable to suits for wrongful foreclosure.** Commercial Equity Corp. v. Majestic Sav. & Loan Ass'n, 620 P.2d 56 (Colo. App. 1980).

**38-39-209. Mortgages to United States.** (1) Any mortgage, deed of trust, or other instrument executed by a corporation organized under the provisions of articles 40, 55, and 56 of title 7, C.R.S., and given to secure any indebtedness to the United States, or any agency or instrumentality thereof, which affects real or personal property, or both, and which is recorded in the real property records in any county in which such property is located or is to be located shall have the same force and effect as if such instrument were also recorded, filed, or indexed as provided by law in the proper office in such county as a mortgage of personal property. All after-acquired real or personal property of such corporation, described or referred to as being mortgaged or pledged in any such instrument, shall become subject to the lien thereof immediately upon the acquisition of such property by such corporation, whether or not such property was in existence at the time of the execution of such instrument.

(2) Recordation of any such instrument shall constitute notice and otherwise have the same effect with respect to such after-acquired property as it has under the laws relating to recordation with respect to property owned by such corporation at the time of the execution of such instrument and therein described or referred to as being mortgaged or pledged thereby. The lien upon personal property of any such instrument shall, after recordation thereof, continue in existence and of record until the performance of the obligation secured thereby or the release or satisfaction thereof by the owner thereof.

**Source:** L. 90: Entire article R&RE, p. 1678, § 3, effective October 1. L. 96: (1) amended, p. 546, § 13, effective July 1.

**Editor's note:** This section is similar to former § 38-40-115, as it existed prior to 1990.

#### ARTICLE 40

#### Mortgage Brokers - Lenders

**Editor's note:** This article was numbered as article 5 of chapter 118, C.R.S. 1963. The substantive provisions of this article were repealed and reenacted in 1990, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this article prior to 1990, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume. Former C.R.S. section numbers are shown in editor's notes following those sections that were relocated. For a detailed comparison of this article, see the comparative tables located in the back of the index.

38-40-101. Mortgage broker fees - escrow accounts - unlawful act - penalty.

38-40-102.

Disclosure of costs - statement of terms of indebtedness.



38-40-103. Servicing of mortgages and deeds of trust - liability for interest or late fees for property taxes.

38-40-104. Cause of action - attorney fees.

38-40-105. Prohibited acts by participants in certain mortgage loan transactions - unconscionable acts and practices - definitions.

### **38-40-101. Mortgage broker fees - escrow accounts - unlawful act - penalty.**

(1) Any funds, other than advanced for actual costs and expenses to be incurred by the mortgage broker on behalf of the applicant for a loan, paid to a mortgage broker as a fee conditioned upon the consummation of a loan secured or to be secured by a mortgage or other transfer of or encumbrance on real estate shall be held in an escrow or a trustee account with a bank or recognized depository in this state. Such account may be any type of checking, demand, passbook, or statement account insured by an agency of the United States government.

(2) It is unlawful for a mortgage broker to misappropriate funds held in escrow or a trustee account pursuant to subsection (1) of this section.

(3) The withdrawal, transfer, or other use or conversion of any funds held in escrow or a trustee account pursuant to subsection (1) of this section prior to the time a loan secured or to be secured by mortgage or other transfer of or encumbrance on real estate is consummated shall be prima facie evidence of intent to violate subsection (2) of this section.

(4) Any mortgage broker violating any of the provisions of subsection (2) of this section commits theft as defined in section 18-4-401, C.R.S.

(5) Any mortgage broker violating any of the provisions of subsection (1) or (2) of this section shall be liable to the person from whom any funds were received for the sum of one thousand dollars plus actual damages caused thereby, together with costs and reasonable attorney fees. No lender shall be liable for any act or omission of a mortgage broker under this section.

(6) As used in this section, unless the context otherwise requires, "mortgage broker" means a person, firm, partnership, association, or corporation, other than a bank, trust company, savings and loan association, credit union, supervised lender as defined in section 5-1-301 (46), C.R.S., insurance company, federal housing administration approved mortgagee, land mortgagee, or farm loan association or duly appointed loan correspondents, acting through officers, partners, or regular salaried employees for any such entity, that engages in negotiating or offering or attempting to negotiate for a borrower, and for commission, money, or other thing of value, a loan to be consummated and funded by someone other than the one acting for the borrower.

**Source:** L. 90: Entire article R&RE, p. 1679, § 4, effective October 1. L. 2000: (6) amended, p. 1874, § 114, effective August 2.

**Editor's note:** This section is similar to former § 38-38-111, as it existed prior to 1990.

**38-40-102. Disclosure of costs - statement of terms of indebtedness.** (1) Any person regularly engaged in the making of loans secured by a mortgage or deed of trust on a one-to-four-family dwelling shall provide to any applicant for a loan to be secured by such a mortgage or deed of trust a good faith estimate, as a dollar amount or range, of each charge for a settlement service to be charged by the lender and paid by the applicant or a third party at the time of the making of the loan for which the application is made. Such disclosure shall be delivered to the applicant, and to any third party who will be liable on the loan and to the seller if the name and address of the third party and seller is known to the lender at the time of the application, in the same manner and at the same time as the good faith estimate required by the federal "Real Estate Settlement Procedures Act of 1974", 12 U.S.C. sec. 2601 et seq. If the lender conditionally guarantees any of the terms of the loan for which the application is made, there shall be delivered to the applicant a written statement of the

conditions of such guaranty, including the period of time within which the consummation of the loan must occur in order for the guaranty to be honored.

(2) A person shall not state terms of an indebtedness to an applicant which are in conflict with the good faith estimate and which he knows to be false or unavailable at the time of the statement or at the time of closing of the agreement creating the indebtedness.

(3) As used in this section, unless the context otherwise requires, the terms "good faith estimate", "person", and "settlement service" shall have the same meanings as given to such terms in the federal "Real Estate Settlement Procedures Act of 1974", 12 U.S.C. sec. 2601 et seq., and in regulation X, 24 CFR part 3500, issued by the United States secretary of housing and urban development pursuant to such act.

(4) The provisions of this section shall not apply to a loan to be made by a bank, trust company, savings and loan association, credit union, federal housing administration approved mortgagee, or supervised lender as defined in section 5-1-301 (46), C.R.S., that will be secured by a mortgage or deed of trust other than a first mortgage or deed of trust having priority as a lien on the real property over any other mortgage or deed of trust.

**Source:** L. 90: Entire article R&RE, p. 1680, § 4, effective October 1. L. 2000: (4) amended, p. 1874, § 115, effective August 2.

**Editor's note:** This section is similar to former § 38-38-112, as it existed prior to 1990.

**38-40-103. Servicing of mortgages and deeds of trust - liability for interest or late fees for property taxes.** (1) (a) (I) Any person who regularly engages in the collection of payments on mortgages and deeds of trust for owners of evidences of debt secured by mortgages or deeds of trust shall promptly credit all payments which are received and which are required to be accepted by such person or his agent and shall promptly perform all duties imposed by law and all duties imposed upon the servicer by such evidences of debt, mortgages, or deeds of trust creating or securing the indebtedness.

(II) No more than twenty days after the date of transfer of the servicing or collection rights and duties to another person, the transferor of such rights and duties shall mail a notice addressed to the debtor from whom it has been collecting payments at the address shown on its records, notifying such debtor of the transfer of the servicing of his or her debt and the name, address, and telephone number of the transferee of the servicing.

(b) The debtor may continue to make payments to the transferor of the servicing of his or her loan until a notice of the transfer is received from the transferee containing the name, address, and telephone number of the new servicer of the loan to whom future payments should be made. Such notice may be combined with the notice required in subparagraph (II) of paragraph (a) of this subsection (1). It shall be the responsibility of the transferor to forward to the transferee any payments received and due after the date of transfer of the loan.

(2) The servicer of a loan shall respond in writing within twenty days from the receipt of a written request from the debtor or from an agent of the debtor acting pursuant to written authority from the debtor for information concerning the debtor's loan, which is readily available to the servicer from its books and records and which would not constitute the rendering of legal advice. Any such response must include the telephone number of the servicer. The servicer shall not be liable for any damage or harm that might arise from the release of any information pursuant to this section.

(3) The servicer of a loan shall annually provide to the debtor a summary of activity related to the loan. Such a summary shall contain, but need not be limited to, the total amount of principal and interest paid on the loan in that calendar year.

(4) The servicer of a loan shall be liable for any interest or late fees charged by any taxing entity if funds for the full payment of taxes on the real estate have been held in an escrow account by such servicer and not remitted to the taxing entity when due.

**Source:** L. 90: Entire article R&RE, p. 1680, § 4, effective October 1.

**Editor's note:** This section is similar to former § 38-38-113, as it existed prior to 1990.



**38-40-104. Cause of action - attorney fees.** (1) If any applicant or debtor is aggrieved by a violation of section 38-40-102 or 38-40-103, which violation is not remedied in a reasonable, timely, and good faith manner by the party obligated to do so, and after a good faith effort to resolve the dispute is made by the debtor or borrower, such debtor or borrower may bring an action in a court of competent jurisdiction for any such violation, and, if the court finds that actual damages have occurred, the court shall award in addition to actual damages the amount of one thousand dollars, together with and costs and reasonable attorney fees.

(2) No transferee from a lender shall be liable for any act or omission of the lender under section 38-40-102. No transferee of servicing or collection rights shall be liable for any act or omission of the transferor of those rights under section 38-40-103.

**Source:** L. 90: Entire article R&RE, p. 1681, § 4, effective October 1. L. 98: Entire section amended, p. 427, § 1, effective April 21.

**Editor's note:** This section is similar to former § 38-38-114, as it existed prior to 1990.

**38-40-105. Prohibited acts by participants in certain mortgage loan transactions - unconscionable acts and practices - definitions.** (1) The following acts by any mortgage broker, mortgage originator, mortgage lender, mortgage loan applicant, real estate appraiser, or closing agent, other than a person who provides closing or settlement services subject to regulation by the division of insurance, with respect to any loan that is secured by a first or subordinate mortgage or deed or trust lien against a dwelling are prohibited:

(a) To knowingly advertise, display, distribute, broadcast, televise, or cause or permit to be advertised, displayed, distributed, broadcast, or televised, in any manner, any false, misleading, or deceptive statement with regard to rates, terms, or conditions for a mortgage loan;

(b) To make a false promise or misrepresentation or conceal an essential or material fact to entice either a borrower or a creditor to enter into a mortgage agreement when, under the terms and circumstances of the transaction, he or she knew or reasonably should have known of such falsity, misrepresentation, or concealment;

(c) To knowingly and with intent to defraud present, cause to be presented, or prepare with knowledge or belief that it will be presented to or by a lender or an agent thereof any written statement or information in support of an application for a mortgage loan that he or she knows to contain false information concerning any fact material thereto or if he or she knowingly and with intent to defraud or mislead conceals information concerning any fact material thereto;

(d) To facilitate the consummation of a mortgage loan agreement that is unconscionable given the terms and circumstances of the transaction;

(e) To knowingly facilitate the consummation of a mortgage loan transaction that violates, or that is connected with a violation of, section 12-61-911, C.R.S.

(f) (Deleted by amendment, L. 2009, (HB 09-1085), ch. 303, p. 1638, § 4, effective August 5, 2009.)

(1.5) (Deleted by amendment, L. 2009, (HB 09-1085), ch. 303, p. 1638, § 4, effective August 5, 2009.)

(1.7) (a) A mortgage broker or mortgage originator shall not commit, or assist or facilitate the commission of, the following acts or practices, which are hereby deemed unconscionable:

(I) Engaging in a pattern or practice of providing residential mortgage loans to consumers based predominantly on acquisition of the foreclosure or liquidation value of the consumer's collateral without regard to the consumer's ability to repay a loan in accordance with its terms; except that any reasonable method may be used to determine a borrower's ability to repay. This subparagraph (I) shall not apply to a reverse mortgage that complies with article 38 of title 11, C.R.S.

(II) Knowingly or intentionally flipping a residential mortgage loan. As used in this subparagraph (II), "flipping" means making a residential mortgage loan that refinances an existing residential mortgage loan when the new loan does not have reasonable, tangible net

benefit to the consumer considering all of the circumstances, including the terms of both the new and refinanced loans, the cost of the new loan, and the consumer's circumstances. This subparagraph (II) applies regardless of whether the interest rate, points, fees, and charges paid or payable by the consumer in connection with the refinancing exceed any thresholds specified by law.

(III) Entering into a residential mortgage loan transaction knowing there was no reasonable probability of payment of the obligation by the consumer.

(b) Except as this subsection (1.7) may be enforced by the attorney general or a district attorney, only the original parties to a transaction shall have a right of action under this subsection (1.7), and no action or claim under this subsection (1.7) may be brought against a purchaser from, or assignee of, a party to the transaction.

(2) (a) Except as provided in subsection (5) of this section, if a court, as a matter of law, finds a mortgage contract or any clause of the contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(b) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable, the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect, to aid the court in making the determination.

(c) (I) In order to support a finding of unconscionability, there must be evidence of some bad faith overreaching on the part of the mortgage broker or mortgage originator such as that which results from an unreasonable inequality of bargaining power or under other circumstances in which there is an absence of meaningful choice on the part of one of the parties, together with contract terms that are, under standard industry practices, unreasonably favorable to the mortgage broker, mortgage originator, or lender.

(II) This paragraph (c) shall not apply to an unconscionable act or practice under subsection (1.7) of this section.

(3) A violation of this section shall be deemed a deceptive trade practice as provided in section 6-1-105 (1) (uu), C.R.S.

(4) The provisions of this section are in addition to and are not intended to supersede the deceptive trade practices actionable at common law or under other statutes of this state.

(5) No right or claim arising under this section may be raised or asserted in any proceeding against a bona fide purchaser of such mortgage contract or in any proceeding to obtain an order authorizing sale of property by a public trustee as required by section 38-38-105.

(6) The following acts by any real estate agent or real estate broker, as defined in section 12-61-101, C.R.S., in connection with any residential mortgage loan transaction, are prohibited:

(a) If directly engaged in negotiating, originating, or offering or attempting to negotiate or originate for a borrower a residential mortgage loan transaction, the real estate agent or real estate broker shall not make a false promise or misrepresentation or conceal an essential or material fact to entice either a borrower or lender to enter into a mortgage loan agreement when the real estate agent or real estate broker actually knew or, under the terms and circumstances of the transaction, reasonably should have known of such falsity, misrepresentation, or concealment.

(b) If not directly engaged in negotiating, originating, or offering or attempting to negotiate or originate for a borrower a residential mortgage loan transaction, the real estate agent or real estate broker shall not make a false promise or misrepresentation or conceal an essential or material fact to entice either a borrower or lender to enter into a mortgage loan agreement when the real estate agent or real estate broker had actual knowledge of such falsity, misrepresentation, or concealment.

(7) As used in this section, unless the context otherwise requires:

(a) "Consumer" has the meaning set forth in section 5-1-301, C.R.S.

(b) "Dwelling" has the meaning set forth in section 5-1-301, C.R.S.

(c) "Mortgage broker" has the same meaning as "mortgage loan originator" as set forth in section 12-61-902, C.R.S.



- (d) "Mortgage lender" has the meaning set forth in section 12-61-902, C.R.S.
- (e) "Mortgage originator" has the same meaning as "mortgage loan originator" as set forth in section 12-61-902, C.R.S.
- (f) "Originate" has the same meaning as "originate a mortgage" as set forth in section 12-61-902, C.R.S.
- (g) "Residential mortgage loan" has the meaning set forth in section 12-61-902, C.R.S.

**Source:** **L. 2002:** Entire section added, p. 1601, § 2, effective June 7. **L. 2003:** (2)(a) and (2)(c) amended and (5) added, p. 1444, § 1, effective August 6. **L. 2007:** IP(1) and (1)(b) amended and (1)(e) and (6) added, pp. 1722, 1723, §§ 8, 9, effective June 1; (1.7)(a)(I) amended, p. 1729, § 8, effective June 1; (1.7) and (7) added and (2)(c) amended, p. 1746, § 4, effective July 1; (1)(f) and (1.5) added, p. 1743, §§ 14, 15, effective January 1, 2008. **L. 2009:** (1)(f), (1.5), and (7) amended, (HB 09-1085), ch. 303, p. 1638, § 4, effective August 5.

Limitations - Homestead Exemptions

ARTICLE 41

Limitations - Homestead Exemptions

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LIMITATION OF ACTIONS AFFECTING REAL PROPERTY		38-41-118.	Construction of sections.
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38-41-106.	Limitation seven years - possession under official and judicial conveyance or orders.	38-41-201.6.	Mobile home, manufactured home, trailer, and trailer coach homestead exemption.
38-41-107.	Rights of heirs.	38-41-202.	Homestead to be created automatically in certain cases - filing of statement required in other cases.
38-41-108.	Rights in possession seven years - color of title and payment of taxes.	38-41-203.	Exemption only while occupied.
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38-41-111.	When action will not lie against person in possession.	38-41-206.	Levy on homestead - excess - costs.
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38-41-113.	Limitations may be asserted affirmatively or by way of defense.	38-41-208.	Survival of exemption.
38-41-114.	When limitations apply.	38-41-209.	Insurance proceeds.
38-41-115.	Setting aside judgments against unknown parties.	38-41-210.	Definitions - vendor's rights.
38-41-116.	Actions to enforce contracts of sale.	38-41-211.	Exemption in addition to allowances.
		38-41-212.	Waiver.

## PART 1

## LIMITATION OF ACTIONS AFFECTING REAL PROPERTY

**Cross references:** For limitation of action to enforce mechanics' liens, see § 38-22-110; for the five-year statute of limitations for recovery of land sold for taxes, see § 39-12-101; for redemption of mining property sold for taxes, see § 39-12-102; for redemption of real property sold for taxes owned by persons under disability, see § 39-12-104; for other statutes of limitations in special situations, see articles 80 and 81 of title 13.

**38-41-101. Limitation of eighteen years.** (1) No person shall commence or maintain an action for the recovery of the title or possession or to enforce or establish any right or interest of or to real property or make an entry thereon unless commenced within eighteen years after the right to bring such action or make such entry has first accrued or within eighteen years after he or those from, by, or under whom he claims have been seized or possessed of the premises. Eighteen years' adverse possession of any land shall be conclusive evidence of absolute ownership.

(2) The limitation provided for in subsection (1) of this section shall not apply against the state, county, city and county, city, irrigation district, public, municipal, or quasi-municipal corporation, or any department or agency thereof. No possession by any person, firm, or corporation, no matter how long continued, of any land, water, water right, easement, or other property whatsoever dedicated to or owned by the state of Colorado, or any county, city and county, city, irrigation district, public, municipal, or quasi-municipal corporation, or any department or agency thereof shall ever ripen into any title, interest, or right against the state of Colorado, or such county, city and county, city, public, municipal, or quasi-municipal corporation, irrigation district, or any department or agency thereof.

(3) (a) In order to prevail on a claim asserting fee simple title to real property by adverse possession in any civil action filed on or after July 1, 2008, the person asserting the claim shall prove each element of the claim by clear and convincing evidence.

(b) In addition to any other requirements specified in this part 1, in any action for a claim for fee simple title to real property by adverse possession for which fee simple title vests on or after July 1, 2008, in favor of the adverse possessor and against the owner of record of the real property under subsection (1) of this section, a person may acquire fee simple title to real property by adverse possession only upon satisfaction of each of the following conditions:

(I) The person presents evidence to satisfy all of the elements of a claim for adverse possession required under common law in Colorado; and

(II) Either the person claiming by adverse possession or a predecessor in interest of such person had a good faith belief that the person in possession of the property of the owner of record was the actual owner of the property and the belief was reasonable under the particular circumstances.

(4) Notwithstanding any other provision of this section, the provisions of subsections (3) and (5) of this section shall be limited to claims of adverse possession for the purpose of establishing fee simple title to real property and shall not apply to the creation, establishment, proof, or judicial confirmation or delineation of easements by prescription, implication, prior use, estoppel, or otherwise, nor shall the provisions of subsections (3) or (5) of this section apply to claims or defenses for equitable relief under the common-law doctrine of relative hardships, or claims or defenses governed by any other statute of limitations specified in this article. Nothing in this section shall be construed to mean that any elements of a claim for adverse possession that are not otherwise applicable to the creation, establishment, proof, or judicial confirmation or delineation of easements by prescription, implication, prior use, estoppel, or otherwise are made applicable pursuant to the provisions of this section.

(5) (a) Where the person asserting a claim of fee simple title to real property by adverse possession prevails on such claim, and if the court determines in its discretion that an award of compensation is fair and equitable under the circumstances, the court may, after



an evidentiary hearing separately conducted after entry of the order awarding title to the adverse possessor, award to the party losing title to the adverse possessor:

(I) Damages to compensate the party losing title to the adverse possessor for the loss of the property measured by the actual value of the property as determined by the county assessor as of the most recent valuation for property tax purposes. If the property lost has not been separately taxed or assessed from the remainder of the property of the party losing title to the adverse possessor, the court shall equitably apportion the actual value of the property to the portion of the owner's property lost by adverse possession including, as appropriate, taking into account the nature and character of the property lost and of the remainder.

(II) An amount to reimburse the party losing title to the adverse possessor for all or a part of the property taxes and other assessments levied against and paid by the party losing title to the adverse possessor for the period commencing eighteen years prior to the commencement of the adverse possession action and expiring on the date of the award or entry of final nonappealable judgment, whichever is later. If the property lost has not been separately taxed or assessed from the remainder of the property of the party losing title to the adverse possessor, such reimbursement shall equitably apportion the amount of the reimbursement to the portion of the owner's property lost by adverse possession, including, as appropriate, taking into account the nature and character of the property lost and of the remainder. The amount of the award shall bear interest at the statutory rate from the dates on which the party losing title to the adverse possessor made payment of the reimburseable taxes and assessments.

(b) At any hearing conducted under this subsection (5), or in the event that adverse possession is claimed solely as a defense to an action for damages based upon a claim for trespass, forcible entry, forcible detainer, or similar affirmative claims by another against the adverse possessor, and not to seek an award of legal title against the claimant, the burden of proof shall be by a preponderance of the evidence. If the defendant is claiming adverse possession solely as a defense to an action and not to seek an award of legal title, the defendant shall so state in a pleading filed by the defendant within ninety days after filing an answer or within such longer period as granted by the court in the court's discretion, and any such statement shall bind the defendant in the action.

**Source:** L. 27: p. 598, § 30. CSA: C. 40, § 136. CRS 53: § 118-7-1. C.R.S. 1963: § 118-7-1. L. 67: p. 351, § 1. L. 2008: (3), (4), and (5) added, p. 668, § 1, effective July 1.

**Cross references:** For the effect of this section of registration of land under the Torrens title system, see § 38-36-137.

## ANNOTATION

- I. General Consideration.
- II. Adverse Possession.
  - A. In General.
  - B. Actual, Adverse, Hostile, Exclusive, and Uninterrupted Possession.
- III. Pleading and Practice.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "The Interest of Landowner and Lessee in Oil and Gas in Colorado", see 25 Rocky Mt. L. Rev. 117 (1953). For comment on *Lovejoy v. Sch.* Dist. No. 46, 129 Colo. 306, 269 P.2d 1067 (1954), appearing below, see 31 Dicta 279 (1954). For note, "Adverse Possession in Colorado", see 27 Rocky Mt. L. Rev. 88 (1954). For article, "Survey of

Title Irregularities, Curative Statutes and Title Standards in Colorado", see 35 U. Colo. L. Rev. 21 (1962). For article, "One Year Review of Property", see 40 Den. L. Ctr. J. 181 (1963). For note, "A Survey of Colorado Water Law", see 47 Den. L.J. 226 (1970). For article, "Adverse Possession after House Bill 1148", see 37 Colo. Law. 73 (November 2008).

**Section should be construed as acting prospectively only**, and does not apply to causes of action existing at the time of its adoption. *Edelstein v. Carlile*, 33 Colo. 54, 78 P. 680 (1904).

**Not retrospectively.** This section cannot be applied where to do so would be giving to this part a retrospective effect. *Connell v. Clifford*, 39 Colo. 121, 88 P. 850 (1907); *Bonfils v. Pub. Utils. Comm'n*, 67 Colo. 563, 189 P. 775 (1920).

**The objection to retrospective statutes does not apply to remedial statutes** such as the statute of limitations, and these statutes may be retrospective in nature, provided they do not impair contracts or disturb vested rights. *Edelstein v. Carlile*, 33 Colo. 54, 78 P. 680 (1904). See also *Fisher v. Hervey*, 6 Colo. 16 (1881).

**The extended limitations period of 18 years set forth in this section does not apply outside the context of an adverse possession claim.** *San Juan Basin Consortium, Ltd. v. EnerVest San Juan Acquisition Ltd. P'ship.*, 67 F. Supp.2d 1213 (D. Colo. 1999).

**General assembly cannot revive action once bar attaches.** When the bar of the statute has once attached, the general assembly cannot, by an amendatory act, revive the action. *Willoughby v. George*, 5 Colo. 80 (1879); *Edelstein v. Carlile*, 33 Colo. 54, 78 P. 680 (1904).

**Public easements are not subject to the bar of the statute of limitations.** *Bowen v. Turgoose*, 136 Colo. 137, 314 P.2d 694 (1957).

**Owner's disability no bar to statute.** The fact that an owner is under disability until her death does not prevent the running of the statute of limitations. *Nesbitt v. Jones*, 140 Colo. 412, 344 P.2d 949 (1959).

**For purposes of the exception to adverse possession in subsection (2), a "quasi-municipal corporation" is a public agency endowed with such attributes of a municipality as may be necessary in the performance of its limited objective.** *Goodwin v. Thieman*, 74 P.3d 526 (Colo. App. 2003).

During the 18-year limitation period, the disputed property was owned by a corporation that was not a public entity or governmental agency; therefore, the corporation was not a "quasi-municipal corporation" for purposes of the exception to adverse possession. *Goodwin v. Thieman*, 74 P.3d 526 (Colo. App. 2003).

**Applied in** *Swift v. Smith*, 79 F. 709 (8th Cir. 1897); *Riggs v. McMurtry*, 157 Colo. 33, 400 P.2d 916 (1965); *Glendale Water & San. Dist. v. City & County of Denver*, 164 Colo. 557, 436 P.2d 669 (1968); *Hayden v. Bd. of County Comm'rs*, 41 Colo. App. 102, 580 P.2d 820 (1978); *Crawford v. French*, 633 P.2d 524 (Colo. App. 1981); *Canady v. Sheldon*, 683 P.2d 1205 (Colo. App. 1983); *City of Canon City v. Cingoranelli*, 740 P.2d 546 (Colo. App. 1987); *Whinnery v. Thompson*, 868 P.2d 1095 (Colo. App. 1993); *Beaver Creek Ranch v. Gordman Leverich Ltd.*, 226 P.3d 1155 (Colo. App. 2009) (decided under law in effect prior to 2008 amendment); *Hunter v. Mansell*, 240 P.3d 469 (Colo. App. 2010); *Westpac Aspen Invs., LLC v. Residences at Little Nell Dev., LLC*, \_\_\_ P.3d \_\_\_ (Colo. App. 2011).

## II. ADVERSE POSSESSION.

### A. In General.

**Possession for 18 years becomes conclusive evidence of absolute ownership of the property**, as provided by this section. *Concord Corp. v. Huff*, 144 Colo. 72, 355 P.2d 73 (1960).

**Adverse possession cannot result in the possessor having a greater property interest than the dispossessed owner enjoyed.** Consequently, the right of ownership to a condominium parking space obtained through adverse possession was not fee simple ownership but was limited by the alienability restrictions included in the condominium's declaration. *B.B. & C. P'ship v. Edelweiss Condo. Ass'n*, 218 P.3d 310 (Colo. 2009).

**Where plaintiffs and their predecessors in title have been in possession of easement for more than 18 years, a presumption arises that their possession was adverse and defendant has the burden to overcome such presumption by sufficient evidence of permissive use.** *Irvin v. Brand*, 690 P.2d 1283 (Colo. App. 1984); *Durbin v. Bonanza Corp.*, 716 P.2d 1124 (Colo. App. 1986).

**Initial presumption in adverse possession case is in favor of the record title holder.** *Whinnery v. Thompson*, 868 P.2d 1095 (Colo. App. 1993).

**The doctrine of adverse possession recognizes the record owner's right to exercise dominion over the property, but holds that the right is lost if a claimant adversely possesses the property for the required time.** *Ocmulgee Prop. Inc. v. Jeffery*, 53 P.3d 665 (Colo. App. 2001).

**Record owner's application to subdivide property and for an exemption from county subdivision regulations did not constitute an exercise of control over the property sufficient to disrupt the period of adverse possession by the claimant in actual possession of the property.** The proceedings on the application, standing alone, did not dispossess the claimant, did not constitute an entry on the land sufficient to reinstate the record owner in possession, did not constitute legal action to regain possession of the land or the equivalent of such an action, and did not result in the ejection of plaintiff or its predecessors in interest. *Ocmulgee Prop. Inc. v. Jeffery*, 53 P.3d 665 (Colo. App. 2001).

**Any act, other than abandonment, that is inconsistent with ownership and occurs after title by adverse possession is vested does not defeat that title.** *Welsch v. Smith*, 113 P.3d 1284 (Colo. App. 2005).

**The law of prescriptive easements permits acquisition of enforceable property rights through unlawful action, namely, trespass for**



the prescriptive period of time. *Clinger v. Hartshorn*, 89 P.3d 462 (Colo. App. 2003).

**A party who claims a prescriptive easement** must prove by a preponderance of the evidence continuous, open, and adverse use of the easement for the statutory period of 18 years. *Proper v. Greager*, 827 P.2d 591 (Colo. App. 1992).

**A prescriptive easement is acquired when the use is open or notorious**, continuous without effective interruption for an 18-year period, and either adverse or pursuant to an attempted but ineffective grant. Intermittent use on a long-term basis is sufficient to satisfy the open, notorious, and continuous use requirement, and using an easement for 18 years entitles the holder to the presumption that the use was adverse. *Clinger v. Hartshorn*, 89 P.3d 462 (Colo. App. 2003).

**Undisputed evidence showed that use of easement was sufficiently adverse** and that the claim of right to use need not be made by a hostile or antagonistic act. *Proper v. Greager*, 827 P.2d 591 (Colo. App. 1992).

**This section applies to an action seeking to terminate an easement by adverse possession** because the statute plainly states that it applies to any real property interest and because the statute does not distinguish between possessory interests such as title to land and non-possessory interests such as title to an easement. *Matoush v. Lovingood*, 177 P.3d 1262 (Colo. 2008).

**An easement will be terminated by adverse possession upon a showing that use of the easement area was:** (1) adverse to the easement holder's right to use the easement; (2) open or notorious; and (3) continuous without effective interruption for the statutorily mandated period of time. *Matoush v. Lovingood*, 177 P.3d 1262 (Colo. 2008).

**Abandonment is not an element of a claim to terminate an easement by adverse possession**, but rather is a separate and distinct method for terminating an easement. *Matoush v. Lovingood*, 177 P.3d 1262 (Colo. 2008).

**A claim to terminate an easement by adverse possession requires a stronger showing of adverse use than a claim to create an easement by adverse possession does.** A party claiming to have terminated an easement by adverse possession must prove that the use interferes significantly enough with the easement owner's enjoyment of the easement to give notice that the easement is under threat. *Matoush v. Lovingood*, 177 P.3d 1262 (Colo. 2008).

**Determining whether use of the easement area is an incompatible or irreconcilable use sufficiently adverse to trigger the statutorily mandated period of time for adverse possession of an easement** depends upon whether the easement was expressly created and whether the easement has ever been used by the easement

holder. *Matoush v. Lovingood*, 177 P.3d 1262 (Colo. 2008).

**When an easement is expressly created but never used**, use of the easement area is not adverse and will not trigger the statutorily mandated period of time for adverse possession until the easement holder needs to use the easement, demands to use it, and is denied the right to use it. *Matoush v. Lovingood*, 177 P.3d 1262 (Colo. 2008).

**Adverse possessor's interest enforceable against everyone except owner.** From the beginning of his possession period, an adverse possessor has an interest in a given piece of property enforceable against everyone except the owner or one claiming through the owner. *Spring Valley Estates, Inc. v. Cunningham*, 181 Colo. 435, 510 P.2d 336 (1973).

**Grant of permission to use disputed property followed by subsequent inaction to disclaim permission would be sufficient to interrupt the running of the statutory period of adverse possession.** *McKenzie v. Pope*, 33 P.3d 1277 (Colo. App. 2001).

**A barrier established for the purpose of, and in fact, interrupting an adverse claimant's use is sufficient to interrupt the running of the statutory period**, even if the barrier is removed by the adverse claimant. *Trask v. Nozisko*, 134 P.3d 544 (Colo. App. 2006).

**Interest matures into absolute fee after statutory duration.** It is not until the adverse possessor has possessed the land for the duration of the statutory period that his interest matures into an absolute fee and his possessory rights become enforceable against the former owner as well as third parties. *Spring Valley Estates, Inc. v. Cunningham*, 181 Colo. 435, 510 P.2d 336 (1973).

**Title to property acquired by adverse possession matures into an absolute fee interest after the statutory prescriptive period has expired.** *Doty v. Chalk*, 632 P.2d 644 (Colo. App. 1981).

**Conveyance to adverse use begins statute's running.** Conveyance of a water right, serving to transform a previous permissive use of water by a canal company to a use which is adverse and inconsistent with the previous relationship of the parties, begins the running of the statute of limitations against a suit for possession or to determine ownership of the water right. *Nesbitt v. Jones*, 140 Colo. 412, 344 P.2d 949 (1959).

**Acquiescence in adverse use may divest prior right of use.** Individuals in whom a prior right to the use of water is vested may lose such right by acquiescence in an adverse use thereof by another continued uninterruptedly for the statutory period. *Lomas v. Webster*, 109 Colo. 107, 122 P.2d 248 (1942).

**Establishment of division line by parol agreement conclusive against owners.** Where there is a doubt or uncertainty, or a dispute has arisen, as to the true location of a boundary line,

the adjoining owners may, by parol agreement, establish a division line and, where the agreement is executed and actual possession is held under such agreement, it is conclusive against the owners and those claiming under them. *Schleining v. White*, 163 Colo. 481, 431 P.2d 458 (1967).

**Settlement of readjustments of boundary line.** If one of two innocent parties must suffer a loss of land due to boundary line readjustments called for by later official surveys, it must fall upon the party who is later in time and who has never been in actual possession of the land in question. *Marr v. Shrader*, 142 Colo. 106, 349 P.2d 706 (1960).

**Tacking possessions of area not described in deed.** The tacking of successive adverse possessions of vendor and purchaser of an area not within the premises described in a deed, but contiguous thereto, requires that the grantor intend to transfer possession of such area to the purchaser. *Doty v. Chalk*, 632 P.2d 644 (Colo. App. 1981).

**When title by adverse possession vanishes.** Title by adverse possession vanishes when the treasurer issues his valid deed for unpaid taxes. *Linville v. Russell*, 168 Colo. 459, 452 P.2d 18 (1969).

**Issuance of treasurer's deed creates virgin title.** The issuance of a valid treasurer's deed creates a virgin title erasing all former interests in the land. *Whiteman v. Mattson*, 167 Colo. 183, 446 P.2d 904 (1968).

**Title to lands derived from federal government.** Statutory limitations affecting title to lands derived from the federal government begin to run in favor of an adverse claimant in possession when the entryman is legally entitled to a patent, and not from the date of filing a homestead or desert entry. *Denver & R.G.R.R. v. Wilson*, 28 Colo. 6, 62 P. 843 (1900); *Priesthof v. Baum*, 94 Colo. 324, 29 P.2d 1032 (1934).

**Failure to institute action within limitation period constitutes bar.** Where the pilasters of a building more than 50 years old encroached on plaintiffs' land, and had so encroached on the time the building was constructed, and no action had been instituted by plaintiffs or their predecessors in title within 18 years after the original encroachment, plaintiffs were barred from asserting any claim or right by reason of such encroachment. *Williams v. Wills*, 149 Colo. 213, 368 P.2d 558 (1962).

**Ownership of water right may be deemed ownership of real property for purposes of adverse possession claims.** *Matter of Water Rights of V-Heart Ranch*, 690 P.2d 1271 (Colo. 1984).

B. Actual, Adverse, Hostile, Exclusive, and Uninterrupted Possession.

**"Possession" defined.** "Possession", referred to in subsection (1), means a general

holding and occupancy with complete dominion over the property involved to the exclusion of others. *Concord Corp. v. Huff*, 144 Colo. 72, 355 P.2d 73 (1960).

**Possession of one cotenant is possession of all.** *Atchison, T. & S.F. Ry. v. North Colo. Springs Land & Imp. Co.*, 659 P.2d 702 (Colo. App. 1982).

**Proof required of adverse possessor.** To prove adverse possession, the one claiming it must clearly show, not only that his possession was actual, adverse, hostile, and under claim of right, but that it has also been exclusive and uninterrupted for the statutory period. *Segelke v. Atkins*, 144 Colo. 558, 357 P.2d 636 (1960); *Hayden v. Morrison*, 152 Colo. 435, 382 P.2d 1003 (1963); *Sanchez v. Taylor*, 377 F.2d 733 (10th Cir. 1967); *Dzuris v. Kucharik*, 164 Colo. 278, 434 P.2d 414 (1967); *Raftopoulos v. Monger*, 656 P.2d 1308 (Colo. 1983); *Matter of Estate of Qualteri*, 757 P.2d 1093 (Colo. App. 1988); *Schutten v. Beck*, 757 P.2d 1139 (Colo. App. 1988); *Smith v. Hayden*, 772 P.2d 47 (Colo. 1989); *Bd. of County Comm'rs v. Ritchey*, 888 P.2d 298 (Colo. App. 1994); *Goodwin v. Thieman*, 74 P.3d 526 (Colo. App. 2003); *Schuler v. Oldervik*, 143 P.3d 1197 (Colo. App. 2006).

**Actual occupancy means** the ordinary use to which the land is capable and such occupancy as an owner would make of it. *Anderson v. Cold Spring Tungsten, Inc.*, 170 Colo. 7, 458 P.2d 756 (1969).

Actual possession is established where the claimant shows that the property was used in a manner commensurate with its particular attributes. *Doty v. Chalk*, 632 P.2d 644 (Colo. App. 1981); *Kroulik v. Knuppel*, 634 P.2d 1027 (Colo. App. 1981).

**Actual occupation required absent barriers or deed.** Where the boundaries of the land claimed have not been established by fences or barriers and there is no deed describing the extent of their holding, the parties claiming title by adverse possession may not claim any property not actually occupied by them for the statutory period because the extent of actual occupancy must be determined by the court when ascertaining the extent of the adverse intent. *Anderson v. Cold Spring Tungsten, Inc.*, 170 Colo. 7, 458 P.2d 756 (1969); *Smith v. Hayden*, 772 P.2d 47 (Colo. 1989).

**Actual occupancy is not limited to structural encroachment** which is common but is not the only physical characteristic of possession. *Anderson v. Cold Spring Tungsten, Inc.*, 170 Colo. 7, 458 P.2d 756 (1969).

**To show actual possession, a party claiming adverse possession of a water right must show actual beneficial use of a specific quantity of water;** merely intercepting the water or preventing the owner from using it does not



suffice. *Archuleta v. Gomez*, 200 P.3d 333 (Colo. 2009).

**Adverse possession without enclosure need not be characterized** by a physical, constant, visible occupancy or improved by improvements of every square foot of the land. *Anderson v. Cold Spring Tungsten, Inc.*, 170 Colo. 7, 458 P.2d 756 (1969).

**Mere occupancy insufficient notice of adverse possession.** Mere occupancy is not sufficient to put any of the true owners on notice that the adverse claimant claimed the land, and the burden of proof, as to open, notorious, and hostile claim, is upon the adverse claimant when it claims title by adverse possession without color of title, and every reasonable presumption is made in favor of the true owner as against adverse possession. *Lovejoy v. Sch. Dist. No. 46*, 129 Colo. 306, 269 P.2d 1067 (1954).

**Use of land for pasturage not hostile to owner.** The use of land for pasturage, natural products, and timber does not ordinarily constitute adverse possession because the pasturage of cattle on unfenced lands cannot be regarded as hostile and adverse to the owner of such land. *Smith v. Town of Fowler*, 138 Colo. 359, 333 P.2d 1034 (1959); *Sanchez v. Taylor*, 377 F.2d 733 (10th Cir. 1967).

The practice of grazing cattle on unfenced land is not of itself sufficient to show adverse possession. *Thomson v. Clarks, Inc.*, 162 Colo. 506, 427 P.2d 314 (1967); *First Nat'l Bank v. Fitzpatrick*, 624 P.2d 927 (Colo. App. 1981).

**Claim sufficient upon erection of fence.** A fencing in of the disputed tracts and an uninterrupted use by predecessors in interest for pasturage and haying, showed exclusive, open, notorious, continuous, and adverse possession for the requisite period. *McKelvy v. Cooper*, 165 Colo. 102, 437 P.2d 346 (1968).

Where, in addition to pasturing livestock, a fence is erected, the statutory period begins to run and the adverse possession claim will not be defeated because use for this purpose is seasonal. *First Nat'l Bank v. Fitzpatrick*, 624 P.2d 927 (Colo. App. 1981).

**Although the mere existence of a fence does not establish adverse possession of land beyond the fence line**, when both property owners believe that the fence has marked the true boundary between the property for 18 years, there is a presumption that the holding is adverse. *Bd. of County Comm'rs v. Ritchey*, 888 P.2d 298 (Colo. App. 1994); *Welsch v. Smith*, 113 P.3d 1284 (Colo. App. 2005).

**Where landowners' predecessors in interest acquiesced in placement of fenceline set back from property line**, strip of land between fence and property line became a public highway pursuant to § 43-2-201(1)(c) as a result of its adverse use by the public for over 20 uninterrupted years. *Bd. of County Comm'rs v. Ritchey*, 888 P.2d 298 (Colo. App. 1994).

**Mere existence of fence erected south of true boundary of claimants' property** did not establish adverse possession when neither the claimants nor their predecessor in interest had erected the fence or adversely claimed or occupied area of land between the boundary and the fence. *Schutten v. Beck*, 757 P.2d 1139 (Colo. App. 1988).

**Removal of a fence after the land has been adversely possessed for more than the statutory period would not necessarily rebut the presumption of adversity.** *Welsch v. Smith*, 113 P.3d 1284 (Colo. App. 2005).

**Adjoining owner not clothed with possession by destruction of fence.** The mere erasure of a common boundary fence in a flood disaster does not clothe an adjoining owner with possession of lands adversely to his neighbors. *Smith v. Town of Fowler*, 138 Colo. 359, 333 P.2d 1034 (1959).

**A claim to terminate an easement by adverse possession requires a stronger showing of adverse use than a claim to create an easement by adverse possession does.** A party claiming to have terminated an easement by adverse possession must prove that the use interferes significantly enough with the easement owner's enjoyment of the easement to give notice that the easement is under threat. *Matoush v. Lovingood*, 177 P.3d 1262 (Colo. 2008).

**Determining whether use of the easement area is an incompatible or irreconcilable use sufficiently adverse to trigger the statutory mandated period of time for adverse possession of an easement** depends upon whether the easement was expressly created and whether the easement has ever been used by the easement holder. *Matoush v. Lovingood*, 177 P.3d 1262 (Colo. 2008).

**When an easement is expressly created but never used**, use of the easement area is not adverse and will not trigger the statutorily mandated period of time for adverse possession until the easement holder needs to use the easement, demands to use it, and is denied the right to use it. *Matoush v. Lovingood*, 177 P.3d 1262 (Colo. 2008).

**Any actual visible means establishing dominion is sufficient.** Any actual visible means, which gives notice of exclusion from the property to the true owner or to the public and of the defendant's dominion over it, is sufficient. *Anderson v. Cold Spring Tungsten, Inc.*, 170 Colo. 7, 458 P.2d 756 (1969); *Matter of Estate of Qualteri*, 757 P.2d 1093 (Colo. App. 1988).

**Possession must be hostile.** The very essence of adverse possession is that the possession must be hostile, not only against the true owner, but against the world as well. *Lovejoy v. Sch. Dist. No. 46*, 129 Colo. 306, 269 P.2d 1067 (1954); *Smith v. Town of Fowler*, 138 Colo. 359, 333 P.2d 1034 (1959); *Sanchez v. Taylor*, 377 F.2d 733 (10th Cir. 1967).

Adverse claim must be hostile at its inception, because, if the original entry is not openly hostile or adverse, it does not become so, and this section does not begin to run as against a rightful owner until an adverse claimant disavows the idea of holding for, or in subservience to another, it actually sets up an exclusive right in himself by some clear, positive and unequivocal act. *Lovejoy v. Sch. Dist. No. 46*, 129 Colo.306, 269 P.2d 1067 (1954); *Smith v. Town of Fowler*, 138 Colo. 359, 333 P.2d 1034 (1959).

The character of the possession must become hostile in order that it may be deemed to be adverse, and this hostility must continue for the full statutory period because this section begins to run at the time the possession of the claimant becomes adverse to that of the owner, and this occurs when the claimant sets up title in himself by some clear, positive, and unequivocal act. *Lovejoy v. Sch. Dist. No. 46*, 129 Colo. 306, 269 P.2d 1067 (1954).

**To maintain adversity, use cannot be with permission during the prescriptive period.** *Hunter v. Mansell*, 240 P.3d 469 (Colo. App. 2010).

**Hostile and adverse requirement does not mean violence.** The requirement that adverse possession be both hostile and adverse does not mean that there need be any violence connected with the entry onto the property or that there be any actual dispute as to ownership between the adverse possessor and the owner of the property. *Anderson v. Cold Spring Tungsten, Inc.*, 170 Colo. 7, 458 P.2d 756 (1969).

**Actual dispute with neighbor not necessary to show intent.** A deliberate attempt to steal a neighbor's property, or an actual dispute at some previous time is not necessary in order to show an intention to hold adversely in Colorado. *Moss v. O'Brien*, 165 Colo. 93, 437 P.2d 348 (1968).

**Hostility arises from intention of adverse possessor to claim exclusive ownership** of the property occupied, and no specific intent directed toward the property owner is required. *Anderson v. Cold Spring Tungsten, Inc.*, 170 Colo. 7, 458 P.2d 756 (1969); *Niles v. Churchill*, 29 Colo. App. 283, 482 P.2d 994 (1971); *Bd. of County Comm'rs v. Ritchey*, 888 P.2d 298 (Colo. App. 1994).

The court has found hostile and adverse possession even though the adverse possessor had stated that he was claiming only to what he believed to be the true boundary of his land and had no intention of claiming the land of another; all that is required to establish hostility is that the person claiming adverse possession occupy the property with belief that the property is his and not another's. *Anderson v. Cold Spring Tungsten, Inc.*, 170 Colo. 7, 458 P.2d 756 (1969); *Niles v. Churchill*, 29 Colo. App. 283, 482 P.2d 994 (1971).

**Hostility not determined only from parties' declarations.** Hostile intent is to be determined

not only from the declarations of the parties but from reasonable deductions from the facts as well. *Moss v. O'Brien*, 165 Colo. 93, 437 P.2d 348 (1968); *Anderson v. Cold Spring Tungsten, Inc.*, 170 Colo. 7, 458 P.2d 756 (1969); *Matter of Estate of Qualteri*, 757 P.2d 1093 (Colo. App. 1988); *Miller v. Bell*, 764 P.2d 389 (Colo. App. 1988).

**In cases of claimed adverse possession between close family members**, the applicable rule is that "strong proof" of hostility is required if the claimant takes possession of property belonging to a relative and there exists no presumption that the possession of land of one family member by another family member is permissive and not adverse. *Matter of Estate of Qualteri*, 757 P.2d 1093 (Colo. App. 1988).

**Actual visible possession may create adverse intent.** Actual visible possession to a given line is a circumstance from which a court may find adverse intent, even though the intention was to claim only to the true line. *Moss v. O'Brien*, 165 Colo. 93, 437 P.2d 348 (1968).

**Possession of successive disseizors may be joined for continuous possession.** Where there is privity of title or estate, the possession of successive disseizors may be joined or tacked together so as to be regarded as continuous possession. *Hodge v. Terrill*, 123 Colo. 196, 228 P.2d 984 (1951).

**Recognition of title in another is inconsistent with adverse possession.** Where an occupant of land acknowledges or recognizes the title of the owner during the period of his claimed adverse possession, he fatally interrupts the continuity of his adverse possession because recognition of title in another is inconsistent with the theory of adverse possession, and the statute of limitations does not begin to run in his favor until he repudiates the owner's title. *Segelke v. Atkins*, 144 Colo. 558, 357 P.2d 636 (1960).

**Disclaimer of intent to adversely possess property terminates adverse possession only if made before statutory period for adverse possession has expired.** Once the statutory period has expired, ownership vests in the adverse possessor and can be transferred only by deed. *Hunter v. Mansell*, 240 P.3d 469 (Colo. App. 2010).

**Public use of part of property does not disprove exclusive possession.** The public use of part of the property in question for picnicking does not disprove exclusive possession because, for possession to be exclusive, it is not necessary that all use of that property by the public be prevented. *Anderson v. Cold Spring Tungsten, Inc.*, 170 Colo. 7, 458 P.2d 756 (1969).

**Property used in common with public negatives exclusive possession.** Proof that ever since 1917, the defendants and their predecessors, as well as other members of the general public similarly situated have used the property



described in plaintiff's complaint for a public right-of-way negatives defendants' contentions that they were in the open, notorious, exclusive possession of the property, adverse to any and all other claimants. *Nelson v. Van Cleve*, 143 Colo. 117, 352 P.2d 269 (1960).

**Casual intrusion does not defeat adverse claim.** A mere casual intrusion by a fisherman, or even by several, did not deprive the plaintiff's adverse possession of its exclusive character or defeat their claim. *McKelvy v. Cooper*, 165 Colo. 102, 437 P.2d 346 (1968); *Anderson v. Cold Spring Tungsten, Inc.*, 170 Colo. 7, 458 P.2d 756 (1969).

**Legal titleholder prevails over common possession.** In case of a mixed or common possession of land by both parties to a suit, the law adjudges the rightful possession to him who holds legal title, and no length of time of possession can give title by adverse possession as against the legal title. *Dzuris v. Kucharik*, 164 Colo. 278, 434 P.2d 414 (1967).

**Statute does not run until ouster established.** Until an actual ouster of the cotenant is established by conduct apart from mere use and occupation of the land by claimant, the statute giving rise to a claim of adverse possession does not begin to run. *Atchison, T. & S.F. Ry. v. North Colo. Springs Land & Imp. Co.*, 659 P.2d 702 (Colo. App. 1982).

**Permissive possession.** The statute of limitations does not start to run where the possession is from inception permissive because a possession which is permissive or is otherwise consistent with a record owner's title is merely that of an owner at whose pleasure it continues. *Nesbitt v. Jones*, 140 Colo. 412, 344 P.2d 949 (1959); *Miller v. Bell*, 764 P.2d 389 (Colo. App. 1988).

**For permissive entry on land to become adverse notice or an explicit disclaimer** must be given to the owner. *Segelke v. Atkins*, 144 Colo. 558, 357 P.2d 636 (1960); *Matter of Estate of Qualteri*, 757 P. 2d 1093 (Colo. App. 1988); *Miller v. Bell*, 764 P.2d 389 (Colo. App. 1988).

**County's initial entry on strip of land was not permissive**, but rather by the assertion of ownership through county dedication of section and township lines as public highways. *Bd. of County Comm'rs v. Ritchey*, 888 P.2d 298 (Colo. App. 1994).

**To assert a claim of adverse possession against a vendor**, a vendee is required to unequivocally renounce the contract relationship between them and his rights thereunder prior to assertion of a right antagonistic to that of his vendor. *White v. Widger*, 144 Colo. 566, 358 P.2d 592 (1960).

**Trespassers do not acquire possession.** Trespassers who go upon lands for a special purpose, hunting, fishing, camping, surveying, etc., do not thereby acquire possession. *Concord Corp. v. Huff*, 144 Colo. 72, 355 P.2d 73 (1960).

**Placing improvements on property not disseisin.** The placing of a few improvements or structures on the property is not a taking possession thereof or a disseisin. *Concord Corp. v. Huff*, 144 Colo. 72, 355 P.2d 73 (1960).

**Transfer of property acquired through adverse possession** may only be effected by a validly executed deed, by adverse possession, or by other legal means. *Doty v. Chalk*, 632 P.2d 644 (Colo. App. 1981).

**Void tax deeds.** Void tax deeds do not convey title, and are wholly ineffective to interrupt another's right to possession of the property they purport to convey. *Concord Corp. v. Huff*, 144 Colo. 72, 355 P.2d 73 (1960).

**Effect of disclaimer.** Where title to disputed property vested in a party by adverse possession long before a disclaimer was executed, such disclaimer has no legal effect. *Doty v. Chalk*, 632 P.2d 644 (Colo. App. 1981).

**Payment of taxes does not indicate sole ownership.** Payment of all of the taxes on the subject property for many years does not indicate a claim of sole ownership, especially in view of the paying party's use and possession of the property rent-free. *Atchison, T. & S.F. Ry. v. North Colo. Springs Land & Imp. Co.*, 659 P.2d 702 (Colo. App. 1982).

**Adverse possession not found.** Plaintiff's testimony that water was used from sump since 1949, that she and her husband worked side-by-side, that in 1966 they were irrigating 300 acres and now 800 acres, and that water has been used continuously on the farm for irrigation, along with all the other evidence presented, was not sufficient evidence to show adverse possession. *Farmer v. Farmer*, 720 P.2d 174 (Colo. App. 1986).

**Adverse possession found** where plaintiffs' possession of property for 24 years was: (1) Hostile, because plaintiffs used the property as their own; (2) exclusive and actual, because they acted as an average landowner would in utilizing the property for its ordinary use; and (3) adverse, because their use of the property was sufficiently open and obvious to apprise the defendant that they intended to claim the property adversely. *Schuler v. Oldervik*, 143 P.3d 1197 (Colo. App. 2006).

**A concession by the adverse possessor of the record ownership of a parcel by another** need not demonstrate the lack of intent to possess adversely. *Smith v. Hayden*, 772 P.2d 47 (Colo. 1989).

**Common ownership of two tracts of land extinguishes any acquiescence in boundary lines attributable to the prior landowners** of the tracts unless the deed adopts the boundary lines as previously acquiesced upon. *Salazar v. Terry*, 911 P.2d 1086 (Colo. 1996).

### III. PLEADING AND PRACTICE.

**All remedies may be utilized against record title holder after statutory period.** Once the

18-year period has passed, all remedies, including those for quiet title, ejectment, and trespass, may be utilized even against the record title holder. *Spring Valley Estates, Inc. v. Cunningham*, 181 Colo. 435, 510 P.2d 336 (1973).

**Mandatory injunction preferred remedy for continuing trespass.** When an improvement encroaches on another's real property, a mandatory injunction requiring its removal is the traditional and preferred remedy. *Hunter v. Mansell*, 240 P.3d 469 (Colo. App. 2010).

**Damages recoverable when statutory period completed.** In an action for trespass by an adverse possessor against a former title holder, damages are recoverable only from the time the 18-year statutory period has been completed. *Spring Valley Estates, Inc. v. Cunningham*, 181 Colo. 435, 510 P.2d 336 (1973).

**Statute of limitations must be specially pleaded.** The defense of the statute of limitations is in the nature of a special privilege, and it must be pleaded specially. *Chivington v. Colo. Springs Co.*, 9 Colo. 597, 14 P. 212 (1886); *Connell v. Clifford*, 39 Colo. 121, 88 P. 850 (1907).

**If not specially pleaded, the defense of the statute of limitations will be waived.** *Chivington v. Colo. Springs Co.*, 9 Colo. 597, 14 P. 212 (1886); *Connell v. Clifford*, 39 Colo. 121, 88 P. 850 (1907).

Because the bar of the statute of limitations is a personal privilege, to be relied upon, or not, as a defendant may choose; being a strict defense, it should be interposed in apt time, and if not, it will be deemed waived. *Walters v. Webster*, 52 Colo. 549, 123 P. 952 (1912).

**Plaintiff's success depends upon strength of his title.** A plaintiff, claiming title to a disputed piece of land and being out of possession thereof, can succeed only on the strength of his own title and not on the weakness of defendants' title. *Reinhardt v. Meyer*, 153 Colo. 296, 385 P.2d 597 (1963).

A person not in possession, asserting title to real property and seeking to enjoin others from claiming an interest therein, has the burden of furnishing evidence of title in himself upon which the court can rest its decision, rather than upon the supposed weakness of others claiming an interest. *Nelson v. Van Cleve*, 143 Colo. 117, 352 P.2d 269 (1960).

**Burden of proof is on owner following 18 years of exclusive possession in an adverse claimant.** *Nesbitt v. Jones*, 140 Colo. 412, 344 P.2d 949 (1959).

**Failure of required proof prevents statute as bar to plaintiff's action.** *Bd. of County Comm'rs v. Blanning*, 29 Colo. App. 61, 479 P.2d 404 (1970).

**To establish abandonment, the relying party must show affirmative acts constituting an intention by the party claiming adverse pos-**

session to abandon. *Rivera v. Queree*, 145 Colo. 146, 358 P.2d 40 (1960).

**Abandonment must be established by clear, unequivocal, and decisive evidence of affirmative acts on the part of the owner of the dominant estate that manifest an intention to abandon the easement.** *Clinger v. Hartshorn*, 89 P.3d 462 (Colo. App. 2003).

**Mere nonuse not abandonment.** Mere nonuse of water rights acquired by deed, though for a period less than that fixed by this section, does not work an abandonment. *Fruit Growers' Ditch & Reservoir Co. v. Donald*, 96 Colo. 264, 41 P.2d 516, 98 A.L.R. 1288 (1935).

**Defense of laches is not available in a quiet title action** because courts will not invoke equitable defenses to destroy legal rights where statutes of limitations are applicable. *Jacobs v. Perry*, 135 Colo. 550, 313 P.2d 1008 (1957).

**Whether possession is hostile or adverse is ordinarily a question of fact.** *Moss v. O'Brien*, 165 Colo. 93, 437 P.2d 348 (1968); *Anderson v. Cold Spring Tungsten, Inc.*, 170 Colo. 7, 458 P.2d 756 (1969); *Bd. of County Comm'rs v. Ritchey*, 888 P.2d 298 (Colo. App. 1994).

**Trial court must make determination where evidence conflicting.** Where evidence is conflicting on the issue of whether use of land was continuously adverse for the statutory period, the trial court is required to make a specific finding as to each of the prerequisites of adverse possession. *Hayden v. Morrison*, 152 Colo. 435, 382 P.2d 1003 (1963).

**To acquire a prescriptive easement, a party must confine his or her use to a single, definite, and certain path.** Minor deviations do not defeat the claimed easement. Whether the route remained substantially the same is a factual determination for the court. The development of a new subdivision, rather than a circumstance over which plaintiffs had any control, required plaintiffs to change their point of entrance to defendants' property. Accordingly, the record supports trial court's determination that plaintiffs adequately proved their use of a definite path across defendants' property for more than the prescriptive period of 18 years specified under this section. *Weisiger v. Harbour*, 62 P.3d 1069 (Colo. App. 2002).

**Using an easement for more than 18 years entitles the holder to the presumption that use was adverse;** however this presumption can be rebutted by showing the use was permissive. Trial court's conclusion that defendants' evidence of permissive use, based upon an arrangement of two locks on a gate separating defendants' property, one for each party, was insufficient to overcome the presumption of adverse use. *Weisiger v. Harbour*, 62 P.3d 1069 (Colo. App. 2002).

**To satisfy the open and notorious element for establishment of a prescriptive easement, the use must be sufficiently obvious to apprise**



**the owner of the servient estate;** however, actual knowledge by the owner need not be proved. Unlike a party claiming title to land by adverse possession, a party claiming a prescriptive easement need not be in continuous physical possession of the land because a prescriptive easement is only a right to use the route whenever the holder desires passage. The record supports trial court's determination that plaintiffs' use was open and notorious because defendants knew plaintiffs were entering their property and using the mining road. In addition, the record also supports trial court's determination that plaintiffs crossed defendants' property whenever they wanted to reach their property. Inter-mittent use on a long-term basis satisfies the requirement for open, notorious, and continuous use. *Weisiger v. Harbour*, 62 P.3d 1069 (Colo. App. 2002).

**Reviewing court may reject trial court's finding where conclusions unsupported.** Al-

though it is true that whether possession is hostile or adverse is ordinarily a question of fact, and a finding on this issue made by the trial court would normally not be set aside on review, this restraint does not limit the power of the reviewing court to reject a trial court's findings and conclusions where they are not supported by evidence or where the law has not been correctly applied. *Niles v. Churchill*, 29 Colo. App. 283, 482 P.2d 994 (1971).

**Trial court's finding that possession was hostile** was supported by declarations in the record, actual use of the parcel by the claimants, and the marking of the supposed boundary line by iron pipes. *Smith v. Hayden*, 772 P.2d 47 (Colo. 1989).

**There is no requirement in this section that a person be the exclusive payer** of taxes on the property in order to comply with the taxpaying provisions of this section. *Barnes v. Winford*, 833 P.2d 756 (Colo. App. 1991).

**38-41-102. How computed.** If such right or title first accrued to an ancestor, predecessor, or grantor of the person who brings the action or to any person from, by, or under whom he claims, the eighteen years shall be computed from the time when the right or title so accrued.

**Source:** L. 27: p. 599, § 31. CSA: C. 40, § 137. CRS 53: § 118-7-2. C.R.S. 1963: § 118-7-2.

**38-41-103. Evidence of adverse possession.** If the records in the office of the county clerk and recorder of the county wherein the real property is situate show by conveyance or other instrument that the party in possession or his predecessors or grantors, through descent, conveyance, or otherwise, have asserted a continuous claim of ownership to the real property adverse to the record owner thereof for a period of eighteen years, then the record shall be deemed prima facie evidence of adverse possession during said period and compliance with the requirements of sections 38-41-101 and 38-41-102.

**Source:** L. 27: p. 599, § 32. CSA: C. 40, § 138. CRS 53: § 118-7-3. C.R.S. 1963: § 118-7-3.

#### ANNOTATION

**Whether or not possession is adverse is generally a question of fact** to be determined by the fact finder. *Schoenherr v. Campbell*, 172 Colo. 306, 472 P.2d 139 (1970).

**Requirement of continuous possession construed.** The requirement of continuous possession in order to establish a right-of-way by prescription does not mean that the claimant must physically possess it every moment of the day, because the nature of the right claimed is the right to passage whenever passage is desired. *Gleason v. Phillips*, 172 Colo. 66, 470 P.2d 46 (1970); *Agric. Ditch & Reservoir Co. v. Gleason*, 686 P.2d 802 (Colo. App. 1984), rev'd on other grounds, 723 P.2d 736 (Colo. 1986).

**"Mere occupancy" not adverse possession.** Where there is insufficient evidence that any of

the defendants ever asserted that they owned the subject property until the commencement of this action, the "mere occupancy" of a part of the subject property from time to time does not add up to adverse possession. *DeCola v. Bochatay*, 161 Colo. 95, 420 P.2d 395 (1966).

**The practice of grazing cattle on unfenced land** is not of itself sufficient to show adverse possession. *Thompson v. Clarks, Inc.*, 162 Colo. 506, 427 P.2d 314 (1967).

**Presumption of adverse possession.** Where the evidence is sufficient to establish that the defendants have been in open, notorious, and continuous possession of the easement since 1940, it must be presumed that the possession was adverse. *Gleason v. Phillips*, 172 Colo. 66, 470 P.2d 46 (1970); *Raftopoulos v. Monger*, 656

P.2d 1308 (Colo. 1983); *Agric. Ditch & Reservoir Co. v. Gleason*, 686 P.2d 802 (Colo. App. 1984), rev'd on other grounds, 723 P.2d 736 (Colo. 1986); *Smith v. Hayden*, 772 P.2d 47 (Colo. 1989).

**Every reasonable presumption is made in true owner's favor** as against one who claims to have acquired title through adverse possession. *DeCola v. Bochaty*, 161 Colo. 95, 420 P.2d 395 (1966).

**Recognition of record title strengthens adverse possessor's claim.** A recognition of record title does not demonstrate an intent not to possess adversely where there is no dispute in the evidence of adverse possession of the disputed property; the very fact that the plaintiffs recognized that the record title of a portion of the property was not in their names, enforced and strengthened the claim of adverse possession. *Schoenherr v. Campbell*, 172 Colo. 306, 472 P.2d 139 (1970).

**Adverse possessor has burden of proof** when trying to divest the record owner of his

lawful title to real property. *DeCola v. Bochaty*, 161 Colo. 95, 420 P.2d 395 (1966).

**Party claiming title by adverse possession** has the burden of proving his claim by clear and convincing evidence. *Schutten v. Beck*, 757 P.2d 1139 (Colo. App. 1988).

**Where the extent of the adverse possession is not defined by deed** or by physical barriers, the claim is limited to the property actually occupied by the claimant and such occupancy is a question of fact for the trial court to determine. Such occupancy does not require constant, visible occupancy or physical improvement on all parts of the parcel, but rather the ordinary use for which the land is suitable and which an owner of the land would make of it. Similarly, possession need not be absolutely exclusive in order to attain the degree of exclusivity required for adverse possession. *Smith v. Hayden*, 772 P.2d 47 (Colo. 1989).

**38-41-104. Time to make an entry or bring an action to recover land.** (1) The right to make an entry or bring an action to recover land shall be deemed to have first accrued at the following times:

(a) When any person is disseised, his right of entry or of action shall be deemed to have accrued at the time of disseisin.

(b) When he claims as heir or devisee of one who died seized or possessed, his right shall be deemed to have accrued at the time of such death, unless there is a tenancy or other estate intervening after the death of such ancestor or devisor, except as provided in section 38-41-112, in which case his right shall be deemed to accrue when such intermediate estate expires or when it would have expired by its own limitations.

(c) (I) When there is such an intermediate estate, and in all cases when the party claims by force of any remainder or reversion, his right, insofar as it is affected by the limitation prescribed in this section, shall be deemed to accrue when the intermediate or precedent estate would have expired by its own limitation, notwithstanding any forfeiture thereof for which he might have entered at an earlier time.

(II) Subparagraph (I) of this paragraph (c) shall not prevent a person from entering when entitled to do so by reason of any forfeiture or breach of condition, but if he claims under such a title, his rights shall be deemed to have accrued when the forfeiture was incurred or the condition was broken.

(d) In all cases not otherwise specifically provided for, the right shall be deemed to have accrued when the claimant or the person under whom he claims first became entitled to the possession of the premises under the title upon which the entry or the action is founded.

**Source:** L. 27: p. 599, § 33. CSA: C. 40, § 139. CRS 53: § 118-7-4. C.R.S. 1963: § 118-7-4.

#### ANNOTATION

**Section could be raised as an affirmative defense** in an answer to a petition to set aside a decree of determination of heirship on the ground of fraud, but it could not be properly

considered on motion to dismiss such petition. *Cisneros v. Cisneros*, 163 Colo. 245, 430 P.2d 86 (1967).

**38-41-105. Abstract of title prima facie evidence.** An abstract of title certified by any reputable Colorado abstractor or abstract company incorporated under the laws of the state



of Colorado may be used to establish prima facie evidence that the chain of title is as shown by the abstract, except as to any of the instruments of conveyance or record thereof or certified copy thereof which may be offered in evidence, and the court may take judicial notice of the repute of the abstractor. The absence of tax sale certificates from such abstract for any period of time covered by the abstract shall be prima facie evidence of the payment of taxes during such period by the party relying upon any chain of title shown by such abstract.

**Source:** L. 27: p. 600, § 34. CSA: C. 40, § 140. CRS 53: § 118-7-5. C.R.S. 1963: § 118-7-5.

#### ANNOTATION

**Law reviews.** For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 16 Dicta 35 (1939). For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 Dicta 281 (1949). For article, "Evidence in the Proof of Real Estate Titles", see 24 Rocky Mt. L. Rev. 424 (1952). For article, "Abstractors Ride Off Into Sunset," see 11 Colo. Law. 2585 (1982).

**Document tendered not objectionable as proof of lesser status.** A document, tendered as proof of title itself and so admitted, is not objectionable as proof of the lesser status of color of title since an abstract of title may serve both as color of title and as evidence of title itself. *Marr v. Shrader*, 142 Colo. 106, 349 P.2d 706 (1960).

**Document offered as evidence solely as proof of color of title** may not also be invoked as proof of title. *Marr v. Shrader*, 142 Colo. 106, 349 P.2d 706 (1960).

**Introduction of judgment roll as additional proof deemed error.** Where defendants offered the abstract of title to show their chain of title, it was error to rule that the defendants must go further and introduce into evidence the judgment roll of the cause in which the decree was rendered because the abstract of title was prima facie proof of the chain of title shown thereby. *Lamberson v. Thomas*, 146 Colo. 539, 362 P.2d 180 (1961).

**Applied** in *Hochmuth v. Norton*, 90 Colo. 453, 9 P.2d 1060 (1932).

**38-41-106. Limitation seven years - possession under official and judicial conveyance or orders.** Actions brought for the recovery of any lands, tenements, or hereditaments which any person may claim by virtue of actual residence, occupancy, or possession for seven successive years having a connected title in law or equity, deducible of record, from this state or the United States, or from any public officer or other person authorized by the laws of this state to sell such land for the nonpayment of taxes, or from any sheriff, marshal, or other person authorized to sell such land on execution, or under any order, judgment, or decree of any court of record shall be brought within seven years next after possession has been taken as provided in this section; but when the possessor acquires such title after taking such possession, the limitation shall begin to run from the time of acquiring title.

**Source:** L. 27: p. 601, § 35. CSA: C. 40, § 141. CRS 53: § 118-7-6. C.R.S. 1963: § 118-7-6.

#### ANNOTATION

**Law reviews.** For note, "Adverse Possession in Colorado", see 27 Rocky Mt. L. Rev. 88 (1954). For article, "One Year Review of Property", see 35 Dicta 48 (1958).

**Limitation begins when deed placed in record.** The seven-year statute of limitations does not begin to run until a deed upon which a party in possession relies as being sufficient to give him color of title has been placed of record. *Poage v. Rollins & Son*, 24 Colo. App. 537, 135 P. 990 (1913); *Fallon v. Davidson*, 137 Colo. 48, 320 P.2d 976 (1958).

**When actual ouster of cotenants established.** Until an actual ouster of any cotenants has been established by conduct, apart from mere use and occupation of the land by a party, this section giving rise to a claim of adverse possession does not begin to run. *Fallon v. Davidson*, 137 Colo. 48, 320 P.2d 976 (1958).

**Void deed sufficient to set limitation into motion.** A deed void upon its face is sufficient color of title to set in motion the seven-year limitation. *Silford v. Stratton*, 54 Colo. 248, 130 P. 327 (1913).

**Void deed is not conclusive of good faith of the party claiming thereunder.** *Silford v. Stratton*, 54 Colo. 248, 130 P. 327 (1913).

**Defenses involve questions of law and fact.** The defenses of the statute of limitations and the statute of frauds both involve questions of fact as well as law. *Bushner v. Bushner*, 134 Colo. 509, 307 P.2d 204 (1957).

**Equitable defenses not invoked where statute of limitations applicable.** The defense of laches is not available in a quiet title action because courts will not invoke equitable de-

fenses to destroy legal rights where statutes of limitations are applicable. *Jacobs v. Perry*, 135 Colo. 550, 313 P.2d 1008 (1957).

**When mineral estate is severed from the surface estate,** actual adverse possession of mineral estate must be established separate from any possession of the surface estate. *Kriss v. Mineral Rights, Inc.*, 911 P.2d 711 (Colo. App. 1996).

**Applied in** *Callbreath v. Hug*, 50 Colo. 95, 114 P. 298 (1911); *Empire Ranch & Cattle Co. v. Weldon*, 26 Colo. App. 111, 141 P. 138 (1914).

**38-41-107. Rights of heirs.** The heirs, devisees, and assigns of the person having such title and possession shall have the same benefit of sections 38-41-101 to 38-41-106 as the person from whom the possession is derived.

**Source:** L. 27: p. 601, § 36. CSA: C. 40, § 142. CRS 53: § 118-7-7. C.R.S. 1963: § 118-7-7.

**38-41-108. Rights in possession seven years - color of title and payment of taxes.** Every person in the actual possession of lands or tenements, under claim and color of title, made in good faith, who for seven successive years continues in such possession and also during said time pays all taxes legally assessed on such lands or tenements shall be held and adjudged to be the legal owner of said lands or tenements to the extent and according to the purport of his paper title. All persons holding under such possession by purchase, devise, or descent, before said seven years have expired, who continue such possession and continue to pay the taxes as provided in this section, so as to complete the possession and payment of taxes for the term, provided in this section, shall be entitled to the benefit of this section.

**Source:** L. 27: p. 602, § 37. CSA: C. 40, § 143. CRS 53: § 118-7-8. C.R.S. 1963: § 118-7-8.

## ANNOTATION

- I. General Consideration.
- II. Proceedings to Which Statute Applies and Persons Entitled to Benefit.
- III. Particular Requisites Considered.
  - A. Possession.
  - B. Color of Title.
  - C. Payment of Taxes.
  - D. Good Faith.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 16 Dicta 35 (1939). For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 Dicta 281 (1949). For note, "'Color of Title' in the Colorado Short Statutes of Limitation", see 21 Rocky Mt. L. Rev. 226 (1949). For note, "When Is Homestead Title Marketable?", see 28 Dicta 415 (1951). For comment on *Fuschino v. Lutin*, appearing below, see 24 Rocky Mt. L. Rev. 257 (1952). For note, "Adverse Possession in Colorado", see 27

Rocky Mt. L. Rev. 88 (1954). For article, "One Year Review of Real Property", see 36 Dicta 57 (1959). For note, "A Survey of Colorado Water Law", see 47 Den. L.J. 226 (1970).

**For history of adverse possession,** see *Laughlin v. City of Denver*, 24 Colo. 255, 50 P. 917 (1897); *Munson v. Marks*, 52 Colo. 553, 124 P. 187 (1912).

**Adverse possession deemed creature of statute.** The doctrine of adverse possession was not recognized by the common law, but is the creation of statute. *Laughlin v. City of Denver*, 24 Colo. 255, 50 P. 917 (1897).

**Section provides an affirmative defense** which defendants are required to set up and establish. *Jewell v. Trilby Mines Co.*, 229 F. 98 (8th Cir. 1915).

**And the statute of limitations must be specially pleaded,** or the defense will be considered waived. *Chivington v. Colo. Springs Co.*, 9 Colo. 597, 14 P. 212 (1886); *Webber v. Wannemaker*, 39 Colo. 425, 89 P. 780 (1907); *Sedgwick v. Culp*, 24 Colo. App. 566, 136 P. 88 (1913).



**No waiver where issue of limitations tried by implied consent.** Where it is apparent from the testimony, the exhibits, and the finding of the court that the issue of the statute of limitations was tried by implied consent, plaintiff will not be held to have waived his right to claim title under the provisions of this section because he did not specially plead the statute either by complaint, answer to interveners' petition or by motion. *Rose v. Roso*, 119 Colo. 473, 204 P.2d 1075 (1949).

**Section 38-41-109 is a parallel provision to this section.** *Winslett v. Rozan*, 279 F.2d 654 (10th Cir. 1960). See also *Empire Ranch & Cattle Co. v. Howell*, 22 Colo. App. 584, 126 P. 1096 (1912), rev'd on other grounds, 60 Colo. 192, 152 P. 1177 (1915).

**Section 38-41-109 must be considered in relation to this section.** *Webermeier v. Pace*, 37 Colo. App. 546, 552 P.2d 1021 (1976), aff'd, 193 Colo. 157, 563 P.2d 950 (1977).

**To constitute a bar, a party must show a complete performance** under either this section or § 38-41-109, and he cannot show part performance under one section and part under the other and, thus, blend the provisions of both sections; the bar must be complete and distinct under the one or the other section. A party cannot avail himself of the provisions of both sections at the same time. *Vider v. Zavislan*, 146 Colo. 519, 362 P.2d 163 (1961).

**Nonresident chargeable with notice of public records.** A nonresident is chargeable with notice of what appears by the public records, and of the actual possession of lands by another, within the limits of this state. *Mulford v. Rowland*, 45 Colo. 172, 100 P. 603 (1909).

**One who relies upon this section must plead and prove with exactness** all of the facts upon which it is based. *Gibson v. Huff*, 26 Colo. App. 144, 141 P. 510 (1914); *Bowers v. McFadzean*, 82 Colo. 138, 257 P. 361 (1927).

**Adverse possession not found.** Plaintiff's testimony that water was used from sump since 1949, that she and her husband worked side-by-side, that in 1966 they were irrigating 300 acres and now 800 acres, and that water has been used continuously on the farm for irrigation, along with all the other evidence presented, was not sufficient evidence to show adverse possession. *Farmer v. Farmer*, 720 P.2d 174 (Colo. App. 1986).

**To obtain title pursuant to this section, a person must demonstrate color of title, possession, and payment of taxes for the full seven-year period.** The statute of limitations does not begin to run until all three elements are met. *Peters v. Smuggler-Durant Mining Corp.*, 930 P.2d 575 (Colo. 1997).

**Applied in** *Barker v. Hawley*, 4 Colo. 316 (1878); *Kannaugh v. Quartette Mining Co.*, 16 Colo. 341, 27 P. 245 (1891); *Lougee v. Beeney*, 22 Colo. App. 603, 126 P. 1102 (1912); *Poage v.*

*E.H. Rullins & Sons*, 24 Colo. App. 537, 135 P. 990 (1913); *Heini v. Bank of Kremmling*, 93 Colo. 350, 25 P.2d 1113, 89 A.L.R. 1442 (1933); *Loveland Camp No. 83 v. Woodmen Bldg. & Benevolent Ass'n*, 108 Colo. 297, 116 P.2d 195 (1941); *Coryell v. Robinson*, 118 Colo. 225, 194 P.2d 342 (1948); *Hand v. Rhodes*, 125 Colo. 508, 245 P.2d 292 (1952); *Jacobs v. Perry*, 135 Colo. 550, 313 P.2d 1008 (1957); *Cleveland v. Dow Chem. Co.*, 168 Colo. 388, 451 P.2d 741 (1969).

## II. PROCEEDINGS TO WHICH STATUTE APPLIES AND PERSONS ENTITLED TO BENEFIT.

**Section applies as defense to recovery of possession and ousters.** This section is meant to apply as a defense only to actions for the recovery of possession, and the ouster from the land of someone in possession. *Munson v. Marks*, 52 Colo. 553, 124 P. 187 (1912); *Morris v. St. Louis Nat'l Bank*, 17 Colo. 231, 29 P. 802 (1892).

**Section applies to all "lands or tenements" possessed.** *Webermeier v. Pace*, 37 Colo. App. 546, 552 P.2d 1021 (1976), aff'd, 193 Colo. 157, 563 P.2d 950 (1977).

**Section applies to disputes concerning title to severed mineral interests.** This section has been applied as the pertinent statute in situations where title to severed mineral interests is sought to be quieted on the basis of adverse possession. *Webermeier v. Pace*, 37 Colo. App. 546, 552 P.2d 1021 (1976), aff'd, 193 Colo. 157, 563 P.2d 950 (1977).

**Section applicable for protection of right-of-way.** A railroad company is entitled to the benefit of this section for the protection of its right-of-way. *Keener v. Union Pac. Ry.* 31 F. 126 (D. Colo. 1887); *Denver & R.G.R.R. v. Doelz*, 49 Colo. 48, 111 P. 595 (1910).

**Section is apparently not limited to cases where a fee is claimed,** and whoever is in possession of lands claiming a title, full or not, a title supported by some written document or under some legal color and claim of title who pays the taxes assessed upon that property, is, to the extent of that claim, protected. *Keener v. Union Pac. Ry.*, 31 F. 126 (D. Colo. 1887).

**Leasehold interest.** If one who claims to have the leasehold interest of a tract of land for a period of 99 years, making no claim to the fee, and possessing that land for five years (now seven years), should pay the taxes assessed upon it, this section protects that title to the extent of that claim, that is, to the extent of his claim of a leasehold interest for 99 years. *Keener v. Union Pac. Ry.*, 31 F. 126 (D. Colo. 1887).

**At least seven full years to the day must elapse** between the first payment of taxes and the date the initial complaint is filed in an action brought pursuant to this section. Payment of taxes on September 27, 1983, and filing of the

action on February 22, 1990, was not sufficient to meet the requirements under this section. *Peters v. Smuggler-Durant Mining Corp.*, 930 P.2d 575 (Colo. 1997).

**Section inapplicable to part of vein apexing without claim's boundary lines.** This section does not extend to that part of a vein apexing without the boundary lines of the claim under which the limitation is asserted. *Davis v. Shepherd*, 31 Colo. 141, 72 P. 57 (1903).

**Applicability of section to patented ground doubtful.** It is extremely doubtful if this section was intended to apply in cases where the disputed territory was patented ground. *Lebanon Mining Co. v. Rogers*, 8 Colo. 34, 5 P. 661 (1885); *Arnold v. Woodward*, 14 Colo. 164, 23 P. 444 (1890); *Silford v. Stratton*, 54 Colo. 248, 130 P. 327 (1913).

**Proof not required in actions to quiet title to irrigation ditches.** One who pleads the seven-year statute of limitations, in an action to quiet title to irrigation ditches, is not required in the first instance either to prove payment of taxes or nonassessment. *Frey v. Paul*, 69 Colo. 244, 193 P. 560 (1920).

**The statute of limitations does not apply to a claim for quiet title when the property was sold after the complaint was filed.** The seven-year statute of limitations may have been applicable, but the quiet title claim became moot. *Tafoya v. Perkins*, 932 P.2d 836 (Colo. App. 1996).

### III. PARTICULAR REQUISITES CONSIDERED.

#### A. Possession.

**Section requires actual, exclusive, and continuous possession of the property in question** for seven years as one of the conditions to quieting title. *Ginsberg v. Stanley Aviation Corp.*, 193 Colo. 157, 568 P.2d 35 (1977).

Continuous, actual, adverse possession of a water right for seven successive years under color of title accompanied by payment of all taxes legally assessed thereon during that period, fixes title in the possessor, and as real property it may be passed by deed. *Kountz v. Olson*, 94 Colo. 186, 29 P.2d 627 (1934).

Exclusive possession of land under color of title and payment of taxes for seven consecutive years constitutes a good title. *Whitehead v. Desserich*, 71 Colo. 327, 206 P. 384 (1922).

Where the plaintiff in an action to quiet title was in actual possession of the land in controversy in good faith, under color of title under a tax deed and through divers mesne conveyances from the common source, and had paid taxes on the land for more than seven successive years, she acquired a valid title under the limitation law then in force. *Laws v. Newkirk*, 39 Colo. 78, 88 P. 861 (1907).

Where a right-of-way deed contained language which created a possibility of reverter, upon termination of the use, the estate of the grantees and those claiming through them would ordinarily be terminated; however, the right of the land board to reacquire the property was subject to statutory conditions which were not complied with by the state, thus the plaintiffs, who have established prima facie color of title by successive grants which are free of condition, who have been in possession adverse to the state for over 20 years and who have been in possession and paid taxes under color of title for over seven years, were entitled to a decree against the state. *State v. Franc*, 165 Colo. 69, 437 P.2d 48, cert. denied, 392 U.S. 928, 88 S. Ct. 2284, 20 L. Ed.2d 1385 (1968).

**Section inapplicable where all requirements not met.** This section cannot apply to create a fee under color of title and payment of taxes for the statutory period in one out of possession. *Radke v. Union P.R.R.*, 138 Colo. 189, 334 P.2d 1077 (1958).

**Mixed or common possession of land by parties to suit.** In case of a mixed or common possession of land by both parties to a suit, the law adjudges the rightful possession to him who holds legal title, and no length of time of possession can give title by adverse possession as against the legal title. *Vider v. Zavislan*, 146 Colo. 519, 362 P.2d 163 (1961).

**Possession in conjunction with other land-owners falls far short of adverse possession** which deprives the true owner of his title. *Webber v. Wannemaker*, 39 Colo. 425, 89 P. 780 (1907).

**Maintenance of lawn, bush, and fences were sufficient acts and evidence of possession** as to fulfill the requirements of this section. *Koch v. Ilgen*, 154 Colo. 59, 388 P.2d 254 (1964).

**Actual possession of contiguous property.** When plaintiff took possession of the premises upon which the home, barn, and corral were located, he took actual possession of the contiguous property because, where one owns several tracts of land adjoining each other, and all of which he holds under deeds, patents, or other writings, and claims to the extent of his boundaries, he is in the actual possession of the adjoining tract, as well as the one upon which he lives, if there is no actual adverse occupancy of either one of the tracts. *Vider v. Zavislan*, 146 Colo. 519, 362 P.2d 163 (1961).

**Land used to graze flocks thereon is sufficient continuous possession.** *Munro v. Eshe*, 113 Colo. 19, 156 P.2d 700 (1944).

**Possession of surface not possession of severed mineral estate.** After title to oil and gas had been severed from the title to the surface by reservation in deed conveying the surface, possession of the surface did not constitute posses-



sion of the severed mineral estate. *Calvat v. Juhan*, 119 Colo. 561, 206 P.2d 600 (1949).

**Actual adverse possession cannot be established by inference or implication**, and the admission that plaintiff was in possession at, and for, some time prior to the time when suit was commenced, was not sufficient because the nature of the defense relied upon requires strict proof. *Fleming v. Howell*, 22 Colo. App. 382, 125 P. 551 (1912).

**Constructive possession sufficient to maintain action to quiet title.** Where one not in actual occupation claims the right of exclusive occupation and no person is in occupation opposing his claim, his possession is constructive and sufficient to enable him to maintain an action to quiet title. *O'Reilly v. Balkwill*, 133 Colo. 474, 297 P.2d 263 (1956).

**Burden of proof.** A person not in possession asserting title to real property and seeking to enjoin others from claiming an interest therein or possessing the same has the burden of furnishing evidence which would enable the court to rest its decision on the strength of his title, rather than on the supposed weakness of the title of others claiming interests in the property. *Nelson v. Van Cleve*, 143 Colo. 117, 352 P.2d 269 (1960).

**Proof required where plaintiff not in possession of property.** Where plaintiff is not in possession of the property, a defendant in an action to quiet title may effectually resist a decree against himself by showing simply that the plaintiff is without title since, if the plaintiff has no title, he cannot complain that someone else, also without title, asserts an interest in the land. *Nelson v. Van Cleve*, 143 Colo. 117, 352 P.2d 269 (1960).

## B. Color of Title.

**Section protects person under colorable title.** This section, when its conditions are complied with, is intended as a protection to a person holding in good faith under a mere colorable title, that is, under a title which is really no title. *Bennet v. North Colo. Springs Land & Imp. Co.*, 23 Colo. 470, 48 P. 812 (1897). See also *Knight v. Lawrence*, 19 Colo. 425, 36 P. 242 (1894); *De Foresta v. Gast*, 20 Colo. 307, 38 P. 244 (1894); *Sullivan v. Scott*, 73 Colo. 451, 216 P. 515 (1923).

**Color of title is mere pretense of title, but not a valid title;** it purports to be a good title, but is not so in fact. *Jackson v. Larson*, 24 Colo. App. 548, 136 P. 81 (1913).

**Paper title must be shown.** *Gibson v. Huff*, 26 Colo. App. 144, 141 P. 510 (1914).

The phrase, "color of title" refers to a paper writing purporting to convey title, or to some writing whereby title is sought to be acquired. *Knight v. Lawrence*, 19 Colo. 425, 36 P. 242 (1894).

**Color of title created by conveyance in fee simple with a possibility of reverter.** *Barnes v. Winford*, 833 P.2d 756 (Colo. App. 1992).

**Color of title can only arise out of conveyance purporting to convey title** to real estate. *Omaha & Grant Smelting & Ref. Co. v. Tabor*, 13 Colo. 41, 21 P. 925 (1889); *Warren v. Adams*, 19 Colo. 515, 36 P. 604 (1894); *Minter v. King*, 27 Colo. App. 233, 148 P. 275 (1915).

Color of title must arise out of some conveyance purporting to vest in the grantee an interest in his own right adverse to the true owner, and not from one that constitutes him a trustee of the title for the use and benefit of such owner; and, furthermore, such claim or color of title must be made in good faith. *Warren v. Adams*, 19 Colo. 515, 36 P. 604 (1894); *Silford v. Stratton*, 54 Colo. 248, 130 P. 327 (1913).

**Deed is color of title only to the premises described therein.** *Denver Trackage & Imp. Co. v. Colo. & S. Ry.*, 58 Colo. 313, 145 P. 707 (1914).

**Color of title placed of record required to invoke limitation.** The seven-year statute of limitations does not begin to run until a deed upon which a party in possession relies as being sufficient to give him color of title has been placed of record. *Fallon v. Davidson*, 137 Colo. 48, 320 P.2d 976 (1958).

**Successor of grantee established color of title** by general warranty deed from grantor who retained a reversionary interest in property. Grantor had conveyed right-of-way to railroad with a provision that if the railroad abandoned use of the right-of-way, the property would revert to the grantor. The grantor's warranty deed conveyed all the estate, right, title and interest to the property, including reversions and remainders to the grantee, with the exception of the right-of-way conveyed to the railroad. When the railroad abandoned use of the right-of-way, the interest reverted to the grantee. *Barnes v. Winford*, 833 P.2d 756 (Colo. App. 1991).

**Tax deed does not, until recorded, constitute color of title**, so as to set in motion the seven-year statute of limitations. *Morris v. St. Louis Nat'l Bank*, 17 Colo. 231, 29 P. 802 (1892); *Wason v. Major*, 10 Colo. App. 181, 50 P. 741 (1897); *Sayre v. Sage*, 47 Colo. 559, 108 P. 160 (1910); *Hughes v. Webster*, 52 Colo. 475, 122 P. 789 (1912); *Empire Ranch & Cattle Co. v. Gibson*, 22 Colo. App. 617, 126 P. 1103 (1912); *Upham v. Weisshaar*, 23 Colo. App. 277, 128 P. 1129 (1913); *Parks v. Roth*, 25 Colo. App. 296, 137 P. 76 (1914); *Minter v. King*, 27 Colo. App. 233, 148 P. 275 (1915).

**Void deed is, color of title.** *Parker v. Betts*, 47 Colo. 428, 107 P. 816 (1910); *Munro v. Eshe*, 113 Colo. 19, 156 P.2d 700 (1944); *Bennet v. North Colo. Springs Land & Imp. Co.*, 23 Colo. 470, 48 P. 812 (1897); *Silford v. Stratton*, 54 Colo. 248, 130 P. 327 (1913).

Deed, purporting to convey title, may be defective and thereby convey no title, yet give color of title. *Whitehead v. Desserich*, 71 Colo. 327, 206 P. 384 (1922).

Deed even though void on its face will make color of title as fully and as effectually as though the deed had been regular on its face. *De Foresta v. Gast*, 20 Colo. 307, 38 P. 244 (1894); *Brinker v. Union Pac. D. & G. Ry.*, 11 Colo. App. 166, 55 P. 207 (1898).

**Deed disclosing unauthorized sale gives color title.** A deed, notwithstanding the fact that it discloses a sale unauthorized by this section, gives color of title. *Hoge v. Magnes*, 85 F. 355 (8th Cir. 1898).

**Void deed admissible to show color of title.** A treasurer's deed, upon sale of land for taxes, void upon its face, is admissible to show color of title. *Jackson v. Larson*, 24 Colo. App. 548, 136 P. 81 (1913).

**Thus, attack of invalidity unimportant.** No importance is attached to the ground of invalidity of an apparent or colorable title. *Richards v. Beggs*, 31 Colo. 186, 72 P. 1077 (1903); *Jackson v. Larson*, 24 Colo. App. 548, 136 P. 81 (1913).

**Where void deed fails to describe land no color of title.** A treasurer's deed which fails to describe the lands sold, is void and does not give the color of title necessary under this section. *Riley v. Lemieux*, 24 Colo. App. 184, 132 P. 699 (1913).

**And quit claim deed failing to convey land not color of title.** A quitclaim deed does not constitute color of title, if it does not purport to convey the land in controversy, but designates a lot whose metes and bounds are specifically described in the map then on file, which description entirely excludes it. *Lebanon Mining Co. v. Rogers*, 8 Colo. 34, 5 P. 661 (1884); *Laughlin v. City of Denver*, 24 Colo. 255, 50 P. 917. (1897);

**Actual possession and tax payments without color of title insufficient.** Actual possession and payment of taxes for seven years, without color of title acquired in good faith, prior to the commencement of the seven-year period, is not sufficient to sustain a plea under this section. *King v. Foster*, 26 Colo. App. 120, 140 P. 930 (1914).

**Color of title invoked as evidence of title impermissible.** One offering a deed as color of title merely cannot afterwards invoke it as evidence of title in fact. *Parks v. Roth*, 25 Colo. App. 296, 137 P. 76 (1914).

**But abstracts of title admitted for the purpose of proving title** may also be used as evidence of color of title, since the same instrument may serve both as color of title and as evidence of title itself. *Marr v. Shrader*, 142 Colo. 106, 349 P.2d 706 (1960).

**Title acquired after the institution of the action does not avail.** *Empire Ranch & Cattle Co. v. McPherin*, 26 Colo. App. 225, 142 P. 419 (1914).

**Document tendered not objectionable as proof of lesser status.** A document tendered as proof of title itself and so admitted is not objectionable as proof of the lesser status of color of title. *Marr v. Shrader*, 142 Colo. 106, 349 P.2d 706 (1960).

**But a document offered as evidence solely as proof of color of title** may not also be invoked as proof of title. *Marr v. Shrader*, 142 Colo. 106, 349 P.2d 706 (1960).

**Record entry of judgment without judgment roll inadmissible.** The mere record entry of a judgment, without the judgment roll is not admissible as evidence of title. *King v. Foster*, 26 Colo. App. 120, 140 P. 930 (1914).

#### C. Payment of Taxes.

**Pleading which fails to comply with section's requirements is insufficient.** Where there is no allegation that plaintiff paid for seven successive years all taxes legally assessed on the lands, nor does the plaintiff set up any paper title as a basis for color of title, nor is there any allegation of possession under claim and color of title made in good faith, the pleading falls far short of the requirements of this section and is insufficient. *United States Security & Bond Co. v. Wolfe*, 27 Colo. 218, 60 P. 637 (1900); *Eberville v. Leadville Tunneling, Mining & Drainage Co.*, 28 Colo. 241, 64 P. 200 (1901); *Webber v. Wannemaker*, 39 Colo. 425, 89 P. 780 (1907).

**Proof of tax payment required to invoke section.** To invoke successfully the provisions of this section, one must prove payment of taxes for the full period next prior to the commencement of a suit to quiet title claimed thereunder. *Whitehead v. Bennett*, 92 Colo. 549, 22 P.2d 168 (1933).

**Seven full years must elapse between date of first payment of taxes** that has become due and payable after color of title is taken and the date of the institution of the suit to recover the land. *Empire Ranch & Cattle Co. v. Howell*, 22 Colo. App. 584, 126 P. 1096 (1912), rev'd on other grounds, 60 Colo. 192, 152 P. 1177 (1915); *DeFord v. Smith*, 23 Colo. App. 78, 127 P. 453 (1912); *Cristler v. Beardsley*, 25 Colo. App. 369, 138 P. 68 (1914); *Empire Ranch & Cattle Co. v. McPherin*, 26 Colo. App. 225, 142 P. 419 (1914).

A tax deed which has not been of record for seven years preceding an action by the original owner for the recovery of the lands does not support a plea of the seven-year statute of limitations. *Stephens-Wilmot Co. v. Howell*, 23 Colo. App. 396, 128 P. 476 (1913).

**Taxes paid after an action is brought are of no avail** to support a plea of the seven-year statute of limitations. *Empire Ranch & Cattle Co. v. Gibson*, 22 Colo. App. 617, 126 P. 1103 (1912). See also *Empire Ranch & Cattle Co. v.*



Howell, 22 Colo. App. 389, 125 P. 592 (1912), rev'd on other grounds, 60 Colo. 192, 152 P. 1177 (1915).

**Only taxes falling due subsequent to issue of tax deed counted.** Only taxes, falling due subsequent to the issue of a tax deed which is relied upon as color of title, are to be counted. *Empire Ranch & Cattle Co. v. Weldon*, 26 Colo. App. 111, 141 P. 138 (1914).

**Tax receipts dated after the institution of an action are inadmissible.** *Upham v. Weisshaar*, 23 Colo. App. 277, 128 P. 1129 (1913).

**Payment of taxes on severed minerals.** Once the validity of a mineral deed is established, creating a separate mineral estate in the grantor, possession of the surface did not constitute possession of the minerals, and, payment of assessed taxes on the surface does not constitute payment of taxes on severed minerals, unless a specific reference to the contrary is made of record. *Winslett v. Rozan*, 279 F.2d 654 (10th Cir. 1960).

**Fact that a person in possession was not the exclusive taxpayer on the property is not of significance.** The requirement is that a person in possession must pay all taxes legally assessed on the land. The prior owner of a right-of way who abandoned the property and failed to inform county government can not be used to defeat title by adverse possession when the person in possession paid all taxes legally assessed on the land. *Barnes v. Winford*, 833 P.2d 756 (Colo. App. 1992).

**Proof must be clear and satisfactory.** Where payment of taxes under color of title is relied upon to defeat the original title the proof must be clear and satisfactory. *Brinker v. Union Pac. D. & G. Ry.*, 11 Colo. App. 166, 55 P. 207 (1898); *Eberville v. Leadville Tunneling, Mining & Drainage Co.*, 28 Colo. 241, 64 P. 200 (1901); *Upham v. Weisshaar*, 23 Colo. App. 277, 128 P. 1129 (1913); *Sullivan v. Scott*, 73 Colo. 451, 216 P. 515 (1923); *Huffman v. Smith*, 87 Colo. 265, 286 P. 861 (1930).

**Title should not be overcome by loose and uncertain testimony,** or upon any conjecture or violent presumption. *Upham v. Weisshaar*, 23 Colo. App. 277, 128 P. 1129 (1913).

**Payment of taxes by nonclaimant insufficient.** It is not sufficient if the taxes were paid any one of the years by a person who at the time made no claim to the property under color of title. *Ballard v. Golob*, 34 Colo. 417, 83 P. 376 (1905); *Webber v. Wannemaker*, 39 Colo. 425, 89 P. 780 (1907).

**Payment of interest on taxes.** If a party pays to the collector all taxes assessed and extended against him on the tax book, he has complied with this requisite of the law; although he may not have paid interest on the taxes due because of nonpayment of the same at the time they were due, if such interest has not been ascertained and

charged to him by the collector, he has not been required by such collector to pay the same. *Latta v. Clifford*, 47 F. 614 (D. Colo. 1891).

#### D. Good Faith.

**Good faith is essential.** *Silford v. Stratton*, 54 Colo. 248, 130 P. 327 (1913).

In order to justify a decree quieting his title, it is incumbent upon defendant to produce clear and convincing evidence that he, in good faith, acquired color of title to the property in question; that for a period of seven years he paid the taxes legally assessed against the same; and that the property claimed by plaintiff was included in his color of title. *Kelly v. Sinclair*, 129 Colo. 226, 268 P.2d 1035 (1954).

**Therefore, party must act bona fide.** A party, who sets up an adverse possession under color of title, must act bona fide, or, in other words he must be honest; he must believe his deed to be valid in law and he must believe that it conveys to him a good title to the land, although it may turn out that another person has a better title. *Sullivan v. Scott*, 73 Colo. 451, 216 P. 515 (1923).

**Color of title made in good faith is shown by any deed or instrument which purports on its face to convey title which a party is willing to, and does, pay his money for, apart from any fraud; the deed itself purports good faith, unless facts and circumstances attending its execution show the party accepting it had no faith or confidence in it.** *Lebanon Mining Co. v. Rogers*, 8 Colo. 34, 5 P. 661 (1884); *Knight v. Lawrence*, 19 Colo. 425, 36 P. 242 (1894).

**Good faith of the claimant is a question of fact.** *Jackson v. Larson*, 24 Colo. App. 548, 136 P. 81 (1913).

**Party aware of fraud cannot render claim availing.** A party receiving color of title, knowing it to be worthless or in fraud of the owner's rights, although he holds the color and asserts the claim, cannot render the claim availing because of the want of good faith. *Knight v. Lawrence*, 19 Colo. 425, 36 P. 242 (1894); *Sullivan v. Scott*, 73 Colo. 451, 216 P. 515 (1923).

**Grantee's knowledge of grantor's insanity not conclusive of bad faith.** The insanity of the grantor, even although known to the grantee at the time of accepting the conveyance, is not conclusive of bad faith on the part of the grantee. *Parker v. Betts*, 47 Colo. 428, 107 P. 816 (1910).

**Test of claim of title in good faith.** If good faith will be presumed by the taking of the deed itself, unless the facts and circumstances attending its execution showed that the party accepting it had no faith or confidence in the deed, it is plain that confidence in the title and purpose in acquiring it constitute the test of claim of title in good faith. *Sedgwick v. Culp*, 24 Colo. App. 566, 136 P. 88 (1913).

**Faith depends upon purpose with which deed is obtained**, and the reliance placed upon the claim and the color, and a party receiving color of title, knowing it to be worthless, or in fraud of the owner's rights, although he holds the color and asserts the claim, cannot render it availing, because of the want of good faith. *Silford v. Stratton*, 54 Colo. 248, 130 P. 327 (1913).

**Deeds unaffected by insertion of treasurer's name following recording.** Where the treasurer's name was omitted from the acknowledg-

ment of tax deeds and, after they were recorded, he inserted his name with a rubber stamp and the county clerk's record was changed accordingly; while such procedure is condemned, it does not affect the validity of the deeds, nor to show claim of title made in bad faith on the part of the person causing the alterations to be made. *Langley v. Young*, 75 Colo. 44, 224 P. 231 (1924).

**Possession and payment of taxes must be affirmatively shown.** *Knight v. Lawrence*, 19 Colo. 425, 36 P. 242 (1894).

**38-41-109. When in possession under color of title - unoccupied lands.** Whenever a person having color of title, made in good faith, to vacant and unoccupied land pays all taxes legally assessed thereon for seven successive years, he shall be deemed and adjudged to be the legal owner of said vacant and unoccupied land to the extent and according to the purport of his paper title. All persons holding under such taxpayer, by purchase, devise, or descent, before said seven years have expired, who continue to pay the taxes as provided in this section, so as to complete the payment of taxes for the period of time provided in this section, shall be entitled to the benefit of this section. If any person, having a better paper title to said vacant and unoccupied land, shall during the said term of seven years pay the taxes assessed on said land for any one or more years during the said term of seven years, then such person seeking title under claim of taxes paid, his heirs and assigns, shall not be entitled to the benefit of this section. For the purposes of this part 1 a redemption from a sale for taxes by the party claiming under any of the limitations set forth in this section shall be considered as the equivalent of a payment of taxes.

**Source:** L. 27: p. 602, § 38. CSA: C. 40, § 144. CRS 53: § 118-7-9. C.R.S. 1963: § 118-7-9.

**Cross references:** For rights of a person in actual possession of lands and tenements for seven years, with color of title and payments of taxes, see § 38-41-108.

## ANNOTATION

- I. General Consideration.
- II. Particular Requirements.
  - A. In General.
  - B. Color of Title.
  - C. Payment of Taxes.
  - D. Good Faith.
- III. Commencement and Interruption of Statute.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 Dicta 281 (1949). For note, "Color of Title" in the Colorado Short Statutes of Limitation", see 21 Rocky Mt. L. Rev. 226 (1949). For note, "Adverse Possession in Colorado", see 27 Rocky Mt. L. Rev. 88 (1954).

**This section is constitutional.** *Towner v. Schaffnit*, 59 Colo. 242, 149 P. 625 (1915).

**This section is intended as a protection** to a person holding in good faith under a mere colorable title, that is, under a title which is really no title. *De Foresta v. Gast*, 20 Colo. 307, 38 P. 244 (1894).

This section is clearly designed to operate as a limitation upon actions involving conflicting titles to vacant and unoccupied lands. *Morris v. St. Louis Nat'l Bank*, 17 Colo. 231, 29 P. 802 (1892).

**Section focuses only on surface occupancy.** *Webermeier v. Pace*, 37 Colo. App. 546, 552 P.2d 1021 (1976), aff'd, 193 Colo. 157, 563 P.2d 950 (1977).

**Section does not pertain to severed mineral interests**, i.e., its applicability is dependent upon there being no one in possession of the surface which would give notice of a potential adverse claim to the surface or fee estate. *Webermeier v. Pace*, 37 Colo. App. 546, 552 P.2d 1021 (1976), aff'd, 193 Colo. 157, 563 P.2d 950 (1977).

**Section is parallel provision to § 38-41-108.** *Winslett v. Rozan*, 279 F.2d 654 (10th Cir. 1960).

**Section must be considered in relation to § 38-41-108.** *Webermeier v. Pace*, 37 Colo. App. 546, 552 P.2d 1021 (1976), aff'd, 193 Colo. 157, 563 P.2d 950 (1977).



To constitute a bar, a party must show complete performance under either this section or § 38-41-108. He cannot show part performance under one section and part under the other and, thus, blend the provisions of both sections. The bar must be complete and distinct under the one or the other section, and a party cannot avail of the provisions of both sections at the same time. *Vider v. Zavislan*, 146 Colo. 519, 362 P.2d 163 (1961).

**Bar to be raised by pleadings.** The benefit of this section cannot be allowed, where its bar was neither raised by the pleadings nor sustained by the facts developed at the trial. *Fleming v. Howell*, 22 Colo. App. 382, 125 P. 551 (1912).

**Failure to plead limitations constitutes waiver.** A defendant who, with full knowledge of all the facts, goes to trial without pleading this statute of limitations waives the defense, and he may not present the defense by a supplemental answer tendered months after the trial. *Empire Ranch & Cattle Co. v. Chapin*, 22 Colo. App. 538, 126 P. 1107 (1912).

**Applied in** *Sullivan v. Collins*, 20 Colo. 528, 39 P. 334 (1895); *Gibson v. Staghorn Cattle Co.*, 26 Colo. App. 148, 141 P. 507 (1914); *Heini v. Bank of Kremmling*, 93 Colo. 350, 25 P.2d 1113, 89 A.L.R. 1442 (1933); *Wright v. Yust*, 118 Colo. 449, 195 P.2d 951 (1948); *Hand v. Rhodes*, 125 Colo. 508, 245 P.2d 292 (1952).

## II. PARTICULAR REQUIREMENTS.

### A. In General.

**Additional requirements for title.** Under this section, in addition to the fact that the land must have been vacant and taxes paid for seven successive years, three things are essential: (1) There must be color of title; (2) the party must claim under it; and (3) that claim must be made in good faith. If any one of these elements is lacking, the title will be defeated. *Silford v. Stratton*, 54 Colo. 248, 130 P. 327 (1913). See *Empire Ranch & Cattle Co. v. Howell*, 22 Colo. App. 584, 126 P. 1096 (1912), rev'd on other grounds, 60 Colo. 192, 152 P. 1177 (1915).

**No possession whatever is necessary** under this section and a court has no power to read such a condition of possession into the section. *Thatcher v. Gottlieb*, 59 F. 872 (8th Cir. 1894).

**Void deed does not confer constructive possession of land**, and the paramount owner is, in law, deemed to continue in possession until actual entry and possession taken by another, or until payment of taxes for the requisite period, concurrent with color of title made in good faith, as provided by this section shall, in the case of vacant lands, have become equivalent in law to an actual ouster. *Fleming v. Howell*, 22 Colo. App. 382, 125 P. 551 (1912).

### B. Color of Title.

**Judgment record may be color of title.** *Marvin v. Witherbee*, 63 Colo. 469, 168 P. 651 (1917).

**Treasurer's deed must describe the land** in order to be color of title. *Riley v. Lemieux*, 24 Colo. App. 184, 132 P. 699 (1913).

**A tax deed not recorded is not color of title to vacant lands under this section.** *Carnahan v. Hughes*, 53 Colo. 318, 125 P. 116 (1912); *Marks v. Morris*, 54 Colo. 186, 129 P. 828 (1913); *Empire Ranch & Cattle Co. v. Howell*, 23 Colo. App. 348, 129 P. 521 (1913).

**The mere record entry of a decree quieting title, not accompanied by the judgment roll, is not admissible as evidence of title.** *Miller v. Weldon*, 26 Colo. App. 108, 140 P. 930 (1914).

### C. Payment of Taxes.

**One who holds under color of title must himself pay the taxes** during the period he is in possession. *Ballard v. Golob*, 34 Colo. 417, 83 P. 376 (1905); *Webber v. Wannemaker*, 39 Colo. 425, 89 P. 780 (1907); *Bowers v. McFadzean*, 82 Colo. 138, 257 P. 361 (1927).

**Payment of taxes alone ineffective to perfect title.** The payment of taxes on land and improvements is ineffective to perfect title where the party claiming fails to show color of title. *Tilbury v. Osmundson*, 143 Colo. 12, 352 P.2d 102 (1960).

**Proof of tax payment required.** One claiming unoccupied lands under a treasurer's deed must, to avail himself of this section, show seven years' payment of taxes subsequent to the record of his deed and before the commencement of an action by the owner of the paramount title. *Johnson v. Gibson*, 24 Colo. App. 392, 133 P. 1052 (1913). See *Bloomer v. Cristler*, 22 Colo. App. 238, 123 P. 966 (1912).

**When section available as defense to recovery action.** This section is not available as a defense to an action to recover vacant land unless seven full years elapse between the first payment of taxes under color of title and the institution of the action. *Evans v. Howell*, 23 Colo. App. 219, 128 P. 879 (1912).

This section is not available to one claiming under a tax deed not of record for the full term of seven years, at a time when an action for the recovery of lands is instituted. *Empire Ranch & Cattle Co. v. Howell*, 22 Colo. App. 584, 126 P. 1096 (1912), rev'd on other grounds, 60 Colo. 192, 152 P. 1177 (1915); *Terry v. Gibson*, 23 Colo. App. 273, 128 P. 1127 (1913).

Where one holding color of title pays all taxes upon the land for seven successive years, the payment of subsequent taxes by the holder of paramount title is of no avail. *Newsom v. DeFord*, 25 Colo. App. 582, 140 P. 207 (1914).

**When section not available as defense.** If the paramount owner brings his action to recover the land before the lapse of seven years succeeding the recording of a tax deed, the limitation of this section has no place. *Empire Ranch & Cattle Co. v. Howell*, 23 Colo. App. 348, 129 P. 521 (1913), rev'd on other grounds, 60 Colo. 192, 152 P. 1177 (1915); *Empire Ranch & Cattle Co. v. Brownson*, 26 Colo. App. 228, 142 P. 421 (1914).

**Tax past due when deed issued not counted.** A tax past due when a treasurer's deed is issued is not to be counted to sustain a plea of the seven-year statute of limitations. *Miller v. Weldon*, 26 Colo. App. 108, 140 P. 930 (1914).

**Effect of payment of part of total tax.** One who assumes to pay taxes solely on improvements on land, or solely on the land, is merely paying a part of the total tax on the realty. *French v. Golston*, 105 Colo. 578, 100 P.2d 581 (1940).

#### D. Good Faith.

**Good faith must be affirmatively shown.** To entitle one claiming lands by virtue of this section under color of title, good faith must be affirmatively shown. *Marvin v. Witherbee*, 63 Colo. 469, 168 P. 651 (1917).

**Sufficient evidence of good faith.** In the absence of proof to the contrary, the fact that a person has acquired, and for a period of 11 years has held, a tax deed to land, and has during said period paid all the taxes on the land, is sufficient evidence of his good faith in the transaction. *De Foresta v. Gast*, 20 Colo. 307, 38 P. 244 (1894).

### III. COMMENCEMENT AND INTERRUPTION OF STATUTE.

**Claimant must show lapse of statutory period.** One who, claiming under a void tax deed, would avail himself of the seven-year limitation prescribed by this section, must show the lapse of the statutory period, not only between the first payment of taxes and the institution of the action of the paramount owner, but between the record of his deed and the institution of this action. *Marks v. Morris*, 54 Colo. 186, 129 P. 828 (1913).

**Only way this section can be arrested,** after color of title has been acquired and payment of taxes for a term of seven years thereunder has been made, is by the commencement of suit within seven years from the time the first payment under said color was made. *Newsom v. DeFord*, 25 Colo. App. 582, 140 P. 207 (1914).

**38-41-110. Payment of delinquent taxes by owner of less than whole property.** The owner of not less than one-tenth undivided interest in real property which he has owned not less than one year may pay and the county treasurer shall receive from him all delinquent taxes due upon the entire or any other fractional interests therein by redemption from prior or subsequent tax sales or by payment of any taxes which are delinquent, or otherwise, and if at the time of such payment he records with the county clerk and recorder a statement describing the property and showing the payment of such taxes under this article, he shall be subrogated to the first and prior lien of the state of Colorado for such taxes and may foreclose such lien at any time after four years from the date when any part of the taxes so paid first became delinquent, in the same manner and with like remedies as a first mortgage; or he shall be entitled to have any such payment allowed as a setoff in any accounting with any other person interested in such property, whether under the provisions of article 44 of title 34, C.R.S., or otherwise. The owner of any other fractional interest may at any time prior to foreclosure pay to the treasurer his pro rata share of such payments, with interest and recording fees which shall be repaid to the lien claimant and for which a redemption certificate shall issue, which, when recorded, shall release such interest from such lien.

**Source:** L. 27: p. 602, § 38. L. 33: p. 796, § 1. CSA: C. 40, § 145. CRS 53: § 118-7-10. C.R.S. 1963: § 118-7-10.

### ANNOTATION

**Rights of co-owners under this section distinguished from right of redemption.** Unlike the right of an interest holder to redeem under § 39-12-103, the right granted to certain co-owners to pay delinquent taxes under this section does not result in issuance of a redemption certificate or acquisition of an interest in the

delinquent co-owner's estate. Rather, the paying co-owner is granted the right to foreclose the lien for unpaid taxes. *Notch Mountain Corp. v. Elliott*, 898 P.2d 550 (Colo. 1995).

**Applied** in *Sine v. Stout*, 119 Colo. 254, 203 P.2d 495 (1949); *Latta v. Stout*, 119 Colo. 257, 203 P.2d 496 (1949).



**38-41-111. When action will not lie against person in possession.** (1) No action shall be commenced or maintained against a person in possession of real property to question or attack the validity of or to set aside, upon any ground or for any reason whatsoever any final decree or final order of any court of record in this state or any instrument of conveyance, deed, certificate of sale, or release executed by any private trustee, successor in trust, public trustee, sheriff, marshal, county treasurer, or any public official whatsoever, whether named in this section or not, or officer or any appointee of any court when such document is the source of or in aid of or in explanation of the title or chain of title or right of the party in possession or any of his predecessors or grantors insofar as the same may affect the title or explain any matter connected with the title in reference to said real property if such document has been recorded and has remained of record in the office of the county clerk and recorder of the county where said real property is situated for a period of seven years. All defects, irregularities, want of service, defective service, lack of jurisdiction, or other grounds of invalidity, nullity, or causes or reasons whereby or wherefore any such document might be set aside or rendered inoperative must be raised in a suit commenced within said seven-year period and not thereafter.

(2) This section shall not apply to any of the following cases:

(a) Forged documents;

(b) During the pendency of an action, commenced prior to the expiration of said seven-year period, to set aside, modify, or annul or otherwise affect such document, and notice of such action has been filed as provided by law;

(c) When such document has been, by proper order or decree of competent court, avoided, annulled, or rendered inoperative;

(d) Where the party, or his predecessor, who brings the action to question, to attack, or to set aside the validity of such documents, has been deprived of possession within two years of the commencement of said action.

**Source:** L. 27: p. 603, § 39. CSA: C. 40, § 146. L. 45: p. 272, § 1. CRS 53: § 118-7-11. C.R.S. 1963: § 118-7-11. L. 75: (2)(d) amended, p. 225, § 84, effective July 16.

#### ANNOTATION

**Law reviews.** For note, discussing this section as a limitation of action, see 6 Dicta 14 (1929). For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 16 Dicta 35 (1939). For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 Dicta 281 (1949). For note, "'Color of Title' in the Colorado Short Statutes of Limitation", see 21 Rocky Mt. L. Rev. 226 (1949). For article, "Check Lists for Court Proceedings in Which Titles to Real Estate are Involved", see 23 Rocky Mt. L. Rev. 371 (1951). For article, "New Real Estate Standard", see 29 Dicta 331 (1952). For note, "The Effect of the Presumption of Death on Marketability of Title", see 25 Rocky Mt. L. Rev. 90 (1952). For article, "Marketable Title: What Certifiable Copies of Court Papers Should Appear of Record", see 34 Dicta 7 (1957).

**Purpose of sections.** The purpose of this section through § 38-41-114 is to make real estate titles more safe, secure, and marketable. Federal Farm Mtg. Corp. v. Schmidt, 109 Colo. 467, 126 P.2d 1036 (1942).

**Sections to be construed harmoniously.** In interpreting this section through § 38-41-114, it

was necessary to construe them harmoniously. Federal Farm Mtg. Corp. v. Schmidt, 109 Colo. 467, 126 P.2d 1036 (1942).

**Actual possession is prerequisite.** Actual possession, at least at the time of the commencement of the action, is a prerequisite to the benefits of the section. Ginsberg v. Stanley Aviation Corp., 193 Colo. 454, 568 P.2d 35 (1977).

**When mineral estate is severed from the surface estate,** actual adverse possession of mineral estate must be established separate from any possession of the surface estate. Kriss v. Mineral Rights, Inc., 911 P.2d 711 (Colo. App. 1996).

**Lack of actual possession is fatal** to any claim under this section. Calvat v. Juhan, 119 Colo. 561, 206 P.2d 600 (1949).

**Tax deed virtually invulnerable to attack.** This section makes a title acquired by tax deed virtually invulnerable to attack after it has been of record seven years. Smith v. Town of Fowler, 138 Colo. 359, 333 P.2d 1034 (1959); Bald Eagle Mining & Ref. Co. v. Brunton, 165 Colo. 28, 437 P.2d 59 (1968).

**Irregularities prior to expiration of limitation period.** Although the statute of limitations

provides sufficient protection for the purchasers of property under tax deeds without further limitations being imposed by the courts, until the applicable periods of limitation have expired, tax deeds, even though valid on their face, are subject to attack for irregularities in the proceedings; otherwise, there would be no need for statute of limitations. *Bald Eagle Mining & Ref. Co. v. Brunton*, 165 Colo. 28, 437 P.2d 59 (1968).

**The statute of limitations does not apply to a claim for quiet title when the property was sold after the complaint was filed.** The seven-year statute of limitations may have been applicable, but the quiet title claim became moot. *Tafoya v. Perkins*, 932 P.2d 836 (Colo. App. 1996).

**Subsection (2)(d) exempts from operation of section persons who have been deprived of**

their possession within two years of the commencement of the action. *Concord Corp. v. Huff*, 144 Colo. 72, 355 P.2d 73 (1960).

**Party must plead subsection (2)(d) exception.** It is necessary for a party, if he wishes to take advantage of subsection (2)(d), to assert this exception in his pleading. *Federal Farm Mtg. Corp. v. Schmidt*, 109 Colo. 467, 126 P.2d 1036 (1942).

**Applied in** *Cisneros v. Cisneros*, 163 Colo. 245, 430 P.2d 86 (1967); *Bd. of County Comm'rs v. Blanning*, 29 Colo. App. 61, 479 P.2d 404 (1970); *Joseph v. Joseph*, 43 Colo. App. 533, 608 P.2d 839 (1980); *LeSatz v. Deshotels*, 757 P.2d 1090 (Colo. App. 1988); *Dynasty, Inc. v. Winter Park Assocs., Inc.*, 5 P.3d 392 (Colo. App. 2000).

**38-41-112. Legal disability - extension of two years.** Persons under legal disability at the time the right of action first accrued who, at the time of the expiration of the limitation applicable, are still under such disability shall have two years from the expiration of a limitation to commence action, and no action shall be maintained by such persons thereafter.

**Source:** L. 27: p. 604, § 40. CSA: C. 40, § 147. CRS 53: § 118-7-12. C.R.S. 1963: § 118-7-12.

**Cross references:** For extension of limitation period for persons under disability in personal actions, see § 13-81-103; for extension of redemption time for tax deeds for those under disability, see § 39-12-104.

## ANNOTATION

**Law reviews.** For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 16 Dicta 35 (1939). For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 Dicta 281 (1949). For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 Dicta 321 (1949). For note, "'Color of Title' in the Colorado Short Statutes of Limitation", see 21 Rocky Mt. L. Rev. 226 (1949). For article, "Check Lists for Court Proceedings in Which Titles To Real Estate Are Involved", see 23 Rocky Mt. L. Rev. 371 (1951). For article, "Marketable Title: What Certifiable Copies of Court Papers Should Ap-

pear of Record?", see 34 Dicta 7 (1957). For article, "Due Process in Involuntary Civil Commitment and Incompetency Adjudication Proceedings: Where Does Colorado Stand?", see 46 Den. L.J. 516 (1969).

**Effect of section where owner under disability until death.** The fact that an owner is under disability until her death does not prevent the running of the statute. This section and § 38-41-101 merely add two years to the period of limitations, it does not suspend the running of the statute. *Nesbitt v. Jones*, 140 Colo. 412, 344 P.2d 949 (1959).

**38-41-113. Limitations may be asserted affirmatively or by way of defense.** The limitations provided for in this part 1 may be asserted either affirmatively or by way of defense and may be used in any action as a source of or as a means to establish title or the right of possession or as an aid or explanation of title. Actions may be maintained affirmatively to establish such limitations provided for in this part 1.

**Source:** L. 27: p. 604, § 41. CSA: C. 41, § 148. CRS 53: § 118-7-13. C.R.S. 1963: § 118-7-13.



## ANNOTATION

**Law reviews.** For article, “Curative Statutes of Colorado Respecting Titles to Real Estate”, see 16 Dicta 71 (1940). For article, “Curative Statutes of Colorado Respecting Titles to Real Estate”, see 26 Dicta 321 (1949). For article, “Curative Statutes of Colorado Respecting Titles to Real Estate”, see 26 Dicta 281 (1949). For note, “‘Color of Title’ in the Colorado Short Statutes of Limitation”, see 21 Rocky Mt. L. Rev. 226 (1949).

**Section is exception to general rule.** The general rule that statutes of limitations are held

to be available only as a matter of defense or bar to the bringing of an action has no application to the limitations contained in this part of article 41, since this section expressly provides that the limitations therein contained “may be asserted affirmatively or by way of defense”. *Federal Farm Mtg. Corp. v. Schmidt*, 109 Colo. 467, 126 P.2d 1036 (1942).

**Applied** in *Crawford v. French*, 633 P.2d 524 (Colo. App. 1981); *Childers v. Quartz Creek Land Co.*, 946 P.2d 534 (Colo. App. 1997), cert. dismissed, 964 P.2d 509 (Colo. 1998).

**38-41-114. When limitations apply.** The limitations established in this part 1 shall apply to causes of action that have accrued prior to March 28, 1927, as well as to all causes of action accruing thereafter. This part 1 shall not be construed as reviving any action barred by any former or other statute.

**Source:** L. 27: p. 604, § 42. CSA: C. 40, § 149. CRS 53: § 118-7-14. C.R.S. 1963: § 118-7-14. L. 2003: Entire section amended, p. 915, § 25, effective August 6.

## ANNOTATION

**Law reviews.** For article, “Curative Statutes of Colorado Respecting Titles to Real Estate”, see 26 Dicta 281 (1949). For note, “‘Color of

Title’ in the Colorado Short Statutes of Limitation”, see 21 Rocky Mt. L. Rev. 226 (1949).

**38-41-115. Setting aside judgments against unknown parties.** No action shall be brought after the expiration of one year from March 14, 1923, to set aside any decree or judgment entered in any action brought against unknown parties where there has been a substantial compliance with the requirements of the Colorado rules of civil procedure as to jurisdiction, pleadings, and service of process.

**Source:** L. 23: p. 218, § 1. Code 35: § 50(f). CRS 53: § 118-7-15. C.R.S. 1963: § 118-7-15. L. 67: p. 84, § 1.

**Cross references:** For service of process on unknown parties, see C.R.C.P. 4(g).

## ANNOTATION

**For when section may be raised as affirmative defense,** see *Cisneros v. Cisneros*, 163 Colo. 245, 430 P.2d 86 (1967).

**Applied** in *Stonewall Estates v. CF & I Steel Corp.*, 197 Colo. 255, 592 P.2d 1318 (1979).

**38-41-116. Actions to enforce contracts of sale.** No action or proceeding whatsoever shall be brought or maintained by any person to enforce or procure any right or title accorded to the purchaser under any contract for the purchase and sale of real property if such person is not in possession of the real property described in and the subject of such contract of purchase and sale unless such action or proceeding is commenced within ten years of the day or the happening of the event appointed in said contract for the delivery by the seller of a deed of conveyance of the property therein agreed to be purchased and sold. If no day is appointed in such contract for the delivery of such conveyance, then such action or proceeding shall be commenced within ten years of the day on which the last and final installment of the purchase price would have been paid but not thereafter.

**Source:** L. 53: p. 205, § 1. CRS 53: § 118-7-16. C.R.S. 1963: § 118-7-16. L. 75: Entire section amended, p. 225, § 85, effective July 16.

#### ANNOTATION

**Application of section's bar precluded.** Since the owner of a mineral estate does not lose possession or title by mere nonuse and since ownership and occupancy of the surface does not constitute possession of the mineral estate, absent evidence that the fee simple owner of the surface actually dispossessed plaintiffs of the mineral estate by drilling or exploration for minerals, plaintiffs retained the requisite possession of a mineral interest so as to preclude application of the bar of this section. *Brian v. Valley View Cattle Ranch, Inc.*, 35 Colo. App. 428, 535 P.2d 237 (1975).

**Where person, as a purchaser not in possession,** was attempting to enforce his right or

equitable title pursuant to the contract of sale, this section was the most specific and the most applicable, and not § 38-41-101 or former § 13-80-114. *Bent v. Ferguson*, 791 P.2d 1241 (Colo. App. 1990).

**A question of fact remained on claim to quiet title** where this section allowed purchaser to bring an action to enforce any right or title he may have under a contract within ten years from the date of delivery of general warranty deed and parties intent concerning when delivery of the deed was to take place required determination. *Bent v. Ferguson*, 791 P.2d 1241 (Colo. App. 1990).

**38-41-117. Actions to enforce bonds for deeds.** No action or proceeding whatsoever shall be brought or maintained by any person who is or may become entitled to have conveyed to him any real property under the terms of any bond for a deed to real property or under the terms of any agreement in the nature of a bond for a deed to real property and who is not in possession of the real property which is the subject of such bond or agreement, to enforce or procure any right or interest granted or assured under the terms thereof or any law or custom relating thereto unless such action or proceeding is commenced within ten years of the day limited therein for the performance of the acts and things upon which the conveyance of such real property is conditioned.

**Source:** L. 53: p. 205, § 2. CRS 53: § 118-7-17. C.R.S. 1963: § 118-7-17.

**38-41-118. Construction of sections.** (1) Sections 38-41-116 to 38-41-118 shall not be construed to alter, modify, amend, or repeal any of the terms and provisions of section 38-35-111.

(2) The limitations imposed by sections 38-41-116 to 38-41-118 shall not apply to any action or proceeding that has been commenced prior to June 1, 1953.

**Source:** L. 53: p. 206, § 3. CRS 53: § 118-7-18. C.R.S. 1963: § 118-7-18. L. 2003: (2) amended, p. 916, § 26, effective August 6.

#### ANNOTATION

**Law reviews.** For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 Dicta 281 (1949). For note, "'Color of

Title' in the Colorado Short Statutes of Limitation", see 21 Rocky Mt. L. Rev. 226 (1949).

**38-41-119. One-year limitation.** No action shall be commenced or maintained to enforce the terms of any building restriction concerning real property or to compel the removal of any building or improvement on land because of the violation of any terms of any building restriction unless said action is commenced within one year from the date of the violation for which the action is sought to be brought or maintained.

**Source:** L. 27: p. 606, § 47. CSA: C. 40, § 154. CRS 53: § 118-8-4. C.R.S. 1963: § 118-8-4. L. 72: p. 616, § 146.



## ANNOTATION

**Law reviews.** For article, "Future Interests in Colorado", Part I, see 21 Rocky Mt. L. Rev. 227 (1948); Part II, 21 Rocky Mt. L. Rev. 1 (1948); Part III, 21 Rocky Mt. L. Rev. 123 (1949).

**Section applies to actions pertaining to public land.** While this section does not bar an action brought by the state, there is no exception to its applicability to private citizens who bring actions pertaining to public land. *Styers v. Mara*, 631 P.2d 1138 (Colo. App. 1981).

**The one-year statute of limitations embodied in this section** applies to actions which accrued respecting estates in airspace after 1972, the year in which that statute was amended. *Ass'n of Owners, Satellite Apt., Inc. v. Otte*, 38 Colo. App. 12, 550 P.2d 894 (1976).

**This section, rather than general statute of limitations, controls.** Since this section of specifically drafted to relate to actions to enforce restrictions concerning real property, it controls an action to enforce a restriction on the use of an estate and to compel removal of the improvement erected in violation of the terms of that restriction to the exclusion of the general statute of limitations relating to actions on a contract. *Ass'n of Owners, Satellite Apt., Inc. v. Otte*, 38 Colo. App. 12, 550 P.2d 894 (1976).

**Administrative hearing is not the commencement of an action** for purposes of this section. *Styers v. Mara*, 631 P.2d 1138 (Colo. App. 1981).

**Action to enforce restriction commenced 21 months after expiration date barred.** A covenant in a warranty deed, requiring grantee to construct a house of a stated value within a prescribed time upon the land conveyed, and providing that upon grantee's default the property was to revert to the grantor, is a "restriction concerning real property" within the meaning of this section; thus, an action to enforce the restriction, commenced 21 months after the expiration date stated in the covenant, was barred by this section. *Wolf v. Hallenbeck*, 109 Colo. 70, 123 P.2d 412 (1942).

**But where each day of noncompliance with**

**an ordinance constitutes a separate violation,** enforcement of the ordinance is not barred. *Town of Grand Lake v. Lanzi*, 937 P.2d 785 (Colo. App. 1996).

**Zoning ordinance is not a "building restriction"** within the meaning of this section. *Town of Grand Lake v. Lanzi*, 937 P.2d 785 (Colo. App. 1996).

**Section held to provide no defense.** *Seeger's Estate v. Puckett*, 115 Colo. 185, 171 P.2d 415 (1946).

**Statute of limitations defense was not preserved on appeal** where defendants raised the defense in their answer to plaintiffs' second amended complaint and in the trial management order, but failed to bring the defense to the court's attention in opening or closing statements, in an oral motion for a directed verdict, or in a motion for a new trial. *Highland Meadows Estates v. Buick*, 994 P.2d 459 (Colo. App. 1999), *aff'd in part and rev'd in part* on other grounds, 21 P.3d 860 (Colo. 2001).

**A setback requirement** contained within a duly adopted planned unit development plat is a building restriction concerning real property as contemplated by § 38-41-119. *McDowell v. U.S.*, 870 P.2d 656 (Colo. App. 1994).

**Equitable relief and money damages barred.** The word "enforce", as used in § 38-41-119 in relation to contractual obligations, embraces a remedy of money damages as well as equitable relief. Section 38-41-119 was meant to apply to any action to enforce a building restriction, regardless of the nature of the relief requested. The nature of the right that plaintiff seeks to exercise controls the applicability of the statute of limitations. Therefore, plaintiff's tardy claim for equitable relief, in the form of removal of encroaching improvements that violate the PUD setback area requirement, and money damages is barred by the statute of limitations of § 38-41-119. *McDowell v. U.S.*, 870 P.2d 656 (Colo. App. 1994).

**Applied** in *Nicol v. Nelson*, 776 P.2d 1144 (Colo. App. 1989), cert. denied, 785 P.2d 917 (Colo. 1989).

## PART 2

## HOMESTEAD EXEMPTIONS

**Law reviews:** For article, "Homestead Marshalling", see 14 Colo. Law. 1612 (1985).

**38-41-201. Homestead exemption - definitions.** (1) Every homestead in the state of Colorado shall be exempt from execution and attachment arising from any debt, contract, or civil obligation not exceeding in actual cash value in excess of any liens or encumbrances on the homesteaded property in existence at the time of any levy of execution thereon:

(a) The sum of sixty thousand dollars if the homestead is occupied as a home by an owner thereof or an owner's family; or

(b) The sum of ninety thousand dollars if the homestead is occupied as a home by an

elderly or disabled owner, an elderly or disabled spouse of an owner, or an elderly or disabled dependent of an owner.

(2) As used in this section, unless the context otherwise requires:

(a) "Disabled owner", "disabled spouse", or "disabled dependent" means an owner, spouse, or dependent who has a physical or mental impairment that is disabling and that, because of other factors such as age, training, experience, or social setting, substantially precludes the owner, spouse, or dependent from engaging in a useful occupation, as a homemaker, a wage earner, or a self-employed person in any employment that exists in the community and for which he or she has competence.

(b) "Elderly owner", "elderly spouse", or "elderly dependent" means an owner, spouse, or dependent who is sixty years of age or older.

**Source:** R.S. p. 385, § 57. G.L. § 1343. G.S. § 1631. R.S. 08: § 2950. C.L. § 5924. CSA: C. 93, § 23. L. 51: p. 522, § 1. CRS 53: § 77-3-1. C.R.S. 1963: § 77-3-1. L. 73: p. 916, § 2. L. 75: Entire section R&RE, p. 1444, § 1, effective July 14. L. 81: Entire section amended, p. 1828, § 1, effective May 21. L. 91: Entire section amended, p. 384, § 6, effective May 1. L. 2000: Entire section amended, p. 717, § 3, effective May 23. L. 2007: Entire section amended, p. 879, § 7, effective May 14.

**Cross references:** For the legislative declaration in the 2007 act amending this section, see section 1 of chapter 226, Session Laws of Colorado 2007.

## ANNOTATION

- I. General Consideration.
- II. Effect of Exemption.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "Executions and Levies on Tangible Property", see 27 Dicta 143 (1950). For note, "A Discussion of Garnishment and Its Exemptions", see 27 Dicta 453 (1950). For note, "Colorado Homestead Now Assertable Against Heirs", see 25 Rocky Mt. L. Rev. 84 (1952). For article, "Trusts and Estates", see 30 Dicta 435 (1953). For note, "The Homestead Rights of Minor Children in Solvent Estates", see 25 Rocky Mt. L. Rev. 370 (1953). For article, "Marital Property Interests", see 27 Rocky Mt. L. Rev. 180 (1955). For article, "Homestead v. Mechanic's Lien", see 40 Den. L. Ctr. J. 2 (1963). For comment, "The Effect of Certified Realty on Mortgage Foreclosure in Colorado", see 52 U. Colo. L. Rev. 301 (1981). For comment, "The Effect of Certified Realty Corp. v. Smith on Mortgage Foreclosure in Colorado", see 52 U. Colo. L. Rev. 301 (1981). For article, "Election to Sue on a Mortgage Note in Lieu of Foreclosure", which discusses avoidance of judgment liens in bankruptcy, see 13 Colo. Law. 621 (1984). For article, "The Statutory Right of Redemption from Foreclosures", which discusses how the statutory right of redemption from foreclosures is modified by the homestead exemptions, see 13 Colo. Law. 793 (1984). For article, "Colorado Homestead Statutes: Exemption or Allowance?", see 17 Colo. Law. 827 (1988).

**Constitutionality.** This section does not violate the uniformity clause of § 8 of art. VIII,

U.S. Const. or supremacy clause, art. VI, cl. 2, U.S. Const. In re Parrish, 19 Bankr. 331 (Bankr. D. Colo. 1982); In re Robinson, 44 Bankr. 292 (Bankr. D. Colo. 1984).

**Primary purpose of article** is to place the property designated as a homestead out of the reach of creditors while occupied as a home, and this is so even though the designation of the property as a homestead occurred after the debt was contracted and immediately before the creditor had attached or levied upon the property, and though the debtor had no other property liable for his debt. Haas v. De Laney, 165 F. Supp. 488 (D. Colo. 1958). See Barnett v. Knight, 7 Colo. 365, 3 P. 747 (1884).

The design of this section is to secure to the householder a home for himself and family, regardless of his financial condition, whether solvent or insolvent. Woodward v. People's Nat'l Bank, 2 Colo. App. 369, 31 P. 184 (1892); In re Nye, 133 F. 33 (8th Cir. 1904).

The policy of the state is to preserve the home to the family, even at the sacrifice of just demands, for the reason that the preservation of the home is deemed of paramount importance. McPhee v. O'Rourke, 10 Colo. 301, 15 P. 420 (1887); Univ. Nat. Bank v. Harsh, 833 P.2d 846 (Colo. App. 1992).

**Spirit of homestead laws preserves right of occupancy.** The spirit and the letter of our homestead laws preserve a right of occupancy for those who stand in the relation of head of the family. In re Wallace's Estate, 125 Colo. 584, 246 P.2d 894 (1952).

**Two governing principles underlie all homestead legislation:** First, the beneficial de-



sign of protecting the citizen householder and his family from the dangers and miseries of destitution consequent upon business reverses or upon calamities from other causes; and, second, the sound public policy of securing the permanent habitation of the family, and cultivating the local interest, pride, and affection of the individual, so essential to the stability and prosperity of a government. *Barnett v. Knight*, 7 Colo. 365, 3 P. 747 (1884); *Weare v. Johnson*, 20 Colo. 363, 38 P. 374 (1894).

**Benefits of this section are extended to every householder**, without qualification, except as to the value and occupancy. *Dallemand v. Mannon*, 4 Colo. App. 262, 35 P. 679 (1894).

**This section does not create an interest in land.** The Colorado homestead has been referred to as an "exemption," and nothing more. *United States v. Morgan*, 554 F. Supp. 582 (D. Colo. 1982).

**Federal tax lien foreclosure not barred.** This section does not operate to bar foreclosure of the federal government's tax lien. *United States v. Morgan*, 554 F. Supp. 582 (D. Colo. 1982).

**Scope of protection.** This section extends certain protection to the premises set apart by the owner as a homestead for his or her family so long as he or she desires to occupy the same as a home for the family, and it protects the same against proceedings by execution and attachment, but it does not appear that further exemption or protection was intended. *Wright v. Whittick*, 18 Colo. 54, 31 P. 490 (1892).

The words "arising from any debt, contract, or civil obligation" are sufficiently broad and comprehensive to embrace any and all forms of indebtedness, including judgments. *Woodward v. People's Nat'l Bank*, 2 Colo. App. 369, 31 P. 184 (1892).

**Section does not rest upon equitable principles.** In no way does this section rest upon the principles of equity, nor in any way yield thereto. *McPhee v. O'Rourke*, 10 Colo. 301, 15 P. 420 (1887); *Helkey v. Ashley*, 113 Colo. 175, 155 P.2d 143 (1945).

**Exemption statutes are to be liberally construed**, so as to promote the humane policy of such legislation, but the courts cannot by construction annex to such statutes consequences not fairly within their purview or intent. *Barnett v. Knight*, 7 Colo. 365, 3 P. 747 (1884); *McPhee v. O'Rourke*, 10 Colo. 301, 15 P. 420 (1887); *Martin v. Bond*, 14 Colo. 466, 24 P. 326 (1890); *Weil v. Nevitt*, 18 Colo. 10, 31 P. 487 (1892); *Wright v. Whittick*, 18 Colo. 54, 31 P. 490 (1892); *Brooks v. Black*, 22 Colo. App. 49, 123 P. 131 (1912); *Haas v. De Laney*, 165 F. Supp. 488 (D. Colo. 1958).

**The right to homestead exemption is not given by the bankruptcy law**, but exists, if at all, by virtue of state laws, and the bankruptcy court will allow whatever exemption the state

law allows. *Edgington v. Taylor*, 270 F. 48 (8th Cir. 1920).

**There is only one homestead exemption per a specific piece of real property.** *In re Lambert*, 34 Bankr. 41 (Bankr. D. Colo. 1983); *In re Pruitt*, 829 F.2d 1002 (10th Cir. 1987); *In re Bryant*, 221 Bankr. 262 (Bankr. D. Colo. 1998).

**And it attaches to the property.** *In re Bryant*, 221 Bankr. 262 (Bankr. D. Colo. 1998).

**The homestead exemption may not be claimed by one joint owner to the exclusion of the other joint owners.** *In re Pruitt*, 829 F.2d 1002 (10th Cir. 1987); *In re Bryant*, 221 Bankr. 262 (Bankr. D. Colo. 1998).

**Exemption under this section attaches automatically upon occupancy of real property as a home by the owner or the owner's family.** *Univ. Nat. Bank v. Harsh*, 833 P.2d 846 (Colo. App. 1992).

**Full homestead exemption is applied** before any determination is made with respect to any specific joint owner's equity that may be subject to the claims of creditors in a bankruptcy case. *In re Dickinson*, 185 Bankr. 76 (Bankr. D. Colo. 1995).

**Homestead exemption policy applies to leased and owned homes.** The public policy of a homestead exemption, to secure to the householder a home for himself and family regardless of financial conditions, whether solvent or insolvent, applies with equal force whether the home is occupied under a lease for a term of years or under a fee ownership. *In re Hellman*, 474 F. Supp. 348 (D. Colo. 1979).

The homestead exemption is available to homeowners and to nonhomeowners alike. *In re Parrish*, 19 Bankr. 331 (Bankr. D. Colo. 1982).

**Who may claim exemption.** One who does not have title or any claim to real property does not have a right to claim a homestead exemption on such real property. *In re Hambric v. Centennial Glass, Inc.*, 32 Bankr. 49 (Bankr. D. Colo. 1983).

Debtor cannot claim a homestead exemption because he did not own real property. What he received upon the death of his mother was an undivided one-third interest in her probate estate, which happened to include a piece of real property. His rights in the probate estate became the property of the bankruptcy estate and at that time he was not an owner of real property. In addition, neither on the date of the filing of his bankruptcy nor on the date he became entitled to his share of the probate estate did the debtor occupy the real property as his primary residence or home. *In re Meachen*, 217 Bankr. 877 (Bankr. D. Colo. 1998).

Although debtor was part owner of home and persons occupying the home were his family, he was not entitled to claim a homestead exemption since he at no time contributed toward the payment of the mortgage, taxes, insurance, maintenance, or utilities nor did he give any pecuniary

consideration for his interest nor did he contribute to living expenses of his family who lived in the home. In re Rodriguez, 38 Bankr. 297 (Bankr. D. Colo. 1984).

Bankruptcy debtor was not entitled to claim the exemption where he had only an undivided one-half interest in the property, and his joint tenant was not a bankruptcy debtor. In re Robinson, 44 Bankr. 292 (Bankr. D. Colo. 1984).

Co-defendant entitled to full homestead exemption because the other defendant, a trust, was legally incapable of occupying the residence and claiming the exemption. Univ. Nat. Bank v. Harsh, 833 P.2d 846 (Colo. App. 1992).

Former husband, as a co-owner of the property, entitled to half of homestead exemption even though he no longer resided in the property. In re Dickinson, 185 Bankr. 76 (Bankr. D. Colo. 1995).

Married individuals living apart in jointly owned properties are each entitled to claim a homestead as exempt. The filing of a joint petition in bankruptcy, however, effected a severance in the joint tenancy of the debtors in each of the properties, with the result that an undivided one-half interest in the husband's estate became the property of the wife, which property became property of the wife's bankruptcy estate, and vice versa. Thus the trustee is entitled to one-half of the homestead exemption and one-half of the remaining equity in each property. In re Pastrana, 216 Bankr. 948 (Bankr. D. Colo. 1998).

**Exemption need not be prorated among two or more cotenants** where there is no danger that full protection will be claimed by one joint owner-occupant to the exclusion of other owner-occupants. Univ. Nat. Bank v. Harsh, 833 P.2d 846 (Colo. App. 1992).

**Pre-paid rents and security deposits.** The homestead exemption applies to pre-paid rents and to security deposits which can be applied to rent. In re Quintana, 28 Bankr. 269 (Bankr. D. Colo. 1983).

**Liens used to calculate exemption.** In determining which liens will be used to calculate a homestead exemption, the court uses only those liens or encumbrances which existed prior to the placement of the homestead right on the property, which exemption is established automatically from the date of the property owner's occupancy (except with respect to liens which arose prior to July 1, 1975), and liens with respect to which the debtor has expressly waived the homestead exemption. Lincoln v. Cherry Creek Homeowners Ass'n, 30 Bankr. 905 (Bankr. D. Colo. 1983).

**Attorney's liens.** Homestead exemption statute includes attorney's liens within its ambit and the attorney's lien does not attach to the homestead. If the debtor has any net equity remaining after the sale of the property in question, the creditor's attorney's lien attaches to that net

equity and his claim is unsecured for any amount over that sum. In re Dickinson, 185 Bankr. 840 (Bankr. D. Colo. 1995).

**Full exemption attached** to residence of widow who owned an undivided one-half interest in property where remainder of property was owned by her deceased husband's trust, and trust was legally incapable of occupying the residence and claiming the exemption. Univ. Nat. Bank v. Harsh, 833 P.2d 846 (Colo. App. 1992).

**Homeowner exemption applies to debtor who owned and occupied the residence at time of filing bankruptcy,** despite her simultaneous plans to move from residence. In re Raymond, 132 Bankr. 53 (Bankr. D. Colo. 1991).

**Equity in duplex.** The rental part of a duplex does not impair the owner's right to exempt the equity in the entire structure, and the debtor is entitled to claim any equity in the property considered as a whole. Wells v. West Greeley Nat. Bank, 29 Bankr. 688 (Bankr. D. Colo. 1983).

**Waiver in deed of trust not waiver to all creditors.** The waiver of the homestead right contained in a deed of trust does not constitute a waiver to all creditors. Frank v. First Nat. Bank, 653 P.2d 748 (Colo. App. 1982).

**Condominium owner waived right to assert homestead exemption** prior to a condominium association's assessment lien due to a condominium declaration which was in existence before owner took title. Whispering Pines W. Condo. v. Treantos, 780 P.2d 26 (Colo. App. 1989).

**Junior lien creditor may redeem from a public trustee's sale without complying with the homestead exemption statute.** Howell v. Farrish, 725 P.2d 9 (Colo. App. 1986).

**Applied** in Drake v. Root, 2 Colo. 685 (1875); In re Youngstrom, 153 F. 98 (8th Cir. 1907); Jasper v. Bicknell, 68 Colo. 308, 191 P. 115 (1920); Whitlock v. Alliance Coal Co., 73 Colo. 205, 214 P. 546 (1923); Vassek v. Moffat County Mercantile Co., 87 Colo. 153, 285 P. 939 (1930); Craig Lumber Co. v. Ramey, 108 Colo. 516, 119 P.2d 608 (1941); Wise v. Thomas, 117 Colo. 376, 188 P.2d 444 (1947); Michels v. Clemens, 140 Colo. 82, 342 P.2d 693 (1959); Thomas v. Hysom, 167 Colo. 218, 446 P.2d 911 (1968).

## II. EFFECT OF EXEMPTION.

**When property exempted from levy of execution.** If the property in question has not been subjected specifically to the judgment lien by the levy of an execution before it was withdrawn as a homestead, it was exempted from the levy of the execution. To construe the statute otherwise would defeat its obvious intention. Woodward v. People's Nat'l Bank, 2 Colo. App. 369,



31 P. 184 (1892); *Patterson v. Serafini*, 187 Colo. 209, 532 P.2d 965 (1974).

**Homestead exempt from judgment lien.**

This section provides that the homestead shall be exempt from "execution and attachment", and if it is exempt from execution, it must of necessity be exempt from the lien of the judgment, as a judgment lien that cannot be enforced is of no avail. *Weare v. Johnson*, 20 Colo. 363, 38 P. 374 (1884); *Woodward v. People's Nat'l Bank*, 2 Colo. App. 369, 31 P. 184 (1892); *Jones v. Olson*, 17 Colo. App. 144, 67 P. 349 (1902); *White v. Hartman*, 26 Colo. App. 475, 145 P. 716 (1915); *Sterling Nat'l Bank v. Francis*, 78 Colo. 204, 240 P. 945 (1925); *City Center Nat. Bank v. Barone*, 807 P.2d 1251 (Colo. App. 1991).

**Section operable against creditor for material used to improve property.** There is no proviso in this section against its operating against a creditor for material used in improvements upon the property before it was designated as a homestead. *McPhee v. O'Rourke*, 10 Colo. 301, 15 P. 420, 3 Am. St. R. 579 (1887).

**Void deed will not invalidate homestead entry as exemption.** That the deed from hus-

band to wife, upon the record of which she makes a homestead entry, was, as to creditors, fraudulent and void, is no defense to, and will not avoid the validity or efficiency of, such homestead entry as an exemption, is forever settled in this state. *McPhee v. O'Rourke*, 10 Colo. 301, 15 P. 420 (1887); *Tibbetts v. Terrill*, 44 Colo. 94, 96 P. 978, 104 P. 605 (1908); *Brooks v. Black*, 22 Colo. App. 49, 123 P. 131 (1912).

**Trustee in bankruptcy in same position as creditor.** As regards the sale of real property belonging to a bankrupt, the trustee in bankruptcy is in the same position as a creditor, and must comply with state law so far as is necessary to preserve the state exemption which is guaranteed the bankrupt. *Baker v. Allen*, 34 Colo. App. 363, 528 P.2d 922 (1974).

**If bank could not assert a lien against the property while party retained title, it cannot assert the same lien against party's grantees,** provided the transaction was bona fide. *City Center Nat. Bank v. Barone*, 807 P.2d 1251 (Colo. App. 1991).

**38-41-201.5. Legislative declaration of homestead exemption for mobile homes.**

The general assembly hereby finds and declares that, as the cost of conventional housing continues to escalate, mobile homes will become an ever larger percentage of the total housing supply, particularly for the elderly and the low-to-moderate income groups; that the purchase of a mobile home is a major investment; that most mobile homes are permanently or semipermanently located; that great improvements have been made in the quality and variety of such homes; and that mobile homes are dwellings which should be accorded a status equivalent to conventional homes. The general assembly recognizes, however, that mobile homes are more readily moved than conventional homes; that they are presently bought and sold as personal property and that there are advantages to both the industry and consumers to continue this practice; and that they presently have a dual nature in the area of taxation and tax collection; therefore mobile homes should be entitled to a homestead exemption.

**Source: L. 82:** Entire section added, p. 544, § 1, effective January 1, 1983.

**38-41-201.6. Mobile home, manufactured home, trailer, and trailer coach homestead exemption.** (1) A manufactured home as defined in section 38-29-102 (6), which includes a mobile home or manufactured home as defined in section 38-12-201.5 (2), 5-1-301 (29), or 42-1-102 (106) (b), C.R.S., that has been purchased by an initial user or subsequent user and for which a certificate of title or registration has been issued in accordance with section 38-29-110 or pursuant to section 38-29-108, is a homestead and is entitled to the same exemption as enumerated in section 38-41-201, except for any loans, debts, or obligations incurred prior to January 1, 1983. For purposes of this homestead exemption, the term "house" as used in section 38-41-205 shall be deemed to include mobile homes or manufactured homes.

(2) A trailer as defined in section 42-1-102 (105), C.R.S., or a trailer coach as defined in section 42-1-102 (106) (a), C.R.S., that has been purchased by an initial user or subsequent user and for which a certificate of title or registration has been issued pursuant to section 42-3-103, C.R.S., is a homestead and is entitled to the same exemption as enumerated in section 38-41-201, except for any loans, debts, or obligations incurred prior to July 1, 2000. For purposes of this homestead exemption, the term "house" as used in section 38-41-205 shall be deemed to include trailers or trailer coaches.

**Source:** **L. 82:** Entire section added, p. 544, § 1, effective January 1, 1983. **L. 83:** Entire section amended, p. 1462, § 2, effective June 15. **L. 94:** Entire section amended, p. 707, § 14, effective April 19; entire section amended, p. 2567, § 85, effective January 1, 1995. **L. 2000:** Entire section amended, p. 717, § 4, effective May 23. **L. 2001:** (1) amended, p. 1279, § 53, effective June 5.

**Editor's note:** Amendments to this section by Senate Bill 94-92 and Senate Bill 94-1 were harmonized.

**38-41-202. Homestead to be created automatically in certain cases - filing of statement required in other cases.** (1) The homestead exemptions described in section 38-41-201 shall be deemed created and may be claimed if the occupancy requirement of section 38-41-203 and the requirement of section 38-41-205 relating to the type of property which may be homesteaded are met.

(2) (a) A homestead exemption granted under the provisions of this part 2 shall not be deemed created and may not be claimed if the debt, contract, or civil obligation which is the basis for the execution and attachment was entered into or incurred prior to July 1, 1975, unless the owner of the property (householder) records in the office of the county clerk and recorder of the county where the property is situate an instrument in writing describing such property, setting forth the nature and source of the owner's interest therein, and stating that the owner is homesteading such property, which instrument may be acknowledged as provided by law.

(b) The spouse of the owner of the property may homestead such property in the manner provided in paragraph (a) of this subsection (2) with the same effect as if the owner had done so.

(3) Subject to the provisions of subsection (4) of this section, property homesteaded solely by operation of the automatic provisions of subsection (1) of this section may be conveyed or encumbered by the owner of the property free and clear of all homestead rights, and no signature other than that of the owner shall be required. The owner of the property shall be determined without regard to the ownership of any homestead rights.

(4) If the owner of the property (householder) or the spouse of such owner records in the office of the county clerk and recorder of the county where the property is situate an instrument in writing describing such property, setting forth the nature and source of the owner's interest therein, and stating that the owner or the owner's spouse is homesteading such property (which instrument may be acknowledged as provided by law), then the signature of both spouses to convey or encumber such property shall be required.

**Source:** **R.S.** p. 385, § 58. **G.L.** § 1344. **G.S.** § 1632. **L. 03:** p. 246, § 1. **R.S. 08:** § 2951. **L. 11:** p. 452, § 1. **C.L.** § 5925. **CSA:** C. 93, § 24. **L. 53:** p. 411, § 1. **CRS 53:** § 77-3-2. **C.R.S. 1963:** § 77-3-2. **L. 73:** p. 1157, § 3. **L. 75:** Entire section R&RE, p. 1444, § 2, effective July 14. **L. 77:** (3) and (4) added, p. 1719, § 2, effective May 27.

## ANNOTATION

I. General Consideration.

II. Title or Interest in Property.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "Executions and Levies on Tangible Property", see 27 Dicta 143 (1950). For note, "Colorado Homestead Now Assertable Against Heirs", see 25 Rocky Mt. L. Rev. 84 (1952). For article, "Additional Real Estate Standards", see 30 Dicta 431 (1953). For article, "Trusts and Estates", see 30 Dicta 435 (1953). For note, "The Homestead Rights of Minor Children In Solvent Estates", see 25

Rocky Mt. L. Rev. 370 (1953). For note, "Rural Poverty and the Law in Southern Colorado", see 47 Den L.J. 82 (1970). For article, "Signatures on Documents Affecting Title to Colorado Real Property — Part I", see 12 Colo. Law. 61 (1983). For article, "Homestead and Bankruptcy in Colorado and Elsewhere", see 56 U. Colo. L. Rev. 175 (1985). For article, "Colorado Homestead Statutes: Exemption or Allowance?", see 17 Colo. Law. 827 (1988).

**Valid exemption can be created only by the method provided** by this section. Johnson v. Mountain Sav. & Loan Ass'n, 162 Colo. 474, 426 P.2d 962 (1967).



**Effect of noncompliance with section.** A complaint is fatally defective if it does not show a compliance with this section. *Goodwin v. Colo. Mtg. Inv. Co.*, 110 U.S. 1, 3 S. Ct. 473, 28 L. Ed. 47 (1884); *Crawford v. Felkey*, 73 Colo. 444, 216 P. 520 (1923).

**Right to occupy the homestead** for homestead purposes is an inseparable part of the exemption, because its purpose is to protect such occupancy and because when the occupancy is voluntarily discontinued the exemption ceases. *In re Nye*, 133 F. 33 (8th Cir. 1904).

**Property remains exempt until**, by a judicial sale had at the instance of a creditor, more than the prescribed amount with costs is realized therefrom; then the excess is to be applied to the demand of the creditor and the prescribed amount is to be paid to the debtor, free of charge or expense, to enable him to acquire another homestead. *In re Nye*, 133 F. 33 (8th Cir. 1904).

**Creditor is charged with knowledge of homestead claims through recording statute**, and his lack of knowledge through inadvertence would be immaterial. *Am. Heritage Bank & Trust Co. v. Trees*, 35 Colo. App. 147, 532 P.2d 380 (1974).

**Homestead entry on deed technically void is valid.** The uniform holding that a homestead entry made upon a deed confessedly void (because executed in fraud of creditors) is sufficient to secure the exemption, would seem to justify the conclusion that an entry upon some other instrument, in form evidence of title, legal or equitable, is also sufficient, although for reasons not appearing upon the face of the instrument, the court might, when properly raised upon trial, hold that said instrument was, in law, something different than it appeared to be, or, for some reasons, was defective or void. *Brooks v. Black*, 22 Colo. App. 49, 123 P. 131 (1912).

**Homestead entry adjudged void cannot be collaterally assailed.** Where a homestead entry has been canceled and adjudged null and void by a decree of the district court, that decree cannot be collaterally assailed. *Smith v. Smith*, 76 Colo. 119, 230 P. 597 (1924).

**Effect of void deed executed by one joint tenant.** Because a deed affecting homesteaded property executed by one of two joint tenants is void, that deed may not be utilized to defeat the homestead act's policy of protecting both owners of homesteaded property from disenfranchisement by the unilateral conduct of one joint tenant. *Knoche v. Morgan*, 664 P.2d 258 (Colo. App. 1983).

**Formerly, this section allowed creation of exemption by marginal entry** on the recorded deed of the word "homestead". *Johnson v. Mountain Sav. & Loan Ass'n*, 162 Colo. 474, 426 P.2d 962 (1967).

**For cases dealing with marginal entry method of creating homestead exemption.** See *Drake v. Root*, 2 Colo. 685 (1875); *Wells v.*

*Caywood*, 3 Colo. 487 (1877); *Goodwin v. Colo. Mtg. Inv. Co.*, 110 U.S. 1, 3 S. Ct. 473, 28 L. Ed. 47 (1884); *Barnett v. Knight*, 7 Colo. 365, 3 P. 747 (1884); *Jones v. Olson*, 17 Colo. App. 144, 67 P. 349 (1891); *Leppel v. Kus*, 38 Colo. 292, 88 P. 448 (1907); *Runyan v. Snyder*, 45 Colo. 156, 100 P. 420 (1909); *White v. Hartman*, 26 Colo. App. 475, 145 P. 716 (1914); *Jasper v. Bicknell*, 68 Colo. 308, 191 P. 115 (1920); *Bean v. Eves*, 92 Colo. 339, 20 P.2d 544 (1933); *Farley v. Harvey*, 93 Colo. 105, 25 P.2d 185 (1933); *Howell v. Burch Whse. & Transf. Co.*, 100 Colo. 247, 67 P.2d 73 (1937).

**Liens used to calculate exemption.** In determining which liens will be used to calculate a homestead exemption, the court uses only those liens or encumbrances which existed prior to the placement of the homestead right on the property, which exemption is established automatically from the date of the property owner's occupancy (except with respect to liens which arose prior to July 1, 1975), and liens with respect to which the debtor has expressly waived the homestead exemption. *Lincoln v. Cherry Creek Homeowners Ass'n*, 30 Bankr. 905 (Bankr. D. Colo. 1983).

**Signatures of both joint tenants were not needed to encumber property that was homesteaded solely** by operation of automatic provisions of statute, and either of two joint tenants could encumber or convey the interest that he owned upon his signature unless a written declaration of homestead rights was recorded. *Comm. Factors of Denver v. Clarke & Waggener*, 684 P.2d 261 (Colo. App. 1984).

**Filing a homestead claim was not a responsive pleading under C.R.C.P. 8(c).** In the matter of *Lombard*, 739 F.2d 499 (10th Cir. 1984).

**Applied in** *Barnett v. Knight*, 7 Colo. 365, 3 P. 747 (1884); *Copeland v. Colo. State Bank*, 13 Colo. App. 489, 59 P. 70 (1899); *Lock v. Berkins*, 95 Colo. 135, 33 P.2d 393 (1934); *Craig Lumber Co. v. Ramey*, 108 Colo. 516, 119 P.2d 608 (1941); *Wise v. Thomas*, 117 Colo. 376, 188 P.2d 444 (1947); *Baker v. Allen*, 34 Colo. App. 363, 528 P.2d 922 (1974).

## II. TITLE OR INTEREST IN PROPERTY.

**Limitation is on value, not quantity of land.** The homestead statutes do not fix the quantity of land which may be held as a homestead; it is the value and not the amount which is limited. *Dallemand v. Mannon*, 4 Colo. App. 262, 35 P. 679 (1894).

**Ownership in fee is not essential.** An equitable title, a lease for a term of years, or any title which may be the subject of levy and sale, may also be the subject of a homestead claim. *Dallemand v. Mannon*, 4 Colo. App. 262, 35 P. 679 (1894).

**Any interest with possession is sufficient** to support the homestead right. *Brooks v. Black*, 22 Colo. App. 49, 123 P. 131 (1912).

**Possession under executory contract of purchase.** One who holds possession of land

under an executory contract of purchase may declare a valid homestead therein. *Brooks v. Black*, 22 Colo. App. 49, 123 P. 131 (1912); *Dallemand v. Mannon*, 4 Colo. App. 262, 35 P. 679 (1894).

**38-41-203. Exemption only while occupied.** Said property, when so homesteaded, shall only be exempt as provided in this part 2 while occupied as a home by the owner thereof or his family.

**Source:** R.S. p. 385, § 59. G.L. § 1345. G.S. § 1633. R.S. 08: § 2952. C.L. § 5926. CSA: C. 93, § 25. L. 53: p. 411, § 2. CRS 53: § 77-3-3. C.R.S. 1963: § 77-3-3.

#### ANNOTATION

**Law reviews.** For article, "Executions and Levies on Tangible Property", see 27 *Dicta* 143 (1950). For note, "Colorado Homestead Now Assertable Against Heirs", see 25 *Rocky Mt. L. Rev.* 84 (1952). For note, "The Homestead Rights of Minor Children in Solvent Estates", see 25 *Rocky Mt. L. Rev.* 370 (1953).

**Occupancy of premises required.** Occupancy of the premises by one claiming a homestead exemption is a necessary requirement to enforce such a claim. *Helkey v. Ashley*, 113 Colo. 175, 155 P.2d 143 (1945).

**Actual personal occupation at all times not required.** This section cannot be construed as requiring an actual personal occupation at all times and under all circumstances, and it is intended that the place shall be the only home of the family, and shall not be abandoned and another occupied with the intention of making such change permanent. *Pierson v. Truax*, 15 Colo. 223, 25 P. 183 (1890).

**Presumption of abandonment.** The cessation of occupancy of a homestead may raise a presumption of abandonment. *Monte Vista Bank & Trust Co. v. Savage*, 75 Colo. 180, 225 P. 219 (1924).

**Claimant has burden of overcoming a presumption of abandonment.** *Monte Vista Bank & Trust Co. v. Savage*, 75 Colo. 180, 225 P. 219 (1924).

**Vague intention to return insufficient to overcome presumption.** A vague intention to return perhaps at some future time and reside there again will not preserve the claimant's home, because the intention which is sufficient

to rebut the presumption of abandonment must be positive and certain, not conditional or indefinite. *Monte Vista Bank & Trust Co. v. Savage*, 75 Colo. 180, 225 P. 219 (1924).

**Removal of family from homestead makes prima facie case of abandonment.** To rebut this presumption, it must appear that the removal was temporary in its nature, made for a specific purpose, with the intention of reoccupying the premises. *Monte Vista Bank & Trust Co. v. Savage*, 75 Colo. 180, 225 P. 219 (1924); *Reed v. State Sav. Bank*, 93 Colo. 325, 25 P.2d 739 (1933).

**Fact that debtors were not residing in the home on the bankruptcy petition date created a presumption of abandonment; however,** debtors rebutted the presumption through testimony that their absence was temporary and made for the specific purposes of renovating the home and avoiding the proximity of debtor husband's former spouse. *In re Patterson*, 275 B.R. 578 (Bankr. D. Colo. 2002).

**Lease of portion of estate not abandonment.** The lease of a portion of the estate, or even of the whole of it, does not of itself work an abandonment of the homestead, because the question of abandonment is very largely one of intention. *Dallemand v. Mannon*, 4 Colo. App. 262, 35 P. 679 (1894).

**When homestead terminates.** The right to homestead terminates when the debtor ceases to be the head of a family, by death or permanent removal from the premises of all the dependent members, or by their reaching the age of majority. *Monte Vista Bank & Trust Co. v. Savage*, 75 Colo. 180, 225 P. 219 (1924).

**38-41-204. Surviving spouse and minor children entitled.** When any person dies seized of a homestead leaving a surviving spouse or minor children, such surviving spouse or minor children are entitled to the homestead exemption. In cases where there is neither surviving spouse nor minor children, the homestead shall be liable for the debts of the deceased.

**Source:** R.S. p. 385, § 60. G.L. § 1346. G.S. § 1634. R.S. 08: § 2953. C.L. § 5927. CSA: C. 93, § 26. CRS 53: § 77-3-4. C.R.S. 1963: § 77-3-4. L. 94: Entire section amended, p. 1041, § 20, effective July 1, 1995.



## ANNOTATION

**Law reviews.** For article, "Executions and Levies on Tangible Property", see 27 Dicta 143 (1950). For note, "Colorado Homestead Now Assertable Against Heirs", see 25 Rocky Mt. L. Rev. 84 (1952). For note, "The Homestead Rights of Minor Children in Solvent Estates", see 25 Rocky Mt. L. Rev. 370 (1953). For article, "Family Protection Under the Uniform Probate Code", see 50 Den. L.J. 137 (1973). For article, "Homestead and Bankruptcy in Colorado and Elsewhere", see 56 U. Colo. L. Rev. 175 (1985). For article, "Colorado Homestead Statutes: Exemption or Allowance?", see 17 Colo. Law. 827 (1988). For article, "The Surviving Spouse Elective Share and the Augmented Estate", see 17 Colo. Law. 1985 (1988).

**This section should be given a liberal construction**, to the end that its purposes will be fulfilled. Chapin Lumber Co. v. Day, 106 Colo. 194, 103 P.2d 14 (1940).

**Construction of section.** The proper construction of this section is that where a husband and wife occupy a homestead, the death of either does not destroy the homestead right so long as the survivor shall reside upon the property. Chapin Lumber Co. v. Day, 106 Colo. 194, 103 P.2d 14 (1940).

**"Seized" construed.** "Seized", as used in this section, must be taken to mean simply the right of possession which inheres in both husband and wife in a homestead. It has no reference to which spouse has the title to the land. Chapin Lumber Co. v. Day, 106 Colo. 194, 103 P.2d 14 (1940).

**"Or" construed.** Where the General Assembly used the word "or" immediately preceding

both occurrences of the phrase "minor children", the intent was to be inclusive. In re Estate of Dodge, 685 P.2d 260 (Colo. App. 1984).

**Homestead right not governed by descent and distribution.** A homestead right is not governed by the law of descent and distribution, and it is not a part of an estate, but insofar as it may appear in the administration of an estate, it is more in the nature of a lien that has attached to the home property, and the heir or devisee who succeeds to the title of the home property takes it subject to that limitation or qualification. In re Wallace's Estate, 125 Colo. 584, 246 P.2d 894 (1952).

**Estate has no interest in exemption of surviving spouse.** The estate of a deceased person has no interest in the homestead exemption of a surviving husband or wife. Union Nat'l Bank v. Wright, 78 Colo. 346, 242 P. 54 (1925); In re Wallace's Estate, 125 Colo. 584, 246 P.2d 894 (1952).

**Rights of survivors unaffected.** The rights of a surviving widow or husband or minor children of a person, who dies seized of a homestead, are not enlarged or diminished merely by the fact of such death. Union Nat'l Bank v. Wright, 78 Colo. 346, 242 P. 54 (1925).

**Payment of surviving spouse in lieu of homestead right.** Where it became necessary to sell real property of an estate, covered by a homestead, to pay debts, an order of court directing the sale and requiring that \$2,000 be retained out of the proceeds to be paid the surviving husband in lieu of his homestead right in the property, was approved. Union Nat'l Bank v. Wright, 78 Colo. 346, 242 P. 54 (1925).

**38-41-205. Of what homestead may consist.** The homestead mentioned in this part 2 may consist of a house and lot or lots or of a farm consisting of any number of acres.

**Source:** R.S. p. 386, § 61. G.L. § 1347. G.S. § 1635. R.S. 08: § 2954. C.L. § 5928. CSA: C. 93, § 27. L. 53: p. 412, § 3. CRS 53: § 77-3-5. C.R.S. 1963: § 77-3-5. L. 82: Entire section amended, p. 552, § 1, effective March 11.

## ANNOTATION

**Law reviews.** For article, "Executions and Levies on Tangible Property", see 27 Dicta 143 (1950). For note, "Colorado Homestead Now Assertable Against Heirs", see 25 Rocky Mt. L. Rev. 84 (1952). For note, "The Homestead Rights of Minor Children in Solvent Estates", see 25 Rocky Mt. L. Rev. 370 (1953). For article, "Homestead and Bankruptcy in Colorado and Elsewhere", see 56 U. Colo. L. Rev. 175 (1985).

**Pickup camper shell qualifies as homestead exemption.** Although not a traditional house, a camper shell was the home and dwelling of the debtor and qualified for the homestead exemption allowed in § 38-41-201. In re Lepka, 105 Bankr. 638 (Bankr. D. Colo. 1989).

**Applied** in Wells v. West Greeley Nat'l Bank, 29 Bankr. 688 (Bankr. D. Colo. 1983).

**38-41-206. Levy on homestead - excess - costs.** (1) Before any creditor of the owner of the homesteaded property may proceed against said property, such creditor shall file with

the county clerk and recorder of the proper county and the sheriff or other proper officer authorized to levy on said property:

- (a) His affidavit showing:
  - (I) A description of the homesteaded property and the name of the claimant of the homestead exemption;
  - (II) The fair market value of said property;
  - (III) That the fair market value of said property less any prior liens or encumbrances thereon exceeds the amount of the homestead exemption fixed in section 38-41-201 for which the claimant qualifies; and
  - (IV) That no previous execution arising out of the same judgment has been levied upon said property;
- (b) The affidavit of a professionally qualified independent appraiser showing the same information required by subparagraphs (I) to (III) of paragraph (a) of this subsection (1).
- (2) If the amount offered at the sale of the homesteaded property does not exceed seventy percent of the fair market value shown in the affidavit of the independent appraiser filed pursuant to paragraph (b) of subsection (1) of this section, all proceedings to sell said property shall terminate. The sheriff or the proper officer shall then file for record in the office of the county clerk and recorder of the proper county an instrument releasing all levies on said property in connection with such sale, and the person instituting the proceedings shall pay the costs of such proceedings, and the title of the owner to said property shall not be impaired or affected.
- (3) If the successful bidder at such sale is a judgment creditor, he shall be required to pay in cash to the sheriff or other proper officer making the sale an amount sufficient to pay the exemption plus the proper costs and expenses and shall not have the right to have such exempt amount applied toward the satisfaction of his judgment.
- (4) If a sale is made, the proceeds thereof shall be applied in the following order:
  - (a) First, to the discharge of all prior liens and encumbrances, if any, on said property;
  - (b) Second, to the homestead claimant in the amount of the homestead exemption for which he qualifies;
  - (c) Third, to the sheriff or other proper officer making the sale in an amount sufficient to pay the proper costs and expenses of the sale;
  - (d) Fourth, to the satisfaction of the judgment; and
  - (e) Fifth, the balance, if any, to the homestead claimant.

**Source:** R.S. p. 386, § 63. G.L. § 1349. G.S. § 1637. R.S. 08: § 2956. C.L. § 5930. CSA: C. 93, § 28. L. 53: p. 412, § 4. CRS 53: § 77-3-6. C.R.S. 1963: § 77-3-6. L. 75: Entire section R&RE, p. 1445, § 3, effective July 14. L. 83: (1)(a)(III) amended, p. 1478, § 1, effective July 1.

#### ANNOTATION

**Law reviews.** For article, "Executions and Levies on Tangible Property", see 27 Dicta 143 (1950). For note, "Colo. Homestead Now Assertable Against Heirs", see 25 Rocky Mt. L. Rev. 84 (1952). For note, "The Homestead Rights of Minor Children in Solvent Estates", see 25 Rocky Mt. L. Rev. 370 (1953). For article, "Homestead and Bankruptcy in Colo. and Elsewhere", see 56 U. Colo. L. Rev. 175 (1985).

**Levy cannot be made without filing of affidavit.** No levy can lawfully be made without the previous filing of the affidavit required by subsection (1). Copeland v. Colo. State Bank, 13 Colo. App. 489, 59 P. 70 (1899); Whitlock v. Alliance Coal Co., 73 Colo. 205, 214 P. 546 (1923).

**Sale may be enjoined.** If a levy is made without such affidavit, the debtor is entitled to an injunction restraining the sale. Whitlock v. Alliance Coal Co., 73 Colo. 205, 214 P. 546 (1923).

**Even though the legislature changed the law from a declared exemption practice to an automatic exemption practice,** an affidavit must still be filed prior to the levy of homestead property and any levy made prior to the filing of the required affidavit is void. Estes Park Bank v. Shanks, 794 P.2d 1108 (Colo. App. 1990).

**Homestead exceeding value of exemption may be subjected to payment of debt.** To the extent that an indivisible homestead exceeds the value of the exemption, it may be subjected to the payment of the debts of the deceased where



there are no other available assets. *Union Nat'l Bank v. Wright*, 78 Colo. 346, 242 P. 54 (1925).

**Wife's valid exemption does not defeat creditor's right.** The fact that the wife has a valid exemption by a proper entry does not defeat the right of the creditor to subject such property to his claim where the property was worth more than the homestead, since a property may be sold and the excess charged with the creditor's claim. *Tibbetts v. Terrill*, 44 Colo. 94, 96 P. 978 (1908).

**Amount of homestead exemption set aside to bankrupt when sale held.** If a bankrupt's interest in the real estate involved exceeds the amount of valid liens plus the homestead exemption, then the trustee in bankruptcy may sell the property for the purpose of obtaining the excess value to satisfy claims of creditors, and if such a sale is held, the amount of the homestead exemption must be set aside to the bankrupt and he shall receive the amount in cash. *Baker v. Allen*, 34 Colo. App. 363, 528 P.2d 922 (1974).

**Public trustee's sale of homesteaded property.** When a public trustee conducts a sale of

homesteaded property upon a deed of trust with a waiver therein, the public trustee must limit the sale to the extent of the waiver or else require that the sale of the homestead conform to the safeguards in a forced sale of homestead by execution as set forth in this section. *Frank v. First Nat'l Bank*, 653 P.2d 748 (Colo. App. 1982).

**Creditor not creditor as to exemption.** While a creditor may be interested when the value of the property exceeds the exemption allowance, nevertheless, as to the exemption, he is, in fact, not a creditor at all. *Barnett v. Knight*, 7 Colo. 365, 3 P. 747 (1884); *Union Nat'l Bank v. Wright*, 78 Colo. 346, 242 P. 54 (1925).

**Creditor may not refuse to pay its bid price.** A judgment creditor cannot bid the property in the sale for the full amount of the homestead exemption and then refuse to pay its bid price. *Am. Heritage Bank & Trust Co. v. Trees*, 35 Colo. App. 147, 532 P.2d 380 (1974).

**38-41-207. Proceeds exempt - bona fide purchaser.** The proceeds from the exempt amount under this part 2, in the event the property is sold by the owner, or the proceeds from such sale under section 38-41-206 paid to the owner of the property or person entitled to the homestead shall be exempt from execution or attachment for a period of two years after such sale if the person entitled to such exemption keeps the exempted proceeds separate and apart from other moneys so that the same may be always identified. If the person receiving such proceeds uses said proceeds in the acquisition of other property for a home, there shall be carried over to the new property the same homestead exemption to which the owner was entitled on the property sold. Such homestead exemption shall not be valid as against one entitled to a vendor's lien or the holder of a purchase money mortgage against said new property.

**Source:** R.S. p. 386, § 64. G.L. § 1350. G.S. § 1638. R.S. 08: § 2957. C.L. § 5931. CSA: C. 93, § 29. L. 53: p. 413, § 5. CRS 53: § 77-3-7. C.R.S. 1963: § 77-3-7. L. 75: Entire section R&RE, p. 1446, § 4, effective July 14. L. 2007: Entire section amended, p. 879, § 8, effective May 14.

**Cross references:** For the legislative declaration in the 2007 act amending this section, see section 1 of chapter 226, Session Laws of Colorado 2007.

## ANNOTATION

**Law reviews.** For article, "Executions and Levies on Tangible Property", see 27 Dicta 143 (1950).

**Section protects rights of creditors and homestead owner.** This section makes provision for the protection of the rights of both the creditors and the owner of the homestead. *Union Nat'l Bank v. Wright*, 78 Colo. 346, 242 P. 54 (1925).

**Debtor's right to dispose of homestead.** This section does away with every doubt as to the debtor's right to dispose of his homestead; the last clause puts at rest all uncertainty as to the effect of a judgment lien upon the home-

stead. *Barnett v. Knight*, 7 Colo. 365, 3 P. 747 (1884).

**Exemption for debtor conveying to ex-wife.** A debtor, who conveyed his interest in the family home to his ex-wife for a promissory note and deed of trust, was allowed to exempt the note and deed of trust for one year as "proceeds" under this section, even though he was not allowed to claim an exemption under § 38-41-201. In re Hoover, 35 Bankr. 709 (Bankr. D. Colo. 1984).

**Sale of homestead property prior to bankruptcy** did not preclude debtor from claiming exemption in the proceeds where the debtor had

specifically reserved his homestead rights at time funds were disbursed. In re Swartzendruber, 72 Bankr. 463 (Bankr. D. Colo. 1987).

**Debtors were allowed to claim homestead exemption on proceeds from sale of Oregon home, even though Colorado statutes specify that the exemption applies to real properties located in Colorado.** In re Bloedon, 137 Bankr. 824 (Bankr. D. Colo. 1992).

**Debtor entitled to homestead exemption** even though she had listed her house for sale, only resided there for ten days after filing petition for bankruptcy, and her family had already relocated to another state. In re Raymond, 987 F.2d 675 (10th Cir. 1993).

**The homestead proceeds exemption covers surplus proceeds paid to a debtor following a**

**nonjudicial public trustee sale.** In re Elliot, 448 B.R. 843 (Bankr. D. Colo. 2011).

**Refinancing of a home mortgage does not qualify as a sale of the home.** Refinancing does not convey an ownership interest in real estate and is not the equivalent of a sale of the home. Proceeds from the refinancing are not, therefore, entitled to an exemption. Polimino v. Peters, 345 B.R. 708 (Bankr. D. Colo. 2006).

**In order to give the debtor full benefit of the homestead exemption, the withdrawal of some funds from the segregated homestead account for non-exempt purposes does not terminate the exempt status of the balance.** Fleet v. Zwick, 994 P.2d 480 (Colo. App. 1999).

**38-41-208. Survival of exemption.** (1) If the property qualifies as a homestead for a joint tenant who is the husband or wife of the other joint tenant or one of the other joint tenants, then, upon the death of either spouse, the homestead shall continue in effect on the interest in such property of the surviving spouse. If the property qualifies as a homestead for a joint tenant who is the parent of one or more of the other joint tenants who are minors, then, upon the death of such parent leaving no spouse surviving, the homestead shall continue in effect on the interest in such property of the surviving minor children.

(2) If the property qualifies as a homestead for a joint tenant who is not related to any other joint tenant as husband or wife or parent and minor child, then, upon the death of such joint tenant, his homestead shall cease and terminate, and the property shall be held by the surviving tenants free of any homestead interest of such decedent, his spouse, or his minor children.

**Source:** L. 53: p. 413, § 6. CRS 53: § 77-3-8. C.R.S. 1963: § 77-3-8. L. 75: Entire section R&RE, p. 1446, § 5, effective July 14.

#### ANNOTATION

**Law reviews.** For article, "Homestead and Bankruptcy in Colorado and Elsewhere", see 56 U. Colo. L. Rev. 175 (1985).

**38-41-209. Insurance proceeds.** Whenever the improvements on property which has been homesteaded are insured in favor of a person entitled to the exemption and a loss is incurred entitling such person to the insurance or a part thereof, such insurance proceeds to the amount of the exemption shall be exempt in the same manner as provided for a sale of the homesteaded property.

**Source:** L. 53: p. 413, § 6. CRS 53: § 77-3-9. C.R.S. 1963: § 77-3-9.

**38-41-210. Definitions - vendor's rights.** The terms "owner of the property" and "householder" mean a person holding any equity under a contract of sale or other agreement whereby such person is holding possession of the property, but the rights of the vendor or seller in such contract or other agreement shall always be superior to any homestead.

**Source:** L. 53: p. 413, § 6. CRS 53: § 77-3-10. C.R.S. 1963: § 77-3-10.

**38-41-211. Exemption in addition to allowances.** The homestead exemption granted under this part 2 shall be in addition to and not in lieu of the exempt property and family



allowances to a surviving spouse and minor and dependent children of a decedent and the preferences granted to dependents of protected persons under articles 10 to 20 of title 15, C.R.S.

**Source:** L. 53: p. 413, § 6. CRS 53: § 77-3-11. C.R.S. 1963: § 77-3-11. L. 73: p. 1648, § 10.

**38-41-212. Waiver.** (1) Any purchase by an encumbrancer, lienholder, or any other person or any redemption by a junior lienholder pursuant to a foreclosure sale conducted by any court, sheriff, public trustee, or other public official pursuant to a mortgage, deed of trust, or other lien which contains a waiver of homestead rights in the encumbered property shall be subject to such waiver of homestead rights, and the purchaser of or person redeeming the property shall be entitled to acquire said property free of any homestead rights and without compliance with the requirements of section 38-41-206.

(2) Any purchase by an encumbrancer, lienholder, or any other person or any redemption by a junior lienholder pursuant to a foreclosure sale conducted by any court, sheriff, public trustee, or other public official pursuant to a mortgage, deed of trust, or other lien, except a tax sale pursuant to article 11 of title 39, C.R.S., which does not contain a waiver of homestead rights in the encumbered property shall be subject to such homestead rights.

**Source:** L. 83: Entire section added, p. 1479, § 1, effective June 15.

ANNOTATION

**Law reviews.** For article, “The Statutory Right of Redemption from Foreclosures”, see 13 Colo. Law. 793 (1984). For article, “Homestead and Bankruptcy in Colorado and Elsewhere”, see 56 U. Colo. L. Rev. 175 (1985). For article, “Partial Redemption In Colorado Foreclosures”, see 67 Den. U.L. Rev. 61 (1990).

**Purpose of section.** By enacting this section, the general assembly extended a senior lienholder’s waiver of homestead rights to junior lienholders. *Janicek v. Obsideo, LLC*, \_\_ P.3d \_\_ (Colo. App. 2011).

**A contractual waiver of homestead rights in a deed of trust constitutes a waiver as to all junior lienholders,** and any junior lienholder redeeming the property takes it free and clear of any homestead rights. *Janicek v. Obsideo, LLC*, \_\_ P.3d \_\_ (Colo. App. 2011).

Because homeowners waived their homestead rights in the first deed of trust, any junior lienholder redeeming pursuant to foreclosure of the first deed of trust is entitled to take the property free of any homestead rights. *Janicek v. Obsideo, LLC*, \_\_ P.3d \_\_ (Colo. App. 2011).

Mineral Interests

ARTICLE 42

Oil, Gas, and Mining Leases

38-42-101.	Lease with option to purchase, title requirements.	38-42-105.	Actions for surrender of lease - damages.
38-42-102.	Option void, when.	38-42-106.	Record of lease no longer notice unless affidavit recorded.
38-42-103.	Title form.		
38-42-104.	Lease surrendered, when.		

**38-42-101. Lease with option to purchase, title requirements.** Every oil and gas or mining lease containing any provision whereby the lessor grants and sells to the lessee therein a right or option, at any time during the term thereof or any extensions or renewals thereof, to purchase any part of the lessor’s mineral or royalty interest in, on, or under the leased premises shall clearly state in the heading or title of the lease that such right or option is contained therein; but the customary provision contained in such leases permitting the lessee to purchase or sell the lessor’s share of production and to account to lessor for the proceeds thereof shall not be deemed to be such a right or option.

**Source:** L. 55: p. 724, § 1. CRS 53: § 118-13-1. C.R.S. 1963: § 118-13-1.

#### ANNOTATION

**Law reviews.** For article, “The Interest of Landowner and Lessee in Oil and Gas in Colorado”, see 25 Rocky Mt. L. Rev. 117 (1953). For article, “Colorado Condominium Act—How It

Works”, see 36 U. Colo. L. Rev. 451 (1964). For article, “Implied Covenants in Oil and Gas Leases”, see 12 Colo. Law. 1803 (1983).

**38-42-102. Option void, when.** Any such right or option contained in any oil and gas or mining lease which is executed subsequent to March 2, 1955, and the title or heading of which does not clearly state that such a right or option is contained therein shall be voidable at the option of the lessor, and upon adjudication by a court of competent jurisdiction that such right or option is voided by virtue of this article, no money paid to the lessor for such lease shall be returned to the lessee therein, but the failure of such lease to satisfy the requirements of this article shall not affect the validity of such lease except as to such right or option to purchase.

**Source:** L. 55: p. 724, § 2. CRS 53: § 118-13-2. C.R.S. 1963: § 118-13-2.

#### ANNOTATION

**Law reviews.** For article, “Highlights of the 1955 Colorado Legislative Session—Oil and Gas”, see 28 Rocky Mt. L. Rev. 53 (1955).

**38-42-103. Title form.** The title or heading of such a lease containing such a right or option in the lessee as set forth in this article shall be deemed to satisfy the requirements of this article if it reads substantially as follows: Oil and gas lease with option to purchase, or mining lease with option to purchase.

**Source:** L. 55: p. 725, § 3. CRS 53: § 118-13-3. C.R.S. 1963: § 118-13-3.

**38-42-104. Lease surrendered, when.** When any oil, gas, or other mineral lease given on land situated in any county of Colorado and recorded therein becomes forfeited or expires by its own terms, it is the duty of the lessee, his successors, or assigns, within ninety days from April 30, 1957, if the forfeiture or expiration occurred prior thereto and within ninety days after the date of the forfeiture or expiration of any other lease, to have such lease surrendered in writing, such surrender to be signed by the party making the same, acknowledged, and placed on record in the county where the leased land is situated without cost to the owner of the leased premises.

**Source:** L. 57: p. 618, § 1. CRS 53: § 118-13-4. C.R.S. 1963: § 118-13-4.

#### ANNOTATION

**Applied** in Graefe & Graefe, Inc. v. Beaver Mesa Exploration Co., 635 P.2d 900 (Colo. App. 1981); Graefe & Graefe, Inc. v. Beaver Mesa

Exploration Co., 695 P.2d 767 (Colo. App. 1984); Whitham Farms, LLC v. City of Longmont, 97 P.3d 135 (Colo. App. 2003).

**38-42-105. Actions for surrender of lease - damages.** If the owner of such lease neglects or refuses to execute a release as provided by section 38-42-104, then the owner of the leased premises may sue in any court of competent jurisdiction to obtain such release, and he may also recover in such action from the lessee, his successors, or assigns the sum of one hundred dollars as damages and all costs, together with a reasonable attorney's fee for preparing and prosecuting the suit, and he may also recover any additional damages that



the evidence in the case warrants. In all such actions, writs of attachment may issue as in other cases if the owner of the leased premises makes demand for release in writing, by certified or registered mail, sent to the last-known address, of the lessee, successor, or assignee, as the case may be, at least thirty days prior to instituting an action under this section.

**Source:** L. 57: p. 618, § 2. CRS 53: § 118-13-5. C.R.S. 1963: § 118-13-5.

ANNOTATION

Applied in Graefe & Graefe, Inc. v. Beaver  
Mesa Exploration Co., 635 P.2d 900 (Colo. App.  
1981); Graefe & Graefe, Inc. v. Beaver Mesa

Exploration Co., 695 P.2d 767 (Colo. App.  
1984).

**38-42-106. Record of lease no longer notice unless affidavit recorded.** (1) The lessee of any oil, gas, or other mineral lease given on or after March 28, 1967, on land situated in this state or any owner of a partial interest in such lease shall, prior to the expiration of six months after the expiration of the primary or definite term set forth in the lease, record in the office of the county clerk and recorder of the county wherein such land is situate an affidavit if the affiant claims an extension of the term of the lease beyond the primary or definite term thereof. If no such affidavit is recorded, then six months after the expiration of the primary or definite term of such lease, the record thereof, if any, shall cease to be notice and shall have no more effect than an unrecorded instrument.

(2) The lessee of any oil, gas, or other mineral lease given prior to March 28, 1967, on land situated in this state or any owner of a partial interest in such lease shall, within six years after March 28, 1967, or prior to the expiration of six months after the expiration of the primary or definite term set forth in the lease, whichever is later, record in the office of the county clerk and recorder of the county wherein such land is situate an affidavit if the affiant claims an extension of the term of the lease beyond the primary or definite term thereof. If such affidavit is not so recorded, then after the expiration of such six-year period, or six months after the expiration of the primary or definite term set forth in the lease, whichever is later, the record of such lease, if any, shall cease to be notice and shall have no more effect than an unrecorded instrument.

**Source:** L. 67: p. 160, § 1; C.R.S. 1963: § 118-13-6.

ANNOTATION

**Law reviews.** For article, “Top Leasing for Oil and Gas: The Legal Perspective”, see 59 U. Den. L.J. 641 (1982).

ARTICLE 43

Oil, Gas, and Other  
Natural Resources - Leases

**Law reviews:** For article “Land and Natural Resources”, which discusses Tenth Circuit decisions with oil and gas leases, see 63 Den. U.L. Rev. 417 (1986).

38-43-101.	Appointment of trustee to make oil, gas, or other mineral lease where contingent future interests are involved.	38-43-103.	being. Contents of complaint.
		38-43-104.	Private or public sale of lease.
38-43-102.	Parties - representation of minors, persons of unsound mind, and persons not in	38-43-105.	Terms of lease: Pooling and unitization.
		38-43-106.	Trustees - control of court,

	removal or resignation, successor, bond, compensation.	38-43-109.	Remedies herein provided cumulative, contracts and options.
38-43-107.	Title of purchaser.		
38-43-108.	Disposition of proceeds.		

**38-43-101. Appointment of trustee to make oil, gas, or other mineral lease where contingent future interests are involved.** (1) Where lands in this state, or any estate or interest therein, are subject to contingent future interests, legal or equitable, whether arising by way of remainder, reversion, possibility of reverter, executory devise, upon the happening of a condition subsequent, or otherwise, created by deed, will, or other instrument, and whether a trust is involved or not, and it is made to appear that it will be advantageous to the present and ultimate owners of said lands or any estate or interest therein that such lands, estate, or interest be leased for the production of minerals, including oil, gas, and other natural resources, or any of them, upon the filing of a complaint by any person having a vested, contingent, or possible interest in said lands, or any estate or interest therein, or by any trustee holding title to any such property in trust, the district or probate court which is administering such lands or any estate or interest therein under a testamentary trust shall have the concurrent power and jurisdiction, pending the happening of any contingency and the vesting of such future interest, to appoint a trustee for such lands, or any estate or interest therein, and to authorize and direct such trustee to sell, execute, and deliver a valid lease covering the minerals, oil, gas, and other natural resources, or any of them, in, on, or under said lands, or any estate or interest therein.

(2) Where the instrument appointing any executor, trustee, or other fiduciary confers the power on such fiduciary to execute leases for the production of minerals, oil, gas, and other natural resources from the lands, or interest therein, which is subject to any such contingent future interest, then no other person except such executor, trustee, or other fiduciary shall have the right to file a complaint as provided in this article.

(3) Any lease executed under this article shall not affect or cover any undivided interest in any such lands, title to which is then vested in fee simple and is not subject to any contingent future interest, but shall cover only such undivided interest therein or the entire interest therein which is subject to some contingent future interest.

**Source:** L. 55: p. 726, § 1. CRS 53: § 118-14-1. C.R.S. 1963: § 118-14-1. L. 64: p. 308, § 271.

#### ANNOTATION

**Law reviews.** For article, "Highlights of the 1955 Colorado Legislative Session—Oil and Gas", see 28 Rocky Mt. L. Rev. 53 (1955).

**38-43-102. Parties - representation of minors, persons of unsound mind, and persons not in being.** All persons in being having a vested, contingent, or possible interest in the lands or estate or interest sought to be leased shall be made parties to such proceedings, and all persons unknown and all persons not in being, who may have or become entitled to a vested, contingent, or possible interest in such lands, may also be made parties to such proceedings by the general description of unknown persons. Such proceedings shall be in the nature of an action in rem, and the process, practice, and procedure shall be in compliance with the Colorado rules of civil procedure then in effect. The court shall appoint a guardian ad litem to represent any such parties who may be minors or persons of unsound mind, unless they are represented by their statutory guardians or conservators. If the court specifically finds that the welfare or interest of any person not in being requires special representation, the court may appoint a guardian ad litem to represent such unknown party not in being, and such guardian ad litem shall file such pleadings or answer and take such steps as he deems proper, and such unknown person not in being will be fully bound by the proceedings under this article, and same shall be conclusive on any such person. Otherwise, and in the absence of such findings by the court, it shall not be necessary to



make parties any persons not in being, but the persons in being who are parties shall stand for and represent the full title and whole interest in said lands, or estate or interest therein, and all parties not in being who might have some contingent or future interest therein, and all persons, whether in being or not in being, having any interest, present, future, or contingent, in the property sought to be leased will be fully bound by the proceedings under this article, and same shall be conclusive on all such persons.

**Source:** L. 55: p. 727, § 2. CRS 53: § 118-14-2. C.R.S. 1963: § 118-14-2.

**38-43-103. Contents of complaint.** The complaint shall describe the property sought to be leased with reasonable certainty and, insofar as it is known to the plaintiff or as can be ascertained with reasonable diligence, shall set forth the names of all persons interested in such property together with their respective estates or interests, either vested, contingent, or executory; whether said land is proven or unproven as to its oil, gas, or other mineral content; its distance from producing or drilling wells or producing mines; and the reasons why it is necessary, desirable, or beneficial that the property be leased for the production of minerals, including oil, gas, and other natural resources, or any of them. If a bona fide offer to lease has been obtained, the complaint shall also set forth the name of the proposed lessee, the true consideration for said lease, and a general statement as to the provisions of said proposed lease, or a copy of the proposed form of such lease setting forth the terms and conditions thereof may be attached to the complaint.

**Source:** L. 55: p. 728, § 3. CRS 53: § 118-14-3. C.R.S. 1963: § 118-14-3.

**38-43-104. Private or public sale of lease.** The court, after a hearing, may thereupon by order approve the leasing of said property by private contract with the proposed lessee and shall appoint a trustee, as provided in this article, and direct such trustee to execute such lease on the form proposed or such form as is satisfactory to the court, and such lease so executed shall be valid and binding and conclusive on all parties. The court, in its discretion, may order the leasing of said property to be conducted at public sale upon such notice and in such manner as the court shall direct. In the event of a public sale, such sale shall be reported back to the court and no lease shall be executed and delivered by the trustee until and unless the sale of said lease is approved by the court.

**Source:** L. 55: p. 728, § 4. CRS 53: § 118-14-4. C.R.S. 1963: § 118-14-4.

**38-43-105. Terms of lease: Pooling and unitization.** Any lease which covers minerals or natural resources other than oil or gas or related hydrocarbons shall be for such term and contain such provisions as may be approved by the court. A lease which specifically covers oil and gas and which may also cover other minerals may be for a primary term not exceeding ten years and as long thereafter as oil, or gas, or other minerals may be produced from the premises embraced in such lease or as long as drilling operations are diligently continued. Such oil and gas lease may provide for pooling, unitization, or consolidation of the leased premises, or any part thereof, with other lands in the same general area to establish a cooperative or unit plan of development or operation and for the apportionment of royalties on production from any such unitized area on an acreage basis. The trustee appointed under this article, or any successor trustee, shall have the power at any time while such trust continues, with the approval of the court, to enter into any agreement providing for such pooling or unitization of all or any part of the leased premises and to bind thereby the said property and all owners thereof having any interest therein whether present, future, or contingent.

**Source:** L. 55: p. 728, § 5. CRS 53: § 118-14-5. C.R.S. 1963: § 118-14-5.

**38-43-106. Trustees - control of court, removal or resignation, successor, bond, compensation.** Any suitable person, bank, or trust company may be appointed trustee under

this article, and if a trust is in existence and there is a trustee serving under the trust, the trustee appointed by the court under this section may, in the court's discretion, be the same trustee as is serving under the existing trust, even though he is not a resident of this state, and may be acting under the control of any other court in the United States. The trustee shall be under the continuing control of the court and may be removed by the court at will. Upon such removal or upon the death or resignation of the trustee or any of them, the court may appoint a successor. The court may in its sole discretion, at any time it may be deemed advisable, require such trustee to give a bond in favor of the owners of the property which is to be or has been leased, and shall fix the amount of such bond and may from time to time require a bond in additional amounts. Said trustee shall be allowed as compensation for his services such sums as the court from time to time may fix, to be paid from moneys collected by him.

**Source:** L. 55: p. 729, § 6. CRS 53: § 118-14-6. C.R.S. 1963: § 118-14-6.

**38-43-107. Title of purchaser.** Where any lease has been executed under the provisions of this article, the title of the lessee under such lease shall be indefeasible by any party to the suit, or by any person who was virtually represented therein by any party to the suit, or by any person who was not in being at the time the suit was commenced. If the decree or order under which such lease was executed is afterwards reversed or set aside for any reason, except for fraud, collusion, or other misconduct of the purchaser or lessee, the title of such purchaser or lessee shall not be affected thereby; but all subsequent orders and decrees shall affect only the proceeds of sale or the reversion subject to such lease, together with the proceeds, rentals, and royalties payable under the terms of the lease.

**Source:** L. 55: p. 729, § 7. CRS 53: § 118-14-7. C.R.S. 1963: § 118-14-7.

**38-43-108. Disposition of proceeds.** The proceeds of sale, and the reversion subject to any such lease for the development of minerals, including oil, gas, and other natural resources, or any of them, together with the proceeds, rentals, and royalties accruing from any such lease, shall, in all respects, be substituted for and stand in place of the property so leased, as regards the ownership and enjoyment thereof, and all persons shall have the same estates or interests, vested, contingent, or executory in such proceeds of sale, or in the reversion subject to any such lease, together with the proceeds, rentals, and royalties accruing from any such lease as they had or would have had in the property so leased. The proceeds of sale or bonus and rentals payable under the terms of such lease coming into the hands of the trustee may be paid, under proper order of court, to the life tenant or other person entitled thereto. Under proper order of court, the trustee shall be authorized to invest and reinvest funds and income from royalties coming into his hands in such securities as fiduciaries are authorized to invest the moneys in their custody, which investments shall remain intact until the ultimate taker is determined and shall then be paid over to such ultimate taker as ordered by the court and the trust closed. Income from investments shall be paid to the life tenant or other person entitled thereto under proper order of court. The court shall make all proper orders and decrees for the faithful application of the funds and for the management and preservation of any property or securities in which the same may be invested for the protection of the rights of all persons having any estate or interest in the leased property, whether vested, contingent, or executory.

**Source:** L. 55: p. 730, § 8. CRS 53: § 118-14-8. C.R.S. 1963: § 118-14-8.

#### ANNOTATION

**Law reviews.** For article, "One Year Review of Contracts", see 36 Dicta 19 (1959).



**38-43-109. Remedies herein provided cumulative, contracts and options.** The rights, powers, authorities, and remedies provided for in this article shall be cumulative and in addition to other existing rights, powers, authorities, and remedies. Any executor, trustee, or other fiduciary or attorney-in-fact having express or implied powers to execute leases for the production of oil, gas, or other minerals may freely do so under the provisions of the instrument appointing them without the necessity of proceeding as provided in this article. The powers of trustees appointed under this article to execute leases includes the power, under proper order of court, to enter into, execute, and deliver valid contracts and option agreements relating to the future execution or delivery of such leases and contracts granting exclusive rights to enter such lands to make geophysical and geological surveys, explorations, and tests including core drilling.

**Source:** L. 55: p. 730, § 9. CRS 53: § 118-14-9. C.R.S. 1963: § 118-14-9.

**Boundaries**

**ARTICLE 44**

**Establishing Disputed Boundaries**

**Cross references:** For relief under special circumstances where improvements are on lands of another, see Johnson v. Dunkel, 132 Colo. 383, 288 P.2d 343 (1955), and Golden Press, Inc. v. Rylands, 124 Colo. 122, 235 P.2d 592, 28 A.L.R. 2d 672 (1951); for jurisdictional and procedural matters in boundary cases, see Gibson v. Neikirk, 98 Colo. 389, 56 P.2d 487 (1936).

38-44-101.	When action may be brought.	38-44-108.	Exceptions - hearing.
38-44-102.	Notice.	38-44-109.	Corners and boundaries established.
38-44-103.	Pleadings - trial of issues.	38-44-110.	Appeal.
38-44-104.	Commissioners - county surveyor.	38-44-111.	Costs.
38-44-105.	Oath - assistants.	38-44-112.	Agreements.
38-44-106.	Hearing.	38-44-113.	Establishment of boundary corner.
38-44-107.	Adjournments and report.		

**38-44-101. When action may be brought.** When one or more owners of land, the corners and boundaries of which are lost, destroyed, or in dispute, desire to have the same established, they may bring an action in the district court of the county where such lost, disputed, or destroyed corners or boundaries or parts thereof are situated against the owners of the other tracts which would be affected by the determination or establishment thereof, to have such corners or boundaries ascertained and permanently established. If any public road is likely to be affected thereby, the proper county shall be made a party defendant.

**Source:** L. 07: p. 286, § 1. Code 08: § 297. Code 21: § 298. Code 35: § 298. CRS 53: § 118-11-1. C.R.S. 1963: § 118-11-1.

**Cross references:** For alternative solution of boundary or corner dispute, see § 38-44-112.

**ANNOTATION**

- I. General Consideration.
- II. Priority of Evidence in Boundary Disputes.

**I. GENERAL CONSIDERATION.**

**Law reviews.** For article, "One Year Review of Property", see 35 Dicta 48 (1958).

**Whether fence is boundary is question of fact.** The question of what function a fence has performed over a period of years and whether it has been acquiesced in as a boundary is peculiarly a question of fact. Kelly v. Mullin, 159 Colo. 573, 413 P.2d 186 (1966).  
**Who suffers loss due to boundary line readjustments.** Where one of two innocent parties

must suffer a loss of land due to boundary line readjustments called for by later official surveys, it must fall upon the party later in time who has never been in actual possession of the land in question. *Marr v. Shrader*, 142 Colo. 106, 349 P.2d 706 (1960).

**When refusal to appoint commission not error.** In an action to establish an alleged disputed boundary to land, where such boundaries can be determined with accuracy, it is not error to refuse the appointment of a commission. *Archuleta v. Rose*, 136 Colo. 211, 315 P.2d 201 (1957).

**Equitable relief granted where improvements mistakenly built upon land.** Where the powers of the court were invoked to settle a boundary dispute and the rights of the parties with respect to improvements mistakenly built upon the land, there being no bad faith on the part of any of the parties, it was the duty of the court to grant such equitable relief as the situation required. *Pull v. Barnes*, 142 Colo. 272, 350 P.2d 828 (1960).

Where an adjoining owner had in good faith erected improvements on adjoining land, believing it to be his own, he should be granted the right to remove the same if feasible, and if not, then given an equitable lien on the property for the value thereof. *Pull v. Barnes*, 142 Colo. 272, 350 P.2d 828 (1960).

**A boundary dispute may be resolved under appropriate statutory or common law proceedings.** *Durbin v. Bonanza Corp.*, 716 P.2d 1124 (Colo. App. 1986).

**An unexplained use of an easement for the statutory period** is presumed to be under a claim of right and is, therefore, adverse. *Durbin v. Bonanza Corp.*, 716 P.2d 1124 (Colo. App. 1986).

**Applied** in *Fisher v. Peterson*, 152 Colo. 221, 381 P.2d 29 (1963); *Hartley v. Ruybal*, 160 Colo. 80, 414 P.2d 114 (1966).

## II. PRIORITY OF EVIDENCE IN BOUNDARY DISPUTES.

**Intention of parties controls.** In construing a deed, the object is to discover and effectuate the

intention of the parties to it, but while that intention is to be gathered from the language and words of the deed, it should be read in the light of the surrounding circumstances at least when it is ambiguous. *Wallace v. Hirsch*, 142 Colo. 264, 350 P.2d 560 (1960).

Where there are two repugnant descriptions in a deed, the court will look into the surrounding facts and will adopt the description which is most definite and certain, and which in the light of the surrounding circumstances can be said to effectuate most clearly the intention of the parties. *Wallace v. Hirsch*, 142 Colo. 264, 350 P.2d 560 (1960).

**Monuments control courses and distances.** In a conveyance of interest in land, whether by ordinary deed or by dedication, if the description of the land is fixed by ascertainable monuments and by courses and distances, the well-settled general rule is that the monuments will control the courses and distances if they are inconsistent with the monument calls. *Wallace v. Hirsch*, 142 Colo. 264, 350 P.2d 560 (1960).

**Courses and distances least reliable of calls.** A general rule of construction invoked in the case of repugnant calls in a deed is that courses and distances are the least reliable of all calls, and that a call which designates a point capable of precise and exact location takes precedence over a call for a course and distance if there is a repugnancy between the two. *Wallace v. Hirsch*, 142 Colo. 264, 350 P.2d 560 (1960).

**Successor to party to boundary agreement estopped.** A successor in title to one who has entered into an executed agreement as to location of the boundary line fence is not in a position to attack that agreement collaterally or to invoke the provisions of this section, merely by creating a dispute. *Schleining v. White*, 163 Colo. 481, 431 P.2d 458 (1967).

**38-44-102. Notice.** Notice of such action shall be given as in other cases and if the defendants or any of them are nonresidents of the state, or unknown, they may be served by publication as provided by law.

**Source:** L. 07: p. 287, § 2. Code 08: § 298. Code 21: § 299. Code 35: § 299. CRS 53: § 118-11-2. C.R.S. 1963: § 118-11-2.

**38-44-103. Pleadings - trial of issues.** The action shall be a civil action, and the only necessary pleadings therein shall be the petition of plaintiff describing the land involved and, insofar as may be, the interest of the respective party and asking that certain corners and boundaries therein described, as accurately as may be, be established. Either the plaintiff or the defendant, by proper plea, may put in issue the fact that certain alleged



boundaries or corners are true ones or that such have been recognized and acquiesced in by the parties or their grantors for a period of twenty consecutive years, which issue may be tried before a commission appointed in the discretion of the court.

**Source:** L. 07: p. 287, § 3. **Code 08:** § 299. **Code 21:** § 300. **Code 35:** § 300. **CRS 53:** § 118-11-3. **C.R.S. 1963:** § 118-11-3.

#### ANNOTATION

**Applied** in *Kelly v. Mullin*, 159 Colo. 573, 413 P.2d 186 (1966).

**38-44-104. Commissioners - county surveyor.** The court in which said action is brought may appoint the county surveyor or, if there is no county surveyor or if the court deems it in the best interest of the parties, shall appoint a commission of one or more disinterested surveyors who, at a date and place fixed by the court in the order of appointment, shall proceed to locate the lost, destroyed, or disputed corners and boundaries.

**Source:** L. 07: p. 287, § 4. **Code 08:** § 300. **Code 21:** § 301. **Code 35:** § 301. **CRS 53:** § 118-11-4. **C.R.S. 1963:** § 118-11-4. **L. 79:** Entire section amended, p. 479, § 5, effective July 1.

#### ANNOTATION

**Applied** in *Davis v. Dilley*, 147 Colo. 395, 363 P.2d 658 (1961).

**38-44-105. Oath - assistants.** The commissioners so appointed shall subscribe and file with the clerk, within ten days from the date of their appointment, an oath for the faithful and impartial discharge of their duties and shall have power to appoint all necessary assistants.

**Source:** L. 07: p. 287, § 5. **Code 08:** § 301. **Code 21:** § 302. **Code 35:** § 302. **CRS 53:** § 118-11-5. **C.R.S. 1963:** § 118-11-5.

**38-44-106. Hearing.** At the time and in the manner specified in the order of court, the commission shall proceed to locate said boundaries and corners and for that purpose may take the testimony of witnesses as to where the true boundaries and corners are located; and, when so ascertained, the commission shall mark the same by erecting or putting down permanent and fixed monuments at all corners so located. In its report to the court, the commission shall file a map or plat showing all monuments, lines, and any other evidences or witness marks that will more nearly identify the corners and, if that issue is presented, shall also take testimony as to whether the boundaries or corners alleged to have been recognized and acquiesced in for twenty years or more have in fact been recognized and acquiesced in. If it finds affirmatively on such issue, it shall incorporate the same into the report to the court.

**Source:** L. 07: p. 287, § 6. **Code 08:** § 302. **Code 21:** § 303. **Code 35:** § 303. **CRS 53:** § 118-11-6. **C.R.S. 1963:** § 118-11-6.

**Cross references:** For methods of erecting monuments at corners, see § 38-51-104.

#### ANNOTATION

**Monuments of original survey control,** and it is a general rule that the original corners as established by the government surveyors, if they can be found, or the places where they were

originally established, if that can be definitely determined, are conclusive on all persons owning or claiming to hold with reference to such survey and the monuments placed by the original surveyor without regard to whether they were correctly located or not. *Brackett v. Cleveland*, 147 Colo. 328, 363 P.2d 1050 (1961).

**Relocation of obliterated corners is first step in settling boundary dispute.** Where sec-

tion corners have been obliterated, and there is a dispute as to boundaries, the correct rule in determining these boundaries is first to relocate the corners. *Brackett v. Cleveland*, 147 Colo. 328, 363 P.2d 1050 (1961).

**Applied** in *Smith v. Dorsey*, 29 Colo. App. 369, 483 P.2d 1359 (1971).

**38-44-107. Adjournments and report.** The proceedings may be adjourned by the commission from time to time as may be necessary, but the survey and location of the corners and boundaries must be complete and the report thereof filed with the clerk of the court at least ten days before the first day of the term next following that of its appointment, unless the court appointing it makes an order for an earlier report.

**Source:** L. 07: p. 288, § 7. **Code 08:** § 303. **Code 21:** § 304. **Code 35:** § 304. **CRS 53:** § 118-11-7. **C.R.S. 1963:** § 118-11-7.

**38-44-108. Exceptions - hearing.** At the term of court after such report is filed, any party interested may file exceptions thereto within ten days from the date the report is filed with the clerk, but if in term time, then within three days after the same is filed, and the court shall hear and determine them, hearing evidence in addition to that reported by the commission if necessary, and may approve or modify such report or again refer the matter to the same or another commission for further report.

**Source:** L. 07: p. 288, § 8. **Code 08:** § 304. **Code 21:** § 305. **Code 35:** § 305. **CRS 53:** § 118-11-8. **C.R.S. 1963:** § 118-11-8.

#### ANNOTATION

**Even though use of "master" pursuant to C.R.C.P. 53 conflicts with this section for resolving a disputed boundary,** because the parties stipulated for the entry of judgment upon final approval of the surveyor's report by the trial court, the parties waived their rights to

object to the trial court's determination of the disputed boundary. *Durbin v. Bonanza Corp.*, 716 P.2d 1124 (Colo. App. 1986).

**Applied** in *Hildebrand v. Olinger*, 689 P.2d 695 (Colo. App. 1984).

**38-44-109. Corners and boundaries established.** The corners and boundaries finally established by the court in proceedings under this article, or an appeal therefrom, shall be binding upon all the parties, their heirs and assigns, as the corners and boundaries that have been lost, destroyed, or in dispute; but if it is found that the boundaries and corners alleged to have been recognized and acquiesced in for twenty years have been so recognized and acquiesced in, such recognized boundaries and corners shall be permanently established. The court order or decree shall be recorded in the grantor-grantee index of the real property records of the county or counties in which the land lies.

**Source:** L. 07: p. 288, § 9. **Code 08:** § 305. **Code 21:** § 306. **Code 35:** § 306. **CRS 53:** § 118-11-9. **C.R.S. 1963:** § 118-11-9. **L. 2010:** Entire section amended, (HB 10-1085), ch. 95, p. 326, § 8, effective August 11.

#### ANNOTATION

**Boundary established by court becomes true boundary.** The boundary established by

the court in these proceedings becomes the true boundary line of the property. *Smith v. Dorsey*,



29 Colo. App. 369, 483 P.2d 1359 (1971).

**Common ownership of two tracts of land extinguishes any acquiescence in boundary lines attributable to the prior landowners of the tracts unless the deed adopts the boundary**

lines as previously acquiesced upon. *Salazar v. Terry*, 911 P.2d 1086 (Colo. 1996).

**Applied in** *Forristall v. Ansley*, 170 Colo. 391, 462 P.2d 116 (1969).

**38-44-110. Appeal.** There shall be no appeal in such proceedings, except from final judgment of the court taken in the manner that other appeals are taken, and no appeal shall be taken after three months from the final order of the court.

**Source:** L. 07: p. 288, § 10. **Code 08:** § 306. **Code 21:** § 307. **Code 35:** § 307. **CRS 53:** § 118-11-10. **C.R.S. 1963:** § 118-11-10.

**38-44-111. Costs.** The costs in the proceedings shall be taxed as the court thinks just and shall be a lien on the land or interest therein owned by the party or parties against whom they are taxed insofar as such lands are involved in the proceedings.

**Source:** L. 07: p. 288, § 11. **Code 08:** § 307. **Code 21:** § 308. **Code 35:** § 308. **CRS 53:** § 118-11-11. **C.R.S. 1963:** § 118-11-11.

#### ANNOTATION

**Assessment of costs and expenses to losing party.** In an action involving boundary dispute, judgment assessing costs of survey and expenses of commissioners to losing party is in accord with this section. *Kelly v. Mullin*, 159 Colo. 573, 413 P.2d 186 (1966).

**Assessment of all costs not abuse of discretion.** But the trial court's assessment of all costs of the action against the defendants was not an

abuse of discretion. *Brackett v. Cleveland*, 147 Colo. 328, 363 P.2d 1050 (1961).

**Costs allocated only between original plaintiff and defendant** since the issue of allocating costs to the third-party defendants was not raised in plaintiff's motion for a new trial and thus the court of appeals had no jurisdiction to decide the issue. *Brewster v. Nandrea*, 705 P.2d 1 (Colo. 1985).

**38-44-112. Agreements.** Any uncertain line, uncertain corner, or uncertain boundary of an existing parcel of land that is recorded in the real estate records in the office of the clerk and recorder for the county where the land is located and that is in dispute may be determined and permanently established by written agreement of all parties thereby affected, signed and acknowledged by each as required for conveyances of real estate, clearly designating the same, and accompanied by a map or plat thereof that shall be recorded as an instrument affecting real estate, and shall be binding upon their heirs, successors, and assigns. If the map or plat is prepared by a licensed professional land surveyor, monuments shall be set for any line, corner, or boundary included in the agreement.

**Source:** L. 07: p. 288, § 12. **Code 08:** § 308. **Code 21:** § 309. **Code 35:** § 309. **CRS 53:** § 118-11-12. **C.R.S. 1963:** § 118-11-12. **L. 2007:** Entire section amended, p. 294, § 5, effective August 3.

**38-44-113. Establishment of boundary corner.** The establishment of a boundary corner through acquiescence confirmed by a court of competent jurisdiction, or by written agreement pursuant to section 38-44-112, shall not alter the location or validity of any existing or properly restored public land survey monument in the vicinity. Such existing or properly restored public land survey monument may be used to control future land surveys in the region when such surveys are not related to the boundary corner established by acquiescence or agreement.

**Source:** L. 97: Entire section added, p. 1629, § 5, effective July 1.

**Safety of Real Property****ARTICLE 45****Carbon Monoxide Alarms**

**Cross references:** In 2009, this article was added by the “Lofgren and Johnson Families Carbon Monoxide Safety Act”. For the short title, see section 1 of chapter 51, Session Laws of Colorado 2009.

38-45-101.	Definitions.	38-45-104.	Carbon monoxide alarms in rental properties.
38-45-102.	Carbon monoxide alarms in single-family dwellings - rules.	38-45-105.	Municipal or county ordinances regarding carbon monoxide alarms.
38-45-103.	Carbon monoxide alarms in multi-family dwellings - rules.	38-45-106.	Limitation of liability.

**38-45-101. Definitions.** As used in this article, unless the context otherwise requires:

- (1) “Carbon monoxide alarm” means a device that detects carbon monoxide and that:
  - (a) Produces a distinct, audible alarm;
  - (b) Is listed by a nationally recognized, independent product-safety testing and certification laboratory to conform to the standards for carbon monoxide alarms issued by such laboratory or any successor standards;

- (c) Is battery powered, plugs into a dwelling’s electrical outlet and has a battery backup, is wired into a dwelling’s electrical system and has a battery backup, or is connected to an electrical system via an electrical panel; and

- (d) May be combined with a smoke detecting device if the combined device complies with applicable law regarding both smoke detecting devices and carbon monoxide alarms and that the combined unit produces an alarm, or an alarm and voice signal, in a manner that clearly differentiates between the two hazards.

- (2) “Dwelling unit” means a single unit providing complete independent living facilities for one or more persons, including permanent provisions for living, sleeping, eating, cooking, and sanitation.

- (3) “Fuel” means coal, kerosene, oil, fuel gases, or other petroleum products or hydrocarbon products such as wood that emit carbon monoxide as a by-product of combustion.

- (4) “Installed” means that a carbon monoxide alarm is installed in a dwelling unit in one of the following ways:

- (a) Wired directly into the dwelling’s electrical system;
  - (b) Directly plugged into an electrical outlet without a switch other than a circuit breaker; or

- (c) If the alarm is battery-powered, attached to the wall or ceiling of the dwelling unit in accordance with the national fire protection association’s standard 720, or any successor standard, for the operation and installation of carbon monoxide detection and warning equipment in dwelling units.

- (5) “Multi-family dwelling” means any improved real property used or intended to be used as a residence and that contains more than one dwelling unit. Multi-family dwelling includes a condominium or cooperative.

- (6) “Operational” means working and in service in accordance with manufacturer instructions.

- (7) “Single-family dwelling” means any improved real property used or intended to be used as a residence and that contains one dwelling unit.

**Source: L. 2009:** Entire article added, (HB 09-1091), ch. 51, p. 180, § 2, effective March 24.



**38-45-102. Carbon monoxide alarms in single-family dwellings - rules.**

(1) (a) Notwithstanding any other provision of law, the seller of each existing single-family dwelling offered for sale or transfer on or after July 1, 2009, that has a fuel-fired heater or appliance, a fireplace, or an attached garage shall assure that an operational carbon monoxide alarm is installed within fifteen feet of the entrance to each room lawfully used for sleeping purposes or in a location as specified in any building code adopted by the state or any local government entity.

(b) By July 1, 2009, the real estate commission created in section 12-61-105, C.R.S., shall by rule require each listing contract for residential real property that is subject to the commission's jurisdiction pursuant to article 61 of title 12, C.R.S., to disclose the requirements specified in paragraph (a) of this subsection (1).

(2) Notwithstanding any other provision of law, every single-family dwelling that includes either fuel-fired appliances or an attached garage where, on or after July 1, 2009, interior alterations, repairs, fuel-fired appliance replacements, or additions, any of which require a building permit, occurs or where one or more rooms lawfully used for sleeping purposes are added shall have an operational carbon monoxide alarm installed within fifteen feet of the entrance to each room lawfully used for sleeping purposes or in a location as specified in any building code adopted by the state or any local government entity.

(3) No person shall remove batteries from, or in any way render inoperable, a carbon monoxide alarm, except as part of a process to inspect, maintain, repair, or replace the alarm or replace the batteries in the alarm.

**Source: L. 2009:** Entire article added, (HB 09-1091), ch. 51, p. 181, § 2, effective March 24.

**38-45-103. Carbon monoxide alarms in multi-family dwellings - rules.**

(1) (a) Notwithstanding any other provision of law, the seller of every dwelling unit of an existing multi-family dwelling offered for sale or transfer on or after July 1, 2009, that has a fuel-fired heater or appliance, a fireplace, or an attached garage shall assure that an operational carbon monoxide alarm is installed within fifteen feet of the entrance to each room lawfully used for sleeping purposes or in a location as specified in any building code adopted by the state or any local government entity.

(b) By July 1, 2009, the real estate commission created in section 12-61-105, C.R.S., shall by rule require each listing contract for residential real property that is subject to the commission's jurisdiction pursuant to article 61 of title 12, C.R.S., to disclose the requirements specified in paragraph (a) of this subsection (1).

(2) Notwithstanding any other provision of law, every dwelling unit of a multi-family dwelling that includes fuel-fired appliances or an attached garage where, on or after July 1, 2009, interior alterations, repairs, fuel-fired appliance replacements, or additions, any of which require a building permit, occurs or where one or more rooms lawfully used for sleeping purposes are added shall have an operational carbon monoxide alarm installed within fifteen feet of the entrance to each room lawfully used for sleeping purposes or in a location as specified in any building code adopted by the state or any local government entity.

(3) No person shall remove batteries from, or in any way render inoperable, a carbon monoxide alarm, except as part of a process to inspect, maintain, repair, or replace the alarm or replace the batteries in the alarm.

**Source: L. 2009:** Entire article added, (HB 09-1091), ch. 51, p. 182, § 2, effective March 24.

**38-45-104. Carbon monoxide alarms in rental properties.** (1) Except as provided in subsection (5) of this section, any single-family dwelling or dwelling unit in a multi-family dwelling used for rental purposes and that includes fuel-fired appliances or an attached garage where, on or after July 1, 2009, interior alterations, repairs, fuel-fired appliance replacements, or additions, any of which requires a building permit, occurs or

where one or more rooms lawfully used for sleeping purposes are added shall be subject to the requirements specified in sections 38-45-102 and 38-45-103.

(2) Except as provided in subsection (5) of this section, each existing single-family dwelling or existing dwelling unit in a multi-family dwelling that is used for rental purposes that has a change in tenant occupancy on or after July 1, 2009, shall be subject to the requirements specified in sections 38-45-102 and 38-45-103.

(3) (a) Notwithstanding any other provision of law, the owner of any rental property specified in subsections (1) and (2) of this section shall:

(I) Prior to the commencement of a new tenant occupancy, replace any carbon monoxide alarm that was stolen, removed, found missing, or found not operational after the previous occupancy;

(II) Ensure that any batteries necessary to make the carbon monoxide alarm operational are provided to the tenant at the time the tenant takes residence in the dwelling unit;

(III) Replace any carbon monoxide alarm if notified by a tenant as specified in paragraph (c) of subsection (4) of this section that any carbon monoxide alarm was stolen, removed, found missing, or found not operational during the tenant's occupancy; and

(IV) Fix any deficiency in a carbon monoxide alarm if notified by a tenant as specified in paragraph (d) of subsection (4) of this section.

(b) Except as provided in paragraph (a) of this subsection (3), the owner of a single-family dwelling or dwelling unit in a multi-family dwelling that is used for rental purposes is not responsible for the maintenance, repair, or replacement of a carbon monoxide alarm or the care and replacement of batteries for such an alarm.

(4) Notwithstanding any other provision of law, the tenant of any rental property specified in subsections (1) and (2) of this section shall:

(a) Keep, test, and maintain all carbon monoxide alarms in good repair;

(b) Notify, in writing, the owner of the single-family dwelling or dwelling unit of a multi-family dwelling, or the owner's authorized agent, if the batteries of any carbon monoxide alarm need to be replaced;

(c) Notify, in writing, the owner of the single-family dwelling or dwelling unit of a multi-family dwelling, or the owner's authorized agent, if any carbon monoxide alarm is stolen, removed, found missing, or found not operational during the tenant's occupancy of the single-family dwelling or dwelling unit in the multi-family dwelling; and

(d) Notify, in writing, the owner of the single-family dwelling or dwelling unit of a multi-family dwelling, or the owner's authorized agent, of any deficiency in any carbon monoxide alarm that the tenant cannot correct.

(5) Notwithstanding the requirements of section 38-45-103 (1) and (2), so long as there is a centralized alarm system or other mechanism for a responsible person to hear the alarm at all times in a multi-family dwelling used for rental purposes, such multi-family dwelling may have an operational carbon monoxide alarm installed within twenty-five feet of any fuel-fired heater or appliance, fireplace, or garage or in a location as specified in any building code adopted by the state or any local government entity.

(6) No person shall remove batteries from, or in any way render inoperable, a carbon monoxide alarm, except as part of a process to inspect, maintain, repair, or replace the alarm or replace the batteries in the alarm.

**Source: L. 2009:** Entire article added, (HB 09-1091), ch. 51, p. 183, § 2, effective March 24.

**38-45-105. Municipal or county ordinances regarding carbon monoxide alarms.** Nothing in this article shall be construed to limit a municipality, city, home rule city, city and county, county, or other local government entity from adopting or enforcing any requirements for the installation and maintenance of carbon monoxide alarms that are more stringent than the requirements set forth in this article.

**Source: L. 2009:** Entire article added, (HB 09-1091), ch. 51, p. 184, § 2, effective March 24.



**38-45-106. Limitation of liability.** (1) No person shall have a claim for relief against a property owner, an authorized agent of a property owner, a person in possession of real property, or an installer for any damages resulting from the operation, maintenance, or effectiveness of a carbon monoxide alarm if the property owner, authorized agent, person in possession of real property, or installer installs a carbon monoxide alarm in accordance with the manufacturer’s published instructions and the provisions of this article.

(2) A purchaser shall have no claim for relief against any person licensed pursuant to article 61 of title 12, C.R.S., for any damages resulting from the operation, maintenance, or effectiveness of a carbon monoxide alarm if such licensed person complies with rules promulgated pursuant to sections 38-45-102 (1) (b) and 38-45-103 (1) (b). Nothing in this subsection (2) shall affect any remedy that a purchaser may otherwise have against a seller.

**Source:** L. 2009: Entire article added, (HB 09-1091), ch. 51, p. 184, § 2, effective March 24.

**SURVEY PLATS AND MONUMENT RECORDS**

**Cross references:** For establishing disputed boundaries, see article 44 of this title; for publication of legal notices, see part 1 of article 70 of title 24.

**ARTICLE 50**

**Survey Plats and Monument Records -  
General Provisions**

**Editor’s note:** This article was numbered as article 1 of chapter 136, C.R.S. 1963. The substantive provisions of this article were repealed and reenacted in 1994, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this article prior to 1994, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume. Former C.R.S. section numbers are shown in editor’s notes following those sections that were relocated. For a detailed comparison of this article, see the comparative tables located in the back of the index.

38-50-101.	Survey plat - records file and index system - informational purpose.	38-50-103.	notes and plats. Public records - monument records.
38-50-102.	Public records - original field		

**38-50-101. Survey plat - records file and index system - informational purpose.**

(1) Survey plats required pursuant to section 38-51-107 and this section shall:

(a) Comply with section 38-51-106;

(b) Depending on the location of the land, contain the following information in the title block:

(I) For parcels of land located within the United States rectangular survey system, the section, township, range, and principal meridian; or

(II) For grants and unsurveyed parcels of land, information relating to the system of indexing the county assessor already has in place;

(c) Within twelve months after the date the monument is accepted in the field by a professional land surveyor performing a monumented land survey or is set by a professional land surveyor, be deposited with the public office designated by the county commissioners.

(2) (a) (I) The county commissioners of each county shall designate the county surveyor to create and maintain a survey plat records file and index system for plats.

(II) If a county surveyor has not been elected or appointed or if the office is vacant, another county official shall be designated to create and maintain such file and index system.

(III) If the county surveyor is unable to index in a timely manner, the county surveyor may designate another county official to do such indexing.

(b) (I) Each plat deposited with the county shall be given a reception number or a book and page number, or both, which shall be set forth on the plat.

(II) (A) Surveyed lands located within the United States rectangular survey system shall be indexed by section, township, range, and principal meridian.

(B) Grant lands and unsurveyed lands shall be indexed by the system of indexing the county assessor already has in place.

(III) Survey plats submitted for depositing shall be indexed in a timely manner, but not more than ten working days after the date the survey plat is deposited.

(3) (a) Each plat submitted for depositing shall:

(I) Bear original signatures and seals; and

(II) Be made:

(A) From a dimensionally stable polyester sheet such as cronar or mylar or other product of equal quality;

(B) At least three mils thick; and

(C) With nonfading permanent print.

(b) The dimensions of each plat, as specified by county requirements, shall be at least eighteen inches wide by twenty-four inches long and no more than twenty-four inches wide by thirty-six inches long with a minimum two-inch margin on the left side and a minimum of one-half inch margins at the top, bottom, and right side of the plat.

(c) Subject to approval by the board of county commissioners, a county may make aperture cards or film-processed copies capable of legible reproduction from polyester sheets as specified in sub-subparagraph (A) of subparagraph (II) of paragraph (a) of this subsection (3) for the purpose of recording.

(4) (a) The fee for depositing plats shall not exceed the amount of the fee collected for the recording of subdivision plats established in section 30-1-103 (2) (f), C.R.S.

(b) The fee for the county surveyor or, if a county surveyor has not been elected or appointed or if the office is vacant, another county official to index and maintain the plats as designated by the county commissioners shall not exceed the amount of the fee collected for the recording of subdivision plats established in section 30-1-103 (2) (f), C.R.S.

(c) The fees provided for by this subsection (4) shall be collected by the public office at which plats are deposited.

(5) (a) Plats shall be deposited in accordance with this section for the sole purpose of recording information on surveying monumentation in order to provide survey data for subsequent land surveys and shall not be construed to affect, in any manner whatsoever, the description of a subdivision, line, or corner contained in the official plats and field notes filed and of record or to subdivide property.

(b) No plat deposited in accordance with this section shall constitute notice pursuant to section 38-35-109.

(c) Subdivision plats which create parcels of land of thirty-five acres or more shall be filed in the county clerk and recorder's office for the county in which the property is located pursuant to section 38-35-109.

(6) Notwithstanding any other provision of law, a county surveyor or any other local government official that maintains a survey plat records file and index system for plats may establish a program to accept plats for recording and filing, with appropriate permanency protocols, by any electronic means it deems appropriate.

**Source:** L. 94: Entire article R&RE, p. 1510, § 46, effective July 1. L. 97: (1)(c) amended, p. 1629, § 6, effective July 1. L. 2008: (6) added, p. 56, § 1, effective August 5.

**Editor's note:** This section is similar to former § 38-51-107, as it existed prior to 1994.

**Cross references:** For provisions regarding engineers and surveyors, see article 25 of title 12.

**38-50-102. Public records - original field notes and plats.** (1) The board of county commissioners for each county is authorized to employ some competent person, at the expense of the county, to make copies of the original field notes and plats of surveys of all



lands surveyed or to be surveyed after March 14, 1877, by the officers appointed by the federal government, within their respective counties.

(2) The board of county commissioners shall:

(a) Procure books in which the copies made pursuant to subsection (1) of this section shall be maintained;

(b) Obtain stationery; and

(c) Fix the compensation of the person employed to procure and make copies of field notes and plats pursuant to subsection (1) of this section whether by contract or otherwise which shall be paid out of the county treasury in the same manner as other expenses are paid.

(3) (a) The copies of field notes and plats made pursuant to subsection (1) of this section shall be filed in the office of the county clerk and recorder of the proper county and shall thereafter be a part of the public records of such county.

(b) Records or copies made and maintained pursuant to this section, when certified by the county clerk and recorder, shall be evidence in all courts and places in this state.

**Source:** L. 94: Entire article R&RE, p. 1512, § 46, effective July 1.

**Editor's note:** The provisions of this section are similar to provisions of several former sections as they existed prior to 1994. For a detailed comparison, see the comparative tables located in the back of the index.

**38-50-103. Public records - monument records.** (1) The state board of licensure for architects, professional engineers, and professional land surveyors, created in section 12-25-106, C.R.S., shall employ personnel at the expense of such board's licensed professional land surveyors to maintain a monument record filing system for all monument records filed in accordance with section 38-53-104.

(2) (a) The state board of licensure for architects, professional engineers, and professional land surveyors shall transmit a copy of each monument record accepted for filing, without fee, to the county clerk and recorder for the county in which the monument is located.

(b) Each county clerk and recorder shall maintain copies of monument records in a file furnished by the board and, upon receipt of each such monument record, shall list it in a master index included with each such file.

(c) Records maintained pursuant to this section shall be open to public inspection during normal business hours.

(3) Certified copies of monument records of the state board of licensure for architects, professional engineers, and professional land surveyors shall be evidence in all courts and places in this state.

(4) No fee shall be charged by the state board of licensure for architects, professional engineers, and professional land surveyors for the filing of monument records. The cost of maintaining the monument record files shall be recouped as part of the renewal fee charged to licensees. Such renewal fee shall be calculated to cover the costs of the staff and equipment necessary to maintain the monument record filing system.

**Source:** L. 94: Entire article R&RE, p. 1513, § 46, effective July 1. L. 2004: (1), (2)(a), (3), and (4) amended, p. 1316, § 71, effective May 28. L. 2006: (1), (2)(a), (3), and (4) amended, p. 743, § 12, effective July 1.

**Editor's note:** This section is similar to former § 38-53-110, as it existed prior to 1994.

## ARTICLE 51

### Minimum Standards for Land Surveys and Plats

**Editor's note:** This article was numbered as article 2 of chapter 136, C.R.S. 1963. The substantive provisions of this article were repealed and reenacted in 1994, resulting in the addition, relocation, and

elimination of sections as well as subject matter. For amendments to this article prior to 1994, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume. Former C.R.S. section numbers are shown in editor's notes following those sections that were relocated. For a detailed comparison of this article, see the comparative tables located in the back of the index.

**Cross references:** For public policy concerning accurate land boundaries and public records relating thereto, see § 38-53-101.

38-51-101.	Applicability - state - county	38-51-107.	Required plats.
	- local - persons.	38-51-108.	Improvement location certificate.
38-51-102.	Definitions.		
38-51-103.	Procedure for subdividing section.	38-51-109.	Unlawful sale.
		38-51-109.3.	Geographic information system positions - professional land surveyor.
38-51-104.	Monumentation of land surveys.		
38-51-105.	Monumentation of subdivisions.	38-51-110.	Violations.
		38-51-111.	Surveyor's affidavit of correction.
38-51-106.	Land survey plats.		

**38-51-101. Applicability - state - county - local - persons.** The provisions of this article shall apply to all agencies of state, county, and local government as well as to individuals, corporations, and partnerships engaged in the private practice of land surveying. This article shall not apply to the location or relocation of mining claims pursuant to article 43 of title 34, C.R.S.

**Source:** L. 94: Entire article R&RE, p. 1513, § 47, effective July 1.

**Editor's note:** This section is similar to former § 38-51-103, as it existed prior to 1994.

**38-51-102. Definitions.** As used in this article, unless the context otherwise requires:

(1) "Accessory" means any physical evidence in the vicinity of a survey monument, the relative location of which is of public record and which is used to help perpetuate the location of the monument. Accessories shall be construed to include the accessories recorded in the original survey notes and additional reference points and dimensions furnished by subsequent land surveyors or attested to in writing by persons having personal knowledge of the original location of the monument.

(2) "Aliquot corner" means any section corner or quarter section corner and any other corner in the public land survey system created by subdividing land according to the rules of procedure set forth in section 38-51-103.

(3) "Bench mark" means any relatively immovable point on the earth whose elevation above or below an adopted datum is known.

(4) "Block" means a parcel of land within a platted subdivision bounded on all sides by streets or avenues, other physical boundaries such as a body of water, or the exterior boundary of a platted subdivision.

(5) "Board" means the state board of licensure for architects, professional engineers, and professional land surveyors, created in section 12-25-106, C.R.S.

(6) "Control corner" means any land survey corner the position of which controls the location of the boundaries of a tract or parcel of land.

(6.3) "Corner" means a point of reference determined by the surveying process.

(7) "Exemption plat" or "subdivision exemption plat" means a subdivision plat which includes all of the information required by section 38-51-106 and which depicts a division of land or the creation of an interest in property for which the board of county commissioners has granted an exemption from subdivision regulations pursuant to section 30-28-101 (10) (d), C.R.S.

(7.5) "Geographic information system land position" or "GIS land position" means a location in a geographic information system intended to control the mapping location of the



boundaries of a tract or parcel of land that may be field surveyed, scaled, calculated, plotted by photogrammetric or remote sensing methods, or located by physical or cultural features.

(8) "Improvement location certificate" means a representation of the boundaries of a parcel of land and the improvements thereon, prepared pursuant to section 38-51-108.

(9) "Improvement survey plat" means a land survey plat as defined in subsection (12) of this section resulting from a monumented land survey showing the location of all structures, visible utilities, fences, hedges, or walls situated on the described parcel and within five feet of all boundaries of such parcel, any conflicting boundary evidence or visible encroachments, and all easements, underground utilities, and tunnels for which properly recorded evidence is available from the county clerk and recorder, a title insurance company, or other sources as specified on the improvement survey plat.

(10) "Irregular parcel" means a parcel of land which is not uniquely defined on a subdivision plat but which is described by any of the following methods:

- (a) A metes and bounds description;
- (b) A book and page or reception number reference;
- (c) Any so-called "assessor's tract"; or
- (d) A description which calls only for the owner's or adjoiner's name.

(11) "Land survey" means a series of observations and measurements made pursuant to sections 38-51-103, 38-51-104, and 38-51-105 for the purpose of locating or restoring any real property boundary.

(12) "Land survey plat" means a plat that shows the information developed by a monumented land survey or shows one or more set monuments pursuant to sections 38-51-104 and 38-51-105 and includes all information required by section 38-51-106.

(12.3) "Monument" means the object or physical structure that marks the corner point.

(13) "Monumented land survey" means a land survey in which monuments are either found or set pursuant to sections 38-51-103, 38-51-104, and 38-51-105 to mark the boundaries of a specified parcel of land.

(14) "Monument record" means a written and illustrated document describing the physical appearance of a bench mark or survey monument and its accessories.

(15) "Platted subdivision" means a group of lots, tracts, or parcels of land created by recording a map which meets the requirements of section 38-51-106 and which shows the boundaries of such lots, tracts, or parcels and the original parcel from which they were created.

(16) "Professional land surveyor" means a person licensed pursuant to part 2 of article 25 of title 12, C.R.S.

(16.1) "Professional land surveyor of record" means the professional land surveyor whose signature and seal appear on an original subdivision plat, land survey plat, or parcel description currently recorded in the office of the clerk and recorder in which the subdivision plat, land survey plat, or parcel description is situated.

(17) "Property description" means a written, narrative description, of a parcel of real property or an easement for the purpose of perpetuating location of title.

(18) "Public land survey monument" means any land boundary monument established on the ground by a cadastral survey of the United States government and any mineral survey monument established by a United States mineral surveyor and made a part of the United States public land records.

(19) "Responsible charge" means control and direction of surveying work.

(20) "Subdivision plat" means a map of a platted subdivision recorded for the purpose of creating land parcels which can be identified uniquely by reference to such map.

(21) "Surveyor's affidavit of correction" means an affidavit prepared and executed by a professional land surveyor of record in accordance with section 38-51-111.

**Source:** **L. 94:** Entire article R&RE, p. 1514, § 47, effective July 1. **L. 97:** (6) and (11) amended and (6.3) and (12.3) added, p. 1630, § 7, effective July 1; (7.5) added, p. 145, § 1, effective August 6. **L. 2004:** (5) and (16) amended, p. 1316, § 72, effective May 28. **L. 2007:** (12) amended, p. 294, § 6, effective August 3. **L. 2010:** (16.1) and (21) added, (HB 10-1085), ch. 95, p. 324, § 4, effective August 11.

**Editor's note:** The provisions of this section are similar to provisions of several former sections as they existed prior to 1994. For a detailed comparison, see the comparative tables located in the back of the index.

**38-51-103. Procedure for subdividing section.** (1) Whenever a professional land surveyor conducts a survey for the purpose of locating a parcel of land which is described in terms of the nomenclature of the public land survey system, such professional land surveyor shall proceed according to the applicable rules contained in the current "Manual of Instructions for the Survey of the Public Lands of the United States" published by the United States government printing office; except that all monumentation shall conform to section 38-51-104.

(2) (a) A section may be subdivided by:

(I) Surveying all necessary aliquot lines in the field; or

(II) Computing the location of the required aliquot corners after making a field survey which includes all required control corners of the section.

(b) Any section subdivided pursuant to paragraph (a) of this subsection (2) shall include all control corners that were originally monumented by the United States government, which must either be found or restored in the field according to the standards set forth in section 38-51-104.

(c) Monument records shall be filed pursuant to section 38-53-104, describing each such corner.

(d) For any section subdivided pursuant to this subsection (2) the location of original aliquot corners of, and procedures used in, the governing official United States government survey, where applicable, shall take precedence.

**Source:** L. 94: Entire article R&RE, p. 1516, § 47, effective July 1.

**Editor's note:** This section is similar to former § 38-50-101, as it existed prior to 1994.

#### ANNOTATION

**Law reviews.** For note, "A Survey of the Colorado Torrens Act", see 5 Rocky Mt. L. Rev. 149 (1933).

**Annotator's note.** Since § 38-51-103 is similar to § 38-50-101 as it existed prior to the 1994 repeal and reenactment of articles 50 to 53, a relevant case construing that provision has been included in the annotations to this section.

**Excess or deficiency in land divided among grantees.** Where a tract of land is subdivided into parts or lots, title to which becomes vested in different persons, none of the grantees are entitled to a preference over the others upon the discovery of an excess of deficiency in the quantity of land contained in the original tract, and the excess or deficiency is then divided among all the lots or parcels in proportion to their areas.

Gaines v. City of Sterling, 140 Colo. 63, 342 P.2d 651 (1959).

**This section applies the principle of the single apportionment rule.** It has the sanction of the statute, most case law and the bureau of public lands regulations, and it is to be applied without regard to the order of the conveyances by a common grantor. Gaines v. City of Sterling, 140 Colo. 63, 342 P.2d 651 (1959).

**Limitations on application of apportionment rule.** Some limitations and exceptions have inevitably grown up to invade the pure application of the apportionment rule, and it is to be applied when the original surveys are made at the same time and so are held to have equal standing. Gaines v. City of Sterling, 140 Colo. 63, 342 P.2d 651 (1959).

**38-51-104. Monumentation of land surveys.** (1) (a) The corners of lots, tracts, other parcels of land, aliquot corners not described in subsection (4) of this section, and any line points or reference points which are set to perpetuate the location of any land boundary or easement shall, when established on the ground by a land survey, be marked by reasonably permanent markers solidly embedded in the ground.

(b) A durable cap bearing the registration number of the professional land surveyor responsible for the establishment of the monument shall be affixed securely to the top of each such monument embedded pursuant to this subsection (1).

(2) If the points designated in subsection (1) of this section fall on solid bedrock,



concrete, stone curbs, gutters, or walks, a durable metal disk or cap shall be securely anchored in the rock or concrete and stamped with the survey point and the registration number of the professional land surveyor responsible for the establishment of the monument or marker.

(3) (a) If the monuments or markers required by subsection (1) of this section cannot practicably be set because of steep terrain, water, marsh, or existing structures, or if they would be lost as a result of proposed street, road, or other construction, one or more reference monuments shall be set.

(b) (I) The letters "RM" or "WC" and the surveyor's registration number shall be affixed to the monument.

(II) For purposes of this paragraph (b), "RM" means reference monument and "WC" means witness corner.

(c) Reference monuments shall be set as close as practicable to the true corner and shall meet the same physical standards required to set the true corner.

(d) If only one reference monument is used, such reference monument shall be set on the actual boundary line or a prolongation thereof, otherwise at least two reference monuments shall be set.

(4) For any monument required by this section that marks the location of a section corner, quarter section corner, or sixteenth section corner, such monument shall meet the physical standards specified by rule and regulation promulgated by the board pursuant to section 24-4-103, C.R.S.

(5) (a) The top of the monument for any corner required by this section which is within the traffic area of a publicly named dedicated or deeded street, road, or highway shall be placed one-half foot below the roadway surface.

(b) If the roadway surface is pavement two inches thick or greater, the monument shall include a monument box the top of which shall be set flush with the surface of the pavement.

(6) No marker required by this section shall bear the registration number of more than one professional land surveyor but may bear the name of an individual surveyor or surveying firm in addition to the required registration number.

**Source:** L. 94: Entire article R&RE, p. 1516, § 47, effective July 1. L. 2006: (5) amended, p. 743, § 13, effective July 1.

**Editor's note:** This section is similar to former § 38-51-101, as it existed prior to 1994.

**Cross references:** For provisions regarding the revocation of a land surveyor's registration, see part 2 of article 25 of title 12.

**38-51-105. Monumentation of subdivisions.** (1) (a) Prior to recording a plat, the external boundaries of any platted subdivisions shall be monumented on the ground by reasonably permanent monuments solidly embedded in the ground.

(b) A durable cap bearing the license number of the professional land surveyor responsible for the establishment of the monument shall be affixed securely to the top of each such monument embedded pursuant to this subsection (1).

(c) Monuments shall be set no more than fourteen hundred feet apart along any straight boundary line, at all angle points, at the beginning, end, and points of change of direction or change of radius of any curved boundaries defined by circular arcs, and at the beginning and end of any spiral curve.

(2) The professional land surveyor who prepares the original subdivision plat, exemption plat, or subdivision exemption plat shall provide external boundary monuments as required in subsection (1) of this section.

(3) (a) Before a sales contract for any lot, tract, or parcel within a subdivision is executed, all boundaries of the block within which such lot, tract, or parcel is located shall be marked with monuments in accordance with subsection (1) of this section.

(b) The seller of the lot, section, or parcel shall provide for the services of a professional land surveyor to establish block monumentation and lot markers as required pursuant to subsection (4) of this section.

(4) (a) Block monumentation may be set on the center lines of streets or on offset lines from such streets as designated on the recorded plat.

(b) The corners of any lot, tract, or parcel sold separately shall be marked within one year of the effective date of the sales contract.

(c) For any structure to be built on a lot, tract, or parcel before the corners have been marked pursuant to this section, the seller of such lot, tract, or parcel shall retain a professional land surveyor to establish control lines on the ground as necessary to assure the proper location of the structure.

(5) For any complete block sold as a unit, it shall become the responsibility of the subsequent seller of any separate lot, tract, or parcel within such block to retain a professional land surveyor to establish lot markers as required pursuant to subsection (4) of this section.

(6) For any points designated in subsection (1), (2), or (3) of this section that fall on solid bedrock, concrete, stone curbs, gutters, or walks, a durable metal disk or cap shall be securely anchored in the rock or concrete and stamped with the survey point and the license number of the professional land surveyor responsible for the establishment of the monument or marker.

(7) (a) If any monuments or markers required by subsection (1), (2), or (3) of this section cannot practicably be set because of steep terrain, water, marsh, or existing structures, or if they would be lost as a result of proposed street, road, or other construction, one or more reference monuments shall be set.

(b) (I) The letters "RM" or "WC" shall be affixed to the monument in addition to the surveyor's license number.

(II) For purposes of this paragraph (b), "RM" means reference monument and "WC" means witness corner.

(c) Reference monuments shall be set as close as practicable to the true corner and shall meet the same physical standards required to set the true corner.

(d) If only one reference monument is used, such reference monument shall be set on the actual boundary line or a prolongation thereof, otherwise at least two reference monuments shall be set.

(8) For any monument required by this section which marks the location of a section corner, quarter section corner, or sixteenth section corner, such monument shall meet the physical standards specified by rule and regulation promulgated by the board pursuant to section 24-4-103, C.R.S.

(9) (a) The top of the monument for any corner required by this section which is within the traffic area of a publicly named dedicated or deeded street, road, or highway shall be placed one-half foot below the roadway surface.

(b) If the roadway surface is pavement two inches thick or greater, the monument shall include a monument box the top of which shall be set flush with the surface of the pavement.

(10) No marker required by this section shall bear the license number of more than one professional land surveyor but may bear the name of an individual surveyor or surveying firm in addition to the required license number.

**Source:** L. 94: Entire article R&RE, p. 1518, § 47, effective July 1. L. 2004: (1)(b), (6), (7)(b)(I), and (10) amended, p. 1317, § 73, effective May 28.

**Editor's note:** This section is similar to former § 38-51-101, as it existed prior to 1994.

#### ANNOTATION

**District court correctly determined location of disputed boundary line.** Here, the parties do not dispute that the pertinent monuments

are located consistently with each other. Hence, there is no need to decide whether the rule of the precedence of the monuments has any exception



under Colorado law because the only conflict here is between the location of the monuments on the ground and the distance call and the boundary line depiction on the plat. Trial court correctly determined that the monuments con-

trolled the location of the boundary line and they superseded any inconsistent distance call or boundary line, referred to or depicted in the subdivision plat. *Morales v. CAMB*, 160 P.3d 373 (Colo. App. 2007).

**38-51-106. Land survey plats.** (1) All land survey plats shall include but shall not be limited to the following:

- (a) A scale drawing of the boundaries of the land parcel;
- (b) (I) All recorded and apparent rights-of-way and easements, and, if research for recorded rights-of-way and easements is done by someone other than the professional land surveyor who prepares the plat, the source from which such recorded rights-of-way and easements were obtained; or
- (II) If the client wishes not to show rights-of-way and easements on the land survey plat, a statement that such client did not want rights-of-way and easements shown;
- (c) All field-measured dimensions necessary to establish the boundaries on the ground and all dimensions for newly created parcels necessary to establish the boundaries on the ground;
- (d) A statement by the professional land surveyor that the survey was performed by such surveyor or under such surveyor's responsible charge;
- (e) A statement by the professional land surveyor explaining how bearings, if used, were determined;
- (f) A description of all monuments, both found and set, that mark the boundaries of the property and of all control monuments used in conducting the survey. If any such boundary monument or control monument marks the location of a lost or obliterated public land survey monument that was restored as a part of the survey on which the plat is based, the professional land surveyor shall briefly describe the evidence and the procedure used for such restoration. If any such boundary monument or control monument marks the location of a quarter section corner or sixteenth section corner that was established as a part of the survey, the professional land surveyor shall briefly describe the evidence and procedure used for such establishment, unless the corner location was established by the mathematical procedure as outlined in section 38-51-103.
- (g) A statement of the scale or representative fraction of the drawing, and a bar-type or graphical scale;
- (h) A north arrow;
- (i) A written property description, which shall include but shall not be limited to a reference to the county and state together with the section, township, range, and principal meridian or established subdivision, block and lot number, or any other method of describing the land as established by the general land office or bureau of land management;
- (j) The signature and seal of the professional land surveyor;
- (k) Any conflicting boundary evidence; and
- (l) A statement defining the lineal units used including but not limited to meters, chains, feet, and U.S. survey feet. If it is necessary to define conversion factors, the factors shall be a function of the meter as defined by the United States department of commerce, national institute of standards and technology.

**Source:** **L. 94:** Entire article R&RE, p. 1519, § 47, effective July 1. **L. 2004:** (1)(f) amended, p. 1317, § 74, effective May 28. **L. 2006:** (1)(f) amended, p. 338, § 2, effective August 7. **L. 2007:** (1)(c) amended and (1)(l) added, p. 294, § 7, effective August 3.

**Editor's note:** This section is similar to former § 38-51-102, as it existed prior to 1994.

**38-51-107. Required plats.** (1) Every professional land surveyor who accepts a monument while performing a monumented land survey shall prepare and deposit a plat if such monument is not of record either in the clerk and recorder's office of the county in which the monument lies or in the public office designated by the county commissioners pursuant to section 38-50-101 (2) or if such monument is set pursuant to section 38-51-104.

(2) No plat shall be required to be prepared or deposited if the monuments accepted or set are within a platted subdivision that was filed in the clerk and recorder's office within the previous twenty years.

(3) Plats required pursuant to this section shall comply with section 38-50-101.

**Source:** L. 94: Entire article R&RE, p. 1520, § 47, effective July 1. L. 97: (2) amended, p. 151, § 1, effective March 28. L. 2004: Entire section amended, p. 1317, § 75, effective May 28.

**Editor's note:** This section is similar to former § 38-51-107 (1), as it existed prior to 1994.

**38-51-108. Improvement location certificate.** (1) A professional land surveyor may prepare an improvement location certificate for the use of a specific client based upon such professional land surveyor's general knowledge of land boundaries and monuments in a given area if such client is not the owner or buyer; except that a copy of such certificate shall be provided to such owner or buyer.

(2) (a) (I) A certificate prepared pursuant to subsection (1) of this section shall not be designated as or construed as being a land survey plat or improvement survey plat.

(II) Such certificate shall be prominently labeled "improvement location certificate" and contain a statement in the following form:

IMPROVEMENT LOCATION CERTIFICATE

I hereby certify that this improvement location certificate was prepared for .... (individual or firm) ....., that it is not a land survey plat or improvement survey plat, and that it is not to be relied upon for the establishment of fence, building, or other future improvement lines.

I further certify that the improvements on the above described parcel on this date, .... (insert date) ....., except utility connections, are entirely within the boundaries of the parcel, except as shown, that there are no encroachments upon the described premises by improvements on any adjoining premises, except as indicated, and that there is no apparent evidence or sign of any easement crossing or burdening any part of said parcel, except as noted.

Stamp  
or  
Seal

By .....(Signed).....  
Date .....

(b) A professional land surveyor shall assume full liability for each improvement location certificate done by such professional land surveyor or under such professional land surveyor's responsible charge pursuant to paragraph (a) of this subsection (2).

**Source:** L. 94: Entire article R&RE, p. 1521, § 47, effective July 1.

**Editor's note:** This section is similar to former § 38-51-105, as it existed prior to 1994.

**38-51-109. Unlawful sale.** (1) It is unlawful for any person to offer to sell, to sell, or otherwise to receive remuneration for any map or plat which purports to be a survey map or plat unless such map or plat conforms with the standards, requirements, and terminology of the provisions of this article.

(2) It is unlawful for any person to offer to sell, to sell, or otherwise to receive remuneration for any document, sketch, or diagram which purports to be an improvement location certificate unless such document, sketch, or diagram conforms with the standards, requirements, and terminology of this article.

**Source:** L. 94: Entire article R&RE, p. 1521, § 47, effective July 1.

**Editor's note:** This section is similar to former § 38-51-106, as it existed prior to 1994.



**38-51-109.3. Geographic information system positions - professional land surveyor.** (1) A professional land surveyor shall be exempt from the requirements of section 38-51-103 when making a GIS land position determination. A GIS land position made by a professional land surveyor shall have the following limitations:

(a) It does not meet the requirements of a land survey as defined in section 38-51-102 (11).

(b) It shall not establish the location of any aliquot or control corner as they are defined in subsections (2) and (6) of section 38-51-102 until complete research and corner evaluation are performed to meet the requirements as provided in this article.

**Source: L. 97:** Entire section added, p. 145, § 2, effective August 6; (1)(b) amended, p. 1032, § 70, effective August 6.

**38-51-110. Violations.** (1) It is the responsibility of the district attorneys of this state to prosecute any person suspected of willfully and knowingly violating this article.

(2) Any person, including the responsible official of any agency of state, county, or local government, who willfully and knowingly violates this article is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than one hundred fifty dollars or more than one thousand five hundred dollars.

(3) (a) The board may revoke the licensure of any professional land surveyor convicted under the provisions of this article.

(b) Any person whose licensure is revoked pursuant to paragraph (a) of this subsection (3) shall be entitled to a hearing on such revocation pursuant to article 4 of title 24, C.R.S., and may appeal any decision of the board to a court of competent jurisdiction.

**Source: L. 94:** Entire article R&RE, p. 1522, § 47, effective July 1. **L. 97:** (3)(b) amended, p. 1630, § 8, effective July 1. **L. 2004:** (3) amended, p. 1318, § 76, effective May 28.

**Editor's note:** This section is similar to former § 38-51-104, as it existed prior to 1994.

#### ANNOTATION

**Criminal sanctions and prosecutorial commands.** This section contains both criminal sanctions for a violation of the minimum standards for land surveys and plats, and prosecutorial commands similar to sections in article 25

of title 12. *South Park Land & Livestock Co. v. Hamilton Enterprises, Ltd.*, 189 Colo. 157, 538 P.2d 444 (1975) (decided under former § 38-51-104 as it existed prior to the 1994 repeal and reenactment of articles 50 to 53).

**38-51-111. Surveyor's affidavit of correction.** (1) If an error described in subsection (2) of this section is discovered on any subdivision plat, land survey plat, or any other survey plat or parcel description duly recorded in the clerk and recorder's office of the county in which the subdivision, land, or parcel is situated, the professional land surveyor of record may prepare and record in that clerk and recorder's office a surveyor's affidavit of correction to correct the error.

(2) The following errors may be corrected by a surveyor's affidavit of correction:

(a) Any bearing, distance, or elevation that has been omitted or labeled incorrectly;

(b) Any text that has been misspelled or mislabeled;

(c) Any error or omission, if the error or omission is ascertainable from the data shown on the recorded plat or parcel description; or

(d) An error within a parcel description shown on a recorded plat.

(3) The surveyor's affidavit of correction shall contain a reference to the recording information of the document being corrected and the signature and seal of the professional land surveyor of record, and shall not be subject to review before being recorded pursuant to subsection (4) of this section. The professional land surveyor of record shall submit a copy of the surveyor's affidavit of correction to the appropriate reviewing authority, citing

the specific provision under subsection (2) of this section that applies to the error being corrected.

(4) The clerk and recorder of the county in which a surveyor's affidavit of correction is submitted for recording shall record the affidavit in the clerk and recorder's office of the county in which the property lies and provide at least one of the following:

(a) A clerk's note referring to the surveyor's affidavit of correction upon the recorded plat or parcel description; or

(b) An electronic reference to the surveyor's affidavit of correction for the recorded plat or parcel description.

(5) Nothing in this section shall be construed to permit changes in courses, distances, or elevations for the purpose of redesigning any lot, tract, or parcel configurations.

(6) A surveyor's affidavit of correction shall not be recorded for a correction not listed in subsection (2) of this section.

**Source:** L. 2010: Entire section added, (HB 10-1085), ch. 95, p. 324, § 5, effective August 11.

ARTICLE 52

Colorado Coordinate System

**Editor's note:** This article was numbered as article 3 of chapter 136, C.R.S. 1963. The substantive provisions of this article were repealed and reenacted in 1988, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this article prior to 1988, consult the Colorado statutory research explanatory note beginning on page vii in the front of this volume. Former C.R.S. section numbers are shown in editor's notes following those sections that were relocated.

**Cross references:** For public policy concerning accurate land boundaries and public records relating thereto, see § 38-53-101.

38-52-101.	Colorado coordinate system zones defined.		description same tract - federal precedence.
38-52-102.	Colorado coordinate system names defined.	38-52-105.	Colorado coordinate system origins defined.
38-52-103.	Colorado coordinate system defined.	38-52-106.	Colorado coordinate system - use of term.
38-52-104.	Federal and state coordinate	38-52-107.	Severability.

**38-52-101. Colorado coordinate system zones defined.** (1) The systems of plane coordinates which have been established by the national ocean service/national geodetic survey (formerly the United States coast and geodetic survey) or its successors for defining and stating the geographic positions or locations of points on the surface of the earth within the state of Colorado are, on and after July 1, 1988, to be known and designated as the Colorado coordinate system of 1927 and the Colorado coordinate system of 1983.

(2) For the purpose of the use of these systems, the state is divided into a north zone, a central zone, and a south zone.

(3) The area now included in the following counties shall constitute the north zone: Moffat, Routt, Jackson, Larimer, Weld, Logan, Sedgwick, Rio Blanco, Grand, Boulder, Gilpin, Adams, Morgan, Washington, Phillips, and Yuma.

(4) The area now included in the following counties shall constitute the central zone: Garfield, Eagle, Summit, Clear Creek, Jefferson, Denver, Arapahoe, Lincoln, Kit Carson, Mesa, Delta, Pitkin, Gunnison, Lake, Chaffee, Park, Fremont, Teller, Douglas, El Paso, Elbert, and Cheyenne.

(5) The area now included in the following counties shall constitute the south zone: Montrose, Ouray, Hinsdale, Saguache, Custer, Pueblo, Crowley, Kiowa, San Miguel, San Juan, Mineral, Rio Grande, Alamosa, Huerfano, Otero, Bent, Prowers, Dolores, Montezuma, La Plata, Archuleta, Conejos, Costilla, Las Animas, and Baca.



**Source:** L. 88: Entire article R&RE, p. 516, § 32, effective July 1.

**Editor's note:** This section is similar to former § 38-52-101, as it existed prior to 1988.

**38-52-102. Colorado coordinate system names defined.** (1) As established for use in the north zone, the Colorado coordinate system of 1927 or the Colorado coordinate system of 1983 shall be named; and, in any land description in which it is used, it shall be designated the Colorado coordinate system of 1927 north zone or the Colorado coordinate system of 1983 north zone.

(2) As established for use in the central zone, the Colorado coordinate system of 1927 or the Colorado coordinate system of 1983 shall be named; and, in any land description in which it is used, it shall be designated the Colorado coordinate system of 1927 central zone or the Colorado coordinate system of 1983 central zone.

(3) As established for use in the south zone, the Colorado coordinate system of 1927 or the Colorado coordinate system of 1983 shall be named; and, in any land description in which it is used, it shall be designated the Colorado coordinate system of 1927 south zone or the Colorado coordinate system of 1983 south zone.

**Source:** L. 88: Entire article R&RE, p. 517, § 32, effective July 1.

**Editor's note:** This section is similar to former § 38-52-102, as it existed prior to 1988.

**38-52-103. Colorado coordinate system defined.** (1) The plane coordinate values for a point on the earth's surface, used to express the geographic position or location of such point in the appropriate zone of this system, shall consist of two distances expressed in United States survey feet and decimals of a foot when using the Colorado coordinate system of 1927. One of these distances, to be known as the x-coordinate, shall give the position in an east-west direction; the other, to be known as the y-coordinate, shall give the position in a north-south direction. These coordinates shall be made to depend upon and conform to plane rectangular coordinate values for the monumented points of the North American horizontal geodetic control network as published by the national ocean survey/national geodetic survey (formerly the United States coast and geodetic survey), or its successors, and the plane coordinates of which have been computed on the systems defined in this article. Any such station may be used for establishing a survey connection to either Colorado coordinate system.

(2) For the purposes of converting coordinates of the Colorado coordinate system of 1983 from meters to feet, the U.S. Survey Foot shall be used. The conversion factor is: One meter equals 3937/1200 feet.

**Source:** L. 88: Entire article R&RE, p. 517, § 32, effective July 1. L. 92: (2) amended, p. 2102, § 1, effective March 16.

**Editor's note:** This section is similar to former § 38-52-103, as it existed prior to 1988.

**38-52-104. Federal and state coordinate description same tract - federal precedence.** (1) Whenever coordinates based on the Colorado coordinate system are used to describe any tract of land which in the same document is also described by reference to any subdivision, line, or corner of the United States public land surveys, the description by coordinates shall be construed as supplemental to the basic description of such subdivision, line, or corner contained in the official plats and field notes filed of record, and, in the event of any conflict, the description by reference to the subdivision, line, or corner of the United States public land surveys shall prevail over the description by coordinates, unless said coordinates are upheld by adjudication, at which time the coordinate description will prevail.

(2) Nothing in this article shall require any purchaser or mortgagee to rely on a description, any part of which depends exclusively upon the Colorado coordinate system, unless such description has been adjudicated as provided in this section.

**Source:** L. 88: Entire article R&RE, p. 517, § 32, effective July 1.

**Editor's note:** This section is similar to former §§ 38-52-108 and 38-52-109, as they existed prior to 1988.

**38-52-105. Colorado coordinate system origins defined.** (1) For the purposes of more precisely defining the Colorado coordinate system of 1927, the following definitions by the United States coast and geodetic survey (now the national ocean survey/national geodetic survey) are adopted:

(a) The "Colorado coordinate system of 1927 north zone" is a Lambert conformal conic projection of the Clarke spheroid of 1866, having standard parallels at north latitudes 39 degrees 43 minutes and 40 degrees 47 minutes along which parallels the scale shall be exact. The origin of coordinates is at the intersection of the meridian 105 degrees 30 minutes west of Greenwich and the parallel 39 degrees 20 minutes north latitude. This origin is given the coordinates: x - 2,000,000 feet and y - 0 feet.

(b) The "Colorado coordinate system of 1927 central zone" is a Lambert conformal conic projection of the Clarke spheroid of 1866, having standard parallels at north latitudes 38 degrees 27 minutes and 39 degrees 45 minutes north latitude along which parallels the scale shall be exact. The origin of coordinates is at the intersection of the meridian 105 degrees 30 minutes west of Greenwich and the parallel 37 degrees 50 minutes north latitude. This origin is given the coordinates: x - 2,000,000 feet and y - 0 feet.

(c) The "Colorado coordinate system of 1927 south zone" is a Lambert conformal conic projection of the Clarke spheroid of 1866, having standard parallels at north latitudes 37 degrees 14 minutes and 38 degrees 26 minutes along which parallels the scale shall be exact. The origin of coordinates is at the intersection of the meridian 105 degrees 30 minutes west of Greenwich and the parallel 36 degrees 40 minutes north latitude. This origin is given the coordinates: x - 2,000,000 feet and y - 0 feet.

(2) For the purposes of more precisely defining the Colorado coordinate system of 1983, the following definition by the national ocean service/national geodetic survey is adopted:

(a) The "Colorado coordinate system of 1983 north zone" is a Lambert conformal conic projection of the North American datum of 1983, having standard parallels at north latitude of 39 degrees 43 minutes and 40 degrees 47 minutes along which parallels the scale shall be exact. The origin of coordinates is at the intersection of the meridian 105 degrees 30 minutes west of Greenwich and the parallel 39 degrees 20 minutes north latitude. This origin is given the coordinates: x - 914,401.8289 meters and y - 304,800.6096 meters.

(b) The "Colorado coordinate system of 1983 central zone" is a Lambert conformal conic projection of the North American datum of 1983, having standard parallels at north latitudes 38 degrees 27 minutes and 39 degrees 45 minutes along which parallels the scale shall be exact. The origin of coordinates is at the intersection of the meridian 105 degrees 30 minutes west of Greenwich and the parallel 37 degrees 50 minutes north latitude. This origin is given the coordinates: x - 914,401.8289 meters and y - 304,800.6096 meters.

(c) The "Colorado coordinate system of 1983 south zone" is a Lambert conformal conic projection of the North American datum of 1983, having standard parallels at north latitudes 37 degrees 14 minutes and 38 degrees 26 minutes along which parallels the scale shall be exact. The origin of coordinates is at the intersection of the meridian 105 degrees 30 minutes west of Greenwich and the parallel 36 degrees 40 minutes north latitude. This origin is given the coordinates: x - 914,401.8289 meters and y - 304,800.6096 meters.

**Source:** L. 88: Entire article R&RE, p. 518, § 32, effective July 1.

**Editor's note:** This section is similar to former § 38-52-105, as it existed prior to 1988.

**38-52-106. Colorado coordinate system - use of term.** The use of the term "Colorado coordinate system of 1927 north zone, central zone, or south zone" or "Colorado coordinate system of 1983 north zone, central zone, or south zone" on any map, report of survey, or



other document shall be limited to coordinates based on the Colorado coordinate systems as defined in this article. Such map, report, or document shall include a statement describing the standard of accuracy, as defined by the national ocean survey/national geodetic survey, maintained in developing the coordinates shown therein.

**Source: L. 88:** Entire article R&RE, p. 519, § 32, effective July 1.

**Editor’s note:** This section is similar to former § 38-52-107, as it existed prior to 1988.

**38-52-107. Severability.** If any provision of this article is declared invalid, such invalidity shall not affect any other portion of this article, which can be given effect without the invalid provision; and, to this end, the provisions of this article are declared severable.

**Source: L. 88:** Entire article R&RE, p. 519, § 32, effective July 1.

ARTICLE 53

Perpetuation of Land Survey Monuments

**Editor’s note:** This article was numbered as article 4 of chapter 136, C.R.S. 1963. The substantive provisions of this article were repealed and reenacted in 1994, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this article prior to 1994, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume. Former C.R.S. section numbers are shown in editor’s notes following those sections that were relocated. For a detailed comparison of this article, see the comparative tables located in the back of the index.

38-53-101.	Legislative declaration.	38-53-106.	ments.
38-53-102.	Applicability - state - county - local - persons.		Forms to be prescribed by board.
38-53-103.	Definitions.	38-53-107.	Monument records.
38-53-104.	Filing of monument record required.	38-53-108.	Filing permitted on any sur- vey monument.
38-53-105.	Professional land surveyor must rehabilitate monu-	38-53-109.	Fees.
		38-53-110.	Violations.

**38-53-101. Legislative declaration.** It is hereby declared to be a public policy of this state to encourage the establishment and preservation of accurate land boundaries, including durable monuments and complete public records, and to minimize the occurrence of land boundary disputes and discrepancies.

**Source: L. 94:** Entire article R&RE, p. 1522, § 48, effective July 1.

**Editor’s note:** This section is similar to former § 38-53-101, as it existed prior to 1994.

ANNOTATION

**Applied** in South Park Land & Livestock Co.  
v. Hamilton Enterprises, Ltd., 189 Colo. 157,  
538 P.2d 444 (1975).

**38-53-102. Applicability - state - county - local - persons.** The provisions of this article shall apply to all agencies of state, county, and local government as well as to individuals, corporations, and partnerships engaged in the private practice of land surveying.

**Source: L. 94:** Entire article R&RE, p. 1522, § 48, effective July 1.

**Editor's note:** This section is similar to former § 38-53-111, as it existed prior to 1994.

**38-53-103. Definitions.** As used in this article, unless the context otherwise requires:

(1) "Accessory" means any physical evidence in the vicinity of a survey monument, the relative location of which is of public record and which is used to help perpetuate the location of the monument. Accessories shall be construed to include the accessories recorded in the original survey notes and additional reference points and dimensions furnished by subsequent land surveyors or attested to in writing by persons having personal knowledge of the original location of the monument.

(2) "Aliquot corner" means any section corner or quarter section corner and any other corner in the public land survey system created by subdividing land according to the rules of procedure set forth in section 38-51-103.

(3) "Bench mark" means any relatively immovable point on the earth whose elevation above or below an adopted datum is known.

(4) "Block" means a parcel of land within a platted subdivision bounded on all sides by streets or avenues, other physical boundaries such as a body of water, or the exterior boundary of a platted subdivision.

(5) "Board" means the state board of licensure for architects, professional engineers, and professional land surveyors, created in section 12-25-106, C.R.S.

(6) "Control corner" means any land survey corner the position of which controls the location of the boundaries of a tract or parcel of land.

(6.3) "Corner" means a point of reference determined by the surveying process.

(7) "Exemption plat" or "subdivision exemption plat" means a subdivision plat which includes all of the information required by section 38-51-106 and which depicts a division of land or the creation of an interest in property for which the board of county commissioners has granted an exemption from subdivision regulations pursuant to section 30-28-101 (10) (d), C.R.S.

(8) "Improvement location certificate" means a representation of the boundaries of a parcel of land and the improvements thereon, prepared pursuant to section 38-51-108.

(9) "Improvement survey plat" means a land survey plat as defined in subsection (12) of this section, resulting from a monumented land survey showing the location of all structures, visible utilities, fences, hedges, or walls situated on the described parcel and within five feet of all boundaries of such parcel, any conflicting boundary evidence or visible encroachments, and all easements, underground utilities, or tunnels, for which property recorded evidence is available from the county clerk and recorder, a title insurance company, or other source as specified on the improvement survey plat.

(10) "Irregular parcel" means a parcel of land which is not uniquely defined on a subdivision plat but which is described by any of the following methods:

- (a) A metes and bounds description;
- (b) A book and page or reception number reference;
- (c) Any so-called "assessor's tract"; or
- (d) A description which calls only for the owner's or adjoiner's name.

(11) "Land survey" means a series of observations and measurements made pursuant to sections 38-51-103, 38-51-104, and 38-51-105 for the purpose of locating or restoring any real property boundary.

(12) "Land survey plat" means a plat that shows the information developed by a monumented land survey or shows one or more set monuments pursuant to sections 38-51-104 and 38-51-105 and includes all information required by section 38-51-106.

(12.3) "Monument" means the object or physical structure that marks the corner point.

(13) "Monumented land survey" means a land survey in which monuments are either found or set pursuant to sections 38-51-103, 38-51-104, and 38-51-105 to mark the boundaries of a specified parcel of land.

(14) "Monument record" means a written and illustrated document describing the physical appearance of a bench mark or survey monument and its accessories.



(15) "Platted subdivision" means a group of lots, tracts, or parcels of land created by recording a map which meets the requirements of section 38-51-106 and which shows the boundaries of such lots, tracts, or parcels and the original parcel from which they were created.

(16) "Professional land surveyor" means a person licensed pursuant to part 2 of article 25 of title 12, C.R.S.

(17) "Property description" means a written, narrative description of a parcel of real property or an easement for the purpose of perpetuating location of title.

(18) "Public land survey monument" means any land boundary monument established on the ground by a cadastral survey of the United States government and any mineral survey monument established by a United States mineral surveyor and made a part of the United States public land records.

(19) "Responsible charge" means control and direction of surveying work.

(20) "Subdivision plat" means a map of a platted subdivision recorded for the purpose of creating land parcels which can be identified uniquely by reference to such map.

**Source:** L. 94: Entire article R&RE, p. 1522, § 48, effective July 1. L. 97: (6) and (11) amended and (6.3) and (12.3) added, p. 1630, § 9, effective July 1. L. 2004: (5) and (16) amended, p. 1318, § 77, effective May 28. L. 2006: (5) amended, p. 744, § 14, effective July 1. L. 2007: (12) amended, p. 294, § 8, effective August 3.

**Editor's note:** The provisions of this section are similar to provisions of several former sections as they existed prior to 1994. For a detailed comparison, see the comparative tables located in the back of the index.

**38-53-104. Filing of monument record required.** (1) (a) If a professional land surveyor conducts a survey that uses any monument representing a public land survey monument location, quarter section corner, sixteenth section corner, government land office or bureau of land management (government) lot corner as defined by the nomenclature of the United States public land survey system, or any United States geological survey or United States coast and geodetic survey (also known as the national ocean service/national geodetic survey) monument as a control corner, such professional land surveyor shall file a monument record describing such monument with the board if the monument and its accessories are not substantially described in an existing monument record previously filed pursuant to this section or its predecessor.

(b) If a professional land surveyor establishes, restores, or rehabilitates any public land survey monument corner location or section corner, quarter section corner, or sixteenth section corner as defined by the nomenclature of the United States public land survey system, such professional land surveyor shall file a monument record.

(c) Any monument record filed pursuant to this section shall describe at least two accessories or reference points.

(2) Monument records shall be filed within six months of the date on which the monument was used as control or was established, restored, or rehabilitated.

**Source:** L. 94: Entire article R&RE, p. 1525, § 48, effective July 1. L. 2006: (1)(a) and (1)(b) amended, p. 338, § 1, effective August 7.

**Editor's note:** This section is similar to former § 38-53-103, as it existed prior to 1994.

**38-53-105. Professional land surveyor must rehabilitate monuments.** For any monument record of a public land survey corner which is required to be filed pursuant to this article, the professional land surveyor shall restore or rehabilitate the corner monument so it is readily identifiable and reasonably durable, if field conditions require it.

**Source:** L. 94: Entire article R&RE, p. 1525, § 48, effective July 1.

**Editor's note:** This section is similar to former § 38-53-104, as it existed prior to 1994.

**38-53-106. Forms to be prescribed by board.** The board shall adopt and revise as necessary the forms used for monument records including the information to be required on such forms. Such forms and any necessary instructions shall be furnished to all professional land surveyors without charge.

**Source: L. 94:** Entire article R&RE, p. 1525, § 48, effective July 1.

**Editor's note:** This section is similar to former § 38-53-105, as it existed prior to 1994.

**38-53-107. Monument records.** No monument record shall be accepted for filing unless it is properly completed and signed and sealed by the professional land surveyor who was in responsible charge of the work.

**Source: L. 94:** Entire article R&RE, p. 1525, § 48, effective July 1.

**Editor's note:** This section is similar to former § 38-53-106, as it existed prior to 1994.

**38-53-108. Filing permitted on any survey monument.** A professional land surveyor may file a monument record describing any land survey monument, accessory, or bench mark with the board.

**Source: L. 94:** Entire article R&RE, p. 1525, § 48, effective July 1.

**Editor's note:** This section is similar to former § 38-53-107, as it existed prior to 1994.

**38-53-109. Fees.** For filings on public land survey monuments and their accessories and aliquot corners or bench marks, there shall be no fee charged. For all other filings, there shall be a fee established pursuant to section 24-34-105, C.R.S., which shall be payable to the board at the time of filing.

**Source: L. 94:** Entire article R&RE, p. 1525, § 48, effective July 1.

**Editor's note:** This section is similar to former § 38-53-109, as it existed prior to 1994.

**38-53-110. Violations.** (1) It is the responsibility of the district attorneys of this state to prosecute any person suspected of willfully and knowingly violating this article.

(2) Any person, including the responsible official of any agency of state, county, or local government, who willfully and knowingly violates this article is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than one hundred fifty dollars or more than one thousand five hundred dollars.

(3) (a) The board may revoke the licensure of any professional land surveyor convicted under the provisions of this article.

(b) Any person whose licensure is revoked pursuant to paragraph (a) of this subsection (3) shall be entitled to a hearing on such revocation, pursuant to article 4 of title 24, C.R.S., and may appeal any decision of the board to a court of competent jurisdiction.

**Source: L. 94:** Entire article R&RE, p. 1526, § 48, effective July 1. **L. 97:** (3)(b) amended, p. 1631, § 10, effective July 1. **L. 2004:** (3) amended, p. 1318, § 78, effective May 28.

**Editor's note:** This section is similar to former § 38-51-104, as it existed prior to 1994.



## ANNOTATION

**Criminal sanctions and prosecutorial commands.** This section contains both criminal sanctions for a violation of the minimum standards for land surveys and plats, and prosecutorial commands similar to sections in article 25

of title 12. *South Park Land & Livestock Co. v. Hamilton Enterprises, Ltd.*, 189 Colo. 157, 538 P.2d 444 (1975) (decided under former § 38-51-104 as it existed prior to the 1994 repeal and reenactment of articles 50 to 53).





























